

1 In February of 2009, Brown moved to dismiss appointed counsel, Jeannie Hua. In March of
2 2009, the state district court conducted a canvass pursuant to *Faretta v. California*, 422 U.S. 806
3 (1975), and granted the motion. Hua was appointed standby counsel.

4 On May 13, 2009, at the conclusion of a three-day trial, a jury in the state district court for
5 Clark County, Nevada, found Brown guilty of all charges alleged in the information. The State filed
6 a notice to seek habitual criminal treatment based on four prior felony convictions.

7 The state district court held a sentencing hearing on August 26, 2009, at which the State
8 moved to dismiss five counts of lewdness with a child under the age of 14. The court declined to
9 adjudicate Brown a habitual criminal. On September 3, 2009, a judgment was entered convicting
10 Brown of three counts of lewdness with a child under the age of 14 and five counts of sexual assault
11 with a minor under the age of 14. He was sentenced to eight life terms with the possibility of parole;
12 all but one of them were ordered to run concurrently.

13 Brown filed a timely notice of appeal. The Nevada Supreme Court affirmed his convictions
14 and sentence on February 3, 2011.

15 On June 3, 2011, Brown filed, pro se, a petition for writ of habeas corpus in the state district
16 court. The state district court denied the petition. On April 11, 2012, the Nevada Supreme Court
17 affirmed that decision.

18 On May 30, 2012, this court received the federal petition for writ of habeas corpus that
19 initiated this action. ECF No. 1. The court concluded that the petition was deficient and ordered
20 Brown to file an amended petition. ECF No. 2. On May 1, 2013, he filed the amended petition that
21 is now before the court for decision.

22 On April 28, 2014, the court concluded that the petition contained only one cognizable claim,
23 which alleges as follows:

24 [P]etitioner was denied rights to due process of law, to a fair trial and to present a
25 defense under the Fifth Amendment when the trial court denied: (a) a motion or
26 motions for a continuance to obtain school records for the victim's brother and

1 MySpace records of the victim as well as to have time to speak to witnesses; and (b) a
2 mid-trial motion for a continuance to obtain a defense DNA expert in order to cross-
examine the State's DNA expert.

3 ECF No. 5, p. 6.

4 The respondents have filed their answer to that claim. ECF No. 8.

5 II. STANDARDS OF REVIEW

6 This action is governed by the Antiterrorism and Effective Death Penalty Act (AEDPA). 28
7 U.S.C. § 2254(d) sets forth the standard of review under AEDPA:

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

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

13 (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.

14 28 U.S.C. § 2254(d).

15 A decision of a state court is "contrary to" clearly established federal law if the state court
16 arrives at a conclusion opposite that reached by the Supreme Court on a question of law or if the
17 state court decides a case differently than the Supreme Court has on a set of materially
18 indistinguishable facts. *Williams v. Taylor*, 529 U.S. 362, 405-06 (2000). An "unreasonable
19 application" occurs when "a state-court decision unreasonably applies the law of [the Supreme
20 Court] to the facts of a prisoner's case." *Id.* at 409. "[A] federal habeas court may not "issue the writ
21 simply because that court concludes in its independent judgment that the relevant state-court decision
22 applied clearly established federal law erroneously or incorrectly." *Id.* at 411.

23 The Supreme Court has explained that "[a] federal court's collateral review of a state-court
24 decision must be consistent with the respect due state courts in our federal system." *Miller-El v.*
25 *Cockrell*, 537 U.S. 322, 340 (2003). The "AEDPA thus imposes a 'highly deferential standard for
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1 evaluating state-court rulings,' and 'demands that state-court decisions be given the benefit of the
2 doubt.'" *Renico v. Lett*, 559 U.S. 766, 773 (2010) (quoting *Lindh v. Murphy*, 521 U.S. 320, 333, n. 7
3 (1997); *Woodford v. Viscotti*, 537 U.S. 19, 24 (2002) (per curiam)). "A state court's determination
4 that a claim lacks merit precludes federal habeas relief so long as 'fairminded jurists could disagree'
5 on the correctness of the state court's decision." *Harrington v. Richter*, 131 S.Ct. 770, 786 (2011)
6 (citing *Yarborough v. Alvarado*, 541 U.S. 652, 664 (2004)). The Supreme Court has emphasized
7 "that even a strong case for relief does not mean the state court's contrary conclusion was
8 unreasonable." *Id.* (citing *Lockyer v. Andrade*, 538 U.S. 63, 75 (2003)); *see also Cullen v.*
9 *Pinholster*, 131 S.Ct.1388, 1398 (2011) (describing the AEDPA standard as "a difficult to meet and
10 highly deferential standard for evaluating state-court rulings, which demands that state-court
11 decisions be given the benefit of the doubt") (internal quotation marks and citations omitted).

12 The state court's factual findings are presumed to be correct unless rebutted by the petitioner
13 by clear and convincing evidence. 28 U.S.C. § 2254(e)(1); *Schriro v. Landrigan*, 550 U.S. 465,
14 473-74 (2007). "[R]eview under § 2254(d)(1) is limited to the record that was before the state court
15 that adjudicated the claim on the merits." *Pinholster*, 131 S.Ct. at 1398. In *Pinholster*, the Court
16 reasoned that the "backward-looking language" present in § 2254(d)(1) "requires an examination of
17 the state-court decision at the time it was made," and, therefore, the record under review must be
18 "limited to the record in existence at that same time, i.e., the record before the state court." *Id.*

19 III. DISCUSSION

20 Brown alleges a violation of his constitutional rights due to the trial court's failure to grant
21 him a continuance to obtain certain records – i.e., school records of the victim's brother and records
22 of the victim's MySpace account. He claims that the records were necessary to establish his defense
23 and could have been used to impeach the victim and her brother. He also alleges a violation of his
24 constitutional rights arising from the trial court's refusal to grant him a continuance to obtain a DNA
25 expert to assist in the cross-examination of the State's DNA expert.

1 In *Ungar v. Sarafite*, 376 U.S. 575 (1964), the United Supreme Court held as follows:

2 The matter of continuance is traditionally within the discretion of the trial
3 judge, and it is not every denial of a request for more time that violates due process
4 even if the party fails to offer evidence or is compelled to defend without counsel.
5 *Avery v. Alabama*, 308 U.S. 444, 60 S.Ct. 321, 84 L.Ed. 377. Contrariwise, a myopic
6 insistence upon expeditiousness in the face of a justifiable request for delay can
7 render the right to defend with counsel an empty formality. *Chandler v. Fretag*, 348
8 U.S. 3, 75 S.Ct. 1, 99 L.Ed. 4. There are no mechanical tests for deciding when a
9 denial of a continuance is so arbitrary as to violate due process. The answer must be
10 found in the circumstances present in every case, particularly in the reasons presented
11 to the trial judge at the time the request is denied. *Nilva v. United States*, 352 U.S.
12 385, 77 S.Ct. 431, 1 L.Ed.2d 415; *Torres v. United States*, 270 F.2d 252 (C.A.9th
13 Cir.); cf. *United States v. Arlen*, 252 F.2d 491 (C.A.2d Cir.).

9 *Ungar*, 376 U.S. at 589-90.

10 Brown presented the claim now before this court to the Nevada Supreme Court. ECF No. 12-
11 13, p. 10-12. The Nevada Supreme Court adjudicated the claim as follows:

12 Brown argues that he was unable to adequately prepare for trial because he did
13 not receive the victim's school and MySpace records in advance and he did not have a
14 DNA expert prepared to testify. Thus, he argues, the district court erred in denying his
15 motions for continuances. We review a district court's decision to deny a motion for
16 continuance for an abuse of discretion. *Higgs v. State*, 126 Nev. ___, ___, 222 P.3d
17 648, 653 (2010). A request for a continuance is evaluated under the circumstances of
18 each case; however, if the continuance was denied, the appellant must demonstrate
19 that he or she was prejudiced by the district court's decision. *Id.* (citing *Rose v. State*,
20 123 Nev. 194, 206, 163 P.3d 408, 416 (2007)). Because Brown has failed to
21 demonstrate prejudice, we conclude that the district court did not abuse its discretion
22 in denying his motions for continuance.

18 School and MySpace records

19 At a pretrial hearing, Brown complained that he did not receive the victim's
20 school and MySpace records from his investigator and moved for a continuance. The
21 State objected to the motion, asserting that the records were irrelevant and
22 inadmissible character evidence that would not be able to be used to attack the
23 victim's credibility. Despite the objection, the State offered to obtain the school
24 records in order to avoid any delays, and Brown indicated that he would be prepared
25 to proceed when he received the records. After the school records were provided, the
26 district court reviewed the records with the parties and determined that nothing within
the documents challenged the victim's credibility. Because the school records were
irrelevant and inadmissible to impeach the victim's credibility, we conclude that
Brown was not prejudiced by the district court's denial of his motion for continuance.

25 Additionally, Brown has failed to demonstrate prejudice from not receiving
26 information regarding the victim's MySpace page. Brown had adequate familiarity

1 with the contents of the MySpace page to effectively cross-examine the victim
2 regarding inaccurate reflections of her age on her MySpace page. Therefore, we
conclude that the district court did not abuse its discretion when it denied Brown's
3 motion for a continuance.

4 DNA expert

5 During trial, Brown again moved for a continuance in order to obtain a DNA
expert, which the district court denied. Brown argues that he was unprepared and
6 prejudiced by the district court's denial of a continuance in order to obtain a DNA
expert witness to counter the State's evidence at trial. We disagree.

7 Brown was notified of the State's intent to present DNA evidence nearly four
8 months prior to trial and had been repeatedly apprised by the court that he would be
held to the same standards for preparation and execution of court proceedings as an
9 attorney. Additionally, while entertaining Brown's motion for a continuance, the
district court clarified that the basis for Brown's challenge to the DNA evidence was
10 not that the DNA testing was inaccurate but, rather, that someone else intentionally
deposited his DNA on the victim's clothing.

11 Brown offers no reason for why he failed to obtain a DNA expert prior to trial,
despite having been put on notice months earlier that the State intended to introduce
12 DNA evidence. A district court's denial of a motion for continuance is not an abuse
of discretion if the delay is the defendant's fault. *See Rose*, 123 Nev. at 206, 163 P.3d
13 at 416. Moreover, because Brown's challenge to the DNA evidence did not invoke
the accuracy of the DNA testing, additional expert testimony would have been
14 inconsequential. Thus, Brown has failed to demonstrate that any prejudice resulted
from the district court's denial of his motion for continuance.

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16 ECF No. 13-1, p. 2-4.

17 Although the Nevada Supreme Court did not cite specifically to federal law, the standards the
18 court imposed were not "contrary to" *Ungar* or any other clearly established Supreme Court law for
the purposes § 2254(d)(1). *See Early v. Packer*, 537 U.S. 3, 8 (2002) (per curiam) (holding that state
19 court is not required to cite Supreme Court cases, or even be aware of them, to avoid its decision
20 being "contrary to" Supreme Court precedent).

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22 In addition, the court's decision was not an unreasonable application of the applicable federal
23 standards or based on an unreasonable determination of the facts. The state supreme court's findings
24 are consistent with, and supported by, the record before this court. ECF Nos. 9-13. The state
25 supreme court did not specifically address the school records of the victim's brother, however, when
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1 Brown asked the trial court for a continuance to obtain school records, he mentioned only the
2 victim's records. ECF No. 10-16. On the first day of trial there was some discussion of Brown
3 wanting the brother's records, but at the conclusion of that discussion he indicated that he was ready
4 to proceed with trial. ECF No. 10-18, p. 12-24. Brown has not specified how the records would
5 have assisted either his defense or his cross-examination of the brother's testimony.

6 Because Brown has failed to show that the Nevada Supreme Court's decision denying his
7 habeas claim is not entitled deference under § 2254(d), the claim must be denied.

8 IV. CONCLUSION

9 For the reasons set forth above, Brown's petition for habeas relief is denied.

10 *Certificate of Appealability*

11 This is a final order adverse to the petitioner. As such, Rule 11 of the Rules Governing
12 Section 2254 Cases requires this court to issue or deny a certificate of appealability (COA).
13 Accordingly, the court has *sua sponte* evaluated the claims within the petition for suitability for the
14 issuance of a COA. *See* 28 U.S.C. § 2253(c); *Turner v. Calderon*, 281 F.3d 851, 864-65 (9th Cir.
15 2002).

16 Pursuant to 28 U.S.C. § 2253(c)(2), a COA may issue only when the petitioner "has made a
17 substantial showing of the denial of a constitutional right." With respect to claims rejected on the
18 merits, a petitioner "must demonstrate that reasonable jurists would find the district court's
19 assessment of the constitutional claims debatable or wrong." *Slack v. McDaniel*, 529 U.S. 473, 484
20 (2000) (citing *Barefoot v. Estelle*, 463 U.S. 880, 893 & n.4 (1983)). For procedural rulings, a COA
21 will issue only if reasonable jurists could debate (1) whether the petition states a valid claim of the
22 denial of a constitutional right and (2) whether the court's procedural ruling was correct. *Id.*

23 Having reviewed its determinations and rulings in adjudicating Brown's petition, the court
24 declines to issue a certificate of appealability for its resolution of any procedural issues or any of
25 Brown's habeas claims.

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IT IS THEREFORE ORDERED that petitioner's amended petition for writ of habeas corpus (ECF No. 4) is DENIED. The Clerk shall enter judgment accordingly.

IT IS FURTHER ORDERED that a certificate of appealability is DENIED.

Dated this 31st day of August, 2015.



UNITED STATES DISTRICT JUDGE