

**FILED**

UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

JAN 28 2019

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

JAMES PHILIP DOUGLAS,

Petitioner-Appellant,

v.

MARGARET GILBERT, Superintendent,

Respondent-Appellee.

No. 18-35569

D.C. No. 3:16-cv-06060-BHS  
Western District of Washington,  
Tacoma

ORDER

Before: CANBY and GRABER, Circuit Judges.

The request for a certificate of appealability (Docket Entry No. 2, 3) 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.**

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D.C. No. 3:16-cv-06060-BHS  
Western District of Washington,  
Tacoma

ORDER

Before: O'SCANLAIN and GOULD, Circuit Judges.

Appellant's letter (Docket Entry No. 5) is construed as a motion for reconsideration, and is denied. *See* 9th Cir. R. 27-10.

No further filings will be entertained in this closed case.

**UNITED STATES DISTRICT COURT**  
WESTERN DISTRICT OF WASHINGTON  
AT TACOMA

JAMES PHILIP DOUGLAS,

Petitioner,

v.

MARGARET GILBERT,

Respondent.

**JUDGMENT IN A CIVIL CASE**

CASE NO. C16-6060-BHS

**Jury Verdict.** This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

**Decision by Court.** This action came to consideration before the Court. The issues have been considered and a decision has been rendered.

**THE COURT DOES HEREBY FIND AND ORDER:**

- (1) The Court adopts the Report and Recommendation.
- (2) Petitioner's petition for habeas corpus is **DISMISSED with prejudice**.
- (3) A certificate of appealability is **DENIED**.
- (4) This case is closed.

Dated June 13, 2018.

William M. McCool

Clerk of Court

s/Stefan Prater

Deputy Clerk

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT TACOMA

JAMES PHILIP DOUGLAS,

Petitioner,

V.

## MARGARET GILBERT,

**Respondent.**

CASE NO. C16-6060 BHS

## ORDER ADOPTING REPORT AND RECOMMENDATION

This matter comes before the Court on the Report and Recommendation ("R&R") of Honorable David W. Christel, United States Magistrate Judge. Dkt. 28. The Court having considered the R&R and the remaining record, and no objections having been filed, does hereby find and order as follows:

- (1) The R&R is **ADOPTED**;
- (2) Petitioner's petition for habeas corpus (Dkt. 7) is **DISMISSED** with **prejudice**;
- (3) A certificate of appealability is **DENIED**; and
- (4) This case is closed.

Dated this 12th day of June, 2018.

  
\_\_\_\_\_  
BENJAMIN H. SETTLE  
United States District Judge

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT TACOMA

JAMES PHILIP DOUGLAS,

Petitioner,

Y.

MARGARET GILBERT,

**Respondent.**

**CASE NO. 3:16-CV-06060-BHS-DWC**

## REPORT AND RECOMMENDATION

Noting Date: June 1, 2018

The District Court has referred this action to United States Magistrate Judge David W.

Christel. Petitioner James Philip Douglas filed his federal habeas Amended Petition, pursuant to 28 U.S.C. § 2254, seeking relief from state court convictions and sentence. *See* Dkt. 1, 23. The Court concludes the Honorable Benjamin H. Settle, the District Judge assigned to this case, previously dismissed Grounds 1, 2, and 3 of the Amended Petition. *See* Dkt. 18. The Court also finds the state court's adjudication of Ground 4 was not contrary to, or an unreasonable application of, clearly established federal law. Therefore, the undersigned recommends the Amended Petition be denied and a certificate of appealability be denied.

## **BACKGROUND**

## **I. Factual Background**

Petitioner was convicted of first degree arson, residential burglary, violation of a protective order, second degree assault, and bail jumping in the Pierce County Superior Court.

*See State v. Douglas*, 146 Wash. App. 1046 (2008); Dkt. 11, Exhibit 3. The entire factual background is contained in the Report and Recommendation filed on August 9, 2017. Dkt. 16.

Thus, the Court will only provide the facts relevant to Ground 4 in this Report and Recommendation.

The Court of Appeals of the State of Washington summarized the relevant facts related to Petitioner's Ground 4 as follows:

On May 26, 2010, Douglas again requested to proceed pro se. Although the judge expressed concerns about Douglas's ability to represent himself, she conducted a colloquy and granted Douglas's request to be allowed to proceed pro se.

On June 20, 2010, the trial commenced. Because the State alleged that Douglas's offenses were part of an ongoing pattern of abuse, the trial court bifurcated the trial under RCW 9.94A.537(4) to avoid unduly prejudicing the jury. On August 17, 2010, the jury found Douglas guilty of first degree arson, residential burglary, and felony violation of a protection order. After the jury returned the verdicts, Douglas requested that the trial court appoint counsel for the aggravating factor phase of trial. The State objected, arguing that reappointing counsel would likely require a continuance and that the jury had already been on the case for two months. The State also expressed concern that Douglas would not work with counsel, resulting in another motion to proceed pro se. After an extensive colloquy with Douglas, the trial court determined that Douglas was not willing to give control of the case to an attorney and refused to reappoint counsel. At that point, Douglas refused to further participate in the case and voluntarily absented himself from the aggravating factor phase of his trial.

On August 19, 2010, the jury found that the arson and residential burglary were part of an ongoing pattern of abuse against [three victims]. The jury also found that the arson was committed with deliberate cruelty.

*State v. Douglas*, 173 Wash. App. 849, 853–54, 295 P.3d 812 (2013) (internal and footnote omitted); Dkt. 11, Exhibit 4, pp. 5-6.

1       **II. Procedural Background**

2       Petitioner challenged his Pierce County Superior Court convictions and sentence on  
3 direct appeal.<sup>1</sup> Dkt. 11, Exhibits 5, 6. The Court of Appeals of the State of Washington reversed  
4 the arson, burglary, and violation of a protective order convictions, and affirmed the separate  
5 assault and bail jumping convictions. Dkt. 11, Exhibit 3. Petitioner did not seek review by the  
6 Washington State Supreme Court and the mandate was issued on October 14, 2008. Dkt. 11,  
7 Exhibits 8-10.

8       Petitioner was resentenced on the assault and bail jumping convictions in 2009 because  
9 the reversal of the arson and burglary convictions impacted the sentence calculation. Dkt. 11,  
10 Exhibit 2. Petitioner was sentenced to twelve months on the assault and bail jumping  
11 convictions. *Id.* Petitioner appealed the new sentence to the Court of Appeals of the State of  
12 Washington, which affirmed the sentence. Dkt. 11, Exhibits 11-14. On February 8, 2012, the  
13 Washington State Supreme Court denied Petitioner's petition for review. Dkt. 11, Exhibits 17,  
14 18. The Court of Appeals of the State of Washington issued its mandate on March 5, 2012. Dkt.  
15 11, Exhibit 19.

16       Petitioner received a new trial on the counts of arson, burglary, and violation of a  
17 protective order. *See* Dkt. 11, Exhibit 1. He was again convicted on these three counts. *Id.*  
18 Petitioner appealed the convictions and sentence to the Court of Appeals of the State of  
19 Washington. Dkt. 11, Exhibit 20-23. The Court of Appeals of the State of Washington affirmed  
20 Petitioner's convictions and sentence, and Petitioner sought review with the Washington State  
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23       <sup>1</sup> Respondent concedes Petitioner exhausted the grounds for relief raised in the Amended Petition. *See* Dkt.  
24 10, p. 12; Dkt. 24, p. 3. Therefore, the Court will not discuss the specific grounds for relief raised on his direct  
appeals or in his state Personal Restraint Petitions.

1 Supreme Court. Dkt. 11, Exhibits 4, 24. The Washington State Supreme Court denied review on  
2 September 4, 2013, and the mandate was issued on September 12, 2013. Dkt. 11, Exhibits 25, 26.

3 Petitioner filed a personal restraint petition (“PRP”) seeking state post-conviction relief  
4 from the assault and bail jumping convictions and sentence on June 3, 2012. Dkt. 11, Exhibit 27.

5 Petitioner’s PRP was dismissed by the Court of Appeals of the State of Washington. Dkt. 11,  
6 Exhibit 32. Petitioner filed a motion for reconsideration, which the Washington State Supreme  
7 Court treated as a motion for discretionary review. Dkt. 11, Exhibit 33, 34. The Washington  
8 State Supreme Court denied review, and a certificate of finality was issued on April 11, 2014.  
9 Dkt. 11, Exhibits 34, 35.

10 Petitioner also filed a second PRP challenging his arson, burglary, and violation of a  
11 protective order convictions and sentence. Dkt. 11, Exhibit 36. The Court of Appeals of the State  
12 of Washington dismissed the second PRP. Dkt. 11, Exhibit 39. Petitioner filed a motion for  
13 reconsideration, which was treated as a motion for discretionary review. Dkt. 11, Exhibit 40. The  
14 Washington State Supreme Court denied review on April 24, 2015. Dkt. 11, Exhibit 41. The  
15 Court of Appeals of the State of Washington issued a certificate of finality on June 29, 2015.  
16 Dkt. 11, Exhibit 42.

17 Petitioner also filed several post-conviction motions in the state superior court, which  
18 were treated as a PRP and dismissed. *See* Dkt. 11, Exhibits 43, 49, 51-54. At the time  
19 Respondent filed her first Answer, Plaintiff has two additional PRPs pending with the Court of  
20 Appeals for the State of Washington. *See* Dkt. 10; Dkt. 11, Exhibit 55-57. As Respondent has  
21 conceded the grounds raised in the Amended Petition are exhausted, the Court will not further  
22 discuss these two PRPs. *See* Dkt. 10, 24.

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1 On December 29, 2016, Petitioner filed his Petition raising the following three grounds:  
2 (1) under the Ex Post Facto Clause, the state does not have authority to impose an exceptional  
3 sentence if one was not imposed at the prior trial or sentencing; (2) the original cases that were  
4 joined for trial were both prejudiced by ineffective assistance of counsel; and (3) upon return for  
5 retrial, a speedy trial was asked for but was not granted violating the speedy trial rules. Dkt. 7.

6 Respondent filed the Answer on February 27, 2017, maintaining the state court's  
7 adjudication of Grounds 1 through 3 was not contrary to, or an unreasonable application of,  
8 clearly established federal law. Dkt. 10, 15. On August 9, 2017, the undersigned entered a Report  
9 and Recommendation ("R&R") recommending Petitioner's Petition be denied. Dkt. 16. After  
10 Petitioner filed Objections, Judge Settle adopted the R&R in part and "Petitioner's claims for a  
11 speedy trial violation, an ex post facto violation, and ineffective assistance of counsel [were]  
12 dismissed." Dkt. 18, p. 3 (emphasis omitted). Judge Settle, however, remanded this action to the  
13 undersigned "for further proceedings to determine whether the petition may be amended to add  
14 the claim raised in Petitioner's reply." *Id.*

15 The Court re-named Petitioner's Reply to "Motion to Amend the Petition" and granted  
16 the Motion. Dkt. 19, 22. On December 14, 2017, Petitioner's Amended Petition was filed, raising  
17 the following four grounds:

- 18 1. Under the Ex Post Facto Clause, the state does not have authority to impose an  
19 exceptional sentence if one was not imposed at the prior trial or sentencing.
- 20 2. The original cases that were joined for trial were both prejudiced by ineffective assistance  
of counsel.
- 21 3. Upon return for retrial, a speedy trial was asked for but was not granted violating the  
speedy trial rules.
- 22 4. Counsel and standby counsel were denied at the first and second phases of the trial  
resulting in constitutional violations.

23 Dkt. 23.

1 Respondent filed an Answer to the Amended Petition on January 26, 2018. Dkt. 24.  
2 Petitioner did not file a reply. On March 15, 2018, the Court directed Respondent to file a  
3 supplement to the state court records. Dkt. 25. Respondent filed the supplemental state court  
4 record on April 18, 2018. Dkt. 26, 27.

**EVIDENTIARY HEARING**

The decision to hold an evidentiary hearing is committed to the Court's discretion.

7 *Schrivo v. Landrigan*, 550 U.S. 465, 473 (2007). “[A] federal court must consider whether such a  
8 hearing could enable an applicant to prove the petition’s factual allegations, which, if true, would  
9 entitle the applicant to federal habeas relief.” *Id.* at 474. In determining whether relief is  
10 available under 28 U.S.C. § 2254(d)(1), the Court’s review is limited to the record before the  
11 state court. *Cullen v. Pinholster*, 131 S.Ct. 1388 (2011). A hearing is not required if the  
12 allegations would not entitle Petitioner to relief under §2254(d). *Landrigan*, 550 U.S. at 474. “It  
13 follows that if the record refutes the applicant’s factual allegations or otherwise precludes habeas  
14 relief, a district court is not required to hold an evidentiary hearing.” *Id.*; *see Cullen*, 131 S.Ct.  
15 1388. The Court finds it is not necessary to hold an evidentiary hearing in this case because the  
16 grounds raised in the Amended Petition can be resolved on the existing state court record.

## **DISCUSSION**

18 Pursuant to 28 U.S.C. § 2254(d)(1), a federal court may not grant habeas relief on the  
19 basis of a claim adjudicated on the merits in state court unless the adjudication “resulted in a  
20 decision that was contrary to, or involved an unreasonable application of, clearly established  
21 Federal law, as determined by the Supreme Court of the United States.” In interpreting this  
22 portion of the federal habeas rules, the Supreme Court has ruled a state decision is “contrary to”  
23 clearly established Supreme Court precedent if the state court either (1) arrives at a conclusion

1 opposite to that reached by the Supreme Court on a question of law, or (2) confronts facts  
2 “materially indistinguishable” from relevant Supreme Court precedent and arrives at an opposite  
3 result. *Williams v. Taylor*, 529 U.S. 362, 405 (2000).

4 Moreover, under § 2254(d)(1), “a federal habeas court may not issue the writ simply  
5 because that court concludes in its independent judgment that the relevant state-court decision  
6 applied clearly established federal law erroneously or incorrectly. Rather, that application must  
7 also be unreasonable.” *Id.* at 411; *see Lockyer v. Andrade*, 538 U.S. 63, 69 (2003). An  
8 unreasonable application of Supreme Court precedent occurs “if the state court identifies the  
9 correct governing legal rule from [Supreme Court] cases but unreasonably applies it to the facts  
10 of the particular state prisoner’s case.” *Williams*, 529 U.S. at 407. In addition, a state court  
11 decision involves an unreasonable application of Supreme Court precedent “if the state court  
12 either unreasonably extends a legal principle from [Supreme Court] precedent to a new context  
13 where it should not apply or unreasonably refuses to extend that principle to a new context where  
14 it should apply.” *Walker v. Martel*, 709 F.3d 925, 939 (9th Cir. 2013) (*quoting Williams*, 529  
15 U.S. at 407).

16 The Anti-Terrorism Effective Death Penalty Act (“AEDPA”) requires federal habeas  
17 courts to presume the correctness of state courts’ factual findings unless applicants rebut this  
18 presumption with “clear and convincing evidence.” 28 U.S.C. § 2254(e)(1). Further, review of  
19 state court decisions under §2254(d)(1) is “limited to the record that was before the state court  
20 that adjudicated the claim on the merits.” *Cullen*, 131 S.Ct. at 1398.

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1           **I.       Grounds 1-3**

2           Petitioner raised Grounds 1, 2, and 3 in the original Petition. *See* Dkt. 7. The Court has  
3           dismissed these three grounds. Dkt. 18. Therefore, the Court declines to reconsider Grounds 1, 2,  
4           or 3.

5           **II.      Ground 4 –Right to Counsel**

6           In Ground 4, Petitioner alleges he was denied: (A) standby counsel prior to the first phase  
7           of his trial; and (B) appointed counsel at the second phase of his trial. Dkt. 23, p. 10.

8           The Sixth Amendment provides a defendant the right to self-representation in criminal  
9           cases. *See Faretta v. California*, 422 U.S. 806, 821, 832 (1975). “When an accused manages his  
10          own defense, he relinquishes, as a purely factual matter, many of the traditional benefits  
11          associated with the right to counsel.” *Id.* at 835. “Waiver of the right to counsel, as of  
12          constitutional rights in the criminal process generally, must be a ‘knowing, intelligent ac[t] done  
13          with sufficient awareness of the relevant circumstances.’” *Iowa v. Tovar*, 541 U.S. 77, 81 (2004)  
14          (quoting *Brady v. United States*, 397 U.S. 742, 748 (1970)). Therefore, a defendant “should be  
15          made aware of the dangers and disadvantages of self-representation, so that the record will  
16          establish that ‘he knows what he is doing and his choice is made with eyes open.’” *Faretta*, 422  
17          U.S. at 835 (quoting *Adams v. U.S. ex rel. McCann*, 317 U.S. 269, 279 (1942)).

18           A defendant’s waiver must be “an intentional relinquishment or abandonment of a known  
19          right or privilege.” *Brewer v. Williams*, 430 U.S. 387, 404 (1977) (quoting *Johnson v. Zerbst*,  
20          304 U.S. 458, 464 (1938)). “[T]he law ordinarily considers a waiver knowing, intelligent, and  
21          sufficiently aware if the defendant fully understands the nature of the right and how it would  
22          likely apply *in general* in the circumstances—even though the defendant may not know the  
23          specific detailed consequences of invoking it.” *United States v. Ruiz*, 536 U.S. 622 (2002)

1 (emphasis in original). The Supreme Court has not “prescribed any formula or script to be read  
2 to a defendant who states that he elects to proceed without counsel.” *Id.* at 88. However,  
3 “[w]arnings of pitfalls of proceeding to trial without counsel . . . must be rigorously conveyed.”  
4 *Id.* at 89 (internal quotations and citations omitted); *see also Tovar*, 541 U.S. at 81 (in discussing  
5 waiver of counsel when entering a guilty plea, the Supreme Court found the constitutional  
6 requirements were satisfied when the trial court informed the accused of the nature of the  
7 charges against him, his right to be counseled regarding his case, and the range of allowable  
8 punishments).

9       A. Right to Standby Counsel

10       First, Petitioner states the trial court’s decision to grant Petitioner *pro se* status on May  
11 26, 2010, but deny his request for standby counsel prior to the first phase of his trial resulted in a  
12 manifest error affecting his constitutional rights. Dkt. 23, p. 10.

13       Once a court has determined that a defendant’s waiver of his right to counsel is knowing,  
14 intelligent, and voluntary, it may appoint standby or “advisory” counsel to assist the defendant  
15 without infringing on his right to self-representation. *McKaskle v. Wiggins*, 465 U.S. 168, 176–  
16 77 (1984). However, a defendant who waives his right to counsel does not have a right to  
17 standby counsel. *United States v. Moreland*, 622 F.3d 1147, 1155 (9th Cir. 2010)<sup>2</sup>; *United States*  
18 *v. Salemo*, 81 F.3d 1453, 1460 (9th Cir. 1996); *United States v. Kienenberger*, 13 F.3d 1354,  
19 1356 (9th Cir. 1994).

20       In rejecting Petitioner’s claim that his rights were violated when he was denied standby  
21 counsel, the Court of Appeals of the State of Washington stated:

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23       <sup>2</sup> Although Supreme Court precedent provides the only relevant source of clearly established federal law  
24 for AEDPA purposes, circuit precedent can be “persuasive authority for purposes of determining whether particular  
state court decision is an ‘unreasonable application’ of Supreme court law,” and in ascertaining “what law is ‘clearly  
established.’” *Duhaime v. Ducharme*, 200 F.3d 597, 600–01 (9th Cir. 2000).

Next, Douglas argues that the trial court erred by refusing to appoint standby counsel after Douglas fired his second attorney and renewed his request to proceed pro se. A defendant proceeding pro se has no constitutional right to standby counsel. [*State v. Silva*, 107 Wash.App. [605,] 626, 27 P.3d 663 [(2001)]. A pro se criminal defendant only has the right to adequate resources to prepare his defense. *Silva*, 107 Wash.App. at 622–23, 27 P.3d 663. As we explained above, Douglas was provided constitutionally adequate resources to aid in his defense. The trial court did not err by refusing to appoint standby counsel for Douglas.

*Douglas*, 173 Wash. App. at 856; Dkt. 11, Exhibit 4, p. 20.

Petitioner does not allege his waiver of his right to counsel was invalid. *See Dkt. 23; see also Dkt. 11, Exhibit 4, pp. 3-5; Dkt. 14, Exhibit 96.* He argues only that his rights were violated when he was denied standby counsel after validly waiving his right to counsel. *See Dkt. 23, p. 10.* Here, the state court correctly found there is no constitutional right to standby counsel after a defendant has waived his right to counsel. Further, the state court determined that Petitioner was provided with adequate resources to aid in his defense. *See Douglas, 173 Wash. App. at 856; Dkt. 11, Exhibit 4, pp. 16-18.*<sup>3</sup> As Petitioner does not have a constitutional right to standby counsel after he validly waives his right to counsel, Petitioner has failed to show the state court's denial of his request for standby counsel prior to the first phase of his trial violated his constitutional rights.

Therefore, Petitioner has not demonstrated the state court's conclusion that the trial court did not err when it declined to provide Petitioner with standby counsel prior to the first phase of his trial was contrary to, or an unreasonable application of, clearly established federal law, or was an unreasonable determination of the facts in light of the evidence presented at trial. See *Simpson v. Battaglia*, 458 F.3d 585, 597 (7th Cir. 2006) ("Certainly there is no Supreme Court precedent clearly establishing [a right to standby counsel].").

<sup>3</sup> Petitioner did not raise a claim of inadequate resources to aid in his defense. *See* Dkt. 23. Thus, the Court need not address this portion of the state court's decision.

1       B. Right to Appointed Counsel

2       Second, Petitioner asserts the trial court's denial of Petitioner's request for appointed  
3       counsel during the second phase, the aggravating factor phase, of his trial was a manifest error  
4       resulting in a constitutional violation. Dkt. 23, p 10.

5       In determining Petitioner's right to counsel was not violated when the trial court did not  
6       appoint counsel for the second phase of Petitioner's trial, the Court of Appeals of the State of  
7       Washington stated:

8       Douglas next argues that he was denied his Sixth Amendment right to counsel  
9       when the trial court refused to reappoint counsel for the aggravating factor phase  
10       of his trial. As an initial matter, Douglas urges this court to adopt a *per se* rule that  
11       counsel must be appointed for sentencing if the defendant requests it. Douglas  
12       cites exclusively to federal law to support this proposition. Br. of Appellant at 15  
13       (citing *United States v. Fazzini*, 871 F.2d 635 (7th Cir.1989); *United States v.*  
14       *Holmen*, 586 F.2d 322 (4th Cir.1978)). But the cases Douglas cites do not support  
15       his position because Douglas requested counsel midtrial rather than at a  
16       sentencing hearing. Instead, as the State correctly points out, under Washington  
17       law, once a defendant has asserted his right to represent himself and made a  
18       knowing, voluntary, and intelligent waiver of counsel, a criminal defendant is no  
19       longer entitled to reappointment of counsel. *State v. DeWeese*, 117 Wash.2d 369,  
20       379, 816 P.2d 1 (1991).

21       After a defendant's valid waiver of counsel, the reappointment of counsel is  
22       within the trial court's discretion. *DeWeese*, 117 Wash.2d at 379, 816 P.2d 1.  
23       When deciding whether to reappoint counsel, the trial court may take into account  
24       all existing circumstances. *State v. Modica*, 136 Wash.App. 434, 443, 149 P.3d  
25       446 (2006) (citing *State v. Canedo-Astorga*, 79 Wash.App. 518, 525, 903 P.2d  
26       500 (1995), *review denied*, 128 Wash.2d 1025, 913 P.2d 816 (1996)), *aff'd*, 164  
27       Wash.2d 83, 186 P.3d 1062 (2008). “[T]he degree of discretion reposing in the  
28       trial court is at its greatest when a request for reappointment of counsel is made  
29       after trial has begun.” *Modica*, 136 Wash.App. at 443–44, 149 P.3d 446.

30       Here, the trial court did not abuse its discretion when it refused to reappoint  
31       counsel for Douglas for the aggravating factor phase of his trial. Douglas argues  
32       that the trial court erred by making its decision based on its finding that Douglas  
33       would be unwilling to give up control of the case to an attorney. Douglas asserts  
34       that the only condition he placed on accepting new counsel was that the attorney  
35       be effective, which is his constitutional right. However, the record belies  
36       Douglas's assertion. Douglas had already fired two attorneys for being  
37       “ineffective,” although the attorney's alleged ineffectiveness was limited to a

1 disagreement about trial strategy. Douglas regularly made it clear that he believed  
2 he was the most capable to handle his case, and his only dissatisfaction was the  
3 difficulty he faced acting as his own attorney while in jail. *See DeWeese*, 117  
4 Wash.2d at 378, 816 P.2d 1 (defendant was not entitled to reappointment of  
5 counsel after he refused to accept professional advice from his two previous  
6 attorneys).

7 Even if Douglas had allowed counsel to control the case, appointment of counsel  
8 would have caused an excessive delay in a case that had already been in trial for  
9 approximately two months. Because Douglas refused to accept a DAC  
10 [(Department of Assigned Counsel)] attorney, any counsel would have to be  
11 appointed from the DAC conflict pool. Furthermore, counsel would likely need  
12 additional time to prepare for the aggravating factor phase of Douglas's trial.  
13 Douglas requested counsel in the middle of his trial, Douglas's request would  
14 have resulted in a significant delay while new counsel prepared, and, based on  
15 Douglas's prior conduct, the trial court had reason to believe reappointing counsel  
16 would result in another motion to proceed pro se. Accordingly, the trial court's  
17 decision does not rest on untenable grounds or reasons and the trial court did not  
18 abuse its discretion by denying Douglas's request for counsel for the aggravating  
19 factor phase of his trial. *Modica*, 136 Wash.App. at 443, 149 P.3d 446.

20 *Douglas*, 173 Wash. App. 849, 856 (internal footnote omitted); Dkt. 11, Exhibit 4, pp. 8-10.

21 In this case, the trial court bifurcated Petitioner's trial into a guilt phase and aggravating  
22 factor phase. *See* Dkt. 11, Exhibit 4; Dkt. 24, p. 7; Dkt. 26, Exhibit 104. Petitioner validly waived  
23 his right to counsel prior to proceeding with the first phase – the guilt phase – of his trial.<sup>4</sup> *See*  
24 Dkt. 23; Dkt. 11, Exhibit 4, pp. 3-5; Dkt. 14, Exhibit 96. After the first phase, Petitioner  
25 requested he be appointed counsel for the second phase – the aggravating factor phase – of his  
26 trial. Dkt. 26, Exhibit 105, pp. 2140-41. The trial court denied Petitioner's request for appointed  
27 counsel for the second phase of his trial because Petitioner would not relinquish control of his  
28 case. Dkt. 26, Exhibit 105, pp. 2145-55. On appeal, the Court of Appeals of the State of  
29 Washington found that (1) Petitioner would not relinquish control if his counsel was  
30 “ineffective;” (2) Petitioner had fired two previous attorneys for being “ineffective;” (3)  
31 appointing counsel in the middle of the trial would cause significant delays; and (4) the trial

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1 court had reason to believe, based on Petitioner's previous conduct regarding counsel, that  
2 appointing counsel would result in another motion to proceed *pro se*. See Dkt. 11, Exhibit 4, pp.  
3 8-10.

4 As discussed above, Petitioner has a right to represent himself during his criminal trial.

5 *See Faretta*, 422 U.S. at 821, 832. However, “[t]here is no clearly established federal law  
6 requiring the appointment of counsel after a defendant has validly waived counsel.” *Gonzales v.*  
7 *Ryan*, 2015 WL 4755068, at \*24 (D. Ariz. Aug. 12, 2015). Petitioner validly waived his right to  
8 counsel. He then requested counsel be appointed mid-trial. The trial court denied the request  
9 after considering Petitioner’s prior tendency to refuse to relinquish control of the case to his  
10 attorney. The Court notes Petitioner also had a history of firing his attorneys, and appointing new  
11 counsel in the middle of the case would cause a delay in a trial that had already lasted nearly two  
12 months. *See* Dkt. 14, Exhibits 76, 85, 96; Dkt. 26, Exhibit 106, p. 2245, Exhibit 105, p. 2144.

13 The Court finds Petitioner has failed to show the state court’s decision was an  
14 unreasonable application of clearly established federal law. *See Marshall v. Rodgers*, 569 U.S.  
15 58, 62-63 (2013) (reversing appellate court’s decision finding trial judge violated criminal  
16 defendant’s Sixth Amendment right by not appointing counsel after the defendant had executed a  
17 valid waiver of counsel and represented himself at trial, but sought and was denied appointment  
18 of counsel to file a post-conviction motion for a new trial; noting absence of any Supreme Court  
19 decision addressing criminal defendant’s ability to reassert right to counsel once validly waived,  
20 and finding no basis for conclusion that the state court’s approach to case was contrary to or an  
21 unreasonable application of clearly established federal law); *McCormick v. Adams*, 621 F.3d 970,  
22 980 (9th Cir. 2010) (holding the state court’s decision to deny the defendant appointment of  
23 counsel in the middle of his trial after he validly waived counsel was not an unreasonable  
24

1 determination of the facts presented to it, nor was it contrary to, or an unreasonable application  
2 of, clearly-established federal law). As there is no clearly established federal law requiring that  
3 Petitioner be reappointed counsel for the second phase of his trial after he validly waived his  
4 right to counsel at the beginning of his first phase of the trial, Petitioner has not demonstrated the  
5 state court's conclusion that the trial court did not err when it failed to appoint Petitioner counsel  
6 for the second phase of his trial was contrary to, or an unreasonable application of, clearly  
7 established federal law, or was an unreasonable determination of the facts in light of the evidence  
8 presented at trial.

9       C. Conclusion

10      The Court finds Petitioner has not shown the state court's decision finding Petitioner's  
11 constitutional rights were not violated when the trial court denied (1) standby counsel prior to the  
12 first phase of his trial; and (2) appointed counsel for the second phase of his trial was contrary to,  
13 or an unreasonable application of, clearly established federal law, or was an unreasonable  
14 determination of the facts in light of the evidence presented at trial. Accordingly, the Court  
15 recommends Ground 4 be denied.

16                    CERTIFICATE OF APPEALABILITY

17      A petitioner seeking post-conviction relief under 28 U.S.C. § 2254 may appeal a district  
18 court's dismissal of the federal habeas petition only after obtaining a certificate of appealability  
19 (COA) from a district or circuit judge. *See* 28 U.S.C. § 2253(c). "A certificate of appealability  
20 may issue . . . only if the [petitioner] has made a substantial showing of the denial of a  
21 constitutional right." 28 U.S.C. § 2253(c)(2). Petitioner satisfies this standard "by demonstrating  
22 that jurists of reason could disagree with the district court's resolution of his constitutional  
23 claims or that jurists could conclude the issues presented are adequate to deserve encouragement

24

1 to proceed further." *Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003) (*citing Slack v. McDaniel*,  
2 529 U.S. 473, 484 (2000)).

3 No jurist of reason could disagree with this Court's evaluation of Petitioner's claims or  
4 would conclude the issues presented in the Petition should proceed further. Therefore, the Court  
5 concludes Petitioner is not entitled to a certificate of appealability with respect to this Amended  
6 Petition.

7 CONCLUSION

8 For the above stated reasons, the Court recommends the Amended Petition be denied. No  
9 evidentiary hearing is necessary and a certificate of appealability should be denied.

10 Pursuant to 28 U.S.C. § 636(b)(1) and Fed. R. Civ. P. 72(b), the parties shall have  
11 fourteen (14) days from service of this Report to file written objections. *See also* Fed. R. Civ. P.  
12 6. Failure to file objections will result in a waiver of those objections for purposes of de novo  
13 review by the district judge. *See* 28 U.S.C. § 636(b)(1)(C). Accommodating the time limit  
14 imposed by Fed. R. Civ. P. 72(b), the clerk is directed to set the matter for consideration on June  
15 1, 2018, as noted in the caption.

16 Dated this 14th day of May, 2018.

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19 David W. Christel  
United States Magistrate Judge  
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**Additional material  
from this filing is  
available in the  
Clerk's Office.**