UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

CHARLES T. KIRVIN, AKA Charles Terrell Kirvin,

Petitioner-Appellant,

v.

PEOPLE OF THE STATE OF CALIFORNIA; XAVIER CANO, Warden,

Respondents-Appellees.

No. 19-55921

D.C. No. 2:16-cv-03387-AG-LAL
Central District of California,
Los Angeles

ORDER

Before: TALLMAN and NGUYEN, Circuit Judges.

The request for a certificate of appealability (Docket Entry Nos. 2, 3, and 5) is denied because the underlying 28 U.S.C. § 2254 petition fails to state any federal constitutional claims debatable among jurists of reason. *See* 28 U.S.C. § 2253(c)(2)-(3); *Gonzalez v. Thaler*, 565 U.S. 134, 140-41 (2012) ("When ... the district court denies relief on procedural grounds, the petitioner seeking a COA must show both 'that jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling.'") (quoting *Slack v. McDaniel*, 529 U.S. 473, 484 (2000)).

Any pending motions are denied as moot.

DENIED.

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

CHARLES T. KIRVIN, Petitioner, v. DAVID BAUGHMAN, Warden,[1] Respondent.	Case No. LACV 16-3387-AG (LAL) **REPORT AND RECOMMENDATION OF UNITED STATES MAGISTRATE JUDGE**

This Report and Recommendation is submitted to the Honorable Andrew J. Guilford, United States District Judge, under the provisions of 28 U.S.C. § 636 and General Order 194 of the United States District Court for the Central District of California.

I.

PROCEEDINGS

On May 17, 2016, Charles T. Kirvin ("Petitioner") filed a Petition for Writ of Habeas Corpus by a Person in State Custody pursuant to 28 U.S.C. § 2254 ("Petition"). On November 20, 2017, Respondent filed an Answer to the Petition.[2] On February 5, 2018, Petitioner filed a Reply. Thus, this matter is ready for decision.

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[1] At the request of Respondent, this Court substitutes Warden Baughman as the Respondent in this matter. See Answer at 1 n.1; see also Fed. R. Civ. P. 25(d).

[2] On June 27, 2016, Respondent filed a Motion to Dismiss the Petition, arguing that Claim Three of the Petition was unexhausted and Claim Four was unexhausted and moot. In response, on March 16, 2017, Petitioner filed a request to stay this action and hold it in abeyance while he exhausted his unexhausted Claims Three and Four. On August

II.

PROCEDURAL HISTORY

On November 20, 2012, Petitioner was convicted after a jury trial in the Los Angeles County Superior Court of two counts of misdemeanor battery in a dating relationship,[3] one count of assault by means likely to produce great bodily injury,[4] one count of dissuading a witness by force or threat,[5] and nine counts of dissuading a witness from prosecuting a crime.[6] (Volume 2 Clerk's Transcript ("CT") at 218-21, 223-31, 233-39, 297, 299.) Petitioner admitted having suffered prior convictions. (2 CT at 201-02.) On January 17, 2013, the trial court sentenced Petitioner to a state prison term of 25 years, in addition to a consecutive one-year jail term. (2 CT at 287-95, 297-99.)

Petitioner appealed his convictions to the California Court of Appeal. (Lodgments 9-11.) On December 4, 2014, the California Court of Appeal struck a domestic violence restitution fine, but otherwise affirmed the judgment. (Lodgment 1.)

Petitioner then filed a petition for review in the California Supreme Court. (Lodgment 2.) On March 11, 2015, the California Supreme Court denied review. (Lodgment 3.)

III.

SUMMARY OF THE EVIDENCE PRESENTED AT TRIAL

Because Petitioner is not challenging the sufficiency of the evidence, after independently reviewing the record, this Court adopts the factual discussion of the California Court of Appeal opinion as a fair and accurate summary of the evidence presented at trial:[7]

10, 2017, the previously assigned magistrate judge issued a Report and Recommendation that Petitioner's motion for stay and abeyance be denied. On October 30, 2017, the District Judge accepted the Report and Recommendation and denied Petitioner's motion for stay and abeyance, impliedly dismissing Petitioner's unexhausted claims. Accordingly, this Court addresses Petitioner's Claims One and Two only. To the extent Claims Three and Four were not dismissed, this Court has considered Petitioner's arguments and find they do not warrant federal habeas corpus relief.

[3] Cal. Penal Code § 243(e)(1).

[4] Cal. Penal Code § 245(a)(1).

[5] Cal. Penal Code § 136.1(c)(1).

[6] Cal. Penal Code § 136.1(b)(2).

[7] "Factual determinations by state courts are presumed correct absent clear and convincing evidence to the contrary . . ." Miller-El v. Cockrell, 537 U.S. 322, 340, 123 S. Ct. 1029, 154 L. Ed. 2d 931 (2003) (citing 28 U.S.C. § 2254(e)(1)). Thus, Ninth Circuit cases have presumed correct the factual summary set forth in an opinion of the California Court of Appeal under 28 U.S.C. §2254(e)(1). See, e.g., Moses v. Payne, 555 F.3d 742, 746 n.1 (9th Cir. 2009) (citations omitted); Slovik v. Yates, 556 F.3d 747, 749 n.1 (9th Cir. 2009).

Al Jesse Cambell (Cambell) was driving Defendant Charles Kirvin (Defendant) and others from Palmdale to Inglewood, California. Defendant and Cambell were dating. Upset with how Cambell was eating candy, Defendant punched her in the right eye so hard it bled. Defendant told Cambell he would hurt her family if she told anyone who hit her; he subsequently drove her to a nearby police station and hospital where she reported that she was hit by a stranger trying to rob her.

A few days later, Defendant grabbed Cambell's arm gruffly after she rebuffed his sexual advances; her arm bruised. When the police arrived, they noticed Cambell's still swollen eye and she told them the truth about the prior incident. Defendant was arrested. Defendant thereafter made several calls from jail urging his sister and others to get Cambell "not to come to court." Six of these calls were made to Defendant's sister on the same day.

(Lodgment 1 at 2.)

IV.

PETITIONER'S CLAIMS

Petitioner raises the following claims for habeas corpus relief:

(1) The trial court abused its discretion when it found Petitioner competent to stand trial; and

(2) The trial court abused its discretion when it denied Petitioner's request to represent himself pursuant to Faretta v. California.[8]

V.

STANDARD OF REVIEW

A. 28 U.S.C. § 2254

The standard of review that applies to Petitioner's claims is stated in 28 U.S.C. § 2254, as amended by the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"):

[8] 422 U.S. 806, 95 S. Ct. 2525, 45 L. Ed. 2d 562 (1975).

> (d) 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—
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> (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
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> (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.

28 U.S.C. § 2254(d). If these standards are difficult to meet, it is because they were meant to be. As the United States Supreme Court stated in Harrington v. Richter,[9] while the AEDPA "stops short of imposing a complete bar on federal court relitigation of claims already rejected in state proceedings[,]" habeas relief may be granted only "where there is no possibility fairminded jurists could disagree that the state court's decision conflicts" with United States Supreme Court precedent. Further, a state court factual determination must be presumed correct unless rebutted by clear and convincing evidence.[10]

B. Sources of "Clearly Established Federal Law"

According to Williams v. Taylor,[11] the law that controls federal habeas review of state court decisions under the AEDPA consists of holdings (as opposed to dicta) of Supreme Court decisions "as of the time of the relevant state-court decision." To determine what, if any, "clearly established" United States Supreme Court law exists, a federal habeas court also may examine decisions other than those of the United States Supreme Court.[12] Ninth Circuit cases "may be persuasive."[13] A state court's decision cannot be contrary to, or an unreasonable

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9 562 U.S. 86, 131 S. Ct. 770, 786, 178 L. Ed. 2d 624 (2011).
10 28 U.S.C. § 2254(e)(1).
11 529 U.S. 362, 412, 120 S. Ct. 1495, 146, L. Ed. 2d 389 (2000).
12 LaJoie v. Thompson, 217 F.3d 663, 669 n.6 (9th Cir. 2000).
13 Duhaime v. Ducharme, 200 F.3d 597, 600 (9th Cir. 1999).

application of, clearly established federal law, if no Supreme Court decision has provided a clear holding relating to the legal issue the habeas petitioner raised in state court.[14]

Although a particular state court decision may be both "contrary to" and an "unreasonable application of" controlling Supreme Court law, the two phrases have distinct meanings under Williams.

A state court decision is "contrary to" clearly established federal law if the decision either applies a rule that contradicts the governing Supreme Court law, or reaches a result that differs from the result the Supreme Court reached on "materially indistinguishable" facts.[15] If a state court decision denying a claim is "contrary to" controlling Supreme Court precedent, the reviewing federal habeas court is "unconstrained by § 2254(d)(1)."[16] However, the state court need not cite or even be aware of the controlling Supreme Court cases, "so long as neither the reasoning nor the result of the state-court decision contradicts them."[17]

State court decisions that are not "contrary to" Supreme Court law may be set aside on federal habeas review only "if they are not merely erroneous, but 'an unreasonable application' of clearly established federal law, or based on 'an unreasonable determination of the facts.'"[18] Accordingly, this Court may reject a state court decision that correctly identified the applicable federal rule but unreasonably applied the rule to the facts of a particular case.[19] However, to obtain federal habeas relief for such an "unreasonable application," a petitioner must show that the state court's application of Supreme Court law was "objectively unreasonable" under Woodford v. Visciotti.[20] An "unreasonable application" is different from merely an incorrect one.[21]

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14 Brewer v. Hall, 378 F.3d 952, 955 (9th Cir. 2004); see also Carey v. Musladin, 549 U.S. 70, 77, 127, S. Ct. 649, 649, 166 L. Ed. 2d 482 (2006) (in the absence of a Supreme Court holding regarding the prejudicial effect of spectators' courtroom conduct, the state court's decision could not have been contrary to or an unreasonable application of clearly established federal law).

15 Early v. Packer, 537 U.S. 3, 8, 123 S. Ct. 362, 154 L. Ed. 2d 263 (2002) (per curiam) (citing Williams, 529 U.S. at 405-06).

16 Williams, 529 U.S. at 406.

17 Early, 537 U.S. at 8.

18 Id. at 11 (citing 28 U.S.C. § 2254(d)).

19 See Williams, 529 U.S. at 406-10, 413.

20 537 U.S. 19, 27, 123 S. Ct. 357, 154 L. Ed. 2d 279 (2002).

21 Williams, 529 U.S. at 409-10.

Where, as here, the California Supreme Court denied the claims without comment, the state high court's "silent" denial is considered to be "on the merits" and to rest on the last reasoned decision on these claims. In the case of Petitioner's claims, this Court looks to the grounds the California Court of Appeal stated in its decision on direct appeal.[22]

VI.

DISCUSSION

A. Competency

1. Background

In Claim One, Petitioner argues the trial court abused its discretion by finding Petitioner competent to stand trial because the court's conclusion was not supported by substantial evidence. (Petition at 3.)

The California Court of Appeal detailed the procedural background underlying Petitioner's claim, as follows:

> Prior to trial, Defendant expressed dissatisfaction with his appointed counsel and the trial court held a hearing with Defendant and his lawyer, pursuant to *People v. Marsden* (1970) 2 Cal.3d 118 (*Marsden*). At that hearing, Defendant complained that his attorney was not moving the case forward fast enough, and was too willing to "waive time." Defendant also stated that he was seeing "mental images" "in his head" of his lawyer "flip[ping] [him] off." The trial court found no basis to appoint new counsel, but declared a doubt about Defendant's competence, suspended the criminal proceedings under section 1368, and appointed two mental health experts to examine Defendant.
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> After examining Defendant, each expert reported that Defendant had first "hear[d] voices" 18 years earlier, had since been on and off various medications, and had never been hospitalized for any mental issues. Both experts further opined that Defendant understood the charges against him, the role of the court officers, and what was at stake. They differed in their opinion of whether

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[22] See Ylst v. Nunnemaker, 501 U.S. 797, 803-06, 111 S. Ct. 2590, 115 L. Ed. 2d 706 (1991).

Defendant could assist his counsel: Dr. Stephen Wilson thought Defendant could not, while Dr. Kory Knapke thought he could. The court appointed a third expert to evaluate Defendant, but Defendant refused to meet with him on two separate occasions. The third expert informed the court that he could not render a "direct opinion" without interviewing Defendant, but remarked that the "available information"--namely, the documents available to the expert as well as Defendant's custodial placement outside the psychiatric unit--indicated that Defendant had not overcome the presumption of competency.

After the parties submitted the issue of competency on the reports, the court ruled that Defendant had not rebutted the statutory presumption of competency. The court cited the absence of any "indication at all that [Defendant] is suffering from any type of mental illness"; the fact that Defendant was not being housed in the mental health unit of the jail; and the concurrence of the two examining experts that "Defendant has a rational, factual understanding of the charges and the nature and purposes of the proceedings." In accord with Dr. Knapke's opinion, the court concluded that Defendant was "able to comprehend his own status and condition in reference to such proceedings and . . . is able to assist counsel in conducting his defense."

(Lodgment 1 at 3-4.)

2. State Court Opinion

The California Court of Appeal denied Petitioner's claim on direct appeal, as follows:

Defendant contends that the trial court's competency determination is not supported by substantial evidence because (1) Dr. Wilson found him unable to assist in his own defense; and (2) the trial court should not have relied upon (a) the opinion of the third expert who never interviewed him; or (b) the jail officials' decision not to place him in a mental health unit.

. . .

> We []conclude that Defendant's contentions lack merit. Dr. Wilson's opinion is not controlling. Dr. Knapke found Defendant to be competent, and a single witness may establish any fact. (Evid. Code, § 411; *People v. Rasmuson* (2006) 145 Cal.App.4th 1487, 1508.) It is "not the role of this court to redetermine the credibility of experts or to reweigh the relative strength of their conclusions." (*Poe*, *supra*, 74 Cal.App.4th at p. 831.) There is also no reason to do so, given that both experts agreed that Defendant understood what was going on and what was at stake.
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> The trial court also did not commit any error vis-à-vis the third expert. Importantly, the court did not cite or otherwise purport to rely on that expert's opinion. But even if it had, courts may lawfully use a third expert as a "tie breaker" (*Blacksher*, *supra*, 52 Cal.4th at p. 798), and may rely upon a report not based on a face-to-face interview when the subject refuses to meet with the expert (*People v. Johnson* (2012) 53 Cal.4th 519, 533 (*Johnson*)). The trial court's observation that jail officials did not view Defendant as needing special accommodation due to mental health issues is also not cause for reversal. Dr. Knapke's report and the court's own observations of Defendant provided ample basis for the court to find that Defendant had not rebutted the presumption of competency; the court's reliance on additional information--even if extraneous--does not undermine the otherwise substantial evidence.

(Lodgment 1 at 5-6.)

3. Legal Standard

The Due Process Clause of the Fourteenth Amendment prohibits the criminal prosecution of a defendant who is not competent to stand trial.[23] A defendant is incompetent if "he lacks the capacity to understand the nature and object of the proceedings against him, to consult with counsel, and to assist in preparing his defense."[24] If the evidence raises a bona fide doubt about

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[23] Medina v. California, 505 U.S. 437, 439, 112 S. Ct. 2572, 120 L. Ed. 2d 353 (1992); Drope v. Missouri, 420 U.S. 162, 171-73, 95 S. Ct. 896, 43 L. Ed. 2d 103 (1975).

[24] Drope, 420 U.S. at 171.

the defendant's competence, due process requires the trial court to hold a full competency hearing.[25] The applicable test for competency is "whether the defendant has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding and has a rational as well as factual understanding of the proceedings against him."[26]

The burden of establishing mental incompetence rests with the petitioner.[27] In finding facts and determining credibility, a trial court is free to assign greater weight to the findings of government experts than to the opposing opinions of defense experts.[28] A "state court's determination that a defendant is competent to stand trial is a factual determination which must be given deference when reviewed in federal court on a petition for habeas corpus."[29] Therefore, a federal court may overturn a state court competency finding only if rebutted by clear and convincing evidence.[30]

4. Analysis

Here, Petitioner has not presented clear and convincing evidence to rebut the state court's competency finding. Rather, Petitioner merely insists this Court should reweigh the evidence presented to the trial court and find Dr. Wilson's incompetency determination is deserving of greater weight than Dr. Knapke's competency determination. This is not the appropriate analysis this Court is to conduct.

In sum, the evidence before the trial court was sufficient to support its finding that Petitioner was competent to stand trial. Both doctors who examined Petitioner agreed that Petitioner understood all aspects of the proceedings against him. (Supplemental CT ("Supp. CT") at 1, 3, 5, 8-9.) The doctors disagreed, however, on the issue of whether Petitioner would be able to assist his trial counsel in his defense. (Supp. CT at 3, 9.) Yet, Petitioner was able to cooperate with both doctors during their examinations and was able to engage counsel and the

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[25] Pate v. Robinson, 383 U.S. 375, 385, 86 S. Ct. 836, 15 L. Ed. 2d 815 (1966).
[26] Godinez v. Moran, 509 U.S. 389, 396, 113 S. Ct. 2680, 125 L. Ed. 2d 321 (1993) (quoting Dusky v. United States, 362 U.S. 402, 402, 80 S. Ct. 788, 4 L. Ed. 2d 824 (1960).
[27] Boag v. Raines, 769 F.2d 1341, 1343 (9th Cir.1985); McKinney v. United States, 487 F.2d 948, 949 (9th Cir. 1973).
[28] See United States v. Gaselum-Almeida, 298 F.3d 1167, 1172 (9th Cir. 2002).
[29] Maggio v. Fulford, 462 U.S. 111, 103 S. Ct. 2261, 76 L. Ed. 2d 794 (1983) (per curiam); 28 U.S.C. § 2254(d)(2) & (e)(1).
[30] 28 U.S.C. § 2254(e)(1).

trial court during pretrial proceedings. (Supp. CT at 1, 3, 5, 8-9; 2 RT at A-2, A-12, A-14, C-1-C-5, D-7-D-9.) Petitioner was even able to lodge requests for new counsel, to represent himself, for discovery, and to disqualify the trial judge. (2 RT at A-2-A-3, A-12, B-5, C-1-C-9, D-7.) Despite Dr. Wilson's opinion to the contrary, the weight of the evidence before the trial court suggested Dr. Knapke's finding of competency was entitled to greater weight.[31]

Petitioner makes much of the fact that the trial court discussed the reports from the third appointed medical expert, Kaushal K. Sharma, M.D., who did not examine Petitioner. (Petition at 3; Reply at 6-10, 12-13, 15-16.) However, even excluding Dr. Sharma's reports, the evidence before the trial court was sufficient to support its competency finding. Thus, it is immaterial whether the trial court also discussed additional evidence that Petitioner suggests is unpersuasive.

Accordingly, the state courts' rejection of Petitioner's competency claim was not contrary to, or an unreasonable application of, federal law. Habeas relief is not warranted on Claim One.

B. Faretta

1. Background

In Claim Two, Petitioner argues the trial court abused its discretion when it denied Petitioner's "final request to represent himself." (Petition at 3.)

The California Court of Appeal detailed the background underlying Petitioner's claim, as follows:

> [After the trial court found Petitioner competent to stand trial, he] renewed his earlier request to represent himself, which the trial court had initially postponed until Defendant's competency was determined. The court denied Defendant's request on two grounds. First, the court pointed to Defendant's refusal to leave his cell that morning, and his earlier refusal to meet with the third mental health expert. As the court saw it, Defendant was "playing games," and Defendant's "actions in refusing to come to court and cooperate with doctors

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[31] See Gaselum-Almeida, 298 F.3d at 1172 (trial court may assign greater weight to the findings of government experts than to the opposing opinions of defense experts).

appointed by the court are disruptive, obstreperous, disobedient and disrespectful to the court, and his misconduct and its impact . . . affect the integrity of the trial court." Second, the court, citing *Indiana v. Edwards* (2008) 554 U.S. 164 (*Edwards*), noted Defendant, while competent to stand trial, lacked the competency to represent himself.

Defendant immediately exercised a peremptory challenge against the judge under Code of Civil Procedure section 170.6, and a new judge was assigned. Defendant again moved to disqualify his appointed counsel and to represent himself. The court conducted a second *Marsden* hearing, and found no basis upon which to appoint new counsel. The court also denied Defendant's request to represent himself due to (1) Defendant's repeated refusals to come to court and meet with the court-appointed expert; and (2) his misconduct in jail (namely, throwing urine and feces). The court found the sum total of Defendant's behavior to be "disruptive to the fundamental operations of the judicial system." (Lodgment 1 at 4.)

2. State Court Opinion

The California Court of Appeal rejected Petitioner's claim, explaining:

The first judge who denied Defendant's request to proceed without counsel relied upon Defendant's misconduct and lack of competency; the second judge relied solely upon Defendant's misconduct. Defendant attacks the second judge's ruling as an abuse of discretion because the judge (1) relied in part upon Defendant's jail misconduct; (2) never spelled out how Defendant's repeated refusal to come out of his cell threatened the integrity of the trial; and (3) never warned Defendant to cease his behavior before denying his request. We review the second judge's ruling for an abuse of discretion (*People v. Welch* (1999) 20 Cal.4th 701, 735), and accord "due deference" to the trial court's assessment of the impact of the Defendant's misconduct on the integrity of the trial (*Carson, supra*, 35 Cal.4th at p. 12; see also *People v. Sarpas* (2014) 225 Cal.App.4th

1539, 1552 [abuse of discretion asks whether the court exceeds the "'bounds of reason'"]). That discretion was not abused.

A defendant's *in-court* misconduct can warrant the denial or revocation of a defendant's right to represent himself. (*Faretta*, *supra*, 422 U.S. at p. 834, fn. 46; *Illinois v. Allen* (1970) 397 U.S. 337, 343-344 (*Allen*); *Carson*, *supra*, 35 Cal.4th at p. 8.) So can a defendant's *out-of-court* misconduct, as long as there is a nexus between that misconduct and the trial process. (*Carson*, *supra*, 35 Cal.4th at p. 7.) What matters is "the effect, not the location, of the misconduct and its impact on the core integrity of the trial." (*Id.* at p. 9.) A defendant's out-of-court efforts to intimidate witnesses may consequently justify the denial of self-representation (*id.* at p. 10), but abuse of the privileges accorded to self-represented litigants or misconduct while incarcerated ordinarily do not (*Butler*, *supra*, 47 Cal.4th at pp. 826-827 [disciplinary infractions in jail; insufficient]; *Carson*, *supra*, 35 Cal.4th at p. 7 [abuse of pro. per. privileges; insufficient]; *People v. Doss* (2014) 230 Cal.App.4th 46, 55-57 [same]).

Defendant is accordingly correct that his repeated episodes of showering jail officials with his excrement are not, without more, a proper ground for denying his request for self-representation. But this was not the only basis for the second judge's ruling, and we must evaluate whether the court abused its discretion in denying self-representation on the remaining basis--namely, Defendant's willful absences from court and other court-ordered interviews. (*People v. Chism* (2014) 58 Cal.4th 1266, 1295, fn. 12 ["'[W]e review the ruling, not the court's reasoning, and, if the ruling was correct on any ground, we affirm.'"].)

The court did not act beyond the "bounds of reason" in concluding that Defendant's repeated refusals to come to court or obey court orders to meet with others would seriously threaten the core integrity of the trial. An in-custody defendant who wishes to represent himself but demonstrates a pattern of refusing

to come to court or to leave his cell when ordered puts the trial court on the horns of a dilemma: That court must either (1) halt the court proceedings whenever the defendant decides to remain in his cell (thereby inconveniencing the jurors and witnesses, and playing havoc with the court's busy calendar), or (2) face the unpleasant prospect of proceeding with trial in the absence of the defendant or anyone representing him (in derogation of the strong statutory and constitutional preference that criminal defendants be present during a trial in which their liberty is on the line). (*Allen*, *supra*, 397 U.S. at p. 342 [noting Sixth Amendment right to be present at trial]; §§ 977, subd. (b)(1), 1043, subd. (a); see also *People v. Williams* (2013) 58 Cal.4th 197, 255 [self-represented defendants have no right to standby counsel].) If, as our Supreme Court has noted, a defendant's refusal to sit in the appropriate place in the courtroom is a basis for denying the right to self-representation (*Carson*, *supra*, 35 Cal.4th at pp. 10-11), the defendant's total absence from the courtroom surely is.

Defendant protests that the trial court did not specifically articulate *why* his repeated refusals to come to court would interfere with his trial, but the court explicitly noted its concern that Defendant's conduct would cause interference; there are no magic words that must always be said, particularly when they would do no more than state the obvious. Nor was there any need for the court to give warnings or to consider alternative remedies in this case. Defendant's refusals were, by their nature, willful and repeated. The second denial of his request for self-representation followed a first, so Defendant was sufficiently forewarned. Further, the trial court had no alternatives to consider; tellingly, Defendant offers none on appeal.

In sum, the trial court did not abuse its discretion in denying Defendant's request to represent himself.

(Lodgment 1 at 7-9.)

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3. Legal Standard

Faretta holds that a criminal defendant has a Sixth Amendment right to self-representation.[32] That right, however, is not absolute.[33] A trial court may properly refuse to permit a criminal defendant to represent himself when he is "not 'able and willing to abide by rules of procedure and courtroom protocol.'"[34] "[A] trial judge may terminate self-representation by a defendant who deliberately engages in serious and obstructionist misconduct."[35] "The right of self-representation is not a license to abuse the dignity of the courtroom."[36]

4. Analysis

As the trial court explained, Petitioner did not show a willingness to abide by courtroom procedure and decorum. (2 RT at D-7-D-8.) By the time of Petitioner's final Faretta motion, he had refused to attend court for pre-trial hearings on more than one occasion, prompting the trial court to issue extraction orders. (1 CT at 78-80, 82, 84, 91-92; 2 RT at B-4, C-1-C-3.) In addition, Petitioner twice refused to attend court-ordered psychiatric evaluations, which complicated the trial court's ability to assess Petitioner's competence to stand trial. (1 CT at 76; 2 RT at B-2-B4, C-2.) Such blatant disregard for the trial court's calendar, scheduling, and orders is inconsistent with the expected behavior of a self-represented defendant. This is particularly so where, had Petitioner been allowed to represent himself, his refusal to attend court hearings would have resulted in the defendant and defense counsel being absent.

While Petitioner blames his failures to appear on the jail's refusal to provide him with shoes, his assertion is unpersuasive. He presents this Court with a jail grievance form requesting new shoes because he had a hole in the bottom of one. (Reply, Exh. A.) Thus, it is apparent Petitioner had shoes with which to attend court and his psychiatric evaluations, even if those shoes were not up to his standards. Moreover, at the time of the trial court's final denial of

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[32] 422 U.S. 806, 832, 95 S. Ct. 2525, 45 L. Ed. 2d 562 (1975).
[33] See id. at 835.
[34] Savage v. Estelle, 924 F.2d 1459, 1463 (9th Cir. 1991) (quoting McKaskle v. Wiggins, 465 U.S. 168, 172, 104 S. Ct. 944, 79 L. Ed. 2d 122 (1984)).
[35] Faretta, 422 U.S. at 834 n.46 (citation omitted).
[36] Id.

Petitioner's Faretta motion, Petitioner had refused to come out of his cell on multiple occasions between the months of June and October 2012. (1 CT at 76, 78-80, 82, 84, 91-92; 2 RT at B-2-B-4, C-1-C-3.) Petitioner has not shown he was without suitable shoes for this entire period of time and, despite the alleged problem with his shoes, he was able to attend other court hearings during this time period. (1 CT at 85, 87, 94.)

Accordingly, the state courts' rejection of Petitioner's Faretta claim was not contrary to, or an unreasonable application of, federal law. Habeas relief is not warranted on Claim Two.

VII.

RECOMMENDATION

IT THEREFORE IS RECOMMENDED that the District Court issue an Order: (1) approving and accepting this Report and Recommendation; and (2) directing that Judgment be entered denying the Petition and dismissing this action with prejudice.

DATED: June 28, 2018

Louise A. La Mothe

HONORABLE LOUISE A. LA MOTHE
United States Magistrate Judge

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

CHARLES T. KIRVIN,

Petitioner,

v.

DAVID BAUGHMAN, Warden,

Respondent.

Case No. LACV 16-3387-AG (LAL)

ORDER ACCEPTING REPORT AND RECOMMENDATION OF UNITED STATES MAGISTRATE JUDGE

Pursuant to 28 U.S.C. § 636, the Court has reviewed the Petition, the Magistrate Judge's Report and Recommendation, and the remaining record, and has made a *de novo* determination.

Accordingly, IT IS ORDERED THAT:

1. The Report and Recommendation is approved and accepted;
2. Judgment be entered denying the Petition and dismissing this action with prejudice; and
3. The Clerk serve copies of this Order on the parties.

DATED: August 31, 2018

HONORABLE ANDREW J. GUILFORD
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

CHARLES T. KIRVIN, Petitioner, v. DAVID BAUGHMAN, Warden, Respondent.	Case No. LACV 16-3387-AG (LAL) **JUDGMENT**

Pursuant to the Order Accepting Report and Recommendation of United States Magistrate Judge,

IT IS ADJUDGED that the Petition is denied and this action is dismissed with prejudice.

DATED: August 31, 2018

HONORABLE ANDREW J. GUILFORD
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

CHARLES T. KIRVIN,

Petitioner,

v.

DAVID BAUGHMAN, Warden,

Respondent.

Case No. LACV 16-3387-AG (LAL)

ORDER DENYING CERTIFICATE OF APPEALABILITY

For the reasons stated in the Report and Recommendation, the Court finds that Petitioner has not made a substantial showing of the denial of a constitutional right.[1] Thus, the Court declines to issue a certificate of appealability.

DATED: August 31, 2018

HONORABLE ANDREW J. GUILFORD
UNITED STATES DISTRICT JUDGE

[1] See 28 U.S.C. § 2253; Fed. R. App. P. 22(b); Miller-El v. Cockrell, 537 U.S. 322, 336, 123 S. Ct. 1029, 154 L. Ed. 2d 931 (2003).

Additional material from this filing is available in the Clerk's Office.