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**UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA**

DANTE H. PATTISON,

Petitioner,

vs.

COLE MORROW, *et al.*,

Respondents.

Case No. 2:12-cv-00315-KJD-PAL

ORDER

This action is a petition for a writ of habeas corpus filed pursuant to 28 U.S.C. § 2254 by a Nevada state prisoner represented by counsel. The matter comes before the Court on the merits of the amended petition.

I. Procedural History

On February 27, 2001, petitioner was charged by criminal complaint with one count of murder with the use of a deadly weapon (Count 1), one count of manslaughter with the use of a deadly weapon (Count 2), two counts of murder with the use of a deadly weapon – victim over 65 years of age or older (Counts 3 and 4), and one count of possession of a firearm by an ex-felon (Count 5). (Exhibit 1).¹ Petitioner was arraigned the following day, and defense counsel requested a psychiatric evaluation to determine petitioner’s competency to stand trial. (*Id.*). Petitioner was

¹ The exhibits referenced in this order are found in the Court’s record at ECF Nos. 17-20.

1 found to be incompetent and the state district court ordered petitioner committed to the Lake's
2 Crossing Center for further evaluation and treatment by order filed April 3, 2001. (Exhibit 4).

3 On January 27, 2003, the state district court held a hearing to reassess petitioner's
4 competency to stand trial. (Exhibit 2, at 7). At the conclusion of the hearing, the state district court
5 determined that petitioner was competent to stand trial and remanded the case to the justice court for
6 a preliminary hearing. (Exhibit 15).

7 On February 18, 2003, petitioner appeared before the justice court and waived his right to a
8 preliminary hearing. (Exhibit 1). Petitioner was bound over to the district court, and on February
9 21, 2003, the State filed a criminal information with the same five counts as charged in the criminal
10 complaint. (Exhibit 16). On February 26, 2003, petitioner entered pleas of not guilty to the charges
11 in the information. (Exhibit 17). On March 18, 2003, the State filed notice of its intent to seek the
12 death penalty. (Exhibit 18). Throughout 2003, the parties engaged in pretrial motion practice which
13 culminated in the trial court entering an order resolving those motions on July 9, 2003. (Exhibit
14 21). On November 19, 2003, the defense moved to continue the trial and petitioner changed his plea
15 from not guilty to not guilty by reason of insanity. (Exhibit 22).

16 On May 13, 2004, defense counsel filed a motion in limine for the court to suppress any
17 reference to the psychological reports prepared at Lake's Crossing and to preclude the doctors or
18 staff from Lake's Crossing from testifying regarding the information contained in those reports.
19 (Exhibit 28). Following a hearing on the motion (Exhibit 29), the trial court entered an order
20 precluding the State from calling doctors from Lake's Crossing, or their representatives, from
21 testifying about visual observations and/or conversations with and/or evaluations of petitioner while
22 he was treated at Lake's Crossing. (Exhibit 31). On October 13, 2004, the trial court ordered that
23 the State may present testimony regarding petitioner's stay at Lake's Crossing after an offer of proof
24 was made. (Exhibit 2, at p. 52).

25 On March 4, 2005, the State filed an amended information, omitting Count 5, possession of
26 a firearm by an ex-felon. (Exhibit 33).

27 The jury trial commenced on March 4, 2005, and concluded on March 12, 2005. (Exhibit
28 34-45). At the conclusion of trial, the jury found petitioner guilty of Counts 1-4. (Exhibit 46). The

1 penalty phase was held on March 15, 2005. (Exhibit 48). The jury returned a special verdict that
2 mitigating circumstances outweighed aggravating circumstances, and the jury sentenced petitioner
3 to life without the possibility of parole. (Exhibits 47 & 48). Another competency hearing
4 commenced on November 28, 2005, and concluded on December 12, 2005, at which time petitioner
5 was found competent and was sentenced in accordance with the jury's decision. (Exhibits 56 & 57).
6 Specifically, as to Count 1, petitioner was sentenced to life imprisonment without the possibility of
7 parole, with an equal and consecutive sentence of life without the possibility of parole for the use of
8 a deadly weapon; as to Count 2, petitioner was sentenced to 48 to 120 month imprisonment; as to
9 Counts 3 and 4, petitioner was sentenced to life imprisonment without the possibility of parole, with
10 an equal and consecutive term of life without the possibility of parole for a victim over 65 years of
11 age. All counts were to run concurrent. The judgment of conviction was filed December 16, 2005.
12 (Exhibit 58).

13 Petitioner appealed his convictions. (Exhibit 59). By order filed December 24, 2007, the
14 Nevada Supreme Court affirmed the convictions. (Exhibit 63). Remittitur issued on January 18,
15 2008. (Exhibit 64).

16 On May 14, 2008, with the assistance of counsel, petitioner filed a post-conviction habeas
17 petition in the state district court. (Exhibit 71). On June 25, 2009, through counsel, petitioner filed
18 a supplement to his petition. (Exhibit 72). On September 14, 2009, and November 4, 2009, the
19 state district court held hearings on the petition and supplement. (Exhibits 75 & 76). On December
20 18, 2009, the state district court filed findings of fact, conclusions of law, and order denying the
21 petition. (Exhibit 77).

22 Petitioner appealed from the denial of his state post-conviction habeas petition. (Exhibit
23 78). On July 13, 2011, the Nevada Supreme Court filed an order affirming the denial of the post-
24 conviction habeas petition. (Exhibit 83). Remittitur issued on August 9, 2011. (Exhibit 84).

25 Petitioner dispatched his federal habeas petition to this Court on February 14, 2012. (ECF
26 No. 1). This Court granted petitioner's motion for the appointment of counsel. (ECF No. 6).
27 Petitioner filed an amended petition on February 11, 2013. (ECF No. 16). On March 27, 2013,
28

1 respondents filed an answer to the amended petition. (ECF No. 22). On October 17, 2013,
2 petitioner filed a reply to the answer. (ECF No. 32).

3 **II. Federal Habeas Corpus Standards**

4 The Antiterrorism and Effective Death Penalty Act (“AEDPA”), at 28 U.S.C. § 2254(d),
5 provides the legal standard for the Court’s consideration of this habeas petition:

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

10 (1) resulted in a decision that was contrary to, or involved an
11 unreasonable application of, clearly established Federal law, as
12 determined by the Supreme Court of the United States; or

13 (2) resulted in a decision that was based on an unreasonable
14 determination of the facts in light of the evidence presented in the
15 State court proceeding.

16 The AEDPA “modified a federal habeas court’s role in reviewing state prisoner applications
17 in order to prevent federal habeas ‘retrials’ and to ensure that state-court convictions are given effect
18 to the extent possible under law.” *Bell v. Cone*, 535 U.S. 685, 693-694 (2002). A state court
19 decision is contrary to clearly established Supreme Court precedent, within the meaning of 28
20 U.S.C. § 2254, “if the state court applies a rule that contradicts the governing law set forth in [the
21 Supreme Court’s] cases” or “if the state court confronts a set of facts that are materially
22 indistinguishable from a decision of [the Supreme Court] and nevertheless arrives at a result
23 different from [the Supreme Court’s] precedent.” *Lockyer v. Andrade*, 538 U.S. 63, 73 (2003)
24 (quoting *Williams v. Taylor*, 529 U.S. 362, 405-406 (2000) and citing *Bell v. Cone*, 535 U.S. 685,
25 694 (2002)). The formidable standard set forth in section 2254(d) reflects the view that habeas
26 corpus is “‘a guard against extreme malfunctions in the state criminal justice systems,’ not a
27 substitute for ordinary error correction through appeal.” *Harrington v. Richter*, 562 U.S. 86, 102-03
28 (2011) (quoting *Jackson v. Virginia*, 443 U.S. 307, 332 n.5 (1979)).

A state court decision is an unreasonable application of clearly established Supreme Court
precedent, within the meaning of 28 U.S.C. § 2254(d), “if the state court identifies the correct
governing legal principle from [the Supreme Court’s] decisions but unreasonably applies that

1 principle to the facts of the prisoner’s case.” *Lockyer v. Andrade*, 538 U.S. at 75 (quoting *Williams*,
2 529 U.S. at 413). The “unreasonable application” clause requires the state court decision to be more
3 than merely incorrect or erroneous; the state court’s application of clearly established federal law
4 must be objectively unreasonable. *Id.* (quoting *Williams*, 529 U.S. at 409). In determining whether
5 a state court decision is contrary to, or an unreasonable application of federal law, this Court looks
6 to the state courts’ last reasoned decision. *See Ylst v. Nunnemaker*, 501 U.S. 797, 803-04 (1991);
7 *Shackleford v. Hubbard*, 234 F.3d 1072, 1079 n.2 (9th Cir. 2000), *cert. denied*, 534 U.S. 944 (2001).

8 In a federal habeas proceeding, “a determination of a factual issue made by a State court
9 shall be presumed to be correct,” and the petitioner “shall have the burden of rebutting the
10 presumption of correctness by clear and convincing evidence.” 28 U.S.C. § 2254(e)(1). If a claim
11 has been adjudicated on the merits by a state court, a federal habeas petitioner must overcome the
12 burden set in § 2254(d) and (e) on the record that was before the state court. *Cullen v. Pinholster*,
13 131 S.Ct. 1388, 1400 (2011).

14 **III. Discussion**

15 **A. Ground 1**

16 Petitioner asserts that his constitutional rights were violated when the trial court allowed the
17 State to introduce testimony of witnesses who observed him at the Lake’s Crossing Center. (ECF
18 No. 16, at pp. 8-10). Petitioner acknowledges that “the State was entitled to rebut Pattison’s
19 insanity defense,” but argues that the State introduced the Lake’s Crossing evidence for an improper
20 purpose, “to impeach him in an effort to prove his guilt.” (*Id.*, at p. 9). Petitioner further asserts
21 that any statement he made to the evaluators at the Lake’s Crossing Center should have been
22 excluded because he was not informed of his Fifth Amendment rights prior to making those
23 statements. (*Id.*). The Nevada Supreme Court denied this claims on direct appeal, as follows:

24 Pattison argues that the State’s use of evidence obtained during his
25 competency evaluation period at Lake’s Crossing violated his due
26 process rights under the Fifth Amendment. Pattison begins his
27 argument with a review of *McKenna v. State*, *Esquivel v. State*, and
28 *Winiarz v. State*. However, in *Estes v. State*, this court distinguished
those cases from the issue presented in this case because “none of the
defendants in those matters placed their sanity at the time of the
alleged criminal misconduct at issue.” In *Estes*, this court held that
the State could introduce evidence obtained during the defendant’s

1 evaluation period at Lake's Crossing if the defendant put his sanity in
2 question and the evidence excluded incriminating statements.
3 Because Pattison placed his sanity into question by pleading not guilty
4 by reason of insanity, this court's determination in Estes controls this
5 case.

6 Pattison attempts to distinguish this case from Estes by arguing that he
7 did not intend to introduce evidence obtained at Lake's Crossing in
8 his case-in-chief or allow his experts to read reports from Lake's
9 Crossing in developing their opinions. In Estes, no facts suggest that
10 the defendant relied on records from Lake's Crossing to establish the
11 defendant's insanity defense, yet this court held that the State could
12 introduce evidence obtained during the defendant's competency
13 evaluation period. When Pattison put his sanity into question by
14 pleading not guilty by reason of insanity, he "opened the door" to the
15 State's use of evidence obtained during Pattison's competency
16 evaluation period at Lake's Crossing as long as that evidence did not
17 include incriminating statements.

18 Pattison next asserts that statements he made to doctors at Lake's
19 Crossing and, conversely, the doctors' reports of what he did not say
20 to them during his competency evaluations at Lake's Crossing should
21 have been suppressed because he was not properly advised of his Fifth
22 Amendment rights.

23 This court acknowledged in Estes that "[i]nterviews during
24 psychiatric evaluations are custodial and statements made by the
25 defendant are entitled to Fifth Amendment protection." However, this
26 court further stated that "when the defendant places his sanity or
27 mental capacity at issue, a defendant's right to protection under the
28 Fifth and Fourteenth Amendments from the disclosure of confidential
communications made during a court-psychiatric evaluation relates
only to the incriminating communications themselves." Thus, the
defendant's non-incriminating statements concerning his mental state
are not protected by the Fifth Amendment's guarantee of due process
and protection against self-incrimination. In Estes, this court held that
the defendant's statements indicating that he was fabricating his
insanity defense and that were inconsistent with his later testimony
were not incriminating.

When Pattison placed his sanity in question, he waived his right to
object to the admission of any non-incriminating statements that he
made or did not make regarding his mental health. None of Pattison's
statements or silences at Lake's Crossing were incriminating. All of
the evidence from Lake's Crossing related to Pattison's mental health
and not whether he committed the crime in question. The Lake's
Crossing evidence relied upon by Dr. Thomas Bittker, the State's
expert who reviewed reports from Lake's Crossing staff in developing
his expert opinion, also did not contain incriminating statements but
only statements regarding Pattison's mental health.

Therefore, we conclude that the district court did not err when it
permitted the State to offer evidence obtained during Pattison's
competency evaluation period at Lake's Crossing to rebut Pattison's
case-in-chief. Because Pattison asserted an insanity defense, his non-

1 incriminating statements concerning his mental state were not
2 protected by the Fifth Amendment’s guarantee of due process and
 protection against self-incrimination.

3 (Exhibit 63, at pp. 2-5) (footnotes omitted). The Nevada Supreme Court’s factual findings that
4 petitioner put his sanity at issue and that none of petitioner’s statements or his silence at Lake’s
5 Crossing were incriminating are entitled to a presumption of correctness. See 28 U.S.C. §
6 2254(e)(1).

7 **1. Due Process Claim**

8 In *Holley v. Yarborough*, 568 F.3d 1091, 1101 (9th Cir. 2009), the Ninth Circuit held that the
9 United States Supreme Court “has not yet made a clear ruling that admission of irrelevant or overtly
10 prejudicial evidence constitutes a due process violation sufficient to warrant issuance of a writ.”
11 Therefore, the Court of Appeals was unable to conclude that the state court’s evidentiary ruling was
12 an unreasonable application of clearly established federal law. *Id.* (citing *Carey v. Musladin*, 549
13 U.S. 70, 76-77 (2006)). Similar to *Holley*, petitioner in the instant case argues that he is entitled to
14 federal habeas relief based on the trial court’s improper admission of evidence. Petitioner has not
15 shown that the trial court’s admission of evidence is contrary to or an unreasonable application of
16 clearly-established federal as determined by the United States Supreme Court. While petitioner
17 seeks to apply the holding of *Buchanan v. Kentucky*, 483 US. 402, 421-23 (1987), to petitioner’s
18 due process claim, the decision analyzes a Fifth Amendment claim of protection against self-
19 incrimination. Moreover, petitioner has failed to meet his burden of proving that the Nevada
20 Supreme Court’s ruling upholding his conviction regarding the due process issue was contrary to, or
21 involved an unreasonable application of, clearly established federal law, as determined by the
22 United States Supreme Court, or that the ruling was based on an unreasonable determination of the
23 facts in light of the evidence presented in the state court proceeding. The Court denies federal
24 habeas relief on this ground of the amended petition.

25 **2. Fifth Amendment Claim**

26 In *Estelle v. Smith*, 451 U.S. 454, 468 (1981), the United States Supreme Court held that “[a]
27 criminal defendant, who neither initiates psychiatric evaluation nor attempts to introduce any
28 psychiatric evidence, may not be compelled to respond to a psychiatrist if his statements can be used

1 against him at a capital sentencing proceeding.” Later, the United States Supreme Court held that if
2 a defendant “presents psychiatric evidence, then, at the very least, the prosecution may rebut this
3 presentation with evidence from the reports of the [psychiatric] examination that the defendant
4 requested” without violating the Fifth Amendment. *Buchanan v. Kentucky*, 483 US. 402, 422-23
5 (1987). In this case, petitioner presented psychiatric evidence in support of his insanity defense.
6 The existing United Supreme Court precedents do not clearly establish that, under these
7 circumstances, a defendant’s statements made to mental health professionals as part of competency
8 evaluations violate the Fifth Amendment. Petitioner has failed to meet his burden of proving that
9 the Nevada Supreme Court’s ruling was contrary to, or involved an unreasonable application of,
10 clearly established federal law, as determined by the United States Supreme Court, or that the ruling
11 was based on an unreasonable determination of the facts in light of the evidence presented in the
12 state court proceeding. Therefore, the Court denies relief on this ground of the federal habeas
13 petition.

14 **B. Ground 2**

15 Petitioner asserts that there was insufficient evidence presented at trial to convict him of first
16 degree murder. (ECF No. 16, at pp. 10-14). Petitioner argues that the evidence was constitutionally
17 insufficient because “[t]here is not a scintilla of evidence that Pattison acted with premeditation and
18 deliberation when he shot his sister and grandparents.” (*Id.*, at p. 13).

19 When a habeas petitioner challenges the sufficiency of evidence to support his conviction,
20 the court reviews the record to determine “whether, after viewing the evidence in the light most
21 favorable to the prosecution, any rational trier of fact could have found the essential elements of the
22 crime beyond a reasonable doubt.” *Jackson v. Virginia*, 443 U.S. 307, 319 (1979); *Jones v. Wood*,
23 207 F.3d 557, 563 (9th Cir. 2000). The *Jackson* standard does not focus on whether a correct guilt
24 or innocence determination was made, but whether the jury made a rational decision to convict or
25 acquit. *Herrera v. Collins*, 506 U.S. 390, 402 (1993). Under the *Jackson* standard, the prosecution
26 has no obligation to rule out every hypothesis except guilt. *Wright v. West*, 505 U.S. 277, 296
27 (1992) (plurality opinion); *Jackson*, 443 U.S. at 326; *Schell*, 218 F.3d at 1023. *Jackson* presents “a
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1 high standard” to habeas petitioners claiming insufficiency of the evidence. *Jones v. Wood*, 207
2 F.3d 557, 563 (9th Cir. 2000).

3 Sufficiency claims are limited to a review of the record evidence submitted at trial. *Herrera*,
4 506 U.S. at 402. Such claims are judged by the elements defined by state law. *Jackson*, 443 U.S. at
5 324, n.16. The reviewing court must respect the exclusive province of the fact-finder to determine
6 the credibility of witnesses, to resolve evidentiary conflicts, and to draw reasonable inferences from
7 proven facts. *United States v. Hubbard*, 96 F.3d 1223, 1226 (9th Cir. 1996). The district court must
8 assume the trier of fact resolved any evidentiary conflicts in favor of the prosecution, even if the
9 determination does not appear on the record, and must defer to that resolution. *Jackson*, 443, U.S.
10 at 326. In evaluating a claim of insufficiency of the evidence under *Jackson*, the reviewing court
11 ““must consider all of the evidence admitted by the trial court,’ regardless of whether that evidence
12 was admitted erroneously.” *McDaniel v. Brown*, 130 S.Ct. 665, 672 (2010) (quoting *Lockhart v.*
13 *Nelson*, 488 U.S. 33, 41 (1988)).

14 The Nevada Supreme Court denied petitioner’s claim of insufficiency of the evidence, as
15 follows:

16 In reviewing the sufficiency of evidence to support a conviction, this
17 court inquires ““whether, after viewing the evidence in the light most
18 favorable to the prosecution, any rational trier of fact could have
19 found the essential elements of the crime beyond a reasonable
20 doubt.”” Additionally, “[w]here there is conflicting testimony, the jury
21 determines its weight and credibility.”

22 Pattison argues that the State failed to produce evidence that Pattison
23 was not psychotic at the time of the shooting and that the State’s
24 experts all testified that Pattison was suffering from drug-induced
25 psychosis. Pattison argues that even if the jury believed the State’s
26 theory of drug-induced psychosis, the law regarding voluntary
27 intoxication would have prohibited a verdict that Pattison was guilty
28 of first-degree murder. Pattison also argues that if the jury believed
Pattison’s interpretation of the evidence, the evidence required a
verdict of not guilty by reason of insanity.

To support a guilty verdict for first-degree murder, the State must
prove beyond a reasonable doubt that the murder was “willful,
deliberate and premeditated.” A murder without premeditation or
deliberation is second-degree murder. In a prosecution for first-
degree murder, intent and premeditation may be deduced from the
circumstances of the killing. A defendant may contend that he was
incapable of forming the requisite deliberation or premeditation
because he was voluntarily intoxicated; however, intoxication does

1 not legally preclude a finding that the defendant premeditated or
2 deliberated. This is a question of fact that the jury must determine.

3 The State presented evidence that Pattison's behavior at the time of
4 the shooting was not consistent with the behavior of a person
5 suffering from delusions. The State further offered evidence that
6 Pattison struggled with his sister for control of the gun and shot her
7 despite her pleas for him to put the gun away. The State also offered
8 evidence that Pattison shot all of his victims at close range, shot some
9 of them multiple times, and that every shot fired hit a victim. All of
10 these facts support a finding that Pattison willfully and deliberately
11 killed his victims. While there is evidence that Pattison may have
12 been suffering from a drug-induced delusion, we conclude that the
13 record contains sufficient evidence from which a reasonable juror
14 could have found that Pattison was guilty of first degree murder.

15 Pattison's second argument, that if a jury believed Pattison's
16 interpretation of the evidence it was required to return a verdict of not
17 guilty by reason of insanity, implies that the State had the burden to
18 prove that Pattison was sane at the time of the shooting and is
19 therefore meritless. The State is not required to prove that a defendant
20 is sane at the time he committed a crime. A defendant raising an
21 insanity defense bears the burden of proving by a preponderance of
22 the evidence that at the time of the alleged crime he suffered from
23 delusions that rendered him incapable of determining the
24 wrongfulness of his actions or understanding that his actions were not
25 authorized by law.

26 Because the burden was on Pattison, not the State, to prove his
27 insanity and Pattison did not meet that burden, we conclude sufficient
28 evidence exists from which a reasonable juror could determine that
Pattison was able to form the requisite intent to justify a verdict of
first-degree murder.

18 (Exhibit 63, at pp. 5-7) (footnotes omitted). The factual findings of the state court are presumed
19 correct. 28 U.S.C. § 2254(e)(1). While petitioner asserts that he presented evidence in support of
20 an insanity defense at trial, the State presented evidence to rebut petitioner's insanity defense.
21 (Exhibits 38-41). This Court must presume under *Jackson* that the jury resolved any evidentiary
22 conflicts in favor of the prosecution. *Jackson*, 443 U.S. at 326. This Court finds that, after viewing
23 the evidence in the light most favorable to the prosecution, any rational trier of fact could have
24 found the essential elements of first degree murder, beyond a reasonable doubt. *See Jackson*, 443
25 U.S. at 319. Petitioner has failed to meet his burden of proving that the Nevada Supreme Court's
26 ruling was contrary to, or involved an unreasonable application of, clearly established federal law, as
27 determined by the United States Supreme Court, or that the ruling was based on an unreasonable
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1 determination of the facts in light of the evidence presented in the state court proceeding. Federal
2 habeas relief is denied as to Ground 2 of the amended petition.

3 **C. Ground 3**

4 Petitioner asserts that his trial counsel were ineffective for failing to object to the State's use
5 of his post-*Miranda* silence and for failing to object to the State shifting the burden of proof to the
6 defense. (ECF No. 16, at pp. 14-16).

7 **1. Standard for Ineffective Assistance of Counsel**

8 Ineffective assistance of counsel claims are governed by the two-part test announced in
9 *Strickland v. Washington*, 466 U.S. 668 (1984). In *Strickland*, the Supreme Court held that a
10 petitioner claiming ineffective assistance of counsel has the burden of demonstrating that (1)
11 counsel's performance was unreasonably deficient, and (2) that the deficient performance prejudiced
12 the defense. *Williams v. Taylor*, 529 U.S. 362, 390-391 (2000) (citing *Strickland*, 466 U.S. at 687).
13 To establish ineffectiveness, the defendant must show that counsel's representation fell below an
14 objective standard of reasonableness. *Id.* To establish prejudice, the defendant must show that there
15 is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding
16 would have been different. *Id.* A reasonable probability is "probability sufficient to undermine
17 confidence in the outcome." *Id.* Additionally, any review of the attorney's performance must be
18 "highly deferential" and must adopt counsel's perspective at the time of the challenged conduct, in
19 order to avoid the distorting effects of hindsight. *Strickland*, 466 U.S. at 689. It is the petitioner's
20 burden to overcome the presumption that counsel's actions might be considered sound trial strategy.
21 *Id.*

22 Ineffective assistance of counsel under *Strickland* requires a showing of deficient
23 performance of counsel resulting in prejudice, "with performance being measured against an
24 'objective standard of reasonableness,' . . . 'under prevailing professional norms.'" *Rompilla v.*
25 *Beard*, 545 U.S. 374, 380 (2005) (quotations omitted). If the state court has already rejected an
26 ineffective assistance claim, a federal habeas court may only grant relief if that decision was
27 contrary to, or an unreasonable application of the *Strickland* standard. *See Yarborough v. Gentry*,
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1 540 U.S. 1, 5 (2003). There is a strong presumption that counsel’s conduct falls within the wide
2 range of reasonable professional assistance. *Id.*

3 The United States Supreme Court has described federal review of a state supreme court’s
4 decision on a claim of ineffective assistance of counsel as “doubly deferential.” *Cullen v.*
5 *Pinholster*, 131 S.Ct. 1388, 1403 (2011) (quoting *Knowles v. Mirzayance*, 556 U.S. 111, 112-113,
6 129 S.Ct. 1411, 1413 (2009)). In *Cullen v. Pinholster*, the Supreme Court emphasized that: “We
7 take a ‘highly deferential’ look at counsel’s performance . . . through the ‘deferential lens of §
8 2254(d).” *Id.* at 1403 (internal citations omitted). Moreover, federal habeas review of an
9 ineffective assistance of counsel claim is limited to the record before the state court that adjudicated
10 the claim on the merits. *Cullen v. Pinholster*, 131 S.Ct. at 1398-1401. The United States Supreme
11 Court has specifically reaffirmed the extensive deference owed to a state court’s decision regarding
12 claims of ineffective assistance of counsel:

13 Establishing that a state court’s application of *Strickland* was
14 unreasonable under § 2254(d) is all the more difficult. The standards
15 created by *Strickland* and § 2254(d) are both “highly deferential,” *id.*
16 at 689, 104 S.Ct. 2052; *Lindh v. Murphy*, 521 U.S. 320, 333, n.7, 117
17 S.Ct. 2059, 138 L.Ed.2d 481 (1997), and when the two apply in
18 tandem, review is “doubly” so, *Knowles*, 556 U.S. at ___, 129 S.Ct. at
19 1420. The *Strickland* standard is a general one, so the range of
reasonable applications is substantial. 556 U.S. at ___, 129 S.Ct. at
1420. Federal habeas courts must guard against the danger of
equating unreasonableness under *Strickland* with unreasonableness
under § 2254(d). When § 2254(d) applies, the question is whether
there is any reasonable argument that counsel satisfied *Strickland*’s
deferential standard.

20 *Harrington v. Richter*, 562 U.S. 86, 105 (2011). “A court considering a claim of ineffective
21 assistance of counsel must apply a ‘strong presumption’ that counsel’s representation was within the
22 ‘wide range’ of reasonable professional assistance.” *Id.* at 787 (quoting *Strickland*, 466 U.S. at
23 689). “The question is whether an attorney’s representation amounted to incompetence under
24 prevailing professional norms, not whether it deviated from best practices or most common
25 custom.” *Id.* (internal quotations and citations omitted).

26 **2. Counsel’s Failure to Object to Use of Petitioner’s Post-Miranda Silence**

27 Petitioner claims that trial counsel was ineffective for failing to object to the State’s
28 questions to mental health experts concerning petitioner’s silence when asked about alleged

1 delusions. (ECF No. 16, at p. 15). The Nevada Supreme Court denied this claim in its order
2 affirming the denial of petitioner's state post-conviction habeas petition, as follows:

3 First, appellant argues that trial counsel was ineffective for failing to
4 object to references made by the State to the length of time appellant
5 was observed at Lake's Crossing and to comments on appellant's
6 silence at Lake's Crossing. Appellant failed to demonstrate that his
7 trial counsel's performance was deficient or that he was prejudiced.
8 As appellant put his sanity in question, the mental health evaluations
9 at Lake's Crossing, the time taken in forming opinions concerning
10 those evaluations, and appellant's failure to fully cooperate with those
11 evaluations were admissible at trial. See *Estes v. State*, 122 Nev.
12 1123, 133-34, 146 P.3d 1114, 1121 (2006). Appellant fails to
13 demonstrate a reasonable probability of a different outcome had
14 counsel objected to references to the length of time appellant was
15 housed at Lake's Crossing or to his silence at that facility. Therefore,
16 appellant fails to demonstrate that the district court erred in denying
17 this claim.

18 (Exhibit 83, at p. 2). The factual findings of the state court are presumed correct. 28 U.S.C. §
19 2254(e)(1). Petitioner has failed to demonstrate that his counsel's performance was deficient or that
20 he was prejudiced under *Strickland*. Petitioner has failed to meet his burden of proving that the
21 Nevada Supreme Court's ruling was contrary to, or involved an unreasonable application of, clearly
22 established federal law, as determined by the United States Supreme Court, or that the ruling was
23 based on an unreasonable determination of the facts in light of the evidence presented in the state
24 court proceeding. The Court denies habeas relief as to this claim.

25 **3. Counsel's Failure to Object to the State Shifting the Burden of Proof**

26 Petitioner claims that counsel was ineffective for failing to object when the State asked a
27 defense expert whether he was aware that petitioner refused to provide a blood sample at the time of
28 his arrest. (ECF No. 16, at pp. 15-16). Petitioner claims that the question impermissibly shifted the
burden of proof to the defense. (*Id.*). The Nevada Supreme Court denied this claim in its order
affirming the denial of petitioner's state post-conviction habeas petition, as follows:

Third, appellant argues that trial counsel was ineffective for failing to
object to the State's questions concerning appellant's refusal to
consent to a blood draw on the night of the murders because they
shifted the burden of production of evidence to appellant. Appellant
fails to demonstrate that he was prejudiced. Given the testimony and
appellant's defense of legal insanity, appellant fails to demonstrate a
reasonable probability that an objection to questions concerning a lack
of a blood draw would have resulted in a different outcome in trial.
Therefore, the district court did not err in denying this claim.

1 (Exhibit 83, at p. 3). The factual findings of the state court are presumed correct. 28 U.S.C. §
2 2254(e)(1). Petitioner has failed to demonstrate that his counsel’s performance was deficient or that
3 he was prejudiced under *Strickland*. Petitioner has failed to meet his burden of proving that the
4 Nevada Supreme Court’s ruling was contrary to, or involved an unreasonable application of, clearly
5 established federal law, as determined by the United States Supreme Court, or that the ruling was
6 based on an unreasonable determination of the facts in light of the evidence presented in the state
7 court proceeding. The Court denies habeas relief on this claim.

8 **IV. Certificate of Appealability**

9 District courts are required to rule on the certificate of appealability in the order disposing of
10 a proceeding adversely to the petitioner or movant, rather than waiting for a notice of appeal and
11 request for certificate of appealability to be filed. Rule 11(a). In order to proceed with his appeal,
12 petitioner must receive a certificate of appealability. 28 U.S.C. § 2253(c)(1); Fed. R. App. P. 22; 9th
13 Cir. R. 22-1; *Allen v. Ornoski*, 435 F.3d 946, 950-951 (9th Cir. 2006); *see also United States v.*
14 *Mikels*, 236 F.3d 550, 551-52 (9th Cir. 2001). Generally, a petitioner must make “a substantial
15 showing of the denial of a constitutional right” to warrant a certificate of appealability. *Id.*; 28
16 U.S.C. § 2253(c)(2); *Slack v. McDaniel*, 529 U.S. 473, 483-84 (2000). “The petitioner must
17 demonstrate that reasonable jurists would find the district court's assessment of the constitutional
18 claims debatable or wrong.” *Id.* (quoting *Slack*, 529 U.S. at 484). In order to meet this threshold
19 inquiry, the petitioner has the burden of demonstrating that the issues are debatable among jurists of
20 reason; that a court could resolve the issues differently; or that the questions are adequate to deserve
21 encouragement to proceed further. *Id.* In this case, no reasonable jurist would find this Court’s
22 denial of the petition debatable or wrong. The Court therefore denies petitioner a certificate of
23 appealability.

24 **V. Conclusion**

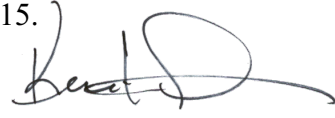
25 **IT IS THEREFORE ORDERED** that the amended petition for a writ of habeas corpus is
26 **DENIED.**

27 **IT IS FURTHER ORDERED** that petitioner is **DENIED A CERTIFICATE OF**
28 **APPEALABILITY.**

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IT IS FURTHER ORDERED that the Clerk of Court **SHALL ENTER JUDGMENT**
ACCORDINGLY.

Dated this 29 day of June, 2015.



UNITED STATES DISTRICT JUDGE