No. _____

IN THE SUPREME COURT

OF THE UNITED STATES

KORY CHRISTIAN PEDERSEN,

Petitioner,

v.

OREGON BOARD OF PAROLE
AND POST-PRISON SUPERVISION,

Respondent.

Petition for a Writ of Certiorari

to the United States Court of Appeals

for the Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

C. Renée Manes
Assistant Federal Public Defender
101 SW Main Street, Suite 1700
Portland, Oregon 97204
(503) 326-2123

Attorney for Petitioner

QUESTIONS PRESENTED

Was Mr. Pedersen denied the effective assistance of counsel guaranteed by the Sixth Amendment, when his trial counsel failed to understand the applicable law on self-defense, and failed to investigate the issues and call appropriate and available experts?

Did the Ninth Circuit err in crediting the post-conviction court with making a ruling on Mr. Pedersen's claims of ineffective assistance of counsel, when the post-conviction court explicitly made a ruling contrary to that stated by the Ninth Circuit?

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On Petition for Writ of Certiorari to

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for the Ninth Circuit

The defendant-petitioner, Kory Christian Pedersen, respectfully requests that a writ of certiorari issue to review the opinion of the United States Court of Appeals for the Ninth Circuit entered on December 24, 2020, Appendix (App.) 1-4, and the denial of rehearing on March 3, 2021. App. 34. The issue on appeal was the denial of the claim of ineffective assistance of counsel for

failing to understand, and adequately present, the defense of self-defense against the use of excessive force against a law enforcement officer.

Opinions Below

The United States District Court for the District of Oregon (district court) denied habeas relief on July 5, 2019, App. 5-9, adopting the Findings and Recommendations of the magistrate court that were issued on April 17, 2019. App. 10-21.

The Ninth Circuit affirmed the denial of habeas corpus relief in an unpublished opinion on December 24, 2020. App. 1-4. The Ninth Circuit denied panel and en banc rehearing on March 3, 2021. App. 34.

The district court and the Ninth Circuit granted deference to the oral and written rulings of the Circuit Court for the County of Umatilla (post-conviction court) issued on March 13, 2013, App. 22-27, and March 17, 2014, App. 28-33, respectively.

Jurisdictional Statement

The denial of rehearing occurred on March 3, 2021. App. 34. This Court has jurisdiction under 28 U.S.C. § 1254(1) (2012).

Constitutional and Statutory Provisions

The Sixth Amendment to the United States Constitution provides that "[i]n all criminal prosecutions, the accused shall enjoy the right to . . . have the Assistance of Counsel for his defence." U.S. Const. amend VI.

28 U.S.C.A. § 2254(d) (1996) provides:

> 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.

Statement Of The Case

The following facts are taken from the state court record submitted in the district court proceedings.

A. The Charge

On June 22, 2007, Mr. Pedersen was charged in Lincoln County with Attempt to Commit Murder, Unlawful Use of a Weapon, Coercion with a Weapon/Attempt to Commit a Class C/Unclassified Felony, Resisting Arrest, Pointing a Firearm at Another, Menacing, and Possession of Cocaine.[1] The charges arose from a June 15, 2007, incident, in which Mr. Pedersen had parked his recently purchased recreational vehicle at the day-use parking area of Lost Creek State Park, near Yaquina Bay Bridge along the Oregon coast. Mr. Pedersen's vehicle's lights were not fully operational and he ended up parking overnight while awaiting mechanical assistance. Overnight parking in a day use area is a vehicular violation under Oregon law.

At approximately 2:00 a.m., a deputy came across the vehicle and engaged with Mr. Pedersen. When Mr. Pedersen exited his vehicle the deputy pulled his taser and pointed it at Mr. Pedersen. A video from the taser recorded the interaction, ending prior to the point where shots were fired. The video shows Mr. Pedersen asking the deputy why he was going to shoot him; the

[1] At trial, Mr. Pedersen did not dispute his possession of cocaine.

deputy and Mr. Pedersen arguing; the deputy tasing Mr. Pedersen; Mr. Pedersen running back into his vehicle with the deputy following; the deputy tasing Mr. Pedersen again and then pepper spraying him twice; the deputy kicking through a thin door that Mr. Pedersen was hiding behind. Fearing for his life and perceiving that the deputy was getting ready to pull his gun, Mr. Pedersen fired his own gun down and away from the deputy in an attempt to scare him. The deputy returned fire, hitting Mr. Pedersen in the hand. Mr. Pedersen's second shot, which he believed was fired involuntarily after his hand was hit, injured the deputy.

B. The Trial

Under Oregon law if an individual has an objectively reasonable belief that a law enforcement officer is using, or is about to use, force that "exceeded the force reasonably necessary" for the situation, then the individual may undertake an intentional or knowing act in an effort to stop or prevent the use of such unlawful force. Once those elements are established, the state bears the burden of disproving self-defense under the beyond-a-reasonable doubt standard. See *State v. Oliphant*, 347 Or. 175, 194-95, 218 P.3d 1281 (Or. 2009); *State v. Vanornum*, 354 Or. 614, 617, 317 P.3d 889 (Or. 2013); *State v. Dahrens,* 192 Or. App. 283, 286, 84 P.3d 1122 (Or. App. 2004). It is not necessary that an individual either intend to cause, or actually cause, any injury to the other person to act in self-defense, but only that they intend to prevent themselves from being harmed by what they reasonably perceive to be another's unlawful use of force. *State v. Strye,* 273 Or. App. 365, 370, 371-72, 356 P.3d 1165 (Or. App. 2015).

Trial counsel failed to adequately understand or explain the elements of self-defense to the jury, and instead presented a virtually incomprehensible argument on self-defense, which asserted

that Mr. Pedersen had to actually intend to hit or kill the officer when he fired the first shot in order to qualify for the defense of self-defense. Stating at the very end of his opening statement:

> Again, there's two ways that we're going to look at this in terms of looking from Mr. Pedersen's point of view. And that is, number one, did he ever intend to kill at all, or was he merely trying to frighten the officer to get the officer off of him?
>
> But number two, if you find that that's a bunch of malarkey, that he was, in fact, aiming at the officer, then you have to decide – it's the second level of analysis – was – did he have the right under these circumstances to defend himself in that way?

And in closing argument:

> Self-defense, by the way, applies to all the counts. Self-defense will apply to attempted aggravated murder. It'll apply to unlawful use of a weapon. It'll apply to coercion. It'll apply to resisting arrest.
>
> Again, there's another defense I didn't know, and it applies to pointing the firearm at another. So if you find that Kory Pedersen did not intend to commit these offenses – no, I take that back. I misspoke. You don't have to find that Kory Pedersen didn't intend. You don't have to find that Kory Pedersen acted in self-defense.
>
> I really need to correct myself. If you don't find beyond a reasonable doubt that that was his intent, you'll acquit him. If you don't find beyond a reasonable doubt – if you don't find beyond a reasonable doubt – listen to me, it's double negative – that he did not act in self defense – beyond a reasonable doubt, they have to prove it doesn't apply – you must acquit him.

The jury convicted Mr. Pedersen on all counts.

C. The Post-Conviction Court Ruling.

In post-conviction Mr. Pedersen alleged that his trial counsel was ineffective in failing to present and support the defense of self-defense. Mr. Pedersen presented the testimony of three experts who were available at the time of trial and would have supported Mr. Pedersen's claims of self-defense if called to testify. Captain Kenneth Carl Herbst, a Captain with the Department of Public Safety Standards and Training, who would have testified that the deputy's conduct was

unreasonable and an excessive use of force under the standards to which law enforcement officers are trained in the State of Oregon, confirming that Mr. Pedersen's perception that the deputy was using excessive force was objectively reasonable, thereby giving Mr. Pedersen the right to defend himself against any further use of force. Dr. William J. Brady, a licensed pathologist with decades of experience, who examined the injuries to Mr. Pedersen's hand and who would have testified regarding those injuries and how they would have caused an involuntary hand seizure. And Mr. Gary Knowles, a forensic scientist with thirty-eight (38) years of experience, who examined the weapons at issue and who would have testified how an involuntary hand seizure could have caused the second shot fired by Mr. Pedersen based on factors such as the trigger pull weight for the gun at issue. Both Dr. Brady and Mr. Knowles would have supported Mr. Pedersen's contention that the second shot was involuntary.

In response, trial counsel confirmed that he did not consult with any of these possible experts, for reasons including that he had never called or attempted to call a self-defense expert, and he did not believe that a medical expert could be of assistance, although he did not make any inquiries with any such expert. More importantly, counsel stated that he did not believer he had the ability to support a claim of self-defense because Mr. Pedersen insisted on stating that he did not intend to hit the deputy with his first, intentional, shot.

The post-conviction court found that Dr. Brady and Mr. Knowles were impressive experts who would have bolstered Mr. Pedersen's claims regarding the second shot being accidental. App. 25. The post-conviction court stated that the case was "self-defense right from the get-go" and agreed that this was not the way the case was tried. App. 26. The court also found that Mr. Pedersen was not credible in contending that he and his attorney discussed pursuing self-defense. App. 30.

However, the post-conviction court did not explain on what basis it was rejecting Mr. Pedersen's claim that trial counsel was ineffective in failing to present self-defense and the available experts in support of that defense, and as a result failed to rule on Mr. Pedersen's claim of ineffectiveness.

D. The Federal Habeas Corpus Case

On January 27, 2017, Mr. Pedersen's pro se habeas corpus petition was filed with the district court. Counsel filed an amended petition on April 12, 2017. After briefing by the parties, the magistrate judge recommended a denial of relief. App. 10-21. The district court adopted the recommendation. App. 5-9.

The district court's reason for denying relief was deference to the post-conviction court's ruling, contending that trial counsel made a reasoned tactical decision not to call Captain Herbst because Mr. Pedersen was not familiar with the training procedures for the deputy, and the trial court might exclude the evidence. App. 8. The court found the subsequent experts would not have helped finding because the jury found that Mr. Pedersen intentionally fired the first shot. App. 9. Ultimately the court deferred to the analysis and ruling of the post-conviction court. App. 8-9.

The district court denied a Certificate of Appealability, but one was granted by the Ninth Circuit. On appeal, the Ninth Circuit denied Mr. Pedersen relief concluding that, whether or not counsel was ineffective, the errors could reasonably be deemed harmless because: (1) the defense was weak for reasons including the fact that Mr. Pedersen did not wait for the deputy to first pull his own gun, App. 3; (2) the testimony that Captain Herbst could provide was only minimally relevant as it did not go to Mr. Pedersen's own personal beliefs, App. 3-4; and, (3) there was no need for any "additional" experts on the question of whether Mr. Pedersen's second shot was voluntarily or involuntary because trial counsel had called Vern Hoyer, a former police officer who had a stated

expertise in firearms trajectories. App. 4. The Ninth Circuit concluded that the post-conviction court could have reasonably rejected Mr. Pedersen's claims that a "more accurate presentation of the self-defense theory would not have changed the result." App. 3.

Reasons For Granting The Writ

This Court should grant the writ because the Ninth Circuit's opinion adopted an interpretation of the post-conviction court's ruling which was completely contrary to the rational of that holding. The post-conviction court did not conclude that the theory of self-defense was presented, but just not as accurate as possible. The post-conviction court determined that the case was not tried as a case of self-defense, and never considered Mr. Pedersen's claim that trial counsel was ineffective in failing to do so.

Further, the Ninth Circuit's opinion failed to conform to this Court's most core rulings regarding an attorney's obligations under the Sixth Amendment, including those set forth in *Strickland v. Washington*, 466 U.S. 668 (1984), *Hinton v. Alabama*, 571 U.S. 263 (2014) and *Williams v. Taylor*, 529 U.S. 362 (2000).

Argument

A. Mr. Pedersen's Claims Are Governed by the Most Central Tenets of the Sixth Amendment Right to the Effective Assistance of Counsel Recognized by this Court.

"An attorney's ignorance of a point of law that is fundamental to his case combined with his failure to perform basic research on that point is a quintessential example of unreasonable performance under *Strickland*[.]" *Hinton v. Alabama*, 571 U.S. at 274 (2014) (further citations omitted). A lawyer "has a duty to make reasonable investigations or to make a reasonable decision

that makes particular investigations unnecessary." *Strickland*, 466 U.S. at 691. While an attorney may make a tactical decision not to investigate, a decision which is based on ignorance of the law is neither strategic nor tactical and is instead ineffective. *Hinton,* 572 U.S. at 274 (further citations omitted).

In assessing prejudice from such deficient performance, this Court has repeatedly held that the failure to introduce readily available evidence supporting a defense, including the testimony of an expert, is prejudicial and requires a grant of relief. *Williams*, 529 U.S. at 396 (2000); *Hinton*, 571 U.S. at 273.

B. The Ninth Circuit Credited The Post-Conviction Court With A Ruling That The Court Never Made.

While 28 U.S.C. § 2254 requires deference to the ruling of a state court, the Ninth Circuit credited the state court with a ruling that was never made, and ignored the ruling which was actually made.

The Ninth Circuit held that the post-conviction court could have reasonably concluded that Mr. Pedersen was not prejudiced by his trial counsel's failures in raising the theory of self-defense because the instruction was given and "the state court could reasonably conclude that a more accurate presentation of the self defense theory would not have changed the result." App. 3. However, the post-conviction court's ruling did not find that self-defense was raised in trial, but instead that the "theory of the case was that his first shot was merely in warning and the second shot was accidental" – which was the explanation offered by trial counsel. App. 29.

In addressing Mr. Pedersen's claim that he wished to pursue self-defense, the post-conviction court held that his testimony was not credible because it was contradicted by trial counsel's claims.

App. 30. While the post-conviction court stated at the post-conviction hearing that the matter should have been tried as a self-defense case, the court found that it was not. App. 26.

The post-conviction court did not make any findings on the sufficiency of the presentation of self-defense nor on potential prejudice, because the post-conviction failed to consider and adjudicate Mr. Pedersen's claim that trial counsel was ineffective in failing to present such a defense and supporting that defense with the testimony of the readily available expert witnesses.

C. Mr. Pedersen Had A Strong Case of Self-Defense Under Oregon Law and The Facts of the Case.

The Ninth Circuit's Opinion Fails To Accurately Apply Oregon Law

The Ninth Circuit concluded that Mr. Pedersen's self-defense case was weak because Mr. Pedersen did not wait to fire until after he had seen the deputy draw his gun. App. 3. However, Oregon law does not require that an individual wait until after they have been assaulted, they may defend themselves when the unlawful use of force is "imminent." *Oliphant,* 347 Or. at 194–95. An individual has every right to act preemptively, specifically to "engage in a defensive act with the knowledge or intent that it will thwart another's application of unlawful force." *Dahrens,* 192 Or. App. at 286.

At the time Mr. Pedersen used his own gun, he had already been tased twice, pepper sprayed twice, and had the door he was hiding behind kicked through – all of which he perceived to be unreasonable and excessive use of force in light of the fact that he had, at most, committed a minor vehicular offense. Mr. Pedersen then perceived that the deputy was going to go for his gun. Mr. Pedersen did not have to wait for the deputy to go further and shoot him if his belief that he was

being subjected to the use of – and a further imminent use of – unreasonable and excessive force was objectively reasonable.

The reasonableness of Mr. Pedersen's belief – and thus the strength of his claims of self-defense – should have been critically supported by the testimony of an expert in the field.

> *The Testimony of Captain Herbst Would Have Been Directly Relevant, Proving That Mr. Pedersen's Perceptions And Beliefs Were Objectively Reasonable, As Required By Oregon Law.*

The Ninth Circuit concluded that the expert testimony of Captain Kenneth Herbst would only have been minimally relevant because the issue for the jury was Mr. Pedersen's " '*own* reasonable belief in the necessity for such action, and not whether the force used or about to be used on him was actually unlawful.' " App. 4, emphasis in original citing *Oliphant*, 218 P.3d at 1290.

Under Oregon law, the standard for self-defense against a law enforcement officer is not purely subjective. It requires consideration of whether "a reasonable person in [the defendant's] position would have believed, that the use or imminent use of force against him exceeded the force reasonably necessary to effect the arrest[.]" *Oliphant*, 347 Or. at 194. This "objective standard" asks "how a reasonable person would have assessed the circumstances in which defendant found himself at the time that he brandished the weapon." *State v. Strickland*, 303 Or. App. 240, 244, 463 P.3d 537, 539 (2020). Captain Herbst's opinion would have been of assistance to the jury in determining whether – whatever Mr. Pedersen's subjective idiosyncracies – a reasonable person would have understood the deputy's use of force as excessive.

Captain Herbst's testimony was particularly important given the admission by Mr. Pedersen that he had used cocaine prior to his interaction with the officer, making it possible that the jury would have discounted the reasonableness of his perception.

The Jury Was Not Offered Any Expert On The Question Of Whether Mr. Pedersen's Second Shot Might Have Been Involuntary And Caused By The Injuries He Sustained.

The Ninth Circuit concluded that trial counsel's failure to present "additional experts" regarding whether the second shot was involuntary was not prejudicial because counsel "put forward an expert witness who testified that it was 'very possible' that Pedersen fired the second shot involuntarily[.]" App. 4.

The only witness presented by trial counsel on such issues was Vern Hoyer, but Mr. Hoyer's only stated expertise was on firearms trajectories. While he had a personal opinion that being hit in the hand might cause someone to accidentally discharge a weapon, he was not qualified to offer, and did not offer, any testimony regarding the injuries to Mr. Pedersen's hand that night, or the weapons at issue in the incident.

In contrast, Dr. Brady was available to testify specifically regarding the injuries to Mr. Pedersen's hand that night, and how those injuries could have caused an involuntary reflexive pull on a trigger. And Mr. Gary Knowles had specific qualifications on trigger pull and bullet weight, could have testified that such a reflexive pull would likely have caused the second shot, based on his research and analysis of the weapon at issue.

None of this evidence was – or could have been – presented in the testimony of Hoyer. Most critically, trial counsel never made any decision to rely on the testimony of Hoyer for these issues. Instead, trial counsel simply did not investigate whether a medical doctor – or any other witness – could provide a helpful opinion. There was no strategic decision made to forego these experts because trial counsel did not undertake the necessary investigation to make such a decision. *Strickland*, 466 U.S. at 688.

The post-conviction court found that Mr. Knowles and Dr. Brady would have been of assistance to the defense on the question of the inadvertence of the second shot, but discounted the importance of this shot, calling it a "red herring." App. 23.

The Failings of Trial Counsel Were Based on Ignorance of the Law and A Failure to Investigate, Not on any Tactical or Strategic Decision.

Trial counsel's failure to support the theory of self-defense was based on his belief that Mr. Pedersen could not claim self-defense if he did not intend to hit the deputy with his first shot. This is a misunderstanding of Oregon's law. Because trial counsel did not understand Oregon law on the issue of self-defense, he failed to investigate the experts who were available who might support that defense, and failed to adequately present the defense to the jury.

Trial counsel's failures constituted deficient performance, and deprived Mr. Pedersen of his right to the effective assistance of counsel under the Sixth Amendment as defined by this Court's core holdings on ineffective assistance – *Strickland, Hinton,* and *Washington*. The Ninth Circuit denied Mr. Pedersen relief by misstating Oregon law and crediting the post-conviction court with making rulings that never occurred while ignoring the ruling that was issued.

Conclusion

For the foregoing reasons, the Court should issue a writ of certiorari.

Dated this 1st day of June, 2021.

C. Renée Manes
Attorney for Petitioner

NOT FOR PUBLICATION

FILED

DEC 24 2020

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

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

KORY CHRISTIAN PEDERSEN, Petitioner-Appellant, v. OREGON BOARD OF PAROLE AND POST-PRISON SUPERVISION, Respondent-Appellee.	No. 19-35599 D.C. No. 6:17-cv-00145-JR MEMORANDUM*

Appeal from the United States District Court
for the District of Oregon
Michael W. Mosman, District Judge, Presiding

Argued and Submitted December 10, 2020
Seattle, Washington

Before: BERZON, MILLER, and BRESS, Circuit Judges.

Kory Pedersen appeals the district court's denial of his 28 U.S.C. § 2254 habeas petition. We review de novo the district court's denial of § 2254 relief. *Carter v. Davis*, 946 F.3d 489, 501 (9th Cir. 2019). We have jurisdiction under 28 U.S.C. § 2253, and we affirm.

Pedersen resisted arrest and then twice shot at the arresting police officer. An

* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

Oregon jury found Pedersen guilty of attempted aggravated murder and other offenses. Pedersen now contends that his trial lawyer provided ineffective assistance of counsel by not adequately investigating and presenting Pedersen's claim that he shot at the officer in self-defense and by failing to put on additional expert witnesses to support Pedersen's theory that his second shot was involuntary.

Under the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), we may only grant habeas relief if the state court's decision (1) "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) "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). To establish ineffective assistance, Pedersen must show that (1) his counsel performed deficiently, and (2) counsel's deficient performance prejudiced him. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). Under AEDPA, we may only grant relief if the constitutional violation is "beyond any possibility for fairminded disagreement." *Harrington v. Richter*, 562 U.S. 86, 103 (2011).[1]

Assuming without deciding that counsel acted deficiently, the state court could reasonably conclude that counsel's performance was not prejudicial—that

[1] The State has forfeited its argument, made for the first time on appeal, that Pedersen failed to exhaust his claims by not raising them in state post-conviction proceedings. *See Franklin v. Johnson*, 290 F.3d 1223, 1233 (9th Cir. 2002).

there is no "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694. Pedersen's counsel did make a self-defense argument to the jury, and the jury was given a self-defense instruction. The jury also heard Pedersen's testimony about why he fired the first shot, as well as a video that documented most of the encounter.

In finding Pedersen guilty, the jury determined that he had the necessary intent to kill the officer without proper justification for at least one of the shots. Under these circumstances, the state court could reasonably conclude that a more accurate presentation of the self-defense theory would not have changed the result. *Id.* That is especially the case considering the apparent weakness of Pedersen's self-defense theory, including the fact that Pedersen never saw the officer draw his handgun or begin to do so before Pedersen fired the first shot. The jury either decided that Pedersen did not intend to hit the officer with the first shot, in which case the inaccurate self-defense theory would not have mattered, or it concluded that Pedersen did have the intent to kill the officer when he fired the first shot, in which case it would not have mattered whether the jury was told that he need not have that intent to succeed on self-defense. Either way, the attorney's inaccuracy as to the Oregon law of self-defense did not matter to the jury verdict.

We likewise reject Pedersen's argument that the state court decision was an unreasonable application of *Strickland* because counsel acted deficiently by failing

to put on expert testimony from Captain Kenneth Herbst concerning whether the arresting officer's actions violated Oregon's Department of Public Safety Standards and Training guidelines for the use of force. Pedersen's "right to use force in self-defense depends on [his] *own* reasonable belief in the necessity for such action, and not on whether the force used or about to be used on him actually was unlawful." *State v. Oliphant*, 218 P.3d 1281, 1290 (Or. 2009). Given the marginal relevance of Herbst's proposed testimony, reasonable jurists could determine that counsel's alleged error was not prejudicial. *See Harrington*, 562 U.S. at 103.

The state court could likewise reasonably conclude that any error in counsel's failure to put on additional experts for Pedersen's second fired shot was not prejudicial. Counsel already put forward an expert witness who testified that it was "very possible" that Pedersen fired the second shot involuntarily because the officer had shot Pedersen in the hand. The jury thus had a basis to vindicate this theory, had it credited it. Pedersen has not shown how additional experts on this topic would have changed the result. That is particularly so considering that this defense at most went to the second shot and did not absolve Pedersen of responsibility for the first shot.

AFFIRMED.

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

EUGENE DIVISION

KORY CHRISTIAN PEDERSEN,

Petitioner,

v.

CHRISTINE POPOFF, Superintendent,
Oregon State Correctional Institution,

Defendant.

No. 6:17-cv-00145-JR

OPINION AND ORDER

MOSMAN, J.,

On April 17, 2019, Magistrate Judge Jolie Russo issued her Findings and Recommendation (F&R) [53], recommending that I deny Kory Pedersen's Amended Petition for Writ of Habeas Corpus [12]. Mr. Pedersen filed Objections to the F&R [55] and Respondent Christine Popoff filed a Response to Mr. Pedersen's Objections [56]. For the reasons below, I adopt Judge Russo's F&R in full.

DISCUSSION

The magistrate judge makes only recommendations to the court, to which any party may file written objections. The court is not bound by the recommendations of the magistrate judge but retains responsibility for making the final determination. The court is generally required to make a de novo determination regarding those portions of the report or specified findings or recommendation as to which an objection is made. 28 U.S.C. § 636(b)(1)(C). However, the

court is not required to review, de novo or under any other standard, the factual or legal conclusions of the magistrate judge as to those portions of the F&R to which no objections are addressed. *See Thomas v. Arn*, 474 U.S. 140, 149 (1985); *United States v. Reyna-Tapia*, 328 F.3d 1114, 1121 (9th Cir. 2003). While the level of scrutiny under which I am required to review the F&R depends on whether or not objections have been filed, in either case, I am free to accept, reject, or modify any part of the F&R. 28 U.S.C. § 636(b)(1)(C).

Judge Russo found that Mr. Pedersen has not shown that he is entitled to habeas corpus relief on his claim of ineffective assistance of trial counsel. F&R [53] at 11. Mr. Pedersen, who was convicted of Attempted Aggravated Murder after firing twice at a Lincoln County Deputy Sheriff, argued that his trial counsel was ineffective in two ways. First, Mr. Pedersen claimed that trial counsel was ineffective in failing to present a theory that the first shot he fired at the Deputy qualified as an act of self-defense. Trial counsel had argued that the first shot was a warning shot, aimed away from the Deputy. If the first shot was intended only as a warning, Mr. Pederson would not have been guilty of attempted murder. Although the jury was instructed on self-defense and trial counsel argued that the jury should acquit based on self-defense, Mr. Pederson argues that his counsel was ineffective in failing to argue that a warning shot also supported a theory of self-defense. Objs. [55] at 10.

Second, Mr. Pedersen claimed that his trial counsel was ineffective in failing to obtain additional experts to bolster his claim that the second shot fired at the Deputy was unintentional. After Mr. Pederson fired the first shot, the Deputy returned fire, hitting Mr. Pederson in his shooting hand. Mr. Pederson claims that his injury caused an involuntary trigger pull, which resulted in the second bullet fired at the Deputy. A private investigator testified at trial that it

was "very possible" that the Deputy's bullet could have caused Mr. Pedersen to unintentionally fire his gun. Tr. 949–52.

The state postconviction review (PCR) court found that additional witnesses would have been useful in establishing the involuntariness of the second shot, but that the jury was not required to believe that the first shot was only meant to be a warning. And testimony by additional experts "couldn't help [Petitioner] a bit with the question of the first shot, which was clearly intentionally fired." Resp't Answer [26] Ex. 2 at 11–12. The PCR court therefore denied Mr. Pederson's claim that his counsel was constitutionally ineffective. Applying the standard of review for a state prisoner asserting an ineffective assistance of counsel claim, Judge Russo found that the PCR court's decision was not unreasonable and was supported by the record. F&R [53] at 10; *see also id.* at 9 ("When § 2254(d) applies, the question is not whether counsel's actions were reasonable. The question is whether there is any reasonable argument that counsel satisfied *Strickland*'s deferential standard.") (quoting *Harrington v. Richter*, 562 U.S. 86, 105 (2011)).

Mr. Pedersen quotes *State v. Strye* for the proposition that a defendant need not "intend to cause, or actually cause, any injury to another person to pursue self-defense, it is only necessary that the defendant act intentionally in a manner designed to prevent themselves from being harmed by another's unlawful use of force." Objs. [55] at 14 (citing 356 P.3d 1165, 1168 (Or. App. 2015)). While this statement of Oregon law highlights the tension between trial counsel's testimony that he pursued a theory that the first shot was a warning rather than self-defense, it does not demonstrate that habeas corpus relief is appropriate. As Judge Russo stated in her F&R, even if Mr. Pederson had established that trial counsel's conduct fell below an objective standard of reasonableness, he must also have demonstrated that he was prejudiced by that deficiency.

F&R [53] at 10. In other words, he needed to demonstrate that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." F&R [53] at 8 (quoting *Strickland v. Washington*, 466 U.S. 668, 694 (1984)). I agree with Judge Russo that the PCR court reasonably found that the result of the proceeding would not have been different had counsel delivered a more convincing argument on a theory of self-defense.

The PCR court's most fundamental holding was that the jury did not believe Mr. Pedersen's testimony that his first shot was fired as a warning. The jury instead found that Mr. Pedersen shot at the Deputy, which would be justifiable as self defense only if, (1) the Deputy made an arrest "with excessive force," and (2) Mr. Pedersen "reasonably believe[d] that the arresting officer was about to use deadly force against him." Trial Tr. [27] Ex. 3 at 1156. Although trial counsel did not argue that Mr. Pedersen was justified in shooting at the Deputy, the decision not to make this argument was based on a reasoned analysis of the facts of the case. In a deposition taken as part of the state postconviction review proceedings, trial counsel stated that he believed Mr. Pedersen would have been justified in firing at the deputy had Mr. Pedersen known that the Deputy was engaged in a felonious assault by acting in violation of his police training. Answer [26-1] Ex. 116 at 27. Trial counsel also stated, however, that Mr. Pedersen "had no idea what police training procedures were," and therefore Mr. Pedersen did not reasonably believe that the Deputy's use of force was felonious. *Id.* Trial counsel explained that he considered presenting evidence that the Deputy did not follow training procedure in his encounter with Mr. Pedersen but decided against it because he anticipated that (1) the prosecutor would object, and (2) the trial court would have ruled that such testimony was irrelevant to Mr. Pedersen's state of mind. *Id.* at 29. This rationale belies Mr. Pedersen's contention that his trial

counsel failed to perceive that there was a viable argument for self-defense in this case. Because the PCR court made a reasonable determination that trial counsel did not violate the standard set forth in *Strickland* with respect to presenting a theory of self-defense, I agree with Judge Russo's finding that Mr. Pedersen is not entitled to habeas corpus relief on this claim.

The PCR court also addressed Mr. Pedersen's second basis for claiming ineffective assistance of trial counsel: that trial counsel was ineffective in not presenting additional expert testimony on whether the second shot was an "accidental discharge" resulting from Mr. Pedersen's involuntary reaction to being shot in the hand. The PCR court noted that additional experts could have helped develop that theory but that there was no reasonable probability that additional experts would have changed the result of the proceeding because Mr. Pedersen intentionally fired the first shot. I agree with Judge Russo that the PCR court reasonably determined that trial counsel was not ineffective in failing to bolster the "accidental discharge" theory with additional experts. Mr. Pedersen is therefore not entitled to habeas corpus relief on this claim.

CONCLUSION

For the reasons described above, I adopt the F&R [53] as my own opinion. The Amended Petition for Writ of Habeas Corpus [12] is DENIED. Because Petitioner has not made a substantial showing of the denial of a constitutional right, Petitioner's request for a certificate of appealability is DENIED. *See* 28 U.S.C. § 2253(c)(2).

IT IS SO ORDERED.

DATED this 5th day of July, 2019.

MICHAEL W. MOSMAN
Chief United States District Judge

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

KORY CHRISTIAN PEDERSEN,

Petitioner,

v.

CHRISTINE POPOFF, Superintendent,
Oregon State Correctional Institution,

Respondent.

Civil No. 6:17-cv-00145-JR

FINDINGS AND RECOMMENDATION

RUSSO, Magistrate Judge.

Petitioner, an inmate at the Oregon State Correctional Institution, brings this habeas corpus action pursuant to 28 U.S.C. § 2254. For the reasons that follow, the Court should DENY the Petition for Writ of Habeas Corpus.

BACKGROUND

On June 22, 2007, a Lincoln County grand jury indicted petitioner on charges of Attempted Aggravated Murder, Unlawful Use of a Weapon, Coercion With a Firearm, Resisting Arrest,

Pointing a Firearm at Another, Menacing, and Unlawful Use of Cocaine. The charges arose from events that transpired during an early morning confrontation with Lincoln County Deputy Sheriff Miller.[1]

On June 16, 2007, at about 2:00 a.m., Deputy Miller approached petitioner's motor home which was illegally parked in a "day-use only" area at a state park. *Pedersen*, 242 Or. App. at 307. Deputy Miller knocked on the door of the motor home for several minutes before petitioner moved to the driver's seat. *Id.* at 308. Petitioner was unresponsive when Deputy Miller requested his identification and asked him to step outside the vehicle; Miller described petitioner as fidgeting with his sweatshirt, pacing frenetically inside the cabin of the motor home, and visibly angry. *Id.*

After Miller repeated his commands multiple times, petitioner eventually exited the motor home, but remained agitated and did not obey Miller's commands. *Id.* When petitioner refused to take his hand out of his pocket, Deputy Miller fired his taser at petitioner in an unsuccessful attempt to subdue him. *Id.* Petitioner retreated inside the motor home, and Deputy Miller followed him. *Id.* Once inside, Deputy Miller again fired his taser at petitioner and twice sprayed petitioner with pepper spray, to no apparent effect. *Id.* Petitioner repeatedly yelled at Miller to "get out," and Miller informed petitioner he was under arrest. *Id.*

Petitioner backed into the corner of his bedroom and rummaged around near his bed, then suddenly came up holding a .45 caliber weapon. *Id.* Petitioner fired two shots at Miller, who felt

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[1]The factual background of the encounter is succinctly set forth in the Oregon Court of Appeals' written opinion from petitioner's direct appeal. *State v. Pedersen*, 242 Or. App. 305, *rev. denied*, 351 Or. 254.

one of the bullets pass his hip. *Id.* Miller returned fire, hitting petitioner in the hand. *Id.* Backup police arrived shortly thereafter, and petitioner was taken into custody. *Id.*

The case was tried to a jury. At trial, petitioner's theory of the case was that he "fired the gun in order to frighten the officer and get him to leave the motor home." Resp. Exh. 116, p. 7. As far as the second shot that petitioner fired, he presented a theory to the jury that it was inadvertent; according to petitioner, Deputy Miller shot petitioner in the hand, which caused petitioner's gun to discharge another bullet. Resp. Exh. 116, pp. 8-10. To that end, trial counsel called as a witness Vern Hoyer, counsel's private investigator, who had significant experience in accident reconstruction, ballistics, and bullet trajectory issues. Tr. 892-99.[2] Hoyer testified that, in his opinion, it was "very possible" that one of Deputy Miller's shots could have hit petitioner's hand and caused petitioner's gun to fire a second bullet. Tr. pp. 949-52. Petitioner testified in his own defense, and admitted firing the first bullet in Deputy Miller's direction because he wanted to "scare him out of my motor home before he draws on me." Tr. 764. Petitioner denied that he was trying to hit Deputy Miller, and said he was "trying to scare the deputy" because he was afraid Miller was going to kill him. Tr. 767-68.

The jury found petitioner guilty of all charges. The trial judge sentenced petitioner to 120 months of imprisonment on the attempted murder conviction. Tr. 1194-95. The sentences on the remaining counts were either ordered to run concurrently with the attempted murder conviction, or the court imposed probation but "suspended imposition" of the probationary sentence, so the total term of imprisonment imposed was 120 months. Tr. 1194-98.

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[2]For ease of reference, the citations to the transcript refer to the numbers in the lower right-hand corner of the page being cited. *See* Docket Entry No. 27.

Petitioner filed a direct appeal asserting assignments of error challenging the sufficiency of the evidence on the coercion conviction, the trial court's jury instructions on the requisite mental state, and the non-unanimity of the jury verdict. In a written opinion, the Oregon Court of Appeals agreed the evidence was legally insufficient for petitioner to be convicted of coercion, but affirmed the trial court's judgment in all other respects. *State v. Pedersen*, 242 Or. App. 305, 255 P.3d 556 (2011). The Court of Appeals reversed the coercion conviction and remanded for entry of an attempted coercion conviction and for re-sentencing. The Oregon Supreme Court denied review. *State v. Pedersen*, 351 Or. 254, 264 P.3d 1285 (2011).

Petitioner then sought state post-conviction relief ("PCR"). Petitioner filed a Second Amended PCR Petition through counsel alleging, *inter alia*, that trial counsel provided ineffective assistance of counsel by failing to "adequately develop and present the defense theory that petitioner's firearm accidentally discharged after [the firearm] and petitioner's hand were struck by a bullet fired by Deputy Miller at petitioner." Resp. Exh. 112, p. 5. Petitioner further alleged that trial counsel "failed to introduce any expert testimony to demonstrate that the impact of Deputy Miller's hollow point .45 caliber bullet on petitioner's firearm and hand could cause an accidental discharge of petitioner's firearm." Resp. Ex. 112, p. 6. Petitioner submitted affidavits from two additional experts supporting his theory of "accidental discharge" as to the second shot. Resp. Exh. 119, 120.

The PCR trial court conducted an evidentiary hearing. Resp. Exh. 122. At the conclusion of the hearing, the PCR trial judge made oral findings denying all relief. Resp. Exh. 122, pp. 27-31. The judge found the issue regarding petitioner's second shot being an "accidental discharge" to be "a bit of a red herring." Resp. Exh. 122, p. 27. The judge acknowledged that it might have been

"useful" for the defense to further pursue that theory to "help take the heat off the first shot," but that, nonetheless, the jury was not required to believe that "firing this first shot in close quarters" was just a "warning shot." Resp. Exh. 122, p. 28. The PCR trial judge noted he was likewise not required to, and in fact did not, believe that theory. *Id.*

The PCR judge highlighted Deputy Miller's testimony, noting that Miller's testimony about the bullet going so close to his hip that he could feel the pressure was "chilling." Resp. Exh. 122, pp. 28-29. According to the PCR trial judge, under these circumstances regardless of what any additional expert witness might have testified to, any expert "could not have helped [petitioner] a bit with the question of the first shot, which was clearly intentionally fired." Resp. Exh. 122, pp. 29-30. Instead, the PCR judge concluded, "[s]o the idea that this is just some warning shot that goes so close to the officer that he can feel this pressure going by, I believe the jurors were entitled to find that intent – that was an intentional act and was the basis for the Attempted Murder conviction." Resp. Exh. 122, p. 29. Following the evidentiary hearing, the PCR trial judge memorialized his oral findings in a General Judgment denying PCR relief. Resp. Exh. 123.

Petitioner appealed, asserting his claim of ineffective assistance of counsel based on trial counsel's alleged failure to "adequately develop and present the defense theory that petitioner's firearm accidentally discharged after it and petitioner's hand were struck by a bullet fired by Deputy Miller at petitioner." Resp. Exh. 124, p. 2. The Oregon Court of Appeals affirmed without opinion, and the Oregon Supreme Court denied review. *Pedersen v. Amsberry*, 278 Or. App. 171, *rev. denied*, 360 Or. 400 (2016).

Petitioner filed a Petition for Writ of Habeas Corpus in this Court. The Court appointed counsel, who file an Amended Petition for Writ of Habeas Corpus on petitioner's behalf. The

Amended Petition alleges six claims for relief, with several sub-claims. In his counseled Brief in Support of the Amended Petition, petitioner argues that he is entitled to habeas corpus relief because trial counsel was ineffective in failing to recognize and present evidence to support a defense of self-defense.[3] Petitioner argues the position of his trial counsel, the state, and the PCR court represent a profound misunderstanding of Oregon law on the availability of the defense of self-defense in petitioner's situation. Respondent counters that the state PCR court's decision denying relief on petitioner's ineffective assistance of counsel claim is entitled to deference, and that petitioner did not meet his burden of proof on the remaining claims not addressed in his Brief in Support.

LEGAL STANDARDS

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[3]Although petitioner does not identify the exact claim for relief addressed in the Brief in Support, it appears petitioner is advancing argument on sub-claims A and D of the Third Claim, which allege as follows:

> A. Counsel failed to adequately investigate and prepare this matter for trial, including consulting with necessary and appropriate experts in support of [petitioner's] claims of self-defense. Such necessary and appropriate experts would have included experts on: appropriate police procedures and tactics and use of force, including appropriate deployment of tasers; self-defense; physiological and mental responses to being tased; and, physiological and mental responses to being shot in the hand.
>
> * * *
>
> D. Counsel failed to call and present critical evidence in support of [petitioner's] defense of self-defense, including necessary fact witnesses, witnesses regarding [petitioner's] background, and expert witnesses on issues including: appropriate police procedures and tactics and use of force, including taser deployment; self-defense; physiological and mental responses to being tased; and, physiological and mental responses to being shot in the hand.

An application for writ of habeas corpus shall not be granted unless adjudication of the claim in state court resulted in a decision that was: (1) "contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States," or (2) "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). A state court's findings of fact are presumed correct and a habeas petitioner bears the burden of rebutting the presumption of correctness by clear and convincing evidence. 28 U.S.C. § 2254(e)(1).

A state court decision is "contrary to . . . clearly established precedent 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 distinguishable from a decision of [the Supreme] Court and nevertheless arrives at a result different from [that] precedent. Williams v. Taylor, 529 U.S. 362, 405-06 (2000). Under the "unreasonable application" clause, a federal habeas court may grant relief only "if the state court identifies the correct legal principle from [the Supreme Court's] decisions, but unreasonably applies that principle to the facts of the prisoner's case." Id. at 413. The "unreasonable application" clause requires the state court decision to be more than incorrect or erroneous. Id. at 410. The state court's application of clearly established law must be objectively unreasonable. Id. at 409.

"Determining whether a state court's decision resulted from an unreasonable legal or factual conclusion does not require that there be an opinion from the state court explaining the state court's reasoning." Harrington v. Richter, 562 U.S. 86, 98 (2011). Where a state court's decision is not accompanied by an explanation, "the habeas petitioner's burden still must be met by showing there was no reasonable basis for the state court to deny relief." Id. Where, however, the highest state

court decision on the merits is not accompanied by reasons for its decision but a lower state court's decision is so accompanied, a federal habeas court should "look through" the unexplained decision to the last related state-court decision that provides a relevant rationale, and presume the unexplained decision adopted the same reasoning. Wilson v. Sellers, 138 S. Ct. 1188, 1192 (2018).

The Supreme Court has established a two-part test to determine whether a petitioner has received ineffective assistance of counsel. First, the petitioner must show that his lawyer's performance fell below an objective standard of reasonableness. Strickland v. Washington, 466 U.S. 668, 686-87 (1984). Due to the difficulties in evaluating counsel's performance, courts must indulge a strong presumption that the conduct falls within the "wide range of reasonable professional assistance." Id. at 689. Stated otherwise, "Strickland's first prong sets a high bar. . . . It is only when the lawyer's errors were 'so serious that counsel was not functioning as the 'counsel' guaranteed . . . by the Sixth Amendment' that Strickland's first prong is satisfied." Buck v. Davis, 137 S. Ct. 759, 776 (2017).

Second, the petitioner must show that his lawyer's performance prejudiced the defense. The appropriate test for prejudice is whether the petitioner can show "that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Strickland, 466 U.S. at 694. A reasonable probability is one which is sufficient to undermine confidence in the outcome of the trial. Id. at 696.

Under the Anti-Terrorism and Effective Death Penalty Act of 1996's deferential standard of review, the key question in analyzing an ineffective assistance of counsel claim brought by a state prisoner is whether the state court's application of Strickland was unreasonable. Harrington, 562 U.S. at 102. "This is different from asking whether defense counsel's performance fell below

Strickland's standard . . . . A state court must be granted a deference and latitude that are not in operation when the case involves review under the Strickland standard itself." Id. "When § 2254(d) applies, the question is not whether counsel's actions were reasonable. The question is whether there is any reasonable argument that counsel satisfied Strickland's deferential standard." Id. at 105. Thus, "[w]hen the claim at issue is one for ineffective assistance of counsel . . . AEDPA review is 'doubly deferential,' because counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." Woods v. Etherton, 136 S. Ct. 1149, 1151 (2016) (citations and internal quotations omitted). "In such circumstances, federal courts are to afford both the state court and the defense attorney the benefit of the doubt." Id. (citation and internal quotation omitted).

DISCUSSION

As noted, petitioner alleges trial counsel was ineffective in failing to recognize and present evidence to support petitioner's argument of self-defense. In particular, petitioner asserts that his initial shot was intended to keep Deputy Miller from escalating his alleged unlawful use of force. Petitioner's intent in firing was only to scare the deputy and not actually hit him, and this falls under self-defense. Petitioner contends that trial counsel, the state, and the PCR trial court misapprehended Oregon law on this issue, and mistakenly assumed petitioner's conduct could not qualify as self-defense under Oregon law. Petitioner further argues that the second shot was unintentional, and that there was available testimony from both a medical practitioner and a firearms expert who could have substantiated petitioner's testimony, but that trial counsel never consulted any of these experts.

As the PCR trial court found, trial counsel could certainly have hired additional experts to bolster petitioner's theory that the second shot he fired was due to "accidental discharge." Petitioner did not, however, establish that there was a reasonable probability that, had the expert testimony been presented, the result of the proceeding would have been different.

The problem with the proposed expert testimony is that it would not "deflect the fact that petitioner fired a first shot directly toward the deputy" before petitioner was hit in the hand. Resp. Exh. 123, p. 2. The PCR court explained that any additional experts on this issue would not have aided petitioner's case, since they could not offer anything about the first shot. Although petitioner testified that he fired the first shot merely as a warning, members of the jury (and indeed, the PCR trial judge) were entitled to disbelieve petitioner. As such, the jury was entitled to treat the first shot as the basis for petitioner's attempted murder conviction. The PCR court's decision was not objectively unreasonable, and was supported by the record before the court.

Moreover, to the extent petitioner argues that defense counsel should have done more to develop the theory of self-defense, petitioner still has not established prejudice. In addressing the issue of the first shot which petitioner intentionally fired, the PCR court said:

> Depending on the then [sic] what theory you have of why it was fired, it would have been better to take the position, I think, that it was self-defense right from the get-go. But I don't think that was the way in which this thing was prosecuted or was defended.
>
> Anyway, I don't find error in this case.

Resp. Exh. 122, p. 30. Again, additional experts would not have aided petitioner's case, because the jury was entitled to disbelieve petitioner when he testified that he fired the first shot merely as a warning. Resp Exh. 123, p. 3. The PCR court likewise did not find petitioner credible when he

testified as much in the PCR proceeding. There is no basis for this Court to disregard either the jury's or the PCR trial court's credibility determination. See Marshall v. Lonberger, 459 U.S. 422, 434 (1983) (Section 2254(d) "gives federal habeas courts no license to redetermine credibility of witnesses whose demeanor has been observed by the state trial court, but not by them"); Sophanthavong, 378 F.3d at 867-68 ("because the state court conducted an evidentiary hearing in which [the petitioner] testified, we are required to defer to the state court's credibility findings").

Accordingly, petitioner is not entitled to habeas corpus relief on his claim of ineffective assistance of trial counsel.

CLAIMS NOT ADDRESSED IN PETITIONER'S BRIEF

As noted, petitioner does not address the remaining grounds for relief alleged in his Petition for Writ of Habeas Corpus. As such, petitioner has not sustained his burden to demonstrate why he is entitled to relief on these claims. See Lampert v. Blodgett, 393 F.3d 943, 970 n. 16 (9th Cir. 2004). Nevertheless, the Court has reviewed petitioner's remaining claims and is satisfied that petitioner is not entitled to habeas corpus relief.

CONCLUSION

Petitioner's Amended Petition for Writ of Habeas Corpus (ECF No. 12) should be DENIED, and a judgment of DISMISSAL should be entered. A Certificate of Appealability should be denied on the basis that petitioner has not made a substantial showing of the denial of a constitutional right pursuant to 28 U.S.C. § 2253(c)(2).

This recommendation is not an order that is immediately appealable to the Ninth Circuit Court of Appeals. Any notice of appeal pursuant to Rule 4(a)(1), Federal Rules of Appellate Procedure, should not be filed until entry of the district court's judgment or appealable order. The parties shall have fourteen (14) days from the date of service of a copy of this recommendation within which to file specific written objections with the court. Thereafter, the parties shall have fourteen (14) days within which to file a response to the objections. Failure to timely file objections to any factual determination of the Magistrate Judge will be considered as a waiver of a party's right to *de novo* consideration of the factual issues and will constitute a waiver of a party's right to appellate review of the findings of fact in an order or judgment entered pursuant to this recommendation.

DATED this 17th day of April, 2019.

/s/ Jolie Russo
Jolie A. Russo
United States Magistrate Judge

IN THE CIRCUIT COURT OF THE STATE OF OREGON

FOR THE COUNTY OF UMATILLA

KORY PEDERSEN,	)	
	)	
Petitioner,	)	Umatilla County Circuit Court
vs.	)	No. CV120100
	)	
RICK COURSEY, Superintendent, Eastern Oregon Correctional Institution,	)	CA A156672
	)	
Defendant.	)	

TRANSCRIPT OF PROCEEDINGS ON APPEAL

BE IT REMEMBERED that the above-entitled Court and cause came on regularly for hearing before the Honorable Jack A. Billings, on Thursday, the 13th day of March, 2013, at the Umatilla County Courthouse, Pendleton, Oregon.

APPEARANCES

Noel Grefenson, Attorney at Law,
Appearing on behalf of the Petitioner;

Vanessa A. Nordyke, Assistant Attorney General,
Appearing on behalf of the Defendant.

KATIE BRADFORD, CSR 90-0148
Court Reporter
(503) 267-5112

Proceedings recorded by digital sound recording; transcript provided by Certified Shorthand Reporter.

petitioner had told them. They addressed it. In fact, they were fighting about that issue throughout the trial.

So it wasn't as though counsel spoke with petitioner, got no decent information to support the accidental discharge theory, and then didn't pursue it all. They were pursuing it. And the State, likewise, was seeking to refute it. So it wasn't just gravy. That was pinnacle on which the case was turning.

As I said before, I believe that -- that an attorney exercising reasonable professional skill and judgment would have recognized the need to establish a -- a basis for the accidental discharge though expert testimony; would call these experts, and if they had done so, there's a reasonable probability that -- that the outcome would have been different.

THE COURT: All right. Well, Counsel, I've appreciated your arguments. And I've been taking some notes. I -- I'm, frankly, of the view here, that the accidental discharge question was a bit of a red herring.

And I can see why it would have been useful for the defense to pursue it, because it would

help take the heat off the first shot, which Mr. -- I'm going to continue to say, Pedersen. I -- that's the way the name looks to me, to take the heat off him.

Clearly, firing this first shot in close quarters and while the testimony from petitioner at trial and here was, this was, basically, just a warning shot. I'd -- I'm -- the jury wasn't required to believe that. And I'm not required to believe it and I don't.

It seems to me that the testimony that's highlighted in the transcript from the officer is what I would refer to as chilling. And the State made a reference to it, and so I went and looked at it. And what he had to say, was exactly why a jury could have found Mr. Pedersen guilty of Attempted Aggravated Murder.

"When is it that you realize that he's got a gun?

"When I see it. He brings it right up, points it right directly at me and he fires at me.

"Where is it pointed when it goes off?

"Right at me.

"Why doesn't it hit you?

"I don't know.

"All right. And where does the bullet hit?

"It goes right next to my hip area, right.

"How do you know that?

"I could feel it.

"What do you mean you could feel it?

"I can feel the pressure. I can feel the pressure as it goes by. I didn't know right then. I thought I'd been shot. I didn't know where I'd been shot."

So the idea that this is just some warning shot that goes so close to the officer that he can feel this pressure going by, I believe the jurors were entitled to find that that intent -- that was an intentional act and was the basis for the Attempted Murder conviction.

And the idea that somehow the second shot, whether it was accidental as a result of his hand being blown up or not, would have been icing on the cake for the State and it made for an interesting argument for the defense.

And I can see that Brady and Knowles could have helped bolster that. But you never -- they couldn't help you a bit with the question of the

first shot, which was clearly intentionally fired.

Depending on the then what theory you have of why it was fired, it would have been better to take the position, I think, that it was self-defense right from the get-go. But I don't think that was the way in which this thing was prosecuted or was defended.

Anyway, I don't find error in this case. I don't find that any of the Church v. Gladden claims has any merit. And so for those reasons I do find that the case should be dismissed.

I have relied in concluding on these matters for the oral and written arguments of defense counsel and I include for consideration if there's an appeal my remarks at the end of the case.

So, Mr. Grefenson, if you would be sure that your client is aware of his right of appeal. It's your custom, I think, to always file one for him and I appreciate that. I think that's the wise way to go.

Mr. Pedersen, I'm ruling -- ruling against your claim here today. You do have the opportunity for an appeal to the Court of Appeals. Mr. Grefenson either has or will discuss that with you.

And we'll conclude these proceedings at this time.

MR. GREFENSON: Thank you.

THE COURT: Thank you. Counsel, I appreciate it.

MS. NORDYKE: Thank you, Your Honor.

* * *

(Conclusion of proceedings, 3-13-14 at 9:31 a.m.)

IN THE CIRCUIT COURT OF THE STATE OF OREGON
FOR THE COUNTY OF UMATILLA BY

Kory Pedersen
SID # 16957915, Petitioner/Plaintiff.
vs.
Rick Coursey, Superintendent
Eastern Oregon Correctional Institution
Defendant.

CASE NO. CV120100

JUDGMENT

☒ General ☐ Supplemental ☐ Limited

The above-entitled matter came before the Court March 13, 2014 for a ☑ Trial ☐ Hearing regarding:

☐ Plaintiff/Petitioner's ☑ Petition for Post-Conviction Relief ☐ Motion to Dismiss
☐ Defendant/Respondent's ☐ Motion for Summary Judgment ☐ Other:

NOW, THEREFORE, IT IS HEREBY ADJUDGED THAT THE:

1. ☑ Petition for Post-Conviction Relief ☐ Motion to Dismiss ☐ Motion for Summary Judgment is:

☐ Allowed;

☒ Denied;

1.a. ☐ Per ORS 138.525, the Petition is dismissed as meritless, and is therefore not appealable.

Based upon the following findings and conclusions:

See pages 2, 3, 4

Exhibits received: 1-9

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Petitioner and a deputy sheriff engaged in a gun fight inside Petitioner's motor home. The deputy had called Petitioner out to discuss his overnight parking in a day use park. The situation quickly deteriorated and Petitioner was Tasered twice, once outside and again inside his motor home. He drew a gun, and shot in the direction of the deputy. The officer returned fire and one of his shots hit Petitioner in his gun hand. His gun discharged again, although his hand was significantly injured. Petitioner's theory of the case was that his first shot was merely in warning and the second was the accidental, physical reaction of the deputy's bullet striking his trigger finger.

Counsel for Petitioner called an expert, Hoyer, who had extensive experience in crime scene preservation and analysis. Hoyer testified that it was very possible that Petitioner's gun discharged because his finger was hit by the deputy's bullet. Petitioner, through counsel, faults his trial attorney because he did not call other witnesses to amplify Hoyer's testimony. He concludes that he received inadequate assistance of counsel. He also contends that counsel should have attacked the deputy's lack of probable cause to arrest Petitioner for what was basically a parking violation.

Counsel for Petitioner has elected not to argue a third claim, that he did not receive adequate assistance for his appellate attorney. The court finds that this claim was without significant legal merit, and finds that Petitioner has not carried his burden of proof.

Petitioner has also filed three claims *Church v. Gladden*, 241 OR 308 (1966) which Counsel does not certify. Defense counsel has filed an answering brief and the issues are properly joined before the court.

The law governing claims for post-conviction relief is easily stated, but not so facilely applied. All agree that the seminal United States Supreme Court case is *Strickland v. Washington*, 466 US 668 (1984). That case provides that the petitioner has the burden of proof on two, closely related points, or "prongs". First, the petitioner must show that defense counsel made errors so serious as to deny the right to effective counsel, as guaranteed by the Sixth Amendment. The second requirement is that the petitioner must prove that the deficient performance significantly prejudiced the defense. The question is whether the deficiencies had a real tendency to affect the outcome. As set forth in *Strickland,* "there is a reasonable probability that, but for counsel's professional errors, the result of the proceeding would have been different". *Id.* at 694. The standards for assessing the adequacy of counsel under the state and federal constitutions are "functionally equivalent." *Montez v. Czerniak*, 237 Or App. 276, 278 (2010). Whether alleged errors by trial counsel had a significant tendency to affect the outcome is quite subjective, and directed to the sound discretion of the court. Similar standards apply to appellate counsel.

Petitioner offers the reports of Dr. William Brady and Gary Knowles. Both have impressive resumes and likely would have bolstered the testimony of Mr. Hoyer. Petitioner's problem is that neither of these witnesses, as with Hoyer, could deflect the fact that Petitioner had already fired a first shot directly toward the deputy, before he

was shot in the hand. The jury was entitled to treat the first shot as the basis for Petitioner's conviction. The testimony was chilling:

"....And he's digging all around in there, and grabs a .45 and comes straight up right at me.
Q. Okay, When is it that you realize that he's got a gun?
A. When I see it.
..... He brings it right up, points it right directly at me. And I start to drop my Taser and I --- my radio, and his gun goes off. He fires at me and ----
Q. Where is it pointed when it goes off?
A. Right at me.
Q. .....[W]hy doesn't he hit you?
A. I don't know. .....
.....
Q. All right. And where does the bullet hit?
A. It goes right next to my hip area, right ---
Q. How do you know that?
A. I can feel it?
Q. What do you mean you can feel it?
A. I can feel the pressure. I can feel the pressure as it goes by. And I didn't know right then --- I thought I had been shot. I didn't know where I'd been shot. I could feel the effects from it, from my leg up my side on my left side." (Tr. 261-264)

The additional experts would not have aided Petitioner's case, since they could offer nothing about the first shot. Petitioner testified that he fired the first shot merely as a warning. However, the jury was entitled to disbelieve him.

In this proceeding, Petitioner was called by the defense. He stated that he and his trial attorney discussed a self- defense theory, contrary to the position stated in his brief. He again said that he fired the first shot to warn the officer. The court does not find this testimony credible. Petitioner has not carried his burden on this claim.

Petitioner's other claim is that counsel should have moved to suppress all the evidence of deputy Miller as he exceeded his authority from the moment he drew his Taser and fired it at Petitioner. Counsel for Petitioner acknowledges that Oregon case law is to the contrary and cites State v. Nelll, 216 OrApp 499 (2007). Even if this court would conclude (and does not) that the deputy exceeded his authority, suppression would not have been available. Again, Petitioner has not proven his claim.

The court has read and considered Petitioner's Church v. Gladden claims and finds that none have merit. Petitioner has not carried his burden to show that any error occurred or that such claimed errors had the substantial likelihood of affecting the outcome of the case.

For the foregoing reasons, Petitioner's case is dismissed. The court has relied in part on the oral and written arguments of defense counsel, and any remarks given at the end of these proceedings.

2. This matter involves ☒ Federal ☒ State Constitutional issue(s). All questions were presented and decided.

☒ 3.a. This judgment shall constitute a final general judgment for purposes of appellate review and for purposes of res judicata.

☐ 3.b. This judgment is a limited judgment; the final general judgment shall be prepared and submitted by:

_____ within _____days of the above-mentioned hearing date, or in any case, no later than _____.

GENERAL JUDGMENT

For the reasons stated on the record, it is further ordered that a general judgment be, and hereby is given in favor of the: ☐ PLAINTIFF/PETITIONER ☒ DEFENDANT/RESPONDENT

For the reasons stated on the record, it is further ordered that the general judgment include:

Attorney fees in the sum of $ _____; and/or

Costs in the sum of $ _____. [1]

[1] *Plaintiff's Attorney fees and/or costs shall be become a lien against the Plaintiff's Department of Corrections Trust Account, payable as funds may become available in such account for payments toward or satisfaction of said lien. Any sum remaining unpaid upon release of Plaintiff shall be paid in payments as set by the Plaintiff's post-prison/parole supervision officer; said payments to be set according to the financial ability of Plaintiff make such payments.*

MONEY AWARD

Judgment Creditor: Rick Coursey, Superintendent

Address: EOCI, 2500 Westgate, Pendleton OR 97801

Represented by: Attorney General – DOJ Trial Div.

Attorney Address: 1162 Court Street NE, Salem, OR 97301

Attorney Phone: 503.947.4723

Judgment Amount: $_____

Interest: $_____

Judgment Debtor: Kory Pedersen Debtor Birth Date: 6/11/1970

16957915

Address: EOCI, 2500 Westgate, Pendleton OR 97801

Represented by: GREFENSON, Noel #882168

Attorney Address: ORPCC, 1415 Liberty St SE, Salem OR 97302

Attorney City State Zip: ORPCC, 1415 Liberty St SE, Salem OR 97302

Attorney Phone: (503) 371-1700

Social Sec. #/Tax ID:

Driver's Lic. #/State:

DATED this 13 day of March 20 14.

Jack Billy

Judge Signature

Circuit Court Judge

Printed Judge Name

CV120100
Judgment – Post-Conviction

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UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

KORY CHRISTIAN PEDERSEN, Petitioner-Appellant, v. OREGON BOARD OF PAROLE AND POST-PRISON SUPERVISION, Respondent-Appellee.	No. 19-35599 D.C. No. 6:17-cv-00145-JR District of Oregon, Eugene ORDER

Before: BERZON, MILLER, and BRESS, Circuit Judges.

The panel has unanimously voted to deny Appellant's petition for panel rehearing and rehearing en banc. The full court has been advised of the petition for rehearing en banc, and no judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

The petition for panel rehearing and rehearing en banc (Dkt. No. 48) is **DENIED**.