No.

October Term, 2020

In the
Supreme Court of the United States

Daniel Page,

Petitioner,

v.

Renee Baker, et al.,

Respondents.

On Petition for Writ of Certiorari
to the United States Court of Appeals
for the Ninth Circuit

Petition for Writ of Certiorari

Rene L. Valladares
Federal Public Defender,
District of Nevada
*C.B. Kirschner
Assistant Federal Public Defender
411 E. Bonneville Ave., Ste. 250
Las Vegas, Nevada 89101
(702) 388-6577
CB_Kirschner@fd.org

*Counsel for Daniel Page

QUESTIONS PRESENTED

1. Whether the Ninth Circuit erred by denying a certificate of appealability on the question of whether the trial court should have granted Mr. Page's pre-sentence motion to withdraw his guilty plea where the plea was not made knowingly, freely, and voluntarily?

2. Whether the Ninth Circuit erred by denying a certificate of appealability on the question of whether Mr. Page received ineffective assistance of trial counsel where his attorney failed to adequately investigate Mr. Page's medical condition prior to entering his plea?

LIST OF PARTIES

The only parties in this proceeding are those listed in the caption.

TABLE OF CONTENTS

Questions Presented i

List of Parties ii

Table of Contents iii

Table of Authorities v

Petition for Writ of Certiorari 1

Opinions Below 1

Jurisdiction 1

Constitutional Provisions Involved 2

Statement of the Case 3

Reasons for Granting the Petition 5

A. Jurists of reason could debate whether the trial court should have granted Mr. Page's pre-sentence motion to withdraw his guilty plea where the plea was not made knowingly, freely, and voluntarily. 6

1. The Nevada Supreme Court applied the wrong standard. 9

2. Mr. Page was unable to knowingly, freely, and voluntarily enter a guilty plea because of the medications he was taking for his acute nervous condition while in custody. 14

B. Jurists of reason could debate whether Mr. Page received ineffective assistance of trial counsel where his attorney failed to adequately investigate Mr. Page's medical condition prior to entering his plea. 19

1. The Nevada Courts applied the wrong test. 21

2. Trial counsel's performance was deficient. 23

3. Mr. Page suffered prejudice 25

Conclusion 27

Index to Appendix ..... **Error! Bookmark not defined.**

TABLE OF AUTHORITIES

Federal Cases

Arizona v. Fulminante, 499 U.S. 279 (1991) 13
Boykin v. Alabama, 395 U.S. 238 (1969) 11, 12
Brady v. United States, 397 U.S. 742 (1970) 10, 14
Buck v. Davis, 137 S.Ct. 759 (2017) 6
Douglas v. Woodford, 316 F.3d 1079 (9th Cir. 2003) 23
Henderson v. Morgan, 426 U.S. 637 (1976) 10
Hill v. Lockhart, 474 U.S. 52 (1985) 25
McCarthy v. United States, 394 U.S. 459 (1969) 10, 12
Miller-El v. Cockrell, 537 U.S. 322 (2003) 5
Schneckloth v. Bustamonte, 412 U.S. 218 (1973) 13
Strickland v. Washington, 466 U.S. 668 (1984) 20
Tanner v. McDaniel, 493 F.3d 1135 (9th Cir. 2007) 16
Tennard v. Dretke, 542 U.S. 274 (2004) 5
Welch v. United States, 136 S.Ct. 1257 (2016) 5

Federal Statutes

28 U.S.C. § 1254 2
28 U.S.C. § 2254 ..... 1, 4

Other

Sixth Amendment to the United States Constitution 2, 20
Fourteenth Amendment to the United States Constitution 2

PETITION FOR WRIT OF CERTIORARI

Petitioner Daniel Page respectfully prays that a writ of certiorari issue to review the order denying a certificate of appealability of the United States Court of Appeals for the Ninth Circuit.[1]

OPINIONS BELOW

On August 22, 2019, the United States District Court for the District of Nevada denied Mr. Page's habeas petition on the merits and declined to issue a certificate of appealability.[2] On March 20, 2020, the Ninth Circuit Court of Appeals issued an unpublished order, denying Mr. Page's application for a certificate of appealability.[3]

JURISDICTION

The United States District had original jurisdiction over this habeas case pursuant to 28 U.S.C. § 2254. The district court denied Mr. Page a certificate of appealability.[4] The Ninth Circuit also denied Mr.

---

[1] Appendix 001.

[2] Appendix 002-016.

[3] Appendix 001.

[4] Appendix 015.

Page's application for a certificate of appealability.[5] This Court has jurisdiction pursuant to 28 U.S.C. § 1254. *See also* SUPREME COURT RULE 13(1).[6]

CONSTITUTIONAL PROVISIONS INVOLVED

The Sixth Amendment to the United States Constitution provides, in pertinent part:

> In all criminal prosecutions, the accused shall enjoy the right to… have the assistance of counsel for his defense.

The Fourteenth Amendment to the United States Constitution provides, in pertinent part:

> No state shall… deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

---

[5] Appendix 001.

[6] Per this Court's order on May 19, 2020, in response to the COVID-19 crisis, the deadline for writs of certiorari was extended to 150 days from the date of the lower court judgment. This petition is therefore timely.

STATEMENT OF THE CASE

On March 25, 2011, Petitioner Daniel Page entered into a negotiated guilty plea, pleading to one count each of sexual assault with a minor under 14 and use of a minor in producing pornography. Sentencing was deferred.

Two weeks later, Page filed a motion seeking to withdraw his guilty plea. Page asserted his innocence and stated he only pleaded guilty because of the powerful medications he had been taking while incarcerated at the Clark County Detention Center. Records from the Detention Center confirmed Page was taking two strong psychotropic medications. Following an evidentiary hearing, the trial court ruled there was no reason to believe Page was impaired and could not understand or appreciate what he was doing when he pleaded guilty. Thus, the court found no basis for the plea to be withdrawn.

Page was subsequently sentenced to two, consecutive terms of imprisonment of 10 years to life. Page was 50 years old and had no prior criminal convictions or arrests.

Page appealed to the Nevada Supreme Court, arguing his plea was not knowing, intelligent, or voluntary. The court affirmed his

conviction.[7]

Page then sought post-conviction habeas relief in Nevada state court. Among other claims, he argued his trial attorney was ineffective for failing to investigate Page's mental health prior to entering the guilty plea. Page was appointed counsel and granted an evidentiary hearing. Following testimony and arguments, the court denied his post-conviction petition. Page once again appealed to the Nevada Supreme Court. He was again denied relief.[8]

On October 1, 2016, Page mailed his pro se Petition for Writ of Habeas Corpus pursuant to 28 U.S.C. § 2254 to the United States District Court, District of Nevada. The Federal Public Defender's Office was appointed to represent him. Page filed a counselled Amended Petition on August 2, 2017. Both parties briefed the claims. On August 22, 2019, the District Court denied the claims on their merits and declined to issue a certificate of appealability ("COA").[9]

Page filed an Application for Certificate of Appealability with the

---

[7] Appendix 021-022.

[8] Appendix 017-020.

[9] Appendix 002-016.

Ninth Circuit Court of Appeals on October 22, 2019. Respondents filed their Opposition on November 25, 2019. The Ninth Circuit issued an order denying the COA on March 20, 2020.[10]

REASONS FOR GRANTING THE PETITION

This Court has ruled a certificate of appealability (COA) should issue where "reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong." *Tennard v. Dretke*, 542 U.S. 274, 276 (2004) (quoting *Slack v. McDaniel*, 529 U.S. 473, 484 (2000)). *See also Welch v. United States*, 136 S.Ct. 1257, 1264 (2016) (finding a COA should only be denied when it is "beyond all debate" that the petitioner is not entitled to relief). This Court has expressed a preference for ensuring that a prisoner's case is reviewed by an appellate court even if the merits of his claim are weak. *Miller-El v. Cockrell*, 537 U.S. 322, 337 (2003) ("Accordingly, a court of appeals should not decline the application for a COA merely because it believes the applicant will not demonstrate an entitlement to relief"). As this

[10] Appendix 001.

Court recognized:

> The COA inquiry… is not coextensive with a merits analysis. At the COA stage, the only question is whether the applicant has shown that "jurists of reason could disagree with the district court's resolution of his constitutional claims or that jurists could conclude the issues presented are adequate to deserve encouragement to proceed further." This threshold question should be decided without "full consideration of the factual or legal bases adduced in support of the claims."

Buck v. Davis, 137 S.Ct. 759, 773 (2017) (quoting *Miller-El*, 537 U.S. at 327, 336). Page should have been granted a COA because reasonable jurists could debate the merits of his constitutional claims.

A. Jurists of reason could debate whether the trial court should have granted Mr. Page's pre-sentence motion to withdraw his guilty plea where the plea was not made knowingly, freely, and voluntarily.

Daniel Page pleaded guilty on March 25, 2011. During his guilty plea colloquy, the court did not inquire as to whether Page was taking any medications or what effect those medications had on his ability to understand the nature of the proceedings. On or about March 30, 2011, counsel for Page, Kevin Speed, learned that Page had changed his mind about his guilty plea because he did not fully understand the nature

and consequences of the plea agreement. As a result, Speed filed a motion to withdraw the guilty plea on April 8, 2011, before Page had been sentenced. The State opposed the motion and the court set the matter for a hearing.

At the hearing on April 21, 2011, the court set a status check for further proceedings pertaining to Page's treatment for a nervous condition and the medications being administered by the jail that may have undermined his ability to understand the guilty plea.

At the status check on May 19, 2011, the parties had discussions concerning the State being allowed to interview Page's treating physician at the Clark County Detention Center. The prosecutor requested to speak to Page's physician in advance of the evidentiary hearing. The court inquired whether Page and his counsel would agree to the prosecutor speaking to Page's doctor about Page's diagnosis, medications, and their effects. Speed requested to be present for any conversations between the prosecutor and Page's doctor. The prosecutor insisted that Page waive doctor-patient confidentiality if he wanted to proceed with a hearing on the motion and objected to defense counsel being present during any witness interviews.

By the evidentiary hearing on August 1, 2011, the prosecutor had changed her position. The State did request Page's medical records, but did not make any attempt to interview his physician. The doctor was also not subpoenaed for the hearing. The State, however, did call to testify Mayra Carpenter, the parole and probation officer who prepared the pre-sentence investigative report for Page. Carpenter interviewed Page for 30 to 45 minutes while preparing her report. There is no indication that Carpenter had any medical or mental health training.

On September 15, 2011, the court denied Page's motion to withdraw his plea. The court did not believe Page was impaired and did not have any concern that he was unable to appreciate what he was doing when he pleaded guilty. The following week, the court sentenced Page to two, consecutive terms of incarceration of 10 years to life in the Nevada Department of Corrections.

Page filed a direct appeal challenging the trial court's denial of his motion to withdraw his guilty plea. The Nevada Supreme Court held, "Nothing in the plea canvas suggests that appellant was impaired and appellant acknowledged in his guilty plea agreement that he was not under the influence of any substance or drug that impaired his ability to

understand the agreement or guilty plea proceedings."[11] The court concluded, "Because appellant has failed to articulate a substantial, fair, and just reason for withdrawing his plea, the district court did not abuse its discretion in this matter."[12]

Page subsequently raised this claim in his federal habeas petition. The district court conducted its own analysis and held, "Page has failed to demonstrate that his guilty plea was not knowing, intelligent, or voluntary."[13] "Thus," the court concluded, "the state courts' ruling… was not contrary to, or an unreasonable application of, clearly established federal law…."[14] Reasonable jurists could disagree with the district court's ruling for the following reasons.

1. The Nevada Supreme Court applied the wrong standard.

A guilty plea must be entered into knowingly, intelligently, and voluntarily. "Waivers of constitutional rights not only must be voluntary but must be knowing, intelligent acts done with sufficient

---

[11] Appendix 022.

[12] Appendix 022.

[13] Appendix 010.

[14] Appendix 010-011.

awareness of the relevant circumstances and likely consequences." *Brady v. United States*, 397 U.S. 742, 748 (1970). A plea that does not meet these requirements constitutes a due process violation. "[I]f a defendant's guilty plea is not equally voluntary and knowing, it has been obtained in violation of due process and is therefore void." *McCarthy v. United States*, 394 U.S. 459, 466 (1969). "A plea may be involuntary either because the accused does not understand the nature of the constitutional protections that he is waiving, or because he has such an incomplete understanding of the charge that his plea cannot stand as an intelligent admission of guilt." *Henderson v. Morgan*, 426 U.S. 637, 645 n.13 (1976) (citing *Johnson v. Zerbst*, 304 U.S. 458, 464-65 (1938)). This Court has recognized the numerous constitutional implications concerning guilty pleas:

> For, as we have said, a plea of guilty is more than an admission of conduct; it is a conviction. Ignorance, incomprehension, coercion, terror, inducements, subtle or blatant threats might be a perfect cover-up of unconstitutionality. The question of an effective waiver of a federal constitutional right in a proceeding is of course governed by federal standards.
>
> Several federal constitutional rights are involved in a waiver that takes place when a plea of guilty

> is entered in a state criminal trial. First, is the privilege against compulsory self-incrimination guaranteed by the Fifth Amendment and applicable to the States by reason of the Fourteenth. Second, is the right to trial by jury. Third, is the right to confront one's accusers. We cannot presume a waiver of these three important federal rights from a silent record.

Boykin v. Alabama, 395 U.S. 238, 242-43 (1969) (internal citations omitted).

On direct appeal, the Nevada Supreme Court held, "Nothing in the plea canvas suggests that appellant was impaired and appellant acknowledged in his guilty plea agreement that he was not under the influence of any substance or drug that impaired his ability to understand the agreement or guilty plea proceedings."[15] The court concluded, "Because appellant has failed to articulate a substantial, fair, and just reason for withdrawing his plea, the district court did not abuse its discretion in this matter."[16]

The Nevada Supreme Court's holding was contrary to and involved an unreasonable application of clearly established federal law

---

[15] Appendix 022.

[16] Appendix 022.

because the court only addressed whether Page articulated "a substantial, fair, and just reason for withdrawing his plea" rather than assessing the constitutional question of whether the plea was entered into knowingly, intelligently, and voluntarily. *See McCarthy*, 394 U.S. at 466; and *Boykin*, 395 U.S. at 242-43. Additionally, the court failed to consider the totality of the circumstances, including that Page suffered from an acute anxiety disorder, had never been through a trial, plea, or sentencing before, and that he was never asked about his medications and their impact.

The district court offered little analysis of the Nevada Supreme Court's opinion and did not specifically address whether the Nevada Supreme Court applied the wrong standard. The district court did its own review of the facts and then tagged on the pro forma language, "the state court's ruling…was not contrary to, or an unreasonable application of, clearly established federal law."[17]

Both the district court and Nevada Supreme Court placed great weight on the language of the guilty plea agreement and in-court

[17] Appendix 010-011.

canvas of Page—largely to the exclusion of all the other relevant facts. However, the voluntariness of a plea must be determined based on the totality of the circumstances. *See Schneckloth v. Bustamonte*, 412 U.S. 218, 227 (1973); *see also Arizona v. Fulminante*, 499 U.S. 279, 285-86 (1991). Limiting the scope of the analysis to the plea agreement and in-court colloquy would always result in a finding of voluntariness because a trial court would violate due process by accepting a plea where the defendant admitted he was impaired and unable to understand what he was doing by pleading guilty. Correct answers to those questions are prerequisites to the acceptance of a guilty plea. If the inquiry ended there, there would never be a case of an involuntary plea. This is why courts must look beyond those elements and consider the totality of the circumstances, which the lower courts failed to do. Here, the totality of the facts demonstrate Page's plea was not knowing, intelligent, and voluntary.

2. Mr. Page was unable to knowingly, freely, and voluntarily enter a guilty plea because of the medications he was taking for his acute nervous condition while in custody.

The totality of the circumstances reveals that Page did not enter into a knowing, intelligent, and voluntary guilty plea. *See Brady v. United States*, 397 U.S. 742, 749 (1970) (assessing voluntariness of plea based on all the relevant surrounding circumstances). Page's inability to understand his plea stemmed from his acute nervous condition for which he had been receiving treatment in the detention center—treatment that included a daily regimen of powerful tranquilizing drugs. This was an issue that spoke directly to Page's lack of requisite mental capacity upon entering into the plea agreement with the State of Nevada. The totality of the circumstances show several key facts.

First, when he was incarcerated on December 14, 2010, Page had a mental health screening in which he explained he was taking medication for anxiety and nervousness. Progress notes on December 16, 2010 reflect that he had "severe hand tremors" and had a history of bad nerves, such that he had been taking anti-anxiety medication since he was a child. The day prior, he was observed sitting in a chair rocking

back and forth and appeared to be anxious. By February 25, 2011, the notes show he was being prescribed Paxil and Vistaril. This was just one month prior to his guilty plea. The psychiatric notes indicate his insight was only "fair" and his judgment was "poor" at that time.

Paxil is an antidepressant used to treat depression and anxiety disorders.[18] Vistaril "is used as a sedative to treat anxiety and tension."[19] The combination of Paxil and Vistaril "may increase side effects such as dizziness, drowsiness, confusion, and difficulty concentrating. Some people, especially the elderly, may also experience impairment in thinking, judgment, and motor coordination."[20] These medications were renewed on March 17, 2011, just days before Page pleaded guilty. On April 24, 2011, one month after pleading guilty, he reported feeling scared and anxious. He was assessed as suffering an anxiety disorder and his insight and judgment were only listed as being "fair."

---

[18] *See* https://www.drugs.com/paxil.html

[19] *See* https://www.drugs.com/vistaril.html

[20] *See* https://www.drugs.com/drug-interactions/hydroxyzine-with-paxil-1303-0-1800-1156.html

Second, the judge who presided over the motion to withdraw was not the same judge who accepted Page's plea, and was therefore not in a position to consider his demeanor during the plea canvas. The canvas itself was insufficient to ensure Page's understanding of what was happening. Of the 28 questions the original judge asked Page during his plea colloquy, 22 of Page's answers consisted of a single word—"yes." Asking questions that required more substantive answers would have revealed more about Page's mental state. Notably, Page was **not** questioned about whether he was taking medications, how those medications affected him, or whether he was mentally impaired. *See Tanner v. McDaniel*, 493 F.3d 1135, 1146 & n.12 (9th Cir. 2007) (the record showed petitioner was not impaired as a result of his depression such that his plea was involuntary where gave lengthy answers during the plea colloquy and stated that his anti-depressant was not affecting him).

Third, the author of Page's pre-sentence investigative report, Mayra Carpenter, testified it was normal for inmates to feel anxiety, but didn't consider that Page suffered an anxiety disorder his entire life and had never been incarcerated before. She did not testify as to

whether at the time Page entered into his guilty plea agreement with the State, and pleaded guilty in court, his acute nervous condition and the medications he had been taking while in custody rendered him unable to knowingly, freely, and voluntarily enter into that agreement and plead guilty. Also, despite knowing that Page was on medications, she never asked him how they were affecting him. Nor did Carpenter have any training as a medical or mental health professional.

Fourth, the written plea agreement had only one signature line, printed on the very last page of the document. On a different page, there was a pre-printed sentence reading, "I am not now under the influence of any intoxicating liquor, a controlled substance or other drug which would in any manner impair my ability to comprehend or understand this agreement or the proceedings surrounding my entry of this plea." There was no place to sign or initial next to this particular statement. The form, as printed, did not require Page to sign off on every pre-written statement and there was no space provided to make changes or alterations to the pro forma language. The structure of the agreement was either that he agree with everything or not enter into the plea at all. Therefore, Page's signature on the final page of the plea

should only be construed as an acceptance of plea, not as an assertion of his ability to comprehend or understand the agreement or proceedings.

Fifth, Page had no prior convictions and had never even been arrested before the instant offense. Hence, he was less likely to be able to understand the confusing plea process, particularly while under the effect of strong mental health medications, than someone who had been through the process before. The totality of the circumstances reveal that Page was under the influence of two, strong prescription medications and suffered from a severe anxiety disorder that left him confused and unable to enter into a knowing, intelligent, and voluntary guilty plea.

Page's right to due process was violated when he entered into a plea that was not knowing, intelligent, and voluntary. At the very least, reasonable jurists could debate the validity of his plea. Page had never been through the criminal justice system before. His strong prescription medications and acute nervous condition left him confused and unable to fully understand the nature of his guilty plea. And the perfunctory guilty plea agreement and limited court-canvas did not establish anything to the contrary. The Ninth Circuit should have granted Page a COA because reasonable jurists could disagree with the district court's

finding on this constitutional claim.

B. Jurists of reason could debate whether Mr. Page received ineffective assistance of trial counsel where his attorney failed to adequately investigate Mr. Page's medical condition prior to entering his plea.

On November 10, 2010, the State of Nevada filed a criminal complaint charging Page with four counts of sexual assault with a minor and one count of use of a minor in producing pornography. On March 15, 2011, Page waived his preliminary hearing pursuant to plea negotiations with the State, brokered by his attorney, Kevin Speed. On March 25, 2011, at the arraignment, Page entered guilty pleas to one count of sexual assault of a minor and one count of use of a minor in producing pornography. Speed represented that the parties had stipulated to consecutive life sentences on those charges, with the possibility of parole after 20 years. However, sentence was not imposed at that time.

On April 8, 2011, Speed, on Page's behalf, filed a Motion to Withdraw Plea. The motion was based on new evidence indicating that someone other than Page had access to his email and social networking accounts and was continuing to contact the complaining witness while

Page was incarcerated. The motion was also based on the fact that Page had been under a physician's care for an acute nervous condition and was heavily medicated at the time of entry of his plea. At the time of the plea, Page was receiving Vistaril and Paxil as a component of his mental health treatment. The state district court denied the motion on the basis of the exculpatory evidence, but permitted trial counsel to develop an argument for withdrawal on the basis of Page's mental state. On September 15, 2011, the court denied the motion to withdraw. The court subsequently sentenced Page to 10 years to life imprisonment on each count, running consecutively to one another.

The Sixth Amendment to the United States Constitution guarantees criminal defendants the effective assistance of counsel at trial. The standard for evaluating an ineffectiveness claim for trial counsel is set forth in *Strickland v. Washington*, 466 U.S. 668 (1984), which requires a showing that counsel's performance fell below an objective standard of professional care and that there was a reasonable probability the outcome would have been different absent the deficient performance.

1. The Nevada Courts applied the wrong test.

Trial counsel's ineffectiveness was raised in post-conviction proceedings and on appeal therefrom. The Nevada Court of Appeals addressed this claim as follows: "Counsel testified at the postconviction evidentiary hearing he had no reason to believe the medications Page took affected his ability to understand the proceedings. The district court concluded counsel was credible and substantial evidence supports the decision of the district court. Therefore, the district court did not err in denying this claim."[21] This decision was contrary to *Strickland*. The state court used a substantial evidence test rather than the de novo evaluation required by *Strickland*. Consequently, no deference is owed under AEDPA and the federal district court should have reviewed this claim de novo.

In *Hardy v. Chappell*, the Ninth Circuit held that a state court erred by using a "substantial evidence" test when assessing a *Strickland* claim and concluded this was contrary to clearly established federal law under AEDPA. 849 F.3d 803, 818-20 (9th Cir. 2016). The

[21] Appendix 018.

Court noted that "substantial evidence" is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion" whereas *Strickland* requires only a "reasonable probability" "sufficient to undermine confidence in the outcome." *Id*. at 819 (internal citations omitted). The Court held the substantial evidence test "has no place in the *Strickland* test." *Id*. Pursuant to *Hardy*, the Nevada court's use of the substantial evidence test is contrary to *Strickland* and its decision was, therefore, owed no AEDPA deference.

The district court considered this argument, but concluded, "whether this court reviews the claim de novo or with deference, the conclusion is the same: Page has failed to show that his counsel's performance was deficient pursuant to *Strickland*."[22] Oddly, the very next sentence in the court's opinion reads, "the Nevada Court of Appeals' ruling… was not contrary to, or an unreasonable application of, clearly established federal law…."[23] Once again this appears to be merely pro forma language tacked on to the end of the court's analysis.

---

[22] Appendix 015.

[23] Appendix 015.

However, the lack of clarity regarding the court's standard of review is troubling. Reasonable jurists could disagree with the district court's decision because a proper *Strickland* analysis reveals trial counsel was ineffective in this case.

2. Trial counsel's performance was deficient.

Trial counsel failed to adequately investigate Page's medical condition prior to the entry of Page's plea. At the post-conviction evidentiary hearing, trial counsel Speed testified he was unaware at the time Page entered into the guilty plea agreement that Page was taking prescribed medication at the prison. Notably, Speed testified that Page answered in the negative to "all of those questions" in the plea agreement. There is actually only one statement about this in the plea agreement, but it falls near the end of a list of eight statements regarding voluntariness. Speed did **not** testify that he went through each of these statements individually with Page. Nor did Speed testify that he **ever** discussed Page's mental health with him. Nevertheless, Speed had a duty to inquire about Page's mental health and medications. *See Douglas v. Woodford*, 316 F.3d 1079, 1085 (9th Cir. 2003) (recognizing a duty to investigate a defendant's mental health). It

is not sufficient for Speed to say his client never disclosed certain information, when in fact Speed never asked about it. The burden is on counsel to ascertain all relevant information. Counsel cannot assume their lay-clients know what information is relevant and, thus, cannot wait for information to be volunteered. All Speed had to do was ask Page about his mental state or what medications he was on.

Clearly Speed failed to inquire because he was the only person who had direct contact with Page who did not know about his anxiety condition and medications. Page did not hesitate to disclose this information to Maita Webb upon his booking, one or more correctional officers at the prison who shared the information with at least four different medical staff members, Michelle Giddings who evaluated Page shortly before his plea, Ahmed Suba, who evaluated Page shortly after his plea, PSI-author Mayra Carpenter, and the court when asked during the evidentiary hearing. If attorney Speed was unaware of this critical information, it is because he failed to simply ask.

The reason for counsel's deficient performance in this regard can be ascertained by the remainder of his testimony. Speed testified that Page was potentially facing a sentence of 70 years to life if convicted

after a trial and had more to lose by withdrawing his plea than to gain. An attorney's belief that a plea is in the client's best interest does not absolve him of his duty to ensure the plea is entered into knowingly, intelligently, and voluntarily. Attorneys are not empowered to act *in loco parentis* for their clients.

Trial counsel's failure to adequately investigate Page's mental health, particularly in light of Page's proclamations of innocence and complaints of depression and anxiety, fell beneath an objective standard of reasonableness. This constitutes deficient performance under *Strickland*.

3. Mr. Page suffered prejudice.

The second part of the *Strickland* test as applied to guilty pleas is whether there is a reasonable probability that, but for counsel's deficient performance, the petitioner "would not have pleaded guilty and would have insisted on going to trial." *Hill v. Lockhart*, 474 U.S. 52, 59 (1985).

Page repeatedly asserted his innocence. Moreover, had Speed done a proper investigation and disclosed to the trial court that Page was under the influence of two mental health medications prescribed for an

acute nervous/anxiety disorder, the court would not have been **able** to accept Page's plea without inquiring further. This would have resulted in the court learning that the combination of Paxil and Vistaril is known to cause confusion, difficulty concentrating, and impaired judgment.[24] The medical records dated shortly before the plea reflect that Page was anxious with limited insight and poor judgment. And Page himself said he was confused and had difficulty concentrating as a result of the medication. It would have been a violation of due process for the court to accept Page's plea under these circumstances.

The district court held, "even if Speed's representation was deficient, Page makes no showing of a reasonable probability that… he would not have pled guilty and would have insisted on going to trial."[25] The court failed to address the fact that the trial court would have been remiss in accepting the guilty plea if it had been informed that Page was impaired. The trial court would have had to reject the plea and schedule the case for trial. Additionally, Page has repeatedly asserted

---

[24] *See* https://www.drugs.com/drug-interactions/hydroxyzine-with-paxil-1303-0-1800-1156.html

[25] Appendix 014.

his innocence.

Consequently, prejudice in this case has been demonstrated because Page entered into a constitutionally invalid plea agreement as a result of counsel's deficient performance. Or at a minimum, reasonable jurists could debate whether Page received ineffective assistance of counsel. The Ninth Circuit erred by denying a COA because reasonable jurists could disagree with the district court's finding on this constitutional claim.

CONCLUSION

Reasonable jurists could debate the merits of Mr. Page's constitutional claims. The totality of the circumstances show Mr. Page did not enter into a knowing, intelligent, and voluntary guilty plea. And Mr. Page's received ineffective assistance of counsel when his attorney failed to investigate his medical condition before advising him to enter a guilty plea. By failing to grant Mr. Page a COA, the Ninth Circuit departed so far from the usual course of judicial proceedings that it calls for this Court to exercise its supervisory power. Therefore, Daniel Page respectfully requests this Court grant his Petition for Writ of Certiorari,

vacate the order of the Ninth Circuit Court of Appeals, and remand with instructions to grant a Certificate of Appealability.

Dated July 27, 2020.

Respectfully submitted,

Rene L. Valladares
Federal Public Defender

/s/ CB Kirschner
C.B. Kirschner
Assistant Federal Public Defender

INDEX TO APPENDIX

Page No.

A. Order Denying Certificate of Appealability
Ninth Circuit Court of Appeals 001
Filed March 20, 2020

B. Order of Dismissal
United States District Court 002
Filed August 22, 2019

C. Order of Affirmance
Nevada Supreme Court 017
Filed November 18, 2015

D. Order of Affirmance
Nevada Supreme Court 021
Filed September 13, 2012

APP. 001

FILED

MAR 20 2020

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

DANIEL PAGE,

Petitioner-Appellant,

v.

RENEE BAKER, Warden; ATTORNEY GENERAL FOR THE STATE OF NEVADA,

Respondents-Appellees.

No. 19-16854

D.C. No. 3:16-cv-00600-MMD-WGC
District of Nevada,
Reno

ORDER

Before: CLIFTON and NGUYEN, Circuit Judges.

The request for a certificate of appealability (Docket Entry No. 2) is denied because appellant has not made a "substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2); *see also Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003).

Any pending motions are denied as moot.

DENIED.

APP. 002

UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

* * *

DANIEL PAGE,

Petitioner,

v.

RENEE BAKER, *et al.*,

Respondents.

Case No. 3:16-cv-00600-MMD-WGC

ORDER

I. SUMMARY

This petition for writ of habeas corpus, pursuant to 28 U.S.C. § 2254, filed by Daniel Page, is before the Court for adjudication of the merits of Page's remaining claims. As further explained below, the Court will deny Page's habeas petition, will deny him a certificate of appealability, and will direct the Clerk of Court to enter judgment accordingly.

II. BACKGROUND

A criminal complaint was filed in Justice Court, North Las Vegas Township, Clark County, Nevada on November 10, 2010, charging Page with four counts of sexual assault with a minor under fourteen years of age and one count of use of a minor in producing pornography. (ECF No. 17-3.) Page waived his preliminary hearing on March 15, 2011. (ECF No. 17-4.) A criminal information was filed in Nevada's Eighth Judicial District Court, Clark County, Nevada on March 24, 2011, charging Page with one count of sexual assault and one count of use of minor in producing pornography. (ECF No. 17-5.) Page signed a guilty plea agreement on March 25, 2011. (ECF No. 17-6.) Page was arraigned on March 25, 2011, by Hearing Master Melisa De La Garza and entered a guilty plea. (ECF No. 17-7.)

Page filed a motion to withdraw his plea on April 8, 2011. (ECF No. 17-8.) The State opposed the motion. (ECF No. 17-10.) A hearing, a status check, and an evidentiary

hearing were held on Page's motion. (ECF Nos. 17-11, 17-13, 17-16.) District Court Judge Valerie Adair denied Page's motion to withdraw his guilty plea. (ECF No. 17-12; *see also* ECF Nos. 17-17 at 2, 17-18.)

Page was sentenced to two consecutive terms of life in prison, with the possibility of parole after ten years on each. (ECF No. 17-22.) Page appealed, and the Nevada Supreme Court affirmed his conviction on September 13, 2012. (ECF No. 18-1.)

On January 16, 2013, Page filed a *pro se* habeas petition in state court. (ECF No. 18-3.) The state district court appointed counsel, and, with counsel, Page filed an amended petition. (ECF No. 18-7 at 2-15.) The State opposed the petition, and Page filed a reply. (ECF Nos. 18-9, 18-10.) The court held an evidentiary hearing, and, on November 24, 2014, denied Page's petition. (ECF Nos. 18-11, 19.) Page appealed, and the Nevada Court of Appeals affirmed the denial of his petition on November 19, 2015. (ECF No. 19-6.)

Page initiated this federal habeas corpus action, *pro se*, on October 17, 2016. (ECF No. 6.) On November 30, 2016, the Court granted Page's motion for appointment of counsel. (ECF No. 5.) Counsel appeared for Page on December 14, 2016, and, with counsel, Page filed an amended petition on August 2, 2017. (ECF Nos. 9, 16.)

Page's amended petition asserted two grounds for relief. In Ground 1, Page claims his federal constitutional rights were violated because "[t]he trial court erred by denying [his] pre-sentence motion to withdraw his guilty plea as said plea was not knowingly, freely and voluntarily given." (ECF No. 16 at 8.) In Ground 2, Page claims that he "received ineffective assistance of counsel where counsel failed to adequately investigate [his] medical condition prior to entering his plea." (*Id*. at 11.)

On September 28, 2017, Respondents filed their motion to dismiss (ECF No. 25), in which they contended that both claims in Page's amended petition were barred by the statute of limitations. The Court granted Respondents' motion to dismiss in part, and denied it in part, on July 12, 2018. (ECF No. 28.) Specifically, the claim in Ground 1 of the Petitioner's amended habeas petition, that his plea was not knowing and voluntary

because he only learned after his plea that the victim and her father received messages, apparently from another person, after he was incarcerated, was dismissed. (*Id.*) In all other respects, he Court denied the motion to dismiss. (*Id.*)

On September 5, 2018, Respondents filed an answer to the amended habeas petition responding to Page's remaining claims. (ECF No. 29.) Page filed a reply on February 4, 2019. (ECF No. 34.)

III. LEGAL STANDARD

28 U.S.C. § 2254(d) sets forth the standard of review generally applicable in habeas corpus cases under the Antiterrorism and Effective Death Penalty Act ("AEDPA"):

> An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim --
>
> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
>
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

A state court decision is contrary to clearly established Supreme Court precedent, within the meaning of 28 U.S.C. § 2254, "if the state court applies a rule that contradicts the governing law set forth in [the Supreme Court's] cases" or "if the state court confronts a set of facts that are materially indistinguishable from a decision of [the Supreme] Court." *Lockyer v. Andrade*, 538 U.S. 63, 73 (2003) (quoting *Williams v. Taylor*, 529 U.S. 362, 405-06 (2000), and citing *Bell v. Cone*, 535 U.S. 685, 694 (2002)). A state court decision is an unreasonable application of clearly established Supreme Court precedent within the meaning of 28 U.S.C. § 2254(d) "if the state court identifies the correct governing legal principle from [the Supreme] Court's decisions but unreasonably applies that principle to the facts of the prisoner's case." *Id.* at 75 (quoting *Williams*, 529 U.S. at 413).

"The 'unreasonable application' clause requires the state court decision to be more than incorrect or erroneous. The state court's application of clearly established law must be objectively unreasonable." *Id.* (quoting *Williams*, 529 U.S. at 409-10) (internal citation omitted).

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

IV. DISCUSSION

A. Ground 1

In Ground 1, Page claims that his federal constitutional rights were violated because the trial court erroneously denied his motion to withdraw his plea.[1] (ECF No. 16 at 8.) Page argues that he was taking medication for a nervous condition, and as such, he did not understand the consequences of his plea. (*Id.* at 10-11.) Page points out that a combination of the two drugs he was taking, Paxil and Vistaril, can cause difficulty concentrating and confusion. (ECF No. 34 at 8.) Respondents assert that Page acknowledged that he was not under the influence of any drug that would impair his ability

[1]In the order entered July 12, 2018 resolving the motion to dismiss (ECF No. 28), the Court found that the first part of this ground—the claim that Page's plea was not knowing and voluntary because he learned only after his plea that the victim and her father received messages, apparently from another person, after Page was incarcerated—was barred by the statute of limitations. Accordingly, only the remainder of this ground—the claim that Page's plea was not knowing and voluntary because of his inability to comprehend the proceedings due to his medication—will be addressed.

to understand his plea agreement, and the state district court conducted a plea canvas prior to accepting his plea to determine that Page entered a knowing and voluntary plea. (ECF No. 29 at 5.)

This ground was raised on appeal in Page's state habeas action. (ECF No. 19-3 at 12 ("When Mr. Page entered his guilty plea, he was under the influence of mind-altering medications, rendering him unable to fully appreciate the consequences of his actions.").) The state courts determined that "[n]othing in the plea canvas suggests that [Page] was impaired and [Page] acknowledged in his guilty plea agreement that he was not under the influence of any substance or drug that impaired his ability to understand the agreement or the guilty plea proceedings." (ECF Nos. 18-1 at 2; 19-6 at 2-3.) The Court finds that the rulings of the state courts were reasonable.

The federal constitutional guarantee of due process of law requires that a guilty plea be knowing, intelligent, and voluntary. *See Brady v. United States*, 397 U.S. 742, 748 (1970); *Boykin v. Alabama*, 395 U.S. 238, 242 (1969); *United States v. Delgado-Ramos*, 635 F.3d 1237, 1239 (9th Cir. 2011). "The voluntariness of [a petitioner's] plea can be determined only by considering all of the relevant circumstances surrounding it." *Brady*, 397 U.S. at 749. Those circumstances include "the subjective state of mind of the defendant." *Iaea v. Sunn*, 800 F.2d 861, 866 (9th Cir. 1986). Addressing the "standard as to the voluntariness of guilty pleas," the Supreme Court has stated:

> (A) plea of guilty entered by one fully aware of the direct consequences, including the actual value of any commitments made to him by the court, prosecutor, or his own counsel, must stand unless induced by threats (or promises to discontinue improper harassment), misrepresentation (including unfulfilled or unfulfillable promises), or perhaps by promises that are by their nature improper as having no proper relationship to the prosecutor's business (e.g. bribes).

Brady, 397 U.S. at 755 (quoting *Shelton v. United States*, 246 F.2d 571, 572 n.2 (5th Cir. 1957), *rev'd on other grounds*, 356 U.S. 26 (1958)); *see also North Carolina v. Alford*, 400 U.S. 25, 31 (1970) (noting that the longstanding "test for determining the validity of guilty

pleas" is "whether the plea represents a voluntary and intelligent choice among the alternative courses of action open to the defendant").

In *Blackledge v. Allison*, the Supreme Court addressed the evidentiary weight of the record of a plea proceeding when the plea is subsequently subject to a collateral challenge. *See* 431 U.S. 63 (1977). While noting that "the barrier of the plea . . . proceeding record . . . is not invariably insurmountable" when challenging the voluntariness of his plea, the Court stated that, nonetheless, the defendant's representations, "as well as any findings made by the judge accepting the plea, constitute a formidable barrier in any subsequent collateral proceedings" and that "[s]olemn declarations in open court carry a strong presumption of verity." *Id.* at 74; *see also Muth v. Fondren*, 676 F.3d 815, 821 (9th Cir. 2012) ("Petitioner's statements at the plea colloquy carry a strong presumption of truth."); *Little v. Crawford*, 449 F.3d 1075, 1081 (9th Cir. 2006).

With regard to competency, a criminal defendant may not plead guilty unless he does so competently and intelligently. *See Godinez v. Moran*, 509 U.S. 389, 396 (1993). In order to meet the competency standard to plead guilty, it must be determined "whether the defendant has 'sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding' and a 'rational as well as factual understanding of the proceedings against him.'" *Id.* (quoting *Dusky v. United States*, 362 U.S. 402, 402 (1960)).

Prior to his arraignment, Page received two medical progress notes while in jail. (ECF Nos. 21-1 (sealed), 21-2 (sealed).) On December 16, 2010, it was reported that Page was feeling anxious and exhibited severe hand tremors. (ECF No. 21-1 (sealed)) at 1.) And on February 25, 2011, it was reported that Page was feeling okay, had no complaints, and that his medications for his anxiety were working fine with no reported side effects. (ECF No. 21-2 (sealed) at 1.)

During his arraignment on March 25, 2011, Page stated his name, age, education level, and his ability to read, write, and understand the English language. (ECF No 17-7 at 2-3.) Page also stated that he understood the charges against him and the sentence

that each charge carries, that he will be subject to lifetime supervision, that he will be required to register as a sex offender, that sentencing is up to the court, and that by pleading guilty he was giving up his Constitutional rights listed in the plea agreement. (*Id.* at 3-5.) Page stated that he was not forced to plead guilty, that he was pleading guilty of his own free will, that he read and understood the plea agreement, that his attorney was available to answer any questions about the plea agreement, that he discussed his case and his rights with his attorney, that he signed the plea agreement freely and voluntarily, and that he did not have any questions regarding his rights or the plea negotiation. (*Id.* at 3-5.) Finally, Page also admitted to the facts alleged in the criminal information. (*Id.* at 5.) Thereafter, the judge "accept[ed his] pleas of guilt as being freely and voluntarily entered into." (*Id.*)

Page's signed Guilty Plea Agreement provides he was "signing th[e] agreement voluntarily, after consultation with [his] attorney, and [he was] not acting under duress or coercion or by virtue of any promises of leniency, except for those set forth in th[e] agreement." (ECF No. 17-6 at 5.) The Guilty Plea Agreement also provides that Page was "not now under the influence of any intoxicating liquor, a controlled substance or other drug which would in any manner impair [his] ability to comprehend or understand th[e] agreement or the proceedings surrounding [his] entry of th[e] plea." (*Id.*)

Fourteen days after his arraignment and the signing of his Guilty Plea Agreement, Page filed a motion to withdraw his plea. (ECF No. 17-8.) A hearing was held on Page's motion on April 21, 2011. (ECF No. 17-11.) During the hearing, the judge indicated that Page and his counsel were welcome to follow up on the medication issue but that the motion to withdraw his plea would be denied with regard to the emails that were sent to the victim during Page's incarceration. (*Id.* at 5-7.)

A status check was held on May 19, 2011. (ECF No. 17-13.) At the status check, Page's counsel indicated that he obtained Page's medical records from the detention center "showing that Mr. Page had been under a physician's care and had been taking not one but two very powerful psychotropic drugs while he was in custody in the detention

center and even before that." (*Id.* at 2.) Following the status check, the State filed an *ex parte* motion for the release of Page's medical records. (ECF No. 17-14.) The *ex parte* motion was granted. (ECF No. 17-15.)

An evidentiary hearing was held on August 1, 2011. (ECF No. 17-16.) Mayra Carpenter, an employee of Parole and Probation, testified at the evidentiary hearing. (*Id.* at 23.) Ms. Carpenter interviewed Page and wrote his presentence investigation report. (*Id.*) She testified that she did not have any problems communicating with Page at that interview and that he told her that "he had some anxiety issues that every 90 days he was treated for it." (*Id.* at 26-27.) Ms. Carpenter also testified that she did not see any reason to interview Page's doctor because he only showed signs of anxiety and "most of the inmates that [she] interview[s] have some type of anxiety." (*Id.* at 43.) At the conclusion of the evidentiary hearing, the judge denied Page's motion to withdraw his guilty plea finding that there "has been nothing to cause the Court to have any concern that [Page] was unable to appreciate . . . what he was doing." (ECF No. 17-17 at 2; *see also* ECF No. 17-18.)

Page later testified at the post-conviction evidentiary hearing that that he was taking Vistaril while his case was pending. (ECF No. 18-11 at 33-35.) When asked how the Vistaril affected him, Page responded as follows:

> It seemed to calm my nerves, but I was confused more or less. I couldn't concentrate properly on any of the questions that were asked. At the time that the – the (unintelligible) or whatever came around, I wasn't asking the questions to try to answer as truthfully as I could. I did take time to answer 'em; it did take me some time so.

(*Id.* at 35.) During cross-examination, Page testified that he never complained of any side effects as a result of the Vistaril to any physician or staff member at the Clark County Detention Center. (*Id.* at 36.) Thereafter, during re-direct examination, Page testified that he is "very nervous, very anxious. So might have been confused. I don't know – I don't even know how to explain that anymore, you know." (*Id.* at 37.)

Importantly, during the plea colloquy, Page acknowledged that he understood the elements of the crime and admitted that he committed the crime. (ECF No. 17-7 at 5.)

Page further acknowledged that he read the plea agreement, discussed it with his counsel, and understood it. (*Id.* at 4.; *see also* ECF No. 17-6 at 5.) Due to these representations made by Page, as well as the judge's "accept[ance of his] pleas of guilt as being freely and voluntarily entered into," (*id.* at 5) Page faces a "formidable barrier in [this] subsequent collateral proceeding[ ]." *Blackledge*, 431 U.S. at 74.

And while Page may have been experiencing anxiety, there is no indication, other than his testimony, that he was confused and unable to comprehend the proceedings. *See Sandgathe v. Maass*, 314 F.3d 371, 379 (9th Cir. 2002) (reasoning that the petitioner "offered no evidence for his asserted incompetence to plead" because the doctor who met the petitioner prior to him entering his plea had no concerns about the petitioner's prescription drug use on his ability to defend himself in court); *cf. Burket v. Angelone*, 208 F.3d 172, 192 (4th Cir. 2000) ("[T]he fact that the petitioner has been treated with anti-psychotic drugs does not per se render him incompetent to stand trial."). And in fact, his testimony was not definitive in explaining his confusion: Page testified that he "was confused more or less" and "might have been confused." (ECF No. 18-11 at 34, 36.) Moreover, although Page was experiencing anxiety and hand tremors on December 16, 2010 (ECF No. 21-1 (sealed) at 1), it was reported on February 25, 2011, a month prior to his arraignment, that Page was feeling okay and that his medications were working fine with no reported side effects. (ECF No. 21-2 (sealed) at 1.) Similarly, Ms. Carpenter, who interviewed Page for his presentence investigation, indicated that Page only showed signs of anxiety and that she had no issues communicating with him. (ECF No. 17-16 at 27, 43.)

Accordingly, after "considering all of the relevant circumstances surrounding" Page's plea, *Brady*, 397 U.S. at 749, Page has failed to demonstrate that his guilty plea was not knowing, intelligent, or voluntary. Further, Page has failed to demonstrate that he was incompetent when he entered his guilty plea. *See Godinez*, 509 U.S. at 396. Thus, the state courts' ruling that "[n]othing in the plea canvas suggests that [Page] was impaired and [Page] acknowledged in his guilty plea agreement that he was not under

the influence of any substance or drug that impaired his ability to understand the agreement or the guilty plea proceedings," (ECF Nos. 18-1 at 2, 19-6 at 2-3) was not contrary to, or an unreasonable application of, clearly established federal law, as determined by the Supreme Court, and was not based on an unreasonable determination of the facts in light of the evidence. *See* 28 U.S.C. § 2254(d). The Court will deny Page habeas corpus relief with respect to Ground 1.[2]

B. Ground 2

In Ground 2, Page claims that his federal constitutional rights were violated because his counsel failed to investigate his medical condition prior to him entering his plea. (ECF No. 16 at 11.) Page argues that his counsel's conduct fell below an objective standard of reasonableness and that there is prejudice due to him entering a constitutionally deficient plea. (*Id.* at 13.) Respondents assert that Page never informed his counsel of any issues with his medication, and counsel had no independent reason to know that Page was having any issue understanding the proceedings. (ECF No. 29 at 9.)

This ground was raised on the appeal in Page's state habeas action. (ECF No. 19-3 at 18 ("trial counsel failed to adequately investigate Mr. Page's medical condition prior

---

[2]Page also argues that the judge presiding over his motion to withdraw his plea was not the same judge that accepted his plea, so she was not in a position to assess his demeanor during the plea canvas. (ECF No. 34 at 9.) At the initial hearing on Page's motion to withdraw his guilty plea, the judge indicated that she had not "reviewed the JAVS to ascertain his demeanor, you know, his comprehension" but that she would "review the JAVS if need be" after Page and his counsel obtained information regarding his medication. (ECF No. 17-11 at 5, 7.) Further, during the evidentiary hearing, the court admitted Page's arraignment court video and audio as an exhibit. (ECF No. 17-16 at 44-45.) Accordingly, although the judge presiding over his motion to withdraw his plea was not the same judge that accepted his plea, the judge had a visual and audio recording of the arraignment to view, so this argument lacks merit.

Page also argues that he was less likely to understand the plea process because he had no prior convictions and that his signature on the final page of the plea should only be construed as an acceptance of the plea, not as an assertion of his ability to understand the agreement. (ECF No. 34 at 10.) Because Page indicated during his arraignment that he read and understood the plea agreement (*see* ECF No. 17-7 at 4), these arguments also lack merit.

to Mr. Page's entry of plea.").) The Nevada Court of Appeals held that "Page fails to demonstrate counsel was deficient. Counsel testified at the postconviction evidentiary hearing he had no reason to believe the medications Page took affected his ability to understand the proceedings. The district court concluded counsel was credible and substantial evidence supports the decision of the district court." (ECF No. 19-6 at 2.) The Court finds that the ruling of the Nevada Court of Appeals was reasonable.

In *Strickland v. Washington*, the Supreme Court propounded a two-prong test for analysis of claims of ineffective assistance of counsel: the petitioner must demonstrate (1) that the attorney's "representation fell below an objective standard of reasonableness," and (2) that the attorney's deficient performance prejudiced the defendant such that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." 466 U.S. 668, 688, 694 (1984). A court considering a claim of ineffective assistance of counsel must apply a "strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." *Id.* at 689. The petitioner's burden is to show "that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." *Id.* at 687. And, to establish prejudice under *Strickland*, it is not enough for the habeas petitioner "to show that the errors had some conceivable effect on the outcome of the proceeding." *Id.* at 693. When the ineffective assistance of counsel claim is based on a challenge to a guilty plea, the *Strickland* prejudice prong requires the petitioner to demonstrate "that there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial." *Hill v. Lockhart*, 474 U.S. 52, 59 (1985). In analyzing a claim of ineffective assistance of counsel under *Strickland*, a court may first consider either the question of deficient performance or the question of prejudice; if the petitioner fails to satisfy one element of the claim, the court need not consider the other. *See Strickland*, 466 U.S. at 697.

At the hearing on his motion to withdraw his plea, Page's attorney, Mr. Kevin Speed, Esq. (hereinafter Speed), indicated that Page did not disclose that he was on any

medications during the negotiation process or when he signed the plea agreement. (ECF No. 17-11 at 3.) Similarly, during the post-conviction hearing, Speed testified that he did "learn that [Page] had been taking medication," but that he,

> did not know that [at the time he was going over the plea with Page] because Mr. Page didn't share that with [him]. There is a portion of the guilty plea agreement that specifically asks a defendant whether he is under the influence or taking any medication that would affect his ability to understand the guilty plea agreement, and to all of those questions Mr. Page answered in the negative.

(ECF No. 18-11 at 10.) Speed testified that Page "had not complained of anxiety or nervousness," that he did not notice anything "that would raise any red flags," and that he did not seem "loopy" or under the influence of any drugs at any time. (*Id.* at 14-15.) Speed clarified that "[i]t was a stressful situation obviously, and I understand – it is understandable for a person charged with the number and type of crimes that Mr. Page was charged with to be nervous, to be anxious, but over and above that, no, [he] didn't notice anything that would raise concerns." (*Id.* at 14.) Speed also testified that "Mr. Page understood the risks of proceeding to trial," that "he came to the decision it seemed rationally to enter the guilty plea negotiations," and that "he seemed fine" regarding his "ability to understand the process and the punishments, the penalties that went along with the crimes that he was charged with." (*Id.* at 18, 28.)

"When counsel has reason to question his client's competence to plead guilty, failure to investigate further may constitute ineffective assistance of counsel." *U.S. v. Howard*, 381 F.3d 873, 881 (9th Cir. 2004); *see also Tharpe v. Warden*, 834 F.3d 1323, 1342 (11th Cir. 2016) (finding that petitioner "has failed to identify . . . what 'red flags' requiring further investigation concerning [his] background should have been seen by [his counsel] under the circumstances as they knew or reasonably should have known them to be at the time of their investigation"); *Gonzales v. Knowles*, 515 F.3d 1006, 1015 (9th Cir. 2008) ("Absent any objective indication that [the defendant] suffered from any mental illness, [trial counsel] cannot be deemed ineffective for failing to pursue this avenue of mitigation where [the defendant]'s mental illness seemed unlikely."); *Douglas v.*

Woodford, 316 F.3d 1079, 1085 (9th Cir. 2003) ("Trial counsel has a duty to investigate a defendant's mental state if there is evidence to suggest that the defendant is impaired."); *Bouchillon v. Collins*, 907 F.2d 589, 597 (5th Cir. 1990) ("It must be a very rare circumstance indeed where a decision not to investigate would be 'reasonable' after counsel has *notice* of the client's history of mental problems.") (emphasis added). Here, there is no reason for Speed to have questioned Page's competence—Page never informed Speed that he was taking any medication, Page never explained to Speed that he was feeling anxious or nervous, and Page did not exhibit any signs that he was medicated or that we was having comprehension issues. Without notice that Page was taking medication or objective evidence suggesting that Page was impaired, there was no basis for Speed to have investigated.

Moreover, Speed's testimony that he was unaware that Page was on any medication is supported by the fact that Page signed a plea agreement stating that he was "not now under the influence of any intoxicating liquor, a controlled substance or other drug which would in any manner impair [his] ability to comprehend or understand this agreement or the proceedings surrounding [his] entry of this plea." (ECF No. 17-6 at 5.) *See also Hibbler v. Benedetti*, 693 F.3d 1140, 1149 (9th Cir. 2012) (reasoning that "the state court record [does not] contain any evidence that [petitioner] had been taking 'powerful anti-psychotic medications' at the time of his plea" because "both [petitioner] and his counsel signed sworn statements on the day [petitioner] entered his plea averring that [petitioner] was not under the influence of any drug that would affect his ability to understand his actions.") Therefore, Speed's actions did not "f[a]ll below an objective standard of reasonableness." *Strickland*, 466 U.S. at 694. Furthermore, even if Speed's representation was deficient, Page makes no showing of a reasonable probability that, but for Speed's alleged inadequate investigation into his medications, he would not have pled guilty and would have insisted on going to trial. *See Hill*, 474 U.S. at 59.

Page also argues that the state court used a substantial evidence test rather than the de novo evaluation required by *Strickland*, so no deference is owed under AEDPA.

(ECF No. 34 at 14.) If the state court used the wrong standard, this court "need not defer to that decision" and, instead, may analyze the claim de novo. *Hardy v. Chappell*, 849 F.3d 803, 820 (9th Cir. 2016). However, whether this court reviews the claim de novo or with deference, the conclusion is the same: Page has failed to show that his counsel's performance was deficient pursuant to *Strickland*.

Accordingly, the Nevada Court of Appeals' ruling that "Page fails to demonstrate counsel was deficient" (ECF No. 19-6 at 2) was not contrary to, or an unreasonable application of, clearly established federal law, as determined by the Supreme Court, and was not based on an unreasonable determination of the facts in light of the evidence. *See* 28 U.S.C. § 2254(d). The Court will deny Page habeas corpus relief with respect to Ground 2.

V. CERTIFICATE OF APPEALABILITY

The standard for the issuance of a certificate of appealability requires a "substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c). The Supreme Court has interpreted 28 U.S.C. § 2253(c) as follows:

> Where 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.

Slack v. McDaniel, 529 U.S. 473, 484 (2000); *see also James v. Giles*, 221 F.3d 1074, 1077-79 (9th Cir. 2000).

Applying this standard, the Court finds that a certificate of appealability is unwarranted in this case. The Court will deny Page a certificate of appealability.

VI. CONCLUSION

It is therefore ordered that the Amended Petition for Writ of Habeas Corpus (ECF No. 16) is denied.

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

///

///

APP. 016

The Clerk of Court is directed to enter judgment accordingly and close this case.

DATED THIS 22nd day of August 2019.

MIRANDA M. DU
UNITED STATES DISTRICT JUDGE

APP. 017

IN THE COURT OF APPEALS OF THE STATE OF NEVADA

DANIEL GERARD PAGE,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 67146

FILED

NOV 19 2015

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY
DEPUTY CLERK

ORDER OF AFFIRMANCE

This is an appeal from an order of the district court denying a postconviction petition for a writ of habeas corpus. Eighth Judicial District Court, Clark County; Valerie Adair, Judge.

Appellant Daniel Page argues the district court erred by denying his ineffective assistance of counsel claims raised in his January 16, 2013, petition and January 23, 2014, amended petition. To prove ineffective assistance of counsel sufficient to invalidate a judgment of conviction based on a guilty plea, a petitioner must demonstrate that his counsel's performance was deficient in that it fell below an objective standard of reasonableness, and resulting prejudice such that there is a reasonable probability, but for counsel's errors, petitioner would not have pleaded guilty and would have insisted on going to trial. *Hill v. Lockhart*, 474 U.S. 52, 58-59 (1985); *Kirksey v. State*, 112 Nev. 980, 988, 923 P.2d 1102, 1107 (1996). Both components of the inquiry must be shown. *Strickland v. Washington*, 466 U.S. 668, 697 (1984). We give deference to the court's factual findings if supported by substantial evidence and not clearly erroneous but review the court's application of the law to those facts de novo. *Lader v. Warden*, 121 Nev. 682, 686, 120 P.3d 1164, 1166 (2005).

15-901406

First, Page claims counsel was ineffective for failing to adequately investigate Page's medical condition prior to entering his plea. Page fails to demonstrate counsel was deficient. Counsel testified at the postconviction evidentiary hearing he had no reason to believe the medications Page took affected his ability to understand the proceedings. The district court concluded counsel was credible and substantial evidence supports the decision of the district court. Therefore, the district court did not err in denying this claim.

Second, Page claims counsel was ineffective for failing to present testimony from Page's doctor at the hearing on his presentence motion to withdraw his guilty plea. Page fails to demonstrate counsel was deficient or resulting prejudice. At the postconviction evidentiary hearing, counsel testified he did not call the physician to testify because he did not believe the testimony would have been helpful. The district court found counsel credible and substantial evidence supports the decision of the district court. "Tactical decisions [of counsel] are virtually unchallengeable absent extraordinary circumstances," *Ford v. State*, 105 Nev. 850, 853, 784 P.2d 951, 953 (1989), and Page fails to demonstrate any extraordinary circumstances. Further, Page fails to demonstrate a reasonable probability of a different outcome at the hearing had the physician testified because Page failed to call the physician at the postconviction evidentiary hearing. Therefore, the district court did not err in denying this claim.

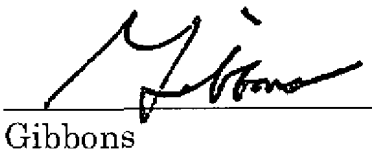
Next, Page claims the district court erred in denying his claim that his plea was invalid because he was taking psychiatric drugs at the time he entered his plea. This claim was previously raised on direct appeal, and the Nevada Supreme Court rejected it. *See Page v. State*, Docket No. 59520 (Order of Affirmance, September 13, 2012). Therefore, the claim is barred by the doctrine of law of the case, *Hall v. State*, 91 Nev.

314, 315-16, 535 P.2d 797, 798-99 (1975), and the district court did not err in denying this claim without considering it at the evidentiary hearing. *See Hargrove v. State*, 100 Nev. 498, 502-03, 686 P.2d 222, 225 (1984) (To warrant an evidentiary hearing, a petitioner must raise claims supported by specific factual allegations, not belied by the record and, if true, would entitle him to relief).

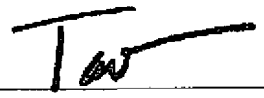
Next, Page claims the district court erred by bifurcating his presentence motion to withdraw his guilty plea into two hearings. This claim is not properly raised in a postconviction petition for a writ of habeas corpus challenging a judgment of conviction based upon a guilty plea. *See* NRS 34.810(1)(a). Because this claim does not challenge the validity of Page's plea or allege he received ineffective assistance of counsel, the district court did not err in denying this claim without considering it at the evidentiary hearing. *See Hargove*, 100 Nev. at 502-03, 686 P.2d at 225.

Finally, Page argues he is entitled to relief based on cumulative error. Because Page failed to demonstrate any error, he necessarily failed to demonstrate cumulative error. Accordingly, we

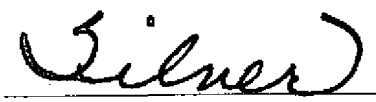
ORDER the judgment of the district court AFFIRMED.



_____, C.J.
Gibbons



_____, J.
Tao



_____, J.
Silver

cc: Hon. Valerie Adair, District Judge
Law Office of Julian Gregory, L.L.C.
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk

APP. 021

IN THE SUPREME COURT OF THE STATE OF NEVADA

DANIEL GERARD PAGE,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 59520

FILED

SEP 13 2012

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY
DEPUTY CLERK

ORDER OF AFFIRMANCE

This is an appeal from a judgment of conviction, pursuant to a guilty plea, of sexual assault and use of a minor in producing pornography. Eighth Judicial District Court, Clark County; Valerie Adair, Judge.

Appellant's sole argument on appeal is that the district court abused its discretion by denying his presentence motion to withdraw his guilty plea because it was involuntary and unknowing. A defendant may file a presentence motion to withdraw a guilty plea, NRS 176.165, which the district court may grant for any substantial, fair, and just reason, Crawford v. State, 117 Nev. 718, 721, 30 P.3d 1123, 1125 (2001).

Appellant contends that he should be allowed to withdraw his guilty plea because he subsequently learned that the victim, his step-granddaughter, and her family had received unwanted email messages from appellant's account and postings on their social network websites, many containing links to suspected illegal pornographic sites, during the time when he was in custody and had no computer access. He argues that this evidence suggests an alternative suspect. However, appellant fails to adequately explain how that evidence is exculpatory, where his convictions stem from sexually assaulting his step-granddaughter and taking pornographic photographs of her.

Similarly, appellant's claim that he was impaired from the use of powerful tranquilizing drugs when he entered his guilty plea lacks merit. After conducting an evidentiary hearing on the matter, during which appellant presented no significant evidence, the district court concluded that there was no reason to believe that he was impaired when he entered his plea. See Molina v. State, 120 Nev. 185, 190, 87 P.3d 533, 537 (2004) (concluding that "guilty pleas are presumptively valid, especially when entered on advice of counsel, and a defendant has a heavy burden to show the district court that he did not enter his plea knowingly, intelligently, or voluntarily"). Nothing in the plea canvass suggests that appellant was impaired and appellant acknowledged in his guilty plea agreement that he was not under the influence of any substance or drug that impaired his ability to understand the agreement or the guilty plea proceedings.

Because appellant has failed to articulate a substantial, fair, and just reason for withdrawing his plea, the district court did not abuse its discretion in this matter. Riker v. State, 111 Nev. 1316, 1322, 905 P.2d 706, 710 (1995).

Accordingly, we

ORDER the judgment of conviction AFFIRMED.

Douglas, J.

Gibbons, J.

Parraguirre, J.

cc: Hon. Valerie Adair, District Judge
Clark County Public Defender
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk