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UNITED STATES DISTRICT COURT

7

DISTRICT OF NEVADA

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9 MICHAEL JOHN MOE,

10 Petitioner,

3:14-cv-00410-RCJ-WGC

11 vs.

ORDER12 JO GENTRY, *et al.*,

13 Respondents.

14 _____/

15

16 Introduction

17 This action is a *pro se* petition for writ of habeas corpus by Michael John Moe, a Nevada
18 prisoner. The action is before the Court with respect to the merits of Moe's petition. The Court will
19 deny the petition.

20 Substitution of Respondent

21 Moe is incarcerated at Nevada's Southern Desert Correctional Center (SDCC). Jo Gentry is
22 the warden of SDCC. Therefore, pursuant to Federal Rule of Civil Procedure 25(d), Jo Gentry is
23 substituted for Brian E. Williams, Sr., as the respondent warden in this action.

24 Background

25 On May 22, 2009, Moe was convicted, in Nevada's Second Judicial District Court, in
26 Washoe County Nevada, pursuant to a jury verdict, of one count of burglary. *See* Judgment,

1 Exhibit 39. (The exhibits referred to in this order were filed by respondents, and are located in the
2 record at ECF Nos. 8, 9, 10, 11, 12, and 13.) Moe was adjudicated an habitual criminal, under
3 NRS 207.010, and he was sentenced to 25 years in prison, with the possibility of parole after 10
4 years. *See* Judgment, Exhibit 39 (ECF No. 9-13)

5 The trial was held on April 6, 2009. *See* Trial Transcript, Exhibit 23 (ECF No. 8-23).
6 Evidence at trial showed that Moe committed a burglary at a Cabela's sporting goods store, and
7 shoplifted items from that store.

8 The first to testify at Moe's trial was Scott Thomas Catron, who was employed by Cabela's
9 as a loss prevention specialist. *See* Testimony of Scott Thomas Catron, Trial Transcript, Exhibit 23,
10 pp. 99-220 (ECF No. 8-23, pp. 100-221). Catron testified that on November 20, 2008, he saw Moe
11 in the Cabela's store. *See id.* at 108, 117, 119 (ECF No. 8-23, pp. 109, 118). Catron saw Moe with a
12 Garmin GPS device, which he placed in a basket and covered with a shirt. *See id.* at 119-20 (ECF
13 No. 8-23, pp. 120-21). Catron then began to watch Moe on a security camera. *See id.* at 121-22
14 (ECF No. 8-23, pp. 122-23). Catron thought that Moe did not seem to be shopping. *See id.* Catron
15 then saw Moe bend down, and stand back up, and do something in his jacket pocket with his hands --
16 "fighting with something inside his jacket." *See id.* at 122-24, 126 (ECF No. 8-23, pp. 123-25, 127).
17 Catron believed that Moe had moved the Garmin GPS device from the basket to his jacket pocket.
18 *See id.* at 150, 216 (ECF No. 8-23, pp. 151, 217). Moe then wandered to the video game section of
19 the store, where he selected some video games. *See id.* at 124-25 (ECF No. 8-23, pp. 125-26).
20 Catron then saw Moe move toward a section of the store with camouflage clothing, where he left the
21 "spider wrap" from the Garmin GPS device. *See id.* at 127, 213 (ECF No. 8-23, pp. 128, 214).
22 "Spider wrap" is a security device that is attached to a product. *See id.* at 114-15 (ECF No. 8-23,
23 pp. 115-16). Catron had another employee, Jeff Duncan, go out on the store floor and retrieve the
24 spider wrap that Moe left in the camouflage clothing section. *See id.* at 127, 159 (ECF No. 8-23, pp.
25 128, 160). Catron then saw Moe move toward the front of the store, but veer off toward a restroom
26 near the store entrance. *See id.* at 125, 127-28, 166 (ECF No. 8-23, pp. 126, 128-29, 167). Moe

1 went into the restroom, and stayed in there for about half an hour. *See id.* at 128 (ECF No. 8-23,
2 p. 129). Catron then had another employee, Burl Sutter, go into the restroom and remove all the
3 trash, so that Catron could later tell what trash Moe left in the restroom. *See id.* at 129, 166-70 (ECF
4 No. 8-23, pp. 130, 167-71). Sutter went into the restroom and checked the trash several times while
5 Moe was inside. *See id.* at 129-30, 166-70 (ECF No. 8-23, pp. 130-31, 167-71). Sutter retrieved
6 from the restroom a Garmin GPS device box. *See id.* at 130-31, 170-71 (ECF No. 8-23, pp. 131-32,
7 171-72). When Moe eventually came out of the restroom, Catron saw him go back into the store
8 area. *See id.* at 131 (ECF No. 8-23, p. 132). Catron noticed Moe watching the front entrance. *See*
9 *id.* at 132, 171-72 (ECF No. 8-23, pp. 133, 172-73). Catron then testified as follows:

10 Q. And eventually does he walk outdoor?

11 A. He does, he makes some more -- a movement throughout the apparel
12 department. At one point in time he takes the Garmin from -- one pocket and placing
13 it in another pocket, stops and looks up at a camera, and then kind of just stands and
14 watches the front of the store and then starts to head towards the front of the building
15 through the standard exit would be if you pay for merchandise through the clothes
16 checkout lanes.

17 Q. Then he walks out the doors and the Reno Police Department is
18 actually already there; is that right?

19 A. They are there, yes.

20 *Id.* at 132 (ECF No. 8-23, p. 133). Catron had called the police. *See id.* at 132-34 (ECF No. 8-23,
21 pp. 133-35). Moe was arrested. *See id.* at 134 (ECF No. 8-23, p. 135). When he was arrested, Moe
22 had in his possession four video games and the Garmin GPS device. *See id.* at 134, 153, 173-75
23 (ECF No. 8-23, pp. 135, 154, 174-76). The Garmin GPS device was, at that point, not in a box. *See*
24 *id.* at 134-35 (ECF No. 8-23, pp. 135-36). During Catron's testimony, the prosecution played for the
25 jury a surveillance video showing Moe in the Cabela's store, and his arrest outside, and showed the
26 jury a photo of the items Moe took from the store. *See id.* at 137-43, 148-74 (ECF No. 8-23,
pp. 138-44, 149-75). Catron testified that the total value of the items that Moe took from the store
was about \$350. *See id.* at 175-76 (ECF No. 8-23, pp. 176-77).

1 Next to testify was Jeffrey Paul Duncan, another Cabela's loss prevention employee. *See*
2 Testimony of Jeffrey Paul Duncan, Trial Transcript, Exhibit 23, pp. 221-39 (ECF No. 8-23,
3 pp. 222-240). Duncan testified that on November 20, 2008, he assisted Catron in watching Moe on
4 the store's security cameras. *See id.* at 222 (ECF No. 8-23, p. 223). Duncan testified that at some
5 point, Catron asked him to go out onto the floor and retrieve a security device that Moe had
6 discarded there; Duncan found the "spider wrap" security device in the pocket of a piece of
7 camouflage clothing where Catron believed Moe had left it. *See id.* at 223-24 (ECF No. 8-23,
8 pp. 224-25).

9 The prosecution's last witness was David Robertson, a police officer with the Reno Police
10 Department. *See* Testimony of David Robertson, Trial Transcript, Exhibit 23, pp. 240-71 (ECF No.
11 8-23, pp. 241-272). Officer Robertson responded to the Cabela's store on November 20, 2008, and
12 participated in apprehending Moe as he exited the store. *See id.* at 242-45 (ECF No. 8-23, pp. 243-
13 46). Officer Robertson testified that Moe was searched, and the police found that he had items from
14 the store concealed under his jacket. *See id.* at 246 (ECF No. 8-23, p. 247). The police found that
15 Moe had only three pennies in his possession, and no other cash, credit cards, or checks. *See id.* at
16 247 (ECF No. 8-23, p. 248). Officer Robertson testified as follows about statements made by Moe:

17 Q. [...] [D]id you ask or did the defendant make a spontaneous statement
18 about what his intention was inside the store, what he was doing there?

19 A. He was there to remove items from the store.

20 Q. Did he state that he had any way to pay for those items?

21 A. I don't recall if he -- if he said that he had a means of payment.

22 * * *

23 Q. And when you spoke to the defendant on November 20th of 2008
24 inside the store at Cabela's after he had stolen this property, he stated to you that he
25 went there to steal it?

26 A. Yes.

Id. at 250, 255 (ECF No. 8-23, pp. 251, 256).

1 The defense called defense investigator Evo Novak as a witness. *See* Testimony of Evo
2 Novak, Trial Transcript, Exhibit 23, pp. 272-82 (ECF No. 8-23, pp. 273-83). Novak testified that he
3 viewed the surveillance video from Cabela's, and he testified about his observations regarding that
4 video. *See id.* at 273-74 (ECF No. 8-23, pp. 274-75). He also testified about going to Cabela's and
5 taking photographs of certain items as part of the defense investigation. *See id.* at 274-77 (ECF No.
6 8-23, pp. 275-78).

7 The jury found Moe guilty of burglary. *See* Trial Transcript, Exhibit 23, pp. 304-06 (ECF
8 No. 8-23, pp. 305-07); Verdict, Exhibit 25 (ECF No. 8-25).

9 Moe filed a motion for a new trial, based on the trial court's denial of a challenge for cause of
10 a prospective juror; however, the prospective juror had been challenged by the defense, using a
11 peremptory challenge, and did not serve on the jury. *See* Motion for New Trial, Exhibit 27 (ECF No.
12 9-1). The court denied that motion. *See* Order, Exhibit 33 (ECF No. 9-7).

13 On April 30, 2009, the State filed a notice of its intent to seek an habitual criminal sentencing
14 enhancement. *See* Notice of Intent to Seek Habitual Criminal Enhancement, Exhibit 32 (ECF
15 No. 9-6). In that notice, the State listed seven prior felony convictions. *See id.*

16 Moe's sentencing was held on May 22, 2009. *See* Transcript of Sentencing, Exhibit 38 (ECF
17 No. 9-12). He was adjudicated an habitual criminal under NRS 207.010, and was sentenced to 25
18 years in prison, with the possibility of parole after 10 years. *See id.* at 60 (ECF No. 9-12, p. 61);
19 Judgment, Exhibit 39 (ECF No. 9-13).

20 Moe appealed, and the Nevada Supreme Court affirmed Moe's judgment of conviction on
21 November 5, 2009. *See* Order of Affirmance, Exhibit 55 (ECF No. 10-4).

22 On April 21, 2010, Moe filed a post-conviction petition for writ of habeas corpus in the state
23 district court. *See* Petition for Writ of Habeas Corpus (Post-Conviction), Exhibit 60 (ECF No. 10-9).
24 After counsel was appointed for him, Moe filed a supplemental petition on August 7, 2011.
25 *See* Supplemental Petition for Writ of Habeas Corpus, Exhibit 88 (ECF No. 11-12). Moe
26 subsequently amended his petition. *See* Motion for Leave to Amend, Exhibit 109 (ECF No. 12-8);

1 Order Granting Motion for Leave to Amend, Exhibit 117 (ECF No. 12-16). On January 8, 2013, the
2 state district court held an evidentiary hearing. *See* Transcript of Evidentiary Hearing, Exhibit 121
3 (ECF No. 12-20). The state district court denied Moe’s petition in a written order on April 8, 2013.
4 *See* Findings of Fact, Conclusions of Law and Judgment, Exhibit 124 (ECF No. 12-23). Moe
5 appealed. On September 18, 2013, the Nevada Supreme Court affirmed the denial of Moe’s petition.
6 *See* Order of Affirmance, Exhibit 138 (ECF No. 13-12).

7 This court received Moe’s *pro se* federal habeas corpus petition on August 6, 2014. *See*
8 Petition for Writ of Habeas Corpus (ECF No. 4). Moe’s federal habeas petition includes 44 grounds
9 for relief, some with several subparts. *See id.*

10 On February 17, 2015, respondents filed a motion to dismiss, contending that all Moe’s
11 claims are unexhausted in state court. *See* Motion to Dismiss (ECF No. 7). Respondents also argued
12 that all Moe’s claims are conclusory and that some of his claims are not cognizable in a federal
13 habeas action. *See id.* The Court ruled on the motion to dismiss on June 25, 2015, granting it in part
14 and denying it in part. *See* Order entered June 25, 2015 (ECF No. 20). The Court ruled that the
15 following of Moe’s claims were exhausted in state court:

16 Ground 20 (to the extent based on trial counsel’s alleged failure to investigate
17 witnesses Donnelly, Duncan and Catron);

18 Ground 24(2) (to the extent based on trial counsel’s alleged failure to call Pam
19 Metzger to testify);

20 Ground 24(3) (to the extent based on trial counsel’s alleged failure to encourage Moe
21 to testify at trial);

22 Ground 24(9) (to the extent based on trial counsel’s alleged failure to investigate
23 witnesses Donnelly, Duncan and Catron);

24 Ground 24(16) (to the extent based on trial counsel’s alleged failure to offer at trial,
25 as evidence, “the advertisement flyer showing sale jackets from Cabela’s store and
26 [the receipt from] Metzger’s gambling tournament at Boomtown”);

Ground 24(21) (to the extent based on trial counsel’s alleged failure to “investigate
the prosecutor’s hearsay remarks regarding Game Stop contacting Cabela’s about
Pam Metzger selling videotapes stolen by Moe”);

1 Ground 24(22) (to the extent based on trial counsel’s alleged failure to object to “the
2 prosecutor’s hearsay remarks regarding Game Stop contacting Cabela’s about Pam
3 Metzger selling videotapes stolen by Moe,” and to offer evidence that one of his prior
4 convictions was the result of a trial at which he was not present);

5 Ground 24(23) (to the extent based on trial counsel’s alleged failure to object to “the
6 prosecutor’s hearsay remarks regarding Game Stop contacting Cabela’s about Pam
7 Metzger selling videotapes stolen by Moe”);

8 Ground 24(24) (to the extent based on trial counsel’s alleged failure to object to “the
9 prosecutor’s hearsay remarks regarding Game Stop contacting Cabela’s about Pam
10 Metzger selling videotapes stolen by Moe”);

11 Ground 24(26) (to the extent based on trial counsel’s alleged failure to object “when
12 the court ordered there were sixteen minutes left to finish the jury trial after the
13 State’s case”);

14 Ground 24(32) (to the extent based on trial counsel’s alleged failure to play “the
15 videotape from Cabela’s security office to impeach Officer David Robertson’s
16 supplemental report,” and to cross-examine Donnelly, Duncan, and Catron); and

17 Ground 25 (to the extent of Moe’s other exhausted claims).

18 *See id.* The court ruled the following claims in petitioner’s habeas petition to be unexhausted:

19 Grounds 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20 (except to the
20 extent based on trial counsel’s alleged failure to investigate witnesses Donnelly,
21 Duncan and Catron), 21, 22, 23, 24(2) (except to the extent based on trial counsel’s
22 alleged failure to call Pam Metzger to testify), 24(3) (except to the extent based on
23 trial counsel’s alleged failure to encourage Moe to testify at trial), 24(4), 24(5), 24(6),
24(7), 24(8), 24(9) (except to the extent based on trial counsel’s alleged failure to
24 investigate witnesses Donnelly, Duncan and Catron), 24(10), 24(11), 24(12), 24(13),
25 24(14), 24(15), 24(16) (except to the extent based on trial counsel’s alleged failure to
26 offer at trial, as evidence, “the advertisement flyer showing sale jackets from Cabela’s
store and [the receipt from] Metzger’s gambling tournament at Boomtown”), 24(17),
24(18), 24(19), 24(20), 24(21) (except to the extent based on trial counsel’s alleged
failure to “investigate the prosecutor’s hearsay remarks regarding Game Stop
contacting Cabela’s about Pam Metzger selling videotapes stolen by Moe”), 24(22)
(except to the extent based on trial counsel’s alleged failure to object to “the
prosecutor’s hearsay remarks regarding Game Stop contacting Cabela’s about Pam
Metzger selling videotapes stolen by Moe,” and to offer evidence that one of his prior
convictions was the result of a trial at which he was not present), 24(23) (except to the
extent based on trial counsel’s alleged failure to object to “the prosecutor’s hearsay
remarks regarding Game Stop contacting Cabela’s about Pam Metzger selling
videotapes stolen by Moe”), 24(24) (except to the extent based on trial counsel’s
alleged failure to object to “the prosecutor’s hearsay remarks regarding Game Stop
contacting Cabela’s about Pam Metzger selling videotapes stolen by Moe”), 24(25),
24(26) (except to the extent based on trial counsel’s alleged failure to object “when
the court ordered there were sixteen minutes left to finish the jury trial after the
State’s case”), 24(27), 24(28), 24(29), 24(30), 24(31), Ground 24(32) (except to the
extent based on trial counsel’s alleged failure to play “the videotape from Cabela’s

1 security office to impeach Officer David Robertson’s supplemental report,” and to
2 cross-examine Donnelly, Duncan, and Catron), 25 (except to the extent of Moe’s
3 exhausted claims), 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43,
4 and 44.

5 *See id.* With respect to Moe’s unexhausted claims, the Court granted Moe an opportunity to make an
6 election to: (1) abandon all the claims found by this Court to be unexhausted, (2) file a motion for a
7 stay, requesting that this case be stayed while he exhausts his unexhausted claims, or (3) file a
8 declaration stating that he wishes to voluntarily dismiss his entire habeas petition in this case without
9 prejudice. *See id.* With regard to respondents’ argument, in their motion to dismiss, that all Moe’s
10 claims are conclusory, and that some of Moe’s claims are not cognizable in this federal habeas
11 corpus action, the Court ruled that those arguments would be better addressed in conjunction with
12 consideration of the merits of Moe’s claims; the Court directed that respondents could assert those
13 arguments in their answer. *See id.*

14 On July 30, 2015, Moe filed a motion for stay, requesting a stay of the action, to allow him to
15 return to state court to exhaust his unexhausted claims (ECF No. 21). The Court denied that motion
16 on December 2, 2016, ruling that Moe did not show good cause for his failure to exhaust his
17 unexhausted claims in his earlier state-court proceedings. *See* Order entered December 2, 2016
18 (ECF No. 24). The Court then granted Moe another opportunity to abandon the unexhausted claims.
19 *See id.* The Court warned that if Moe did not file a notice of abandonment of his unexhausted claims
20 within the time allowed, this action would be dismissed, without prejudice, pursuant to *Rose v.*
Lundy, 455 U.S. 509 (1982). *See id.*

21 On March 3, 2016, Moe filed a motion for reconsideration regarding the denial of his motion
22 for stay (ECF No. 28). The Court denied that motion in an order entered April 12, 2016 (ECF No.
23 31). The Court granted Moe more time to abandon his unexhausted claims.

24 On May 18, 2016, Moe filed a motion to dismiss his unexhausted claims (ECF No. 32). The
25 Court granted that motion on June 28, 2016, and dismissed Moe’s unexhausted claims. *See* Order
26 entered June 28, 2016 (ECF No. 35).

1 Also on May 18, 2016, Moe filed a motion for leave to amend his habeas petition, stating that
2 he wished to amend to clarify his exhausted claims (ECF No. 33). The Court denied that motion on
3 December 12, 2016. *See* Order entered December 12, 2016 (ECF No. 41). The Court ruled that
4 Moe’s proposed amended petition was improper in that it was incomplete in and of itself, and
5 depended on reference to, and incorporation of, material in his original petition. *See* LR 15-1(a)
6 (“The proposed amended pleading must be complete in and of itself without reference to the
7 superseded pleading...”). The Court also determined that amendment was unnecessary; Moe
8 acknowledged that he “[made] no attempt to change any claims.” *See* Reply in Support of Motion
9 for Leave to Amend (ECF No. 40), p. 2. Rather, Moe sought “only to clarify and supply the
10 supporting facts and evidence to Petitioner’s claims that were deemed exhausted by this Court.” *Id.*
11 Therefore, the Court concluded that the proposed amended petition was in the nature of a
12 memorandum of argument in support of his exhausted claims. The Court denied Moe’s motion for
13 leave to amend his habeas petition, but ordered that it would consider the arguments in Moe’s
14 proposed amended petition (ECF No. 38), with respect to the merits of his exhausted claims.

15 Respondents then filed an answer on February 3, 2017 (ECF No. 42), and Moe filed a reply
16 on June 12, 2017 (ECF No. 48).

17 Discussion

18 Standard of Review

19 28 U.S.C. § 2254(d) sets forth the standard of review applicable in this case under the
20 Antiterrorism and Effective Death Penalty Act (AEDPA):

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

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

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

3 28 U.S.C. § 2254(d).

4 A state court decision is contrary to clearly established Supreme Court precedent, within the
5 meaning of 28 U.S.C. § 2254, “if the state court applies a rule that contradicts the governing law set
6 forth in [the Supreme Court’s] cases” or “if the state court confronts a set of facts that are materially
7 indistinguishable from a decision of [the Supreme Court] and nevertheless arrives at a result
8 different from [the Supreme Court’s] precedent.” *Lockyer v. Andrade*, 538 U.S. 63, 73 (2003)
9 (quoting *Williams v. Taylor*, 529 U.S. 362, 405-06 (2000), and citing *Bell v. Cone*, 535 U.S. 685, 694
10 (2002)). A state court decision is an unreasonable application of clearly established Supreme Court
11 precedent, within the meaning of 28 U.S.C. § 2254(d), “if the state court identifies the correct
12 governing legal principle from [the Supreme Court’s] decisions but unreasonably applies that
13 principle to the facts of the prisoner’s case.” *Lockyer*, 538 U.S. at 75 (quoting *Williams*, 529 U.S. at
14 413). The “unreasonable application” clause requires the state court decision to be more than
15 incorrect or erroneous; the state court’s application of clearly established law must be objectively
16 unreasonable. *Id.* (quoting *Williams*, 529 U.S. at 409).

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

1 Grounds 20, 24(9) and 24(32)

2 In Ground 20, Moe claims he “was denied his Sixth and Fourteenth Amendment rights to
3 effective assistance of counsel when counsel failed to conduct any pretrial investigation on State’s
4 witnesses, and witnesses Petitioner requested to be investigated and called for trial.” *See* Petition
5 for Writ of Habeas Corpus (ECF No. 4), p. 11. In the June 25, 2015, order, the Court ruled that
6 Moe exhausted this claim, in part, on the appeal in his state habeas action. *See* Order entered
7 June 25, 2015 (ECF No. 20), p. 9. Specifically, the Court ruled that Moe exhausted this claim in
8 state court to the extent that he claimed that his trial counsel was ineffective for failure to investigate
9 witnesses Donnelly, Duncan, and Catron. *See id.* That part of Ground 20 is before the Court for
10 resolution on its merits.

11 In Ground 24(9), Moe claims that he was denied his federal constitutional right to effective
12 assistance of his trial counsel on account of trial counsel’s failure “to investigate any of State’s
13 witnesses along with lying about availability of petitioner’s witnesses.” *See* Petition for Writ of
14 Habeas Corpus, p. 23. In the June 25, 2015, order, the Court ruled that Moe exhausted this claim, on
15 the appeal in his state habeas action, to the extent that he claims that his trial counsel was ineffective
16 for failing to investigate witnesses Donnelly, Duncan, and Catron. *See* Order entered June 25, 2015,
17 p. 12. That part of Ground 24(9), which is the same as Ground 20, is before the Court for resolution
18 on its merits.

19 In Ground 24(32), Moe claims that he was denied his federal constitutional right to effective
20 assistance of his trial counsel because “[t]rial counsel failed to call impeachment witnesses and
21 failed to offer impeachment evidence to impeach the complaining witnesses.” *See* Petition for Writ
22 of Habeas Corpus, p. 25. In the June 25, 2015, order, the Court ruled that Moe exhausted this claim
23 in state court with respect to his claim that his trial counsel “should have played the videotape from
24 Cabela’s security office to impeach Officer David Robertson’s supplemental report,” and should
25 have cross-examined Donnelly, Duncan, and Catron. *See* Order entered June 25, 2015, p. 19. That
26 part of Ground 24(32), too, is before the Court for resolution on its merits.

1 In *Strickland v. Washington*, 466 U.S. 668 (1984), the Supreme Court propounded a two
2 prong test for analysis of claims of ineffective assistance of counsel: the petitioner must demonstrate
3 (1) that the defense attorney’s representation “fell below an objective standard of reasonableness,”
4 and (2) that the attorney’s deficient performance prejudiced the defendant such that “there is a
5 reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding
6 would have been different.” *Strickland*, 466 U.S. at 688, 694. A court considering a claim of
7 ineffective assistance of counsel must apply a “strong presumption” that counsel’s representation
8 was within the “wide range” of reasonable professional assistance. *Id.* at 689. The petitioner’s
9 burden is to show “that counsel made errors so serious that counsel was not functioning as the
10 ‘counsel’ guaranteed the defendant by the Sixth Amendment.” *Id.* at 687. And, to establish
11 prejudice under *Strickland*, it is not enough for the habeas petitioner “to show that the errors had
12 some conceivable effect on the outcome of the proceeding.” *Id.* at 693. Rather, the errors must be
13 “so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.” *Id.* at 687.

14 Where a state court has adjudicated a claim of ineffective assistance of counsel, under
15 *Strickland*, establishing that the decision was unreasonable under AEDPA is especially difficult.
16 *See Richter*, 562 U.S. at 104-05. In *Richter*, the Supreme Court instructed:

17 The standards created by *Strickland* and § 2254(d) are both highly deferential,
18 [*Strickland*, 466 U.S. at 689]; *Lindh v. Murphy*, 521 U.S. 320, 333, n. 7, 117 S.Ct.
19 2059, 138 L.Ed.2d 481 (1997), and when the two apply in tandem, review is “doubly”
20 so, [*Knowles v. Mirzayance*, 556 U.S. 111, 123 (2009)]. The *Strickland* standard is a
21 general one, so the range of reasonable applications is substantial. 556 U.S., at 123,
22 129 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 not whether counsel’s actions were reasonable. The
question is whether there is any reasonable argument that counsel satisfied
Strickland’s deferential standard.

23 *Richter*, 562 U.S. at 105; *see also Cheney v. Washington*, 614 F.3d 987, 994-95 (9th Cir. 2010)
24 (acknowledging double deference required to state court adjudications of *Strickland* claims).

1 After holding an evidentiary hearing, the state district court ruled, as follows, on this claim:

2 One of the claims is that trial counsel rendered ineffective assistance in
3 failing to investigate to see if any of the other security officers or police officers
4 would contradict the claim of one of the officers that Moe admitted that he entered the
5 store with the intent to steal. This court finds that claim to be unproven because none
6 of the witnesses has testified in a manner that contradicted the claim of retired Officer
7 Robertson. Each witness claimed that they had no current recollection of what they
8 had heard, related to the alleged admission or on any other subject. In addition, the
9 claim is unproven because Chris Fortier [Moe's trial counsel] had a tactical reason for
10 not investigating. He testified that the circumstances under which the evidence of the
11 admission was generated allowed for impeachment and for the suggestion that it was
12 fabricated. He evaluated the likelihood that some officers would contradict the one
13 who claimed Moe made admissions, assumed it to be unlikely, based on his
14 experience, and further evaluated the risk that the nature of the investigation would
15 get back to the prosecutor. He further evaluated the perceived impeachment value of
16 the single officer and made the tactical choice on how to proceed. The court finds
17 that was a legitimate tactic and that Moe has failed to prove that the decision not to
18 investigate was unreasonable. The court further finds that Moe has not shown that
19 additional investigation would have yielded evidence that would have altered the
20 outcome of the trial. Accordingly, the claim of ineffective assistance in failing to
21 investigate or present additional evidence is denied.

22 Findings of Fact, Conclusions of Law and Order, Exhibit 124, pp. 3-4 (ECF No. 12-23, pp. 4-5).

23 The Nevada Supreme Court affirmed this ruling; in its order, the Nevada Supreme Court
24 stated the following:

25 [...] Moe contends that the district court erred by denying his claims that
26 counsel was ineffective for failing to investigate and cross-examine witnesses to
determine whether they heard him confess. Moe asserts that, if the witnesses heard
him confess, counsel was ineffective for failing to question them regarding why the
confession was not in their written reports, and if the witnesses did not hear him
confess, counsel was ineffective for failing to present their testimony and video
footage which would demonstrate that they would have heard the confession had it
occurred. The district court denied these claims because it determined that counsel
made a reasonable tactical decision not to investigate whether the witnesses heard the
confession and Moe failed to demonstrate that the verdict would have otherwise been
different. *See State v. Powell*, 122 Nev. 751, 759, 138 P.3d 453, 458 (2006) (tactical
decisions must be supported by thorough investigations or “reasonable decisions that
that particular investigations are unnecessary”); *Doleman v. State*, 112 Nev. 843, 848,
921 P.2d 278, 280-81 (1996) (an attorney's tactical decisions are virtually
unchallengeable). The record supports these determinations, and we concluded that
the district court did not err by denying these claims. *See [Warden v. Lyons*, 100 Nev.
430, 432-33, 683 P.2d 504, 505 (1984)].

Order of Affirmance, Exhibit 138, p. 2 (ECF No. 13-12, p. 3).

1 The Nevada Supreme Court reasonably determined, upon the evidence presented at the
2 evidentiary hearing in the state habeas action, that Moe’s trial counsel made a reasonable tactical
3 decision not to pursue an investigation into whether witnesses heard Moe’s confession. *See*
4 Testimony of Chris Fortier, Transcript of Evidentiary Hearing, Exhibit 121, pp. 265-82 (ECF
5 No. 12-20, pp. 266-83).

6 Furthermore, Moe has made no showing that further investigation of Donnelly, Duncan or
7 Catron would have uncovered any information that could have been used to impeach any of the
8 State’s witnesses. Nor has Moe made any showing that the videotape in question could have been
9 used to impeach any prosecution witness. Moe’s assertions in these regards are speculative.

10 Moe has not shown that his trial counsel’s performance was unreasonable, and, at any rate, he
11 has not shown that he was prejudiced. There is no showing that, had there been further investigation
12 of Donnelly, Duncan or Catron, there is a reasonable probability of a different outcome at trial.

13 The Nevada Supreme Court’s denial of relief on these claims was not contrary to, or an
14 unreasonable application of, *Strickland*, or any other Supreme Court precedent. The Court will deny
15 Moe habeas corpus relief with respect to Grounds 20, 24(9) and 24(32).

16 Grounds 24(2) and 24(3)

17 In Ground 24(2), Moe claims that he was denied his federal constitutional right to effective
18 assistance of counsel on account of his trial counsel’s failure to call certain witnesses to testify on his
19 behalf. *See* Petition for Writ of Habeas Corpus, p. 22. In the June 25, 2015, order, the Court ruled
20 that Moe exhausted this claim in state court with respect to Moe’s claim that his trial counsel was
21 ineffective for failing to prepare, encourage, and subpoena Pam Metzger to testify. *See* Order
22 entered June 25, 2015, p. 10. That part of Ground 24(2) is before the Court for resolution on its
23 merits.

24 In Ground 24(3), Moe claims that he was denied his federal constitutional right to effective
25 assistance of counsel on account of his trial counsel’s failure “to call and allow petitioner to testify in
26 motion to suppress hearing and at trial.” *See* Petition for Writ of Habeas Corpus, p. 22. In the

1 June 25, 2015, order, the Court ruled that Moe exhausted this claim in state court to the extent he
2 claims that his trial counsel was ineffective for failing to encourage him to testify at trial. *See* Order
3 entered June 25, 2015, pp. 10-11. That part of Ground 24(3) is before the Court for resolution on its
4 merits.

5 With regard to these claims, the Nevada Supreme Court ruled as follows:

6 [...] Moe contends that the district court erred by denying his claims that
7 counsel was ineffective for failing to prepare and encourage him and his girlfriend to
8 testify. The district court denied these claims because it found credible counsel's
9 testimony that Moe did not want either of them to testify and because it concluded
10 that Moe failed to demonstrate that the verdict would have otherwise been different.
11 The record supports the district court's determinations and we conclude that it did not
12 err by denying these claims.

13 Order of Affirmance, Exhibit 138, p. 3 (ECF No. 13-12, p. 4).

14 The Nevada Supreme Court's ruling was reasonable in light of the evidence at the evidentiary
15 hearing. Moe's trial attorney testified that Moe told him that he did not want him to call Metzger to
16 testify. *See* Testimony of Chris Fortier, Transcript of Evidentiary Hearing, Exhibit 121, p. 291
17 (ECF No. 12-20, p. 292) ("I think the words were more like don't even consider putting Ms.
18 Metz[g]er on the stand."). Metzger was on federal parole at the time, and she and Moe apparently
19 believed that it would jeopardize her freedom if she testified for Moe. *See id.*

20 With regard to the question of Moe testifying on his own behalf, his trial attorney testified as
21 follows at the evidentiary hearing:

22 Q. What do you recall about that?

23 A. I recall -- and I think I reviewed part of the transcript on this. I recall
24 the Court making the *Phillips* charge instructing Mr. Moe that, in fact, he had the
25 right to testify. And then I recall advising Mr. Moe very clearly that this was his
26 decision, that this is the part of the trial, it is his choice of whether or not he wants to
take the stand to testify, and he indicated that he did not want to testify.

And from that point, after that, that's why I suggested to the Court, and
Instruction Number 12 b3e provided to the jury because Instruction 1 Number 12 is
basically the *Allen*, or excuse me, the *Phillips* instruction.

1 Q. Well, if Mr. Moe testified that when you went outside, you said to him
2 “No, no, no, no. You will not testify” --

3 A. That’s totally erroneous.

4 Testimony of Chris Fortier, Transcript of Evidentiary Hearing, Exhibit 121, pp. 282-83 (ECF No.
5 12-20, pp. 283-84).

6 Moreover, Moe makes no showing that his testimony or Metzger’s testimony would have had
7 any reasonable probability of changing the outcome of his trial. *See* Findings of Fact, Conclusions of
8 Law and Judgment, Exhibit 124, pp. 4-5 (ECF No. 12-23, pp. 5-6).

9 The Nevada Supreme Court’s denial of relief on these claims was not contrary to, or an
10 unreasonable application of, *Strickland*, or any other Supreme Court precedent. The Court will deny
11 Moe habeas corpus relief with respect to Grounds 24(2) and 24(3).

12 Ground 24(16)

13 In Ground 24(16), Moe claims that he was denied his federal constitutional right to effective
14 assistance of his trial counsel because “[t]rial counsel failed to present evidence at motion to
15 suppress hearing, at trial, and during sentencing.” *See* Petition for Writ of Habeas Corpus, p. 23. In
16 the June 25, 2015, order, the Court ruled that Moe exhausted this claim in state court with respect to
17 Moe’s claim that his trial counsel was ineffective for failing to offer at trial, as evidence, “the
18 advertisement flyer showing sale jackets from Cabela’s store and [the receipt from] Metzger’s
19 gambling tournament at Boomtown.” *See* Order entered June 25, 2015, p. 14. That part of Ground
20 24(16) is before the Court for resolution on its merits.

21 The Nevada Supreme Court ruled as follows regarding this claim:

22 [...]Moe contends that the district court erred by denying his claim that
23 counsel was ineffective for failing to introduce evidence which would have supported
24 claims made in the opening statement that he did not enter the business with intent to
25 steal. Because the record demonstrates that this evidence, which consisted of a sales
advertisement and casino receipt, was not indicative of Moe’s intent and would not
have changed the outcome at trial, we conclude that the district court did not err by
denying this claim.

26 Order of Affirmance, Exhibit 138, p. 3 (ECF No. 13-12, p. 4).

1 The Nevada Supreme Court’s ruling on this claim was reasonable in light of the evidence
2 presented at the evidentiary hearing. It is not clear that the original sales advertisement that Moe
3 claims to have carried into the store was available to be introduced as evidence, and, even if it were,
4 the Nevada Supreme Court reasonably concluded that it would have shed little light on Moe’s
5 intentions when he entered the store. Similarly, evidence that Metzger was at a casino participating
6 in a slot machine tournament, while Moe was in the Cabela’s store, would have had little impact on
7 the question of Moe’s intentions when he entered the store. So, even if it could be determined that
8 Moe’s attorney acted unreasonably in not introducing these materials into evidence at trial -- a
9 conclusion this Court does not reach -- Moe has not shown that such evidence would have
10 had any reasonable probability of changing the outcome of his trial.

11 The Nevada Supreme Court’s denial of relief on this claim was not contrary to, or an
12 unreasonable application of, *Strickland*, or any other Supreme Court precedent. The Court will deny
13 Moe habeas corpus relief with respect to Ground 24(16).

14 Grounds 24(21), 24(22), 24(23) and 24(24)

15 Grounds 24(21), 24(22), 24(23) and 24(24) all relate to assertions made by the prosecution, at
16 Moe’s sentencing, to the effect that a Game Stop store contacted Cabela’s about Metzger pawning
17 video games that appeared to be from Cabela’s.

18 In Ground 24(21), Moe claims that he was denied his federal constitutional right to effective
19 assistance of his trial counsel because “[t]rial counsel failed to adequately review and investigate
20 defendant’s case.” *See* Petition for Writ of Habeas Corpus, p. 24. In the June 25, 2015, order, the
21 Court ruled that Moe exhausted this claim in state court with respect to his claim that his trial
22 counsel was ineffective for failing to “investigate the prosecutor’s hearsay remarks regarding Game
23 Stop contacting Cabela’s about Pam Metzger selling videotapes stolen by Moe.” *See* Order entered
24 June 25, 2015, p. 15. That part of Ground 24(21) is before the Court for resolution on its merits.

25 In Ground 24(22), Moe claims that he was denied his federal constitutional right to effective
26 assistance of his trial counsel because “[t]rial counsel failed to present evidence and to object to

1 evidence during sentencing that would of made habitual sentence improper sentence.” *See* Petition
2 for Writ of Habeas Corpus, p. 24. In the June 25, 2015, order, the Court ruled that Moe exhausted
3 this claim in state court with respect to his claim that his trial counsel was ineffective for failing to
4 object to “the prosecutor’s hearsay remarks regarding Game Stop contacting Cabela’s about Pam
5 Metzger selling videotapes stolen by Moe.” *See* Order entered June 25, 2015, pp. 15-16. That part
6 of Ground 24(22) is before the Court for resolution on its merits.

7 In Ground 24(23), Moe claims that he was denied his federal constitutional right to effective
8 assistance of his trial counsel because “[t]rial counsel failed to object to improper statements by
9 prosecuting attorney during voir dire questioning, trial, and sentencing.” *See* Petition for Writ of
10 Habeas Corpus, p. 24. In the June 25, 2015, order, the Court ruled that Moe exhausted this claim in
11 state court with respect to his claim that his trial counsel was ineffective for failing to object to “the
12 prosecutor’s hearsay remarks regarding Game Stop contacting Cabela’s about Pam Metzger selling
13 videotapes stolen by Moe.” *See* Order entered June 25, 2015, p. 16. That part of Ground 24(23) is
14 before the Court for resolution on its merits.

15 In Ground 24(24), Moe claims that he was denied his federal constitutional right to effective
16 assistance of his trial counsel because “[t]rial counsel failed to object to improper commentary by
17 prosecuting attorney during opening statements, and during closing arguments, and during
18 sentencing.” *See* Petition for Writ of Habeas Corpus, p. 24. In the June 25, 2015, order, the Court
19 ruled that Moe exhausted this claim in state court with respect to his claim that his trial counsel was
20 ineffective for failing to object to “the prosecutor’s hearsay remarks regarding Game Stop contacting
21 Cabela’s about Pam Metzger selling videotapes stolen by Moe.” *See* Order entered June 25, 2015,
22 pp. 16-17. That part of Ground 24(24) is before the Court for resolution on its merits.

23 The comments of the prosecutor, at the sentencing, that are the subject of these claims were
24 the following:

25 Now, the Court may ask what difference does it make and why do we care that
26 the defendant is stealing video games? What I can inform you is this. My
investigator has done some work, and I actually spoke to Mr. Catron, who you
remember from the trial was the store security at Cabela’s. Cabela’s had been

1 contacted because -- had been contacted by Game Stop which is a local video game
2 store, and the reason Cabela's was contacted was that there was a woman by the name
3 of Pamela [Metzger] who was pawning an awful lot of video games from Cabela's.
Now, how does that all tie into the defendant? Some of the letters that you have
received are from Pamela [Metzger].

4 * * *

5 [...] Pamela [Metzger] is the one who's pawning the video games at local game stores
6 that the defendant is stealing, so his name is not associated at the Game Stop, hers is.
7 So we've got a man who, basically, is either creating his only income or
8 supplementing whatever income he has by stealing from local businesses, giving
those, the fruits of that theft to somebody else, and laundering it through local video
game stores.

9 Transcript of Sentencing, Exhibit 38, pp. 39-40 (ECF No. 9-12, pp. 40-41).

10 The Nevada Supreme Court ruled, as follows, regarding Moe's claim that his counsel was
11 ineffective with respect to his handling of these comments by the prosecutor:

12 [...] Moe contends that the district court erred by denying his claim that
13 counsel was ineffective for failing to object, investigate, and move for a continuance
14 after the prosecutor suggested at sentencing that Moe's friend planned to sell the
15 stolen merchandise. The district court found credible counsel's testimony at the
16 evidentiary hearing that he did not think an objection was warranted and his strategy
was to focus on the stale and nonviolent nature of Moe's prior convictions. Moe fails
to demonstrate that his sentence would have otherwise been different. We conclude
that the district court did not err by denying this claim.

17 Order of Affirmance, Exhibit 138, pp. 4-5 (ECF No. 13-12, pp. 5-6).

18 This ruling by the Nevada Supreme Court was reasonable. The assertion that Moe planned to
19 sell the stolen merchandise, perhaps with Metzger's help, was not surprising, and added little, if
20 anything, to the prosecution's case at the sentencing. Then Nevada Supreme Court reasonable
21 concluded that Moe's counsel made a legitimate strategic decision to forego an objection to these
22 comments, and to focus on the nature of Moe's prior convictions. *See* Testimony of Chris Fortier,
23 Transcript of Evidentiary Hearing, Exhibit 121, pp. 293-94 (ECF No. 12-20, pp. 294-95).

24 The Nevada Supreme Court's denial of relief on these claims was not contrary to, or an
25 unreasonable application of, *Strickland*, or any other Supreme Court precedent. The Court will deny
26 Moe habeas corpus relief with respect to Grounds 24(21), 24(22), 24(23) and 24(24).

1 The Other Exhausted Part of Ground 24(22)

2 Again, in Ground 24(22), Moe claims that he was denied his federal constitutional right to
3 effective assistance of his trial counsel because “[t]rial counsel failed to present evidence and to
4 object to evidence during sentencing that would of made habitual sentence improper sentence.” *See*
5 *Petition for Writ of Habeas Corpus*, p. 24. In the June 25, 2015, order, the Court ruled that Moe also
6 exhausted this claim in state court with respect to his claim that his trial counsel was ineffective for
7 failing to offer evidence at the sentencing that one of his prior convictions was the result of a trial at
8 which he was not present. *See Order entered June 25, 2015*, pp. 15-16. That part of Ground 24(22)
9 is also before the Court for resolution on its merits.

10 The Nevada Supreme Court denied relief on this claim without discussion. This Court finds
11 that ruling to be reasonable. Moe has made no showing that he was convicted in absentia of the
12 felony auto theft in Minnesota, or, for that matter, that, if he was, it was unconstitutional, or
13 otherwise impermissible for the trial court to consider the conviction under Nevada’s habitual
14 criminal statute. Therefore, there is no showing that Moe’s counsel performed unreasonably with
15 regard to this prior conviction, or that Moe was prejudiced. The Nevada Supreme Court’s denial of
16 relief on this claim was not contrary to, or an unreasonable application of, *Strickland*, or any other
17 Supreme Court precedent. The Court will deny Moe habeas corpus relief with respect to this part of
18 Ground 24(22).

19 Ground 24(26)

20 In Ground 24(26), Moe claims that he was denied his federal constitutional right to effective
21 assistance of his trial counsel because “[t]rial counsel failed to object to judicial misconduct and
22 judicial abuse of discretion during motion to suppress hearing, trial, and during sentencing.” *See*
23 *Petition for Writ of Habeas Corpus*, p. 24. In the June 25, 2015, order, the Court ruled that Moe
24 exhausted this claim in state court with respect to his claim that his trial counsel was ineffective for
25 failing to object “when the court ordered there were sixteen minutes left to finish the jury trial after
26

1 the State’s case.” *See* Order entered June 25, 2015, p. 17. That part of Ground 24(26) is before the
2 Court for resolution on its merits.

3 The comment of the trial judge that Moe claims should have prompted an objection from his
4 trial counsel was the following, during the testimony of Officer David Robertson, who was the
5 prosecution’s last witness:

6 THE COURT: All right. Next question. Let’s go. We’ve got 16 minutes for
7 the trial.

8 Trial Transcript, Exhibit 23, p. 267 (ECF No. 8-23, p. 268).

9 At the evidentiary hearing in Moe’s state habeas action, Moe testified that when the judge
10 made that comment, he looked at his watch and saw that it was “16 minutes to five.” *See* Transcript
11 of Evidentiary Hearing, Exhibit 121, p. 108 (ECF No. 12-20, p. 109). At the evidentiary hearing,
12 Moe’s trial counsel was asked how he understood the Court’s comment, and he responded, “[t]hat
13 meant we had 16 minutes left for the rest of the day.” *Id.* at 285 (ECF No. 12-20, p. 286). He
14 testified that he thought he “could have gone into the next day if [he] thought it was warranted.” *Id.*
15 He testified further:

16 Despite the Court saying to me we have 16 minutes left, if Mr. Moe would have said
17 to me, you know, I want to testify here, and I felt as though that that’s what he wanted
18 to do, and even though the Court said to me we have 16 minutes left, I would have
put on the record and addressed the Court that Mr. Moe wants to testify and we need
more time.

19 *Id.* at 285-86 (ECF No. 12-20, pp. 286-87). In response to a question whether it occurred to counsel
20 that the court’s comment meant that he would not have an opportunity to present Moe’s testimony,
21 Moe’s trial counsel responded, “No.” *Id.* at 288-89 (ECF No. 12-20, pp. 289-90).

22 After holding the evidentiary hearing, the state district court ruled as follows on this claim:

23 Several of the claims are based on the notion that the defense was given only
24 16 minutes to present their case. That claim is false. Fortier [Moe’s trial counsel]
25 testified that he was aware that there was no hard deadline and that if he had
26 additional evidence, it would be heard. Indeed, the record reveals that the trial went
on beyond the end of the usual work day and that all who were present were aware
that the court did not arbitrarily impose a deadline for the end of the trial. The
suggestion that this court meant that it would exclude evidence is incorrect.
Therefore, each of the many claims for relief that are based on the notion that this

1 court imposed a deadline, and that the deadline affected the presentation of evidence,
2 are denied.

3 Findings of Fact, Conclusions of Law and Order, Exhibit 124, p. 5 (ECF No. 12-23, p. 6). The
4 Nevada Supreme Court, affirmed this ruling, as follows:

5 [...] Moe contends that the district court erred by denying his claims that
6 counsel was ineffective for failing to object or request a continuance regarding the
7 district court's order that there were only sixteen minutes left of trial and for
8 presenting a minimal defense to comply with the court's order. The district court
9 denied these claims because it found credible counsel's testimony that he understood
the district court's comment to refer to the time left in the day, he did not feel
constrained by the comment, and he would have presented more evidence had he
deemed it necessary. We conclude that the district court did not err by denying these
claims.

10 Order of Affirmance, Exhibit 138, pp. 2-3 (ECF No. 13-12, pp. 3-4).

11 The state supreme court's ruling was reasonable. The testimony at the evidentiary hearing
12 supports the conclusion that the trial court did not limit the time the defense had to present its case.
13 There was nothing objectionable about the trial court notifying counsel that there were only sixteen
14 minutes left for trial proceedings on that day. Moe's counsel did not perform unreasonably in not
15 objecting to the comment, and Moe was not prejudiced. The Nevada Supreme Court's denial
16 of relief on this claim was not contrary to, or an unreasonable application of, *Strickland*, or any
17 other Supreme Court precedent. The Court will deny Moe habeas corpus relief with respect to
18 Ground 24(26).

19 Ground 25

20 Finally, in Ground 25, Moe claims that his federal constitutional rights were violated as a
21 result of cumulative error. *See* Petition for Writ of Habeas Corpus, p. 33. In the June 25, 2015,
22 order, the Court ruled that Moe exhausted this claim to the extent that it incorporates Moe's other
23 exhausted claims. *See* Order entered June 25, 2015, p. 19. To that extent, then, Ground 25 is before
24 the Court for resolution on its merits.

25 Whether considered individually or cumulatively, Moe has not shown that any error of his
26 trial counsel prejudiced him. There is no "reasonable probability that, but for counsel's

1 unprofessional errors, the result of the proceeding would have been different.” *See Strickland*, 466
2 U.S. at 688, 694. The Court will deny Moe habeas corpus relief with respect to Ground 25.

3 Certificate of Appealability

4 The standard for issuance of a certificate of appealability calls for a “substantial showing
5 of the denial of a constitutional right.” 28 U.S.C. § 2253(c). The Supreme Court has interpreted
6 28 U.S.C. § 2253(c) as follows:

7 Where a district court has rejected the constitutional claims on the merits, the
8 showing required to satisfy § 2253(c) is straightforward: The petitioner must
9 demonstrate that reasonable jurists would find the district court’s assessment of the
constitutional claims debatable or wrong.

10 *Slack v. McDaniel*, 529 U.S. 473, 484 (2000); *see also James v. Giles*, 221 F.3d 1074, 1077-79
11 (9th Cir. 2000). The Supreme Court further illuminated the standard in *Miller-El v. Cockrell*,
12 537 U.S. 322 (2003). The Court stated in that case:

13 We do not require petitioner to prove, before the issuance of a COA, that some jurists
14 would grant the petition for habeas corpus. Indeed, a claim can be debatable even
15 though every jurist of reason might agree, after the COA has been granted and the
16 case has received full consideration, that petitioner will not prevail. As we stated in
17 *Slack*, “[w]here a district court has rejected the constitutional claims on the merits, the
showing required to satisfy § 2253(c) is straightforward: The petitioner must
demonstrate that reasonable jurists would find the district court’s assessment of the
constitutional claims debatable or wrong.”

18 *Miller-El*, 537 U.S. at 338 (quoting *Slack*, 529 U.S. at 484). The Court has considered all of Moe’s
19 claims with respect to whether they satisfy the standard for issuance of a certificate of appeal, and
20 determine that none of them do. The Court will deny Moe a certificate of appealability.

21 **IT IS THEREFORE ORDERED** that, pursuant to Federal Rule of Civil Procedure 25(d),
22 the Clerk of the Court shall substitute Jo Gentry for Brian E. Williams, Sr., on the docket for this
23 case, as the respondent warden, and shall update the caption of the action to reflect this change.

24 **IT IS FURTHER ORDERED** that the Petition for Writ of Habeas Corpus (ECF No. 4) is
25 **DENIED**.

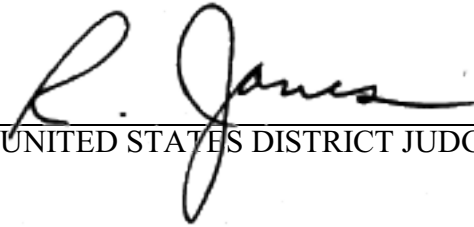
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IT IS FURTHER ORDERED that petitioner is denied a certificate of appealability.

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

Dated this 20th day of October, 2017.


UNITED STATES DISTRICT JUDGE