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UNITED STATES DISTRICT COURT

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DISTRICT OF NEVADA

8

DEVELL MOORE,

Case No.: 3:13-cv-00390-LRH-WGC

9

Petitioner,

ORDER

10 v.

11

LEGRAND, *et al.*,

12

Respondents.

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This habeas petition is before the court for a decision on the merits (ECF No. 32).

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Respondents filed an answer (ECF No. 40), and petitioner Devell Moore filed a reply

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(ECF No. 45).

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I. Procedural History and Background

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In 2009, a jury found Moore guilty of 3 counts of sexual assault of a minor under

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age 14 and 1 count of lewdness with a child under age 14 (exhibit 13).¹ The state

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district court sentenced him to 3 consecutive terms of life with the possibility of parole

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after 35 years with a concurrent term of life with the possibility of parole after 10 years.

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Exh. 14. Judgment of conviction was entered on February 3, 2010. Exh. 15.

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¹ Exhibits referenced in this order are found at ECF Nos. 19-21, 36.

1 The Nevada Supreme Court affirmed Moore’s convictions, affirmed the denial of
2 Moore’s state postconviction petition, and denied a motion for rehearing of the petition.
3 Exhs. 21, 27, 29.

4 On July 19, 2013, Moore dispatched his federal habeas petition for filing (ECF
5 No. 6). Ultimately, this court appointed the Federal Public Defender as counsel for
6 Moore. Respondents have now answered the petition (ECF No. 40).

7 **II. LEGAL STANDARD -Antiterrorism and Effective Death Penalty Act**
8 **(AEDPA)**

9 28 U.S.C. § 2254(d), a provision of the Antiterrorism and Effective Death Penalty
10 Act (AEDPA), provides the legal standards for this court’s consideration of the petition in
11 this case:

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

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

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

22 The AEDPA “modified a federal habeas court’s role in reviewing state prisoner
23 applications in order to prevent federal habeas ‘retrials’ and to ensure that state-court
24 convictions are given effect to the extent possible under law.” *Bell v. Cone*, 535 U.S.
25 685, 693-694 (2002). This Court’s ability to grant a writ is limited to cases where “there
26 is no possibility fair-minded jurists could disagree that the state court’s decision conflicts

1 with [Supreme Court] precedents.” *Harrington v. Richter*, 562 U.S. 86, 102 (2011). The
2 Supreme Court has emphasized “that even a strong case for relief does not mean the
3 state court’s contrary conclusion was unreasonable.” *Id.* (citing *Lockyer v. Andrade*, 538
4 U.S. 63, 75 (2003)); see also *Cullen v. Pinholster*, 563 U.S. 170, 181 (2011) (describing
5 the AEDPA standard as “a difficult to meet and highly deferential standard for evaluating
6 state-court rulings, which demands that state-court decisions be given the benefit of the
7 doubt”) (internal quotation marks and citations omitted).

8 A state court decision is contrary to clearly established Supreme Court
9 precedent, within the meaning of 28 U.S.C. § 2254, “if the state court applies a rule that
10 contradicts the governing law set forth in [the Supreme Court’s] cases” or “if the state
11 court confronts a set of facts that are materially indistinguishable from a decision of [the
12 Supreme Court] and nevertheless arrives at a result different from [the Supreme
13 Court’s] precedent.” *Lockyer*, 538 U.S. at 73 (quoting *Williams v. Taylor*, 529 U.S. 362,
14 405-06 (2000), and citing *Bell*, 535 U.S. at 694).

15 A state court decision is an unreasonable application of clearly established
16 Supreme Court precedent, within the meaning of 28 U.S.C. § 2254(d), “if the state court
17 identifies the correct governing legal principle from [the Supreme Court’s] decisions but
18 unreasonably applies that principle to the facts of the prisoner’s case.” *Lockyer*, 538
19 U.S. at 74 (quoting *Williams*, 529 U.S. at 413). The “unreasonable application” clause
20 requires the state court decision to be more than incorrect or erroneous; the state
21 court’s application of clearly established law must be objectively unreasonable. *Id.*
22 (quoting *Williams*, 529 U.S. at 409).

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1 To the extent that the state court's factual findings are challenged, the
2 "unreasonable determination of fact" clause of § 2254(d)(2) controls on federal habeas
3 review. *E.g., Lambert v. Blodgett*, 393 F.3d 943, 972 (9th Cir.2004). This clause
4 requires that the federal courts "must be particularly deferential" to state court factual
5 determinations. *Id.* The governing standard is not satisfied by a showing merely that the
6 state court finding was "clearly erroneous." 393 F.3d at 973. Rather, AEDPA requires
7 substantially more deference:

8 [I]n concluding that a state-court finding is unsupported by
9 substantial evidence in the state-court record, it is not enough that we
10 would reverse in similar circumstances if this were an appeal from a
11 district court decision. Rather, we must be convinced that an appellate
panel, applying the normal standards of appellate review, could not
reasonably conclude that the finding is supported by the record.

12 *Taylor v. Maddox*, 366 F.3d 992, 1000 (9th Cir.2004); *see also Lambert*, 393
13 F.3d at 972.

14 Under 28 U.S.C. § 2254(e)(1), state court factual findings are presumed to be
15 correct unless rebutted by clear and convincing evidence. The petitioner bears the
16 burden of proving by a preponderance of the evidence that he is entitled to habeas
17 relief. *Cullen*, 563 U.S. at 181.

18 **III. Instant Petition**

19 **Ground 1**

20 Moore asserts that his Fifth and Fourteenth Amendment rights were violated by
21 the trial court's failure to grant his request to exclude his taped confessional statement
22 where he failed to explicitly waive his Miranda rights and where the circumstances of
23 the in-custody interview rendered his statement involuntary (ECF No. 32, pp. 12-14).

1 The Fifth Amendment to the United States Constitution guarantees the privilege
2 against self-incrimination. In *Miranda v. Arizona*, 384 U.S. 436 (1966), the Supreme
3 Court established procedural safeguards to protect the exercise of the privilege against
4 self-incrimination. Prior to questioning, law enforcement must inform the suspect of his
5 or her right to remain silent and the right to have counsel present during interrogation.
6 A suspect has the right to cut off questioning at any time. *Id.*

7 After Moore was arrested, he was taken to an interview room at the police
8 station. The detective who questioned Moore first read Moore his Miranda rights, and
9 Moore stated that he understood his rights. Exh. 3. Moore then confessed to the
10 crimes charged. The transcript reflects that Moore answered the detective's questions
11 and never invoked his right to remain silent or to have counsel present. Moore did
12 indicate that he needs "mental help" because he makes bad judgments, but his
13 statements are coherent, often detailed, and responsive to the questions. The detective
14 relayed the accusations and Moore responded: "I foolishly have made the wrong
15 judgment and do the wrong thing, and I really just—I've, I've even told uh, my fiancé
16 that I need mental help on a lot of situations because I get very hostile . . . um, just bad
17 judgment my mental is truly off." Moore also responded to questions with specifics
18 about the types of abuse, and where and when the abuse took place. *Id.* At trial, the
19 State played the tape of Moore's statement to police. Exh. 10, p. 31.

20 Affirming the convictions, the Nevada Supreme Court denied the claim:

21 Moore contends that the district court erred by denying his motion to
22 suppress his confession because it was involuntary and obtained in
23 violation of *Miranda v. Arizona*, 384 U.S. 436 (1966). We disagree. After
the interviewing detective recited Moore's Miranda rights, Moore stated
that he understood them and never unambiguously invoked his right to
remain silent. See *Berghuis v. Thompkins*, 560 U.S. ___, ___, 130 S. Ct.

1 2250, 2259-60 (2010). Further, a review of the factors he cites in support
2 of his brief argument that his confession was involuntary do not lead us to
conclude that substantial evidence does not support the district court's
conclusion. See *Rosky v. State*, 111 P.3d 690, 694 (2005).

3 Exh. 21 at 1.

4 Moore has not demonstrated that the in-custody interview violated his Miranda
5 rights. The Nevada Supreme Court's adjudication of this claim did not result in a
6 decision that was contrary to, or involved an unreasonable application of, clearly
7 established federal law, as determined by the Supreme Court of the United States; nor
8 was its decision based on an unreasonable determination of the facts in light of the
9 evidence presented in the State court proceeding. See 28 U.S.C. § 2254(d). Federal
10 habeas relief is denied as to ground 1.

11 **Ground 2**

12 Moore argues that the trial court violated his Fourteenth Amendment equal
13 protection and fair trial rights when it allowed the prosecution to use its peremptory
14 challenges to exclude 2 prospective jurors (ECF No. 32, pp. 14-17).

15 In *Batson v. Kentucky*, 476 U.S. 79 (1986), the United States Supreme Court
16 held that the Equal Protection Clause guarantees defendants that prosecuting
17 authorities will not exclude members of a protected minority class from the jury venire
18 pool solely based on race. The Court subsequently pronounced a three-part test for
19 determining whether a prospective juror has been impermissibly excluded:

20 Under our *Batson* jurisprudence, once the opponent of a peremptory
21 challenge has made out a prima facie case of racial discrimination (step
22 1), the burden of production shifts to the proponent of the strike to come
23 forward with a race-neutral explanation (step 2). If a race-neutral
explanation is tendered, the trial court must then decide (step 3) whether
the opponent of the strike has proved purposeful discrimination.

Purkett v. Elem, 514 U.S. 765, 767 (1995).

1 The state-court record reflects that during jury selection defense counsel moved
2 for a mistrial, arguing that the State had violated *Batson*. Counsel argued that the fact
3 that the State excused a Hispanic juror and an African-American juror showed a pattern
4 of discrimination against minority prospective jurors. Exh. 9, pt. 1, pp. 3-8. The State
5 first argued that striking two jurors is hardly a pattern. They further responded that they
6 used a peremptory strike against the African-American woman in question because she
7 stated that she had a brother in prison related to drug, prostitution, and trafficking
8 convictions. She had also said that her brother was wrongfully imprisoned due to a girl
9 lying about her age to police. The district attorney noted “she couldn’t be more right to
10 put off my jury, whatever color her skin was.” *Id.* at 4.

11 With respect to the Hispanic prospective juror, the State said they primarily
12 wanted to use the strike in order to “get to the pool” because there were a couple of
13 upcoming prospective jurors that they viewed as favorable. The prosecutor also noted
14 that the prospective juror seemed particularly gullible. The prosecutor observed that the
15 State had only exercised 4 peremptory strikes and also that the defense had used
16 peremptory strikes against 3 Hispanics and an African American woman.

17 The state district court denied the motion for mistrial, concluding that the State
18 “sufficiently articulated the reasons for their challenges per *Batson*.” The court also
19 observed that in its view the jury pool and the jury as selected were sufficiently diverse.
20 *Id.* at 6.

21 The Nevada Supreme Court denied the claim on direct appeal, stating:

22 Moore claims that the district court erred in denying his motion for a
23 mistrial pursuant to *Batson v. Kentucky*, 476 U.S. 79 (1986). In his motion,
Moore alleged that the State used two of its four peremptory challenges in
a discriminatory manner. The State offered the following explanations for

1 striking the two minority panel members: (1) juror Barber because her
2 brother was tried for pandering and drug trafficking and she believed he
3 was treated unfairly by police and (2) juror Enriquez because she
4 appeared gullible and easily persuaded by the defense's theory of the
5 case. The district court ruled that these rationales were not pretextual, and
6 we also conclude that, because "discriminatory intent is not inherent in the
7 State's explanation[s]," and those explanations are not "implausible or
8 fantastic," the district court did not clearly err in rejecting Moore's *Batson*
9 challenge. *Ford v. State*, 122 Nev. 398, 403, 404, 132 P.3d 574, 578
10 (2006).

11 Exh. 21 at 1–2.

12 There is no support for Moore's claim that the trial court failed to engage in an
13 analysis of the validity of the prosecutor's explanations. The Nevada Supreme Court's
14 adjudication of this claim did not result in a decision that was contrary to, or involved an
15 unreasonable application of, clearly established federal law, as determined by the
16 Supreme Court of the United States; nor was its decision based on an unreasonable
17 determination of the facts in light of the evidence presented in the State court
18 proceeding. See 28 U.S.C. § 2254(d). Accordingly, Moore is not entitled to federal
19 habeas relief on ground 2.

20 **Ground 3**

21 Ground 3 alleges ineffective assistance of defense counsel in violation of
22 Moore's Sixth and Fourteenth Amendment rights (ECF No. 32, pp. 17-19). Ineffective
23 assistance of counsel (IAC) claims are governed by the two-part test announced in
Strickland v. Washington, 466 U.S. 668 (1984). In *Strickland*, the Supreme Court held
that a petitioner claiming ineffective assistance of counsel has the burden of
demonstrating that (1) the attorney made errors so serious that he or she was not
functioning as the "counsel" guaranteed by the Sixth Amendment, and (2) that the
deficient performance prejudiced the defense. *Williams*, 529 U.S. at 390-91 (citing

1 *Strickland*, 466 U.S. at 687). To establish ineffectiveness, the defendant must show that
2 counsel's representation fell below an objective standard of reasonableness. *Id.* To
3 establish prejudice, the defendant must show that there is a reasonable probability that,
4 but for counsel's unprofessional errors, the result of the proceeding would have been
5 different. *Id.* A reasonable probability is "probability sufficient to undermine confidence in
6 the outcome." *Id.* Additionally, any review of the attorney's performance must be "highly
7 deferential" and must adopt counsel's perspective at the time of the challenged conduct,
8 in order to avoid the distorting effects of hindsight. *Strickland*, 466 U.S. at 689. It is the
9 petitioner's burden to overcome the presumption that counsel's actions might be
10 considered sound trial strategy. *Id.*

11 Ineffective assistance of counsel under *Strickland* requires a showing of deficient
12 performance of counsel resulting in prejudice, "with performance being measured
13 against an objective standard of reasonableness, . . . under prevailing professional
14 norms." *Rompilla v. Beard*, 545 U.S. 374, 380 (2005) (internal quotations and citations
15 omitted). When the ineffective assistance of counsel claim is based on a challenge to a
16 guilty plea, the *Strickland* prejudice prong requires a petitioner to demonstrate "that
17 there is a reasonable probability that, but for counsel's errors, he would not have
18 pleaded guilty and would have insisted on going to trial." *Hill v. Lockhart*, 474 U.S. 52,
19 59 (1985).

20 If the state court has already rejected an ineffective assistance claim, a federal
21 habeas court may only grant relief if that decision was contrary to, or an unreasonable
22 application of, the *Strickland* standard. See *Yarborough v. Gentry*, 540 U.S. 1, 5 (2003).
23 There is a strong presumption that counsel's conduct falls within the wide range of

1 reasonable professional assistance. *Id.*

2 The United States Supreme Court has described federal review of a state
3 supreme court's decision on a claim of ineffective assistance of counsel as "doubly
4 deferential." *Cullen*, 563 U.S. at 190 (quoting *Knowles v. Mirzayance*, 129 S.Ct. 1411,
5 1413 (2009)). The Supreme Court emphasized that: "We take a 'highly deferential' look
6 at counsel's performance . . . through the 'deferential lens of § 2254(d).'" *Id.* at 1403
7 (internal citations omitted). Moreover, federal habeas review of an ineffective assistance
8 of counsel claim is limited to the record before the state court that adjudicated the claim
9 on the merits. *Cullen*, 563 U.S. at 181-84. The United States Supreme Court has
10 specifically reaffirmed the extensive deference owed to a state court's decision
11 regarding claims of ineffective assistance of counsel:

12 Establishing that a state court's application of *Strickland* was
13 unreasonable under § 2254(d) is all the more difficult. The standards
14 created by *Strickland* and § 2254(d) are both "highly deferential," *id.* at
15 689, 104 S.Ct. 2052; *Lindh v. Murphy*, 521 U.S. 320, 333, n.7, 117 S.Ct.
16 2059, 138 L.Ed.2d 481 (1997), and when the two apply in tandem, review
17 is "doubly" so, *Knowles*, 556 U.S. at —, 129 S.Ct. at 1420. The
18 *Strickland* standard is a general one, so the range of reasonable
19 applications is substantial. 556 U.S. at —, 129 S.Ct. at 1420. Federal
20 habeas courts must guard against the danger of equating
21 unreasonableness under *Strickland* with unreasonableness under §
22 2254(d). When § 2254(d) applies, the question is whether there is any
23 reasonable argument that counsel satisfied *Strickland's* deferential
standard.

20 *Harrington*, 562 U.S. at 105. "A court considering a claim of ineffective assistance
21 of counsel must apply a 'strong presumption' that counsel's representation was within
22 the 'wide range' of reasonable professional assistance." *Id.* at 104 (quoting *Strickland*,
23 466 U.S. at 689). "The question is whether an attorney's representation amounted to

1 incompetence under prevailing professional norms, not whether it deviated from best
2 practices or most common custom.” *Id.* (internal quotations and citations omitted).

3 Here, Moore asserts that his counsel was ineffective for failing to investigate
4 Moore’s competency in light of Moore’s irrational rejection of a guilty plea deal (ECF No.
5 32, pp. 17-19). Moore notes that medical staff at Clark County Detention Center
6 prescribed him 2 antidepressants. Defense counsel did not have Moore’s competency
7 evaluated. Moore contends that after the victim failed to appear in justice court the
8 State offered a plea agreement whereby Moore would be eligible for release in 8 years.
9 Moore rejected the offer and proceeded to trial. *Id.* Moore includes a 2013 letter from
10 defense counsel that states that, according to her notes in the file, the State offered 8-
11 to-life on the day that the preliminary hearing was scheduled but the victim was not
12 present, which Moore rejected.

13 The state district court dismissed the claim because it was alleged in such a
14 cursory and unspecific manner as to be insufficiently pleaded. Exh. 24 at 4. Moore
15 appealed, and the Nevada Supreme Court affirmed the denial of Moore’s petition,
16 stating:

17 [A]ppellant claimed that counsel failed to seek a pretrial competency
18 evaluation as appellant asserted he used antipsychotic medication during
19 trial. Appellant failed to demonstrate that counsel’s performance was
20 deficient or that he was prejudiced. That appellant used medication during
21 trial was insufficient to demonstrate that he did not have the ability to
22 consult with his attorney with a reasonable degree of rational
23 understanding and that he did not have a factual understanding of the
proceedings against him. *See Melchior-Gloria v. State*, 99 Nev. 174, 179-
80, 660 P.2d 109, 113 (1983) (citing *Dusky v. United States*, 362 U.S.
402, 402 (1960)). Appellant failed to demonstrate a reasonable probability
of a different outcome had counsel sought a pretrial competency
evaluation. Therefore, the district court did not err in denying this claim.

Exh. 27 at 3.

1 In his federal petition, Moore mischaracterizes the references he made to his
2 mental health in his voluntary statement to the detective. As noted above in the
3 discussion of ground 1, Moore *did* state that he needed mental health assistance. But
4 any fair reading of his statements reveal that he was focused on having exercised bad
5 judgment: “I made the wrong the judgment instead of being like a father figure and
6 saying—no I’m sayin’, would make the wrong mental judgment.” “But I know I
7 have this feeling towards, you know, the way I look at little girls, and I know it ain’t right
8 so, you know, mentally it’s wrong.” Exh. 3. Moore has not shown that a competency
9 evaluation had a reasonable probability of changing the result of the trial. Further, the
10 2013 letter from the public defender—referencing her 2008 notes—is the sum total of
11 information or evidence about the plea deal. Moore has failed to demonstrate that the
12 Nevada Supreme Court’s decision was contrary to or involved an unreasonable
13 application of *Strickland* or was based on an unreasonable determination of the facts in
14 light of the evidence presented in the state court proceeding. 28 U.S.C. § 2254(d).
15 Federal habeas relief is denied as ground 3.

16 Accordingly, the petition is denied in its entirety.

17 **IV. Certificate of Appealability**

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

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

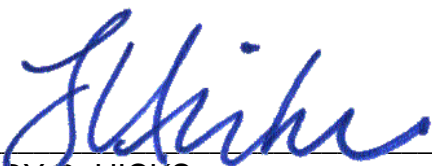
9 Having reviewed its determinations and rulings in adjudicating Moore's petition,
10 the court finds that none of those rulings meets the *Slack* standard. The court therefore
11 declines to issue a certificate of appealability for its resolution of any of Moore's claims.

12 **IT IS THEREFORE ORDERED** that the third-amended petition (ECF No. 32) is
13 **DENIED** in its entirety.

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

15 **IT IS FURTHER ORDERED** that the Clerk shall enter judgment accordingly and
16 close this case.

17 Dated: March 28, 2019.

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19 _____
LARRY R. HICKS
20 UNITED STATES DISTRICT JUDGE
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