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UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

* * *

HERMAN REED,

v.
ISIDRO BACA, *et al.*,

Respondents.

Case No. 3:13-cv-00426-MMD-WGC

ORDER

This *pro se* first-amended petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254 by state prisoner Herman Reed is before the court for final disposition on the merits. (ECF No. 5.) Respondents have answered the petition. (ECF No. 20.) Reed did not file a reply.

I. PROCEDURAL HISTORY AND BACKGROUND

On October 7, 2009, Reed was convicted of three counts stemming from his arrest during a traffic stop (exhibit 22 to respondents' motion to dismiss).¹ When the police officer smelled marijuana, he asked Reed if he could search the vehicle, Reed consented; the officer found a green leafy substance on the floor in the back of the car and a loaded firearm in the trunk. Reed told the officer that he had purchased the gun from a guy behind a gas station and that it was likely stolen. A jury convicted Reed of count 1: unlawful possession of a firearm; count 2: possession of stolen property; and count 3: possession of a firearm by ex-felon. (Exh. 22.) Counts 1 and 3 were charged under the same statute,

¹Exhibits referenced in this order are exhibits to respondents' motion to dismiss, ECF No. 10.

1 and the court granted the State’s motion to dismiss count 1. (Exh. 30.) On January 22,
2 2010, petitioner was sentenced to forty-eight to one hundred twenty months on count 2
3 and a consecutive sentence of twenty-eight to seventy months on count 3. (Exh. 30.) The
4 judgment of conviction was entered on February 8, 2010. (Exh. 31.)

5 The Nevada Supreme Court affirmed Reed’s convictions on April 11, 2012. (Exh.
6 42.) Remittitur issued on May 7, 2012. (Exh. 43.) The Nevada Supreme Court affirmed
7 the state district court’s denial of Reed’s state postconviction petition for writ of habeas
8 corpus on June 12, 2013, denied a petition for rehearing on June 25, 2013, and remittitur
9 issued on August 21, 2013. (Exhs. 54, 56, 57.)

10 On June 24, 2015, this Court granted respondents’ motion to dismiss several grounds
11 in Reed’s federal petition for writ of habeas corpus. (ECF No. 16.) Respondents have now
12 answered the remaining grounds.

13 **II. LEGAL STANDARDS**

14 28 U.S.C. § 2254(d), a provision of the Antiterrorism and Effective Death Penalty
15 Act (AEDPA), provides the legal standards for this court’s consideration of the petition in
16 this case:

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

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

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

24 The AEDPA “modified a federal habeas court’s role in reviewing state prisoner
25 applications in order to prevent federal habeas ‘retrials’ and to ensure that state-court
26 convictions are given effect to the extent possible under law.” *Bell v. Cone*, 535 U.S. 685,
27 693-694 (2002). This Court’s ability to grant a writ is limited to cases where “there is no
28 possibility fair-minded jurists could disagree that the state court’s decision conflicts with

1 [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 precedent,
9 within the meaning of 28 U.S.C. § 2254, “if the state court applies a rule that contradicts
10 the governing law set forth in [the Supreme Court’s] cases” or “if the state court confronts
11 a set of facts that are materially indistinguishable from a decision of [the Supreme Court]
12 and nevertheless arrives at a result different from [the Supreme Court’s] precedent.”
13 *Lockyer*, 538 U.S. at 73 (quoting *Williams v. Taylor*, 529 U.S. 362, 405-06 (2000), and
14 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 U.S.
19 at 74 (quoting *Williams*, 529 U.S. at 413). The “unreasonable application” clause requires
20 the state court decision to be more than incorrect or erroneous; the state court’s
21 application of clearly established law must be objectively unreasonable. *Id.* (quoting
22 *Williams*, 529 U.S. at 409).

23 To the extent that the state court’s factual findings are challenged, the
24 “unreasonable determination of fact” clause of § 2254(d)(2) controls on federal habeas
25 review. *E.g.*, *Lambert v. Blodgett*, 393 F.3d 943, 972 (9th Cir.2004). This clause requires
26 that the federal courts “must be particularly deferential” to state court factual
27 determinations. *Id.* The governing standard is not satisfied by a showing merely that the

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1 state court finding was “clearly erroneous.” 393 F.3d at 973. Rather, AEDPA requires
2 substantially more deference:

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

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

10 Under 28 U.S.C. § 2254(e)(1), state court factual findings are presumed to be
11 correct unless rebutted by clear and convincing evidence. The petitioner bears the burden
12 of proving by a preponderance of the evidence that he is entitled to habeas relief. *Cullen*,
13 563 U.S. at 181.

14 **III. INSTANT PETITION**

15 **A. Ground 3**

16 Reed asserts that his Fourteenth Amendment due process rights were violated
17 because the State failed to present sufficient evidence to support his conviction pursuant
18 to NRS § 202.360(1)(c)² of possession of a firearm by a person who is an unlawful user
19 of, or addicted to, any controlled substance. (ECF No. 5, pp. 12-14.) However, Reed was
20 not charged, convicted of, or sentenced for a violation of NRS § 202.360(1). Relief on this
21 claim would not affect the fact of his convictions or affect his sentences in any way.
22 Accordingly, ground 3 is meritless and moot. *Spencer v. Kemna*, 523 U.S. 1, 7 (1998).
23 Ground 3 is, therefore, denied.

24 **B. Ground 4**

25 Reed alleges a federal double jeopardy violation on the basis that “convictions for
26 ex-felon in possession of a firearm, and possession of stolen property (handgun), violate
27 double jeopardy and redundancy principles.” (ECF No. 5 at 16.)

28 To determine whether two offenses are the “same” for double jeopardy purposes,
a court must consider “whether each offense contains an element not contained in the

²This statutory offense is currently codified as NRS § 202.360(1)(d).

1 other; if not, they are the 'same offense' and double jeopardy bars additional punishment
2 and successive prosecution." *United States v. Dixon*, 509 U.S. 688, 696 (1993) (citing
3 *Blockburger v. United States*, 284 U.S. 299, 304 (1932)). "Conversely, '[d]ouble jeopardy
4 is not implicated so long as each violation requires proof of an element which the other
5 does not.'" *Wilson v. Belleque*, 554 F.3d 816, 829 (9th Cir. 2009) (quoting *United States*
6 *v. Vargas-Castillo*, 329 F.3d 715, 720 (9th Cir. 2003). "If each [offense] requires proof of
7 a fact that the other does not, the *Blockburger* test is satisfied, notwithstanding a
8 substantial overlap in the proof offered to establish the crimes." *Id.* (quoting *Iannelli v.*
9 *United States*, 420 U.S. 770, 785-86 n.17 (1975).

10 In affirming the denial of this claim, the Nevada Supreme Court set forth the
11 *Blockburger* test. (Exh. 42.) The Nevada Supreme Court also stated that NRS §
12 202.360(1)(a) (possession of a firearm by a felon) requires the State to prove that the
13 defendant (1) possessed a firearm and (2) has an unpardoned felony conviction; while
14 NRS § 205.275(2)(c) (possession of stolen property) requires the State to prove that the
15 defendant (1) buys, possesses, or withholds property and (2) knows or reasonably should
16 know under the circumstances that the property is stolen. The state supreme court then
17 pointed out that the State could have proven that Reed was a felon in possession of a
18 firearm without proving that Reed possessed the handgun knowing that it was stolen and
19 that the statutes codifying these crimes were directed to combat distinct and separate
20 social harms; thus "simultaneous punishment for both crimes comports with legislative
21 intent and the convictions are not redundant." (*Id.*)

22 As set forth above, the offenses of possession of a firearm by a felon and
23 possession of stolen property in Nevada each contain an element not contained in the
24 other offense. Thus, petitioner has failed to demonstrate that the Nevada Supreme
25 Court's decision was contrary to, or involved an unreasonable application of, federal law
26 established by the United States Supreme Court. 28 U.S.C. § 2254(d). Accordingly,
27 ground 4 is denied.

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1 **C. Ground 8**

2 Reed contends that the district court erred in admitting at trial his involuntary
3 statements in violation of his Sixth Amendment rights. (ECF No. 5 at 44.)

4 In *Miranda v. Arizona*, the United States Supreme Court held that any person who
5 is subjected to a custodial interrogation must first be informed of his or her Fifth
6 Amendment right to remain silent and must knowingly, voluntarily, and intelligently waive
7 those rights in order for any statement to be rendered admissible at trial. 384 U.S. 436
8 (1966). The State must prove by a preponderance of the evidence that a defendant
9 waived his rights under *Miranda*. *Colorado v. Connelly*, 479 U.S. 157, 168 (1986).

10 The Nevada Supreme Court rejected this claim on direct appeal:

11 Reed contends that the district court erred in failing to suppress his
12 statement admitting that the firearm was likely stolen because he did not
13 knowingly or voluntarily waive his rights under *Miranda v. Arizona*, 384 U.S.
14 436 (1966). In his motion to suppress, Reed only claimed that his waiver
15 was invalid because he was extremely intoxicated. On appeal, Reed
16 abandons this theory and expands his argument, asserting that he is not “of
17 high intelligence” and that the general environment of the traffic stop was
prohibitively coercive. As Reed failed to raise these grounds in the district
court, his claim is precluded. *See Rippo v. State*, 113 Nev. 1239, 1259, 946
P.2d 1017, 1030 (1997). Additionally, these claims are belied by the record
and we therefore discern no plain error. *See* NRS 178.602 (“Plain errors or
defects affecting substantial rights may be noticed although they were not
brought to the attention of the court.”).

18 The arresting officer testified at trial to the following: after he discovered the firearm in the
19 trunk, he placed Reed in handcuffs. (Exh. 38 at 280.) The officer read Reed his *Miranda*
20 rights. Reed indicated that he understood his rights and agreed to talk to the officer. Reed
21 told the officer that he bought the gun about a month earlier from a guy named Larry
22 behind the Arco station for \$35. He said he did not know where the Arco station was, he
23 figured that Larry sold it for \$35 because he had either found it or stolen it, and Reed said
24 that he had bought the gun in order to turn it in to the police. (*Id.* at 280-281.)

25 The record also reflects that the officer testified in the same manner at a hearing
26 on a defense motion to suppress the statements on the basis that Reed was under the
27 influence of marijuana and not able to give consent. (Exh. 19.) The state district court
28 denied the motion. *Id.*

1 Reed points to nothing in the state-court record that suggests that he was not able
2 to give consent because he was under the influence or that — as he now argues —he
3 failed to understand the questions because he lacked the intelligence or sufficient
4 education. Reed has, therefore, failed to demonstrate that the Nevada Supreme Court’s
5 decision was contrary to, or involved an unreasonable application of, federal law
6 established by the United States Supreme Court. 28 U.S.C. § 2254(d). Accordingly,
7 ground 8 is denied.

8 **D. Ground 9**

9 Reed argues that the cumulative effect of trial errors violated his Fourteenth
10 Amendment fair trial rights. (ECF No. 5 at 51.) The Nevada Supreme Court rejected all of
11 Reed’s claims of trial error on direct appeal, and therefore also concluded that Reed’s
12 cumulative error claim lacked merit. (Exh. 42.) Reed has not identified constitutional trial
13 errors, and therefore, he has failed to demonstrate that the Nevada Supreme Court’s
14 decision was contrary to, or involved an unreasonable application of, federal law
15 established by the United States Supreme Court. 28 U.S.C. § 2254(d). Ground 9,
16 therefore, is denied.

17 **E. Ground 10**

18 Reed claims that trial counsel rendered ineffective assistance in several ways in
19 violation of his Sixth and Fourteenth Amendment rights. (ECF No. 5 at 54-62.)

20 Ineffective assistance of counsel claims are governed by the two-part test
21 announced in *Strickland v. Washington*, 466 U.S. 668 (1984). In *Strickland*, the Supreme
22 Court held that a petitioner claiming ineffective assistance of counsel has the burden of
23 demonstrating that (1) the attorney made errors so serious that he or she was not
24 functioning as the “counsel” guaranteed by the Sixth Amendment, and (2) that the
25 deficient performance prejudiced the defense. *Williams*, 529 U.S. at 390-91 (citing
26 *Strickland*, 466 U.S. at 687). To establish ineffectiveness, the defendant must show that
27 counsel’s representation fell below an objective standard of reasonableness. *Id.* To
28 establish prejudice, the defendant must show that there is a reasonable probability that,

1 but for counsel's unprofessional errors, the result of the proceeding would have been
2 different. *Id.* A reasonable probability is "probability sufficient to undermine confidence in
3 the outcome." *Id.* Additionally, any review of the attorney's performance must be "highly
4 deferential" and must adopt counsel's perspective at the time of the challenged conduct,
5 in order to avoid the distorting effects of hindsight. *Strickland*, 466 U.S. at 689. It is the
6 petitioner's burden to overcome the presumption that counsel's actions might be
7 considered sound trial strategy. *Id.*

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

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

21 The United States Supreme Court has described federal review of a state supreme
22 court's decision on a claim of ineffective assistance of counsel as "doubly deferential."
23 *Cullen*, 563 U.S. at 190 (quoting *Knowles v. Mirzayance*, 129 S.Ct. 1411, 1413 (2009)).
24 The Supreme Court emphasized that: "We take a 'highly deferential' look at counsel's
25 performance . . . through the 'deferential lens of § 2254(d).'" *Id.* at 1403 (internal citations
26 omitted). Moreover, federal habeas review of an ineffective assistance of counsel claim
27 is limited to the record before the state court that adjudicated the claim on the merits.
28 *Cullen*, 563 U.S. at 181-84. The United States Supreme Court has specifically reaffirmed

1 the extensive deference owed to a state court's decision regarding claims of ineffective
2 assistance of counsel:

3 Establishing that a state court's application of *Strickland* was
4 unreasonable under § 2254(d) is all the more difficult. The standards
5 created by *Strickland* and § 2254(d) are both "highly deferential," *id.* at 689,
6 104 S.Ct. 2052; *Lindh v. Murphy*, 521 U.S. 320, 333, n.7, 117 S.Ct. 2059,
7 138 L.Ed.2d 481 (1997), and when the two apply in tandem, review is
8 "doubly" so, *Knowles*, 556 U.S. at —, 129 S.Ct. at 1420. The *Strickland*
9 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.

10 *Harrington*, 562 U.S. at 105. "A court considering a claim of ineffective assistance of
11 counsel must apply a 'strong presumption' that counsel's representation was within the
12 'wide range' of reasonable professional assistance." *Id.* at 104 (quoting *Strickland*, 466
13 U.S. at 689). "The question is whether an attorney's representation amounted to
14 incompetence under prevailing professional norms, not whether it deviated from best
15 practices or most common custom." *Id.* (internal quotations and citations and quotations
16 omitted).

17 As ground 10(A) Reed claims that trial counsel failed to adequately communicate
18 with him, and in ground 10(B) he argues that counsel failed to investigate Reed's claim
19 that he did not consent to the search of his vehicle and that police planted marijuana and
20 a stolen firearm in his car. (ECF No. 5 at. 54-55.)

21 The Nevada Supreme Court affirmed the denial of these claims, stating that Reed
22 failed to demonstrate prejudice "as he did not explain how further communication or
23 investigation would have helped with his defense or changed the outcome of the trial.
24 (Exh. 54 at 2.)

25 This Court agrees that Reed has failed to state what evidence would have been
26 obtained by additional investigations or additional meetings with counsel and how the
27 outcome of his trial would have changed.

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1 Relatedly, Reed argues in ground 10(D) that trial counsel failed to present his
2 “defense of choice” at trial. (ECF No. 5 at 59.) The Nevada Supreme Court concluded
3 that this claim was belied by the record because at trial defense counsel advanced Reed’s
4 “defense of choice” when counsel challenged the police officers’ testimony about the
5 traffic stop and search and seizure and argued that the officers were not telling the truth
6 and that Reed did not consent to the search. (Exh. 54 at 3.)

7 In ground 10(C) Reed contends that trial counsel failed to adequately litigate the
8 motion to suppress the evidence. (ECF No. 5 at 56.) The Nevada Supreme Court
9 observed that two police officers testified that Reed consented to a search of his car
10 during a routine traffic stop and that they found marijuana and a firearm in the vehicle.
11 (Exh. 54 at 2.) The state supreme court therefore reasoned that “in light of this testimony,
12 appellant failed to demonstrate a reasonable probability that the evidence would have
13 been suppressed had counsel argued that the search was non-consensual and that the
14 evidence was planted by police.” (*Id.*)

15 As ground 10(E) Reed asserts that trial counsel failed to object to the admission
16 of evidence seized from Reed’s vehicle. (ECF No. 5 at 60.) The Nevada Supreme Court
17 pointed out that the district court made a pretrial ruling that the evidence was admissible
18 at trial and that “[c]ounsel cannot be deemed ineffective for failing to make a futile
19 objection or motion.” (Exh. 54 at 3; pretrial hearing, Exh. 14 at 6-8.)

20 Related to all of the above ineffective assistance claims, the trial record reflects
21 that defense counsel cross-examined the two police officers involved in the traffic stop
22 regarding: the failure to field test the marijuana found; failure to fingerprint or DNA test
23 the gun found in Reed’s vehicle; failure to photograph the fact that Reed’s license plate
24 light was not working; failure to record Reed’s statements; failure to document the fact
25 that Reed’s demeanor changed during the course of the investigation; and the failure to
26 get Reed’s consent to the search in writing. (Exh. 20 at 53-54; Exh. 21 at 12.) Defense
27 counsel argued during closing that the officers were not telling the truth and that one
28 officer had planted the evidence. (Exh. 21 at 17.)

1 In ground 10(F) Reed argues that trial counsel failed to object to the State's
2 introduction of hearsay in the form of Reed's admissions to law enforcement. (ECF No. 5
3 at 61.) The Nevada Supreme Court reasoned that, as Reed's statement was not hearsay,
4 Reed failed to demonstrate that his counsel's performance was deficient or that he was
5 prejudiced. (Exh. 54 at 3; see NRS 51.035(3)(a).)

6 Reed claims in ground 10(G) that counsel had a conflict of interest on the basis
7 that counsel failed to investigate and litigate claims and issues, failed to lodge objections
8 at trial, and failed to prepare Reed to testify. (ECF No. 5 at 61-62.) The Nevada Supreme
9 Court pointed out that as this claim was based entirely on Reed's other claims of
10 ineffective assistance, as set forth above, that Reed therefore failed to show an actual
11 conflict of interest. (Exh. 54 at 3.)

12 Reed has failed to demonstrate that the Nevada Supreme Court's decision on any
13 of the ineffective assistance of counsel claims in federal ground 10 was contrary to, or
14 involved an unreasonable application of, *Strickland*. 28 U.S.C. § 2254(d). Accordingly,
15 ground 10 is denied.

16 The petition is therefore 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).

23 Pursuant to 28 U.S.C. § 2253(c)(2), a COA may issue only when the petitioner
24 "has made a substantial showing of the denial of a constitutional right." With respect to
25 claims rejected on the merits, a petitioner "must demonstrate that reasonable jurists would
26 find the district court's assessment of the constitutional claims debatable or wrong." *Slack*
27 *v. McDaniel*, 529 U.S. 473, 484 (2000) (citing *Barefoot v. Estelle*, 463 U.S. 880, 893 & n.4
28 (1983)). For procedural rulings, a COA will issue only if reasonable jurists could debate

1 (1) whether the petition states a valid claim of the denial of a constitutional right and (2)
2 whether the court's procedural ruling was correct. *Id.*

3 Having reviewed its determinations and rulings in adjudicating Reed's petition, the
4 Court finds that none of those rulings meets the *Slack* standard. The Court therefore
5 declines to issue a certificate of appealability for its resolution of any of Reed's claims.


6 **V. CONCLUSION**

7 It is therefore ordered that the petition (ECF No. 5) is denied in its entirety.

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

9 It is further ordered that the Clerk enter judgment accordingly and close this case.

10 DATED THIS 21st day of November 2016.

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13 MIRANDA M. DU
14 UNITED STATES DISTRICT JUDGE
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