FILED
United States Court of Appeals
Tenth Circuit

May 18, 2022

Christopher M. Wolpert
Clerk of Court

**UNITED STATES COURT OF APPEALS**

**FOR THE TENTH CIRCUIT**

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In re: MEGAN KYTE,

Petitioner.

No. 22-1121
(D.C. No. 3:18-CV-00649-SB)
(D. Or.)

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**ORDER**

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Before **HARTZ**, **BACHARACH**, and **CARSON**, Circuit Judges.

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Megan Kyte petitions for a writ of mandamus directed to the United States District Court for the District of Oregon.[1] But we lack jurisdiction over the District of Oregon because it is not in our circuit. *See McGeorge v. Cont'l Airlines, Inc.*, 871 F.2d 952, 954 (10th Cir. 1989) ("When Congress defined the outer limits beyond which an appellate court cannot reach, it meant to limit the power of review as well as the authority to supervise to those district courts within the circumscribed circuit."); *In re McBryde*, 117 F.3d 208, 221 (5th Cir. 1997) ("By analogy, we lack jurisdiction over district courts outside of this circuit, and thus cannot issue mandamus running to them."); *Gen. Elec. Co. v. Byrne*, 611 F.2d 670, 672 (7th Cir. 1979) ("The Courts of Appeals have construed their mandamus jurisdiction to extend to cases within their actual or potential

[1] Ms. Kyte represents herself, so we construe her filings liberally. *See Hall v. Bellmon*, 935 F.2d 1106, 1110 (10th Cir. 1991).

appellate jurisdiction."). The United States Court of Appeals for the Ninth Circuit has jurisdiction over the District of Oregon.

So the question becomes whether we should dismiss Ms. Kyte's petition or transfer it to the Ninth Circuit. Transfer is appropriate if it would further the interests of justice. *See* 28 U.S.C. § 1631. Ms. Kyte has attached to her petition a recent order from the Ninth Circuit denying her petition for a writ of mandamus directed to the District of Oregon. In fact, the Ninth Circuit's order contains the same appellate case number and district-court case number that Ms. Kyte included in the caption of the petition before us. The Ninth Circuit's order says that it would not entertain further filings in the case. This circumstance weighs against transfer, and we see nothing suggesting transfer would further the interests of justice. *See Trujillo v. Williams*, 465 F.3d 1210, 1223 n.16 (10th Cir. 2006) (identifying factors bearing on whether to transfer or dismiss).

The petition is dismissed.

Entered for the Court

CHRISTOPHER M. WOLPERT, Clerk

Appendix A

**Kyte v. Persson**

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF OREGON PORTLAND DIVISION

Oct 29, 2020

No. 3:18-cv-00649-SB (D. Or. Oct. 29, 2020)

No. 3:18-cv-00649-SB 10-29-2020

MEGAN ELIZABETH KYTE, Petitioner, v. ROB PERSSON, Respondent.

MOSMAN, J.

OPINION AND ORDER **MOSMAN, J.,**

On July 27, 2020, Magistrate Judge Stacie F. Beckerman issued her Findings and Recommendation (F&R) [ECF 52]. Judge Beckerman recommended that I DENY Petitioner's Amended Petition for Writ of Habeas Corpus [ECF 34] and decline to issue a Certificate of Appealability. Petitioner Megan Elizabeth Kyte filed objections [ECF 61] and Respondent Rob Persson filed a response [ECF 62]. Upon review, I agree with Judge Beckerman and DISMISS this case with prejudice.

## 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

Appendix A

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).

**CONCLUSION**

Upon review, I agree with Judge Beckerman's recommendation and I ADOPT the F&R [ECF 52] as my own opinion. Ms. Kyte's Amended Petition for Writ of Habeas Corpus [ECF 34] is DENIED and I decline to issue a Certificate of Appealability. The case is DISMISSED with prejudice.

IT IS SO ORDERED.

DATED this 29 day of October, 2020.

/s/

MICHAEL W. MOSMAN

United States District Judge

IN THE UNITED STATES DISTRICT COURT

DISTRICT OF OREGON

MEGAN ELIZABETH KYTE,

Petitioner,

v.

ROB PERSSON,

Respondent.

Case No. 3:18-cv-00649-SB

**FINDINGS AND RECOMMENDATION**

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**BECKERMAN, U.S. Magistrate Judge.**

Petitioner Megan Elizabeth Kyte ("Petitioner") filed this habeas corpus proceeding pursuant to 28 U.S.C. § 2254. For the reasons that follow, the district judge should deny the Amended Petition for Writ of Habeas Corpus (ECF No. 34) (the "Amended Petition"), and decline to issue a certificate of appealability.

## BACKGROUND

On November 4, 2014, a Clackamas County grand jury returned an indictment charging Petitioner with four counts of Burglary in the First Degree, twelve counts of Identity Theft, three

counts of Theft in the Second Degree, and one count of Theft in the Third Degree. Resp't Ex. 116 at 37-41. All charges arose out of several incidents in which Petitioner broke into a home, stole cash and a credit card from the homeowner's wallet, and subsequently used the stolen credit card to make purchases at various stores in the Portland area. Resp't Ex. 111 at 25-34.

The Clackamas County Circuit Court initially set Petitioner's trial for December 17, 2014. Resp't Ex. 103 at 2. In the week leading up to the scheduled trial date, defense counsel moved for a continuance, citing the need for additional time to prepare Petitioner's defense and to obtain an evaluation of Petitioner's mental health. Resp't Exs. 104 at 2; 105 at 3. At a hearing on the motion on December 17, 2014, the trial court noted that Petitioner had signed a waiver of her right to a speedy trial, to which Petitioner objected. Resp't Ex. 105 at 2. Petitioner protested that she had been in custody for fifty days without access to the evidence against her, and stated that she wanted to fire her attorney. *Id.* at 3-4. The trial court nevertheless filed Petitioner's signed waiver, explaining that while Petitioner did not "agree[] to it here in the moment," a continuance was necessary to investigate her ability to aid and assist in her defense, and to determine whether the circumstances warranted defense counsel's withdrawal. *Id.* at 4, 6. The trial court reset Petitioner's trial to begin February 10, 2015. *Id.* at 7.

On January 12, 2015, defense counsel withdrew as Petitioner's attorney of record, citing an irreparable breakdown of the attorney-client relationship. Resp't Ex. 107 at 2. On January 20, 2015, Petitioner moved for appointment of new counsel. Resp't Ex. 108 at 2. The trial court granted Petitioner's motion on the same day, and appointed John Gutbezahl ("Gutbezahl") to represent Petitioner at trial. Resp't Ex. 110 at 2.

On February 10, 2015, Gutbezahl moved to continue the trial date. *Id.* at 2. Petitioner objected, denying that she had waived her rights:

> So I -- I didn't -- I'm not -- when they asked for an extension, I didn't want the first extension. I explained that. I was not given discovery the first 50 days it was. I was not told the terms of the extension. I mean, I wasn't even explained my original plea deal by this original attorney. And now, I have to sit here and wait for you guys to get me an attorney who explains things to me? So I've not been given proper or adequate defense at all, and I've been sitting here for over 100 days.

*Id.* The trial court evaluated Petitioner's objection pursuant to Oregon's speedy trial statute, OR. REV. STAT. § 136.295, which permits a second extension of a criminal defendant's pretrial custody and postponement of the trial date for up to sixty days upon a showing of good cause, provided the extension will not cause the defendant to be detained longer than 180 days. *Id.* at 3. Citing Gutzbezahl's recent appointment and the complex nature of the case, the trial court determined good cause existed to warrant a sixty-day continuance. *Id.* at 3-4. The trial court observed that an additional sixty days would not extend Petitioner's pretrial custody beyond the 180-day limit imposed by OR. REV. STAT. § 136.295, but noted that any additional extensions would likely require Petitioner's express consent. *Id.* at 4.

Trial began on April 7, 2015. Resp't Ex. 111 at 1. Outside of the presence of the jury, Petitioner again protested that she had not been allowed to review the discovery in her case, and she requested that Gutzbezahl withdraw as counsel. Resp't Ex. 112 at 9. Petitioner also grieved the pretrial delay, speculating that the prosecution had gathered additional evidence against her in the interim:

> It's my belief that the February 10th extension -- it's possible that the prosecution did acquire three new surveillance tapes in this ID theft. I have not wanted one extension since I've been here. I've been lied to by these attorneys, given extensions I don't want. I wanted to go to trial. I rejected my plea.

*Id.* Commending Gutzbezahl's performance and noting that his withdrawal "would be extremely disruptive to the trial [and] extremely confusing to the jury," the trial court denied Petitioner's request to proceed *pro se*. *Id.* at 11-12.

On April 9, 2015, the jury found Petitioner guilty on all counts.[1] Resp't Ex. 113 at 3-4. The trial judge later sentenced Petitioner to a custodial term of sixty months, followed by thirty-six months of post-prison supervision. Resp't Ex. 101.

Petitioner appealed *pro se*. Resp't Ex. 116. In her appellate brief, Petitioner set forth numerous assignments of error, challenging, among other things, the sufficiency of the evidence and pre-trial delay. *Id.* at 2-6. The Oregon Court of Appeals affirmed Petitioner's convictions without opinion, and the Oregon Supreme Court denied review. *State v. Kyte*, 287 Or. App. 696, *rev. denied*, 362 Or. 289 (2018). Petitioner did not seek post-conviction relief.

On April 16, 2018, Petitioner filed a *pro se* Petition for Writ of Habeas Corpus in this Court. On June 13, 2019, appointed counsel filed an Amended Petition, asserting three grounds for relief:

> (a) [Petitioner's] conviction was obtained in violation of the Fourteenth Amendment to the United States Constitution, as interpreted in *Jackson v. Virginia*, 443 U.S. 307 (1979), because there was insufficient evidence to sustain the convictions on Counts 1, 2, 3, 4, 5, 9, and 12.
>
> (b) [Petitioner's] rights under the due process clause of the Fourteenth Amendment to the United States Constitution were violated when witnesses who were not examined by the grand jury testified against [Petitioner], and she was not provided sufficient notice prior to trial.
>
> (c) [Petitioner's] rights under the Sixth Amendment to the United States Constitution were violated when she was denied a speedy trial.

Am. Pet. (ECF No. 34). Respondent urges the Court to deny habeas relief because Petitioner failed fairly to present any of the grounds for relief alleged in the Amended Petition to the Oregon Supreme Court, and they are now procedurally defaulted. Resp. Am. Pet. (ECF No. 39) at 4-8. Additionally, Respondent argues that to the extent Petitioner properly exhausted Ground

[1] The jury did not consider Count 19, Identity Theft, because the trial court dismissed it prior to trial. Resp't Ex. 111 at 9.

(c), the state court decision denying relief was neither contrary to, nor an unreasonable application of, clearly established federal law and is entitled to deference. *Id.* at 8-11. In her Supporting Brief, Petitioner addresses Respondent's arguments as to Ground (c) only.

## DISCUSSION

### I. EXHAUSTION AND PROCEDURAL DEFAULT

#### A. Legal Standards

An individual in state custody generally must exhaust all available remedies in state court, either on direct appeal or through collateral proceedings, before a federal court may consider granting habeas relief. 28 U.S.C. § 2254(b)(1); *Smith v. Baldwin*, 510 F.3d 1127, 1137 (9th Cir. 2007) (noting that a prisoner must first exhaust available remedies before a federal court may consider the merits of a habeas petition); *Carter v. Giurbino*, 385 F.3d 1194, 1196 (9th Cir. 2004) (holding that a state prisoner must fairly present all claims to the highest state court before seeking habeas relief) (citing *Picard v. Connor*, 404 U.S. 270, 278 (1971)). A habeas petitioner satisfies the exhaustion requirement "by fairly presenting the federal claim to the appropriate state courts . . . in the manner required by the state courts, thereby 'afford[ing] the state courts a meaningful opportunity to consider allegations of legal error.'" *Casey v. Moore*, 386 F.3d 896, 915-16 (9th Cir. 2004) (quoting *Vasquez v. Hillery*, 474 U.S. 254, 257 (1986) (alteration in original)).

A fair presentation requires that the petitioner made "'reference to a specific federal constitutional guarantee, [and included] a statement of the facts that entitle [him or her] to relief.'" *Dickens v. Ryan*, 740 F.3d 1302, 1317 (9th Cir. 2014) (quoting *Gray v. Netherland*, 518 U.S. 152, 162-63 (1996)). The presentation of a federal claim "for the first and only time in a procedural context in which its merits will not be considered unless there are special and

important reasons" for doing so does not satisfy the exhaustion requirement. *Castille v. Peoples*, 489 U.S. 346, 351 (1989); *see also Roettgen v. Copeland*, 33 F.3d 36, 38 (9th Cir. 1994) (noting that the submission of "a new claim to the state's highest court in a procedural context in which its merits will not be considered absent special circumstances does not constitute fair presentation").

If the petitioner fails fairly to present her federal claims to the highest state court, and state procedural rules now bar their consideration, the claims are procedurally defaulted. *Hurles v. Ryan*, 752 F.3d 768, 779-80 (9th Cir. 2014) (holding that the petitioner procedurally defaulted his claims because he failed to present his claims to the Arizona Supreme Court, and if presently raised, the claims would be dismissed as waived); *see also O'Sullivan v. Boerckel*, 526 U.S. 838, 845, 848 (1999) (holding that the petitioner failed to present three of his claims to the Illinois Supreme Court in a timely fashion and therefore procedurally defaulted those claims). An individual in state custody is barred from raising procedurally defaulted claims in federal court unless he "can demonstrate cause for the default and actual prejudice as a result of the alleged violation of federal law or demonstrate that failure to consider the claims will result in a fundamental miscarriage of justice." *Coleman v. Thompson*, 501 U.S. 722, 750 (1991).

**B. Analysis**

In Ground (c), Petitioner alleges that the pretrial delay violated her Sixth Amendment right to a speedy trial. Specifically, Petitioner contends that an almost six-month delay between indictment and trial is presumptively prejudicial, that her attorneys caused the delay over her objections, that she repeatedly asserted her right to a speedy trial, and that the delay resulted in prejudice because she remained in custody while awaiting trial. Br. Supp. Am. Pet. (ECF No. 49) at 7-8.

In her appellate brief on direct appeal, Petitioner raised as her Third Assignment of Error: "[t]rial court exercised a lack of judicial notice when the defendant did not waive her right to a quick and speedy trial on February 10th, 2015." Resp't Ex. 116 at 19. Citing the trial court's review of Gutzbezahl's motion for a continuance pursuant to OR. REV. STAT. § 136.295, Petitioner argued that "[t]he trial court denied [her] a quick and speedy trial on Feb[r]uary 10th, 2015." Resp't Ex. 116 at 19. Petitioner further claimed that OR. REV. STAT. § 136.295 "conflicts with the Sixth Amendment," and that she "never waived her right to a quick and speedy trial." Resp't Ex. 116 at 19-20. Petitioner thus alleged that she was unlawfully detained from February 10, 2015 to April 7, 2015 while awaiting trial. *Id.* at 20.

In response, the State argued that Petitioner had not preserved the Third Assignment of Error, and did not request plain error review on appeal. Resp't Ex. 117 at 8. The State nevertheless addressed the merits of the claim, arguing that the trial court did not violate Petitioner's speedy trial rights because her trial began within 180 days as required under OR. REV. STAT. § 136.295. Resp't Ex. 117 at 9. The State further argued that a delay of less than six months, primarily at the request of Petitioner's attorneys, was not unreasonable under the Oregon Constitution or the United States Constitution. *Id.* at 10.

Respondent here argues that Petitioner failed fairly to present Ground (c) to the highest state court because she neglected to preserve the issue in the trial court, and failed to request plain error review on appeal. Resp. Am. Pet. at 8. Petitioner does not deny that she failed to preserve her claim, nor does she refute Respondent's assertion that she did not request plain error review.

Generally, Oregon law requires an appellant to preserve her claims in the trial court before raising such claims to the Oregon Court of Appeals. *See* OR. R. APP. P. 5.45(1)

(instructing that "[n]o matter claimed as error will be considered on appeal unless the claim of error was preserved in the lower court . . . ."). If a litigant fails to preserve her claims in the lower court, those claims are waived. *Id.*; *cf. Ramirez v. State of Oregon*, 214 Or. App. 400, 401 (2007) (noting that all grounds for post-conviction relief must be asserted in the petition, and any grounds "not so asserted are deemed waived"). "Under Oregon's plain error doctrine, however, an appellate court may address a defaulted argument if the trial court committed error apparent on the face of the record." *Smith v. Or. Bd. of Parole & Post-Prison Supervision*, 736 F.3d 857, 860 (9th Cir. 2013) (citing *State v. Ramirez*, 343 Or. 505, 512-13 (2007)). The decision to consider plain error is left to the discretion of the Oregon Court of Appeals. OR. R. APP. P. 5.45(1) (noting that the appellate court may, in its discretion, consider plain error).

Determining whether to review an unpreserved claim of error requires a two-step analysis. First, the appellate court must determine if the error (1) is "one of law"; (2) is obvious and "'not reasonably in dispute'"; and (3) appears on the face of the record without requiring the reviewing court to go beyond the record to identify the error or to choose between competing inferences. *State v. Tilden*, 252 Or. App. 581, 590 (2012) (quoting *State v. Brown*, 310 Or. 347, 355 (2007)). If plain error is identified, the appellate court must "'exercise its discretion to consider or not to consider the error,'" *State v. Fults*, 343 Or. 515, 521 (2007) (en banc) (quoting *Ailes v. Portland Meadows, Inc.*, 312 Or. 376, 381 (1991)), taking into account "the competing interests of the parties; the nature of the case; the gravity of the error; the ends of justice in the particular case; how the error came to the court's attention; and whether the policies behind the general rule requiring preservation of error have been served in the case in another way." *Ailes*, 312 Or. at 382 n.6. If the reviewing court elects to consider the error, it "must articulate its reasons for doing so.'" *Fults*, 343 Or. at 521 (quoting *Ailes*, 312 Or. at 381).

The appellant generally bears the burden of explaining "why an error satisfies the requisites of plain error and . . . why [the Court] should exercise [its] discretion to correct that error." *Tilden*, 252 Or. App. at 589; *see also* OR. R. APP. P. 5.45(4)(b) (providing that "[w]here a party has requested that the court review a claimed error as plain error, the party must identify the precise error, specify the state of the proceedings when the error was made, and set forth pertinent quotations of the record where the challenged error was made"). Thus, the Oregon Court of Appeals "ordinarily will not proceed to the question of plain error unless an appellant has explicitly asked" it to do so. *Tilden*, 252 Or. App. at 589; *see also* OR. R. APP. P. 5.45(7) (instructing that the appellate court "may decline to exercise its discretion to consider plain error absent a request explaining the reasons that the court should consider the error").

Petitioner did not explicitly request plain error review from the Oregon Court of Appeals, but nevertheless contends that her speedy trial claim was properly before the Oregon Court of Appeals pursuant to *Tilden*. Br. in Supp. at 4-6. In *Tilden*, the Oregon Court of Appeals considered an unpreserved assignment of error despite the appellant's failure explicitly to request plain error review. The Oregon Court of Appeals determined that it could properly address plain error, despite the absence of an express request to do so, because the appellant had "satisfied the requisites of ORAP 5.45 regarding a claim of error apparent on the record and . . . [had] met his burden of demonstrating that type of error in his opening brief." *Tilden*, 252 Or. App. at 589. Petitioner argues that like the appellant in *Tilden*, she complied with Oregon's appellate rules governing claims of error apparent on the record, and properly included argument in her appellate brief as to why the alleged error met the plain error standard. Br. in Supp. at 5. Petitioner thus claims that she fairly presented the speedy trial claim to the state courts, and that pursuant to *Smith v. Oregon Board of Parole and Post-Prison Supervision*, the Oregon Court of

Appeals' "cursory rejection" of her speedy trial claim, without specific reliance on a state procedural rule, satisfies the exhaustion requirement. *Id.*

Even if this Court assumes that Petitioner's speedy trial claim was properly before the Oregon Court of Appeals on plain error review pursuant to *Tilden*, Petitioner nevertheless presented her claim in a procedural context in which its merits would not be considered absent special circumstances. *See State v. Gornick*, 340 Or. 160, 166 (2006) (noting that plain error review is conducted "only in rare and exceptional cases," and must be utilized with "utmost caution"); *Steffler v. Belleque*, Case No. 3:09-cv-01371-MA, 2013 WL 182873, at *3 (D. Or. Jan. 17, 2013) (holding that the petitioner did not fairly present his claim to Oregon courts on direct appeal and his claim was therefore procedurally defaulted, because "[p]resentation of a claim to the Oregon Court of Appeals on a plain error basis . . . is not a fair presentation for exhaustion purposes because the claim's merits will not be considered absent special and important reasons to do so" (citing *Castille*, 489 U.S. at 351)). As such, Petitioner failed fairly to present Ground (c) to the Oregon courts, and because Petitioner can no longer preserve and present Ground (c) in state court, the claim is procedurally defaulted. *See, e.g.*, *Glasscock v. Taylor*, Case No. 2:14-cv-016-SI, 2017 WL 1735173, at *7-8 (D. Or. Apr. 25, 2017) (holding that the petitioner procedurally defaulted a claim raised as "plain error" to the Oregon Court of Appeals because he raised the claim in a procedural context in which the merits would not be considered absent special circumstances, and could no longer raise the claim), *aff'd*, 740 F. App'x 566 (9th Cir. 2018).

Furthermore, Petitioner's reliance on *Smith* is misplaced. In *Smith*, the Ninth Circuit held that where the Oregon Court of Appeals affirmed with only a cursory explanation, it was "quite plausible" that the Court of Appeals reached the merits of both the petitioner's unpreserved

federal claim and preserved state claim because the Court of Appeals did not "intimat[e] that its disposition rested on state procedural grounds." *Smith*, 736 F.3d at 861. The analysis in *Smith* focused on whether the Oregon Court of Appeals had rejected a claim based upon an independent and adequate state procedural rule, and the Ninth Circuit applied a presumption that the Court of Appeals adjudicated the claim on the merits. *Id.*

Here, the issue is whether Petitioner fairly presented his claim, not whether the Oregon Court of Appeals rejected the claim on state procedural grounds, and the same presumption does not apply. *See Glasscock*, 2017 WL 1735173, at *7 (distinguishing *Smith* on the ground that "this is an issue of fair presentation, not an analysis of whether the Oregon Court of Appeals invoked an independent and adequate state procedural rule"). Unlike in *Smith*, here there is no reason to believe that the Oregon Court of Appeals conducted a plain error review of Petitioner's federal speedy trial claim, without comment, where Petitioner did not explicitly request plain error review and where Oregon rules allow plain error review only under exceptional circumstances and require that the Court of Appeals articulate its reasons for considering plain error. *See id.* (holding that "Petitioner did not fairly present on appeal his federal constitutional claim" and finding that "[u]nlike in *Smith*, Petitioner here did not attempt to prove his right to present a defense claim as 'plain error'"). Thus, the Court "declines to apply the court-created presumption that the state court proceeded to the merits of the federal claim." *Id.*; *see also Caughlin v. Premo*, Case No. 3:09-cv-01038-KI, 2016 WL 676375, at *4-5 (D. Or. Feb. 18, 2016) (distinguishing *Smith* and holding that "[i]n the absence of some ambiguity as to whether the Court of Appeals' affirmance without opinion was 'interwoven with federal law,' this Court declines to apply the court-created presumption that the state court proceeded to the merits of the federal claim."); *cf. Coleman*, 501 U.S. at 735 (explaining that to apply the merits presumption, the state court

decision "must fairly appear to rest primarily on federal law or to be interwoven with federal law").

In sum, Petitioner failed fairly to present her federal constitutional speedy trial claim on appeal because she presented it to the Oregon Court of Appeals in a procedural context in which the Court of Appeals would not consider its merits absent special circumstances. The claim is now procedurally defaulted because Petitioner is time-barred from raising the claim in state court, and Petitioner has not demonstrated cause for the default and actual prejudice, nor that failure to consider the claim will result in a fundamental miscarriage of justice. Therefore, the district judge should deny habeas relief on Ground (c).

## II. RELIEF ON THE MERITS

Even if Petitioner's speedy trial claim is not procedurally defaulted, Petitioner is not entitled to habeas relief on the merits of her claim.

### A. Legal Standards

#### 1. Deference to State Court Decisions

The Antiterrorism and Effective Death Penalty Act ("AEDPA") imposes "a difficult to meet and highly deferential standard for evaluating state-court rulings, which demands that state-court decisions be given the benefit of the doubt." *Cullen v. Pinholster*, 563 U.S. 170, 181 (2011) (internal quotations and citations omitted). Under the AEDPA, a federal court may not grant habeas relief unless the petitioner demonstrates that such denial was "contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States" or 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).

A state court decision is "contrary to" clearly established federal law if it "applies a rule that contradicts the governing law set forth in [the Supreme Court's] cases," or if it "confronts a set of facts that are materially indistinguishable 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). A state court unreasonably applies clearly established federal law if it correctly identifies the governing legal principle but misapplies that principle to the facts at hand. *Id.* at 407 (confirming that an unreasonable application occurs where "the state court identifies the correct governing legal rule from [the Supreme Court's] cases but unreasonably applies it to the facts of the particular state prisoner's case"). The "unreasonable application" clause requires the state court's decision to be more than merely erroneous or incorrect. *Id.* at 411 (holding that habeas relief may not be granted "simply because that court concludes in its independent judgment that the relevant state-court decision applied clearly established federal law erroneously or incorrectly"). Rather, the state court's application of clearly established federal "must also be 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 decision is issued without explanation, a habeas court "must determine what arguments or theories supported or, . . . could have supported, the state court's decision; and then it must ask whether it is possible fairminded jurists could disagree that those arguments or theories are inconsistent with the holding in a prior decision of [the Supreme Court]." *Id.* at 102. A habeas petitioner therefore must still meet her burden "by showing there was no reasonable basis for the state court to deny relief." *Id.*

**2. Sixth Amendment Right to a Speedy Trial**

The Sixth Amendment guarantees the right of an accused to a speedy trial. U.S. Const. amend VI. Unlike other procedural rights, the right to a speedy trial is "a more vague concept" because it is "impossible to determine with precision when the right has been denied." *Barker v. Wingo*, 407 U.S. 514, 521 (1972). Accordingly, to determine whether the right to speedy trial has been violated, the Court must assess four factors: "[1] Length of delay, [2] the reason for the delay, [3] the defendant's assertion of his right, and [4] prejudice to the defendant." *Id.* at 530. No factor is by itself "a necessary or sufficient" condition to find a deprivation of the right to a speedy trial. *See id.* at 533 (explaining that the four factors "are related . . . and must be considered together with such other circumstances as may be relevant").

To trigger a speedy analysis under *Barker*, "an accused must allege that the interval between accusation and trial has crossed the threshold dividing ordinary from 'presumptively prejudicial' delay." *Doggett v. U.S.*, 505 U.S. 647, 651-52 (1992) (citing *Barker*, 407 U.S. at 530-31). If the accused makes such a showing, "the court must then consider, as one factor among several, the extent to which the delay stretches beyond the bare minimum needed to trigger judicial examination of the claim." *Id.* at 652. Whether the length of a given delay can be considered presumptively prejudicial "is necessarily dependent upon the peculiar circumstances of the case." *Barker*, 407 U.S. at 530-31.

**B. Analysis**

Petitioner argues that given the facts of her case, all fairminded jurists would conclude that she was denied a speedy trial in violation of the Sixth Amendment, and thus the state court's contrary conclusion was objectively unreasonable. Br. in Supp. at 9. In response, Respondent

argues that the pretrial delay in this case is insufficient to trigger an inquiry under *Barker*, and that Petitioner nevertheless is responsible for the delay. Resp. to Am. Pet. at 10-11.

Law enforcement took Petitioner into custody on October 28, 2014, where she remained until trial commenced on April 7, 2015. Resp't Ex. 112 at 124. Thus, less than six months elapsed between Petitioner's arrest and the beginning of her trial. Given the nature and number of charges leveled against Petitioner, the state court reasonably could have concluded that a delay of less than six months was not presumptively prejudicial and therefore did not trigger the *Barker* analysis. *See Doggett*, 505 U.S. at 652 n.1 (noting that, depending on the charges, post-accusation delay generally is found to be presumptively prejudicial "at least as it approaches one year"); *see also U.S. v. Chavez-Torres*, 53 F. App'x 840, 842 (9th Cir. 2002) (holding that "no peculiar or special circumstances" warranted reaching the additional *Barker* factors with delay of less than six months); *U.S. v. Beamon*, 992 F.2d 1009, 1013 (9th Cir. 1993) (acknowledging that delays approaching one year typically satisfy the "presumptively prejudicial" threshold); *but see U.S. v. Valentine*, 783 F.2d 1413, 1417 (9th Cir. 1986) (six-month delay on a single count of felon in possession of a firearm sufficient to trigger analysis of additional *Barker* factors); *U.S. v. Simmons*, 536 F.2d 827, 831 (9th Cir. 1976) (noting that a six-month delay on two counts of forgery was a "borderline case," but holding that such delay was sufficient to trigger the *Barker* inquiry).

Even if a delay of less than six months could be considered sufficiently prejudicial to trigger an analysis of the other *Barker* factors, on balance those factors weigh against Petitioner. The delay here was largely attributable to Petitioner, not the government. The trial court granted only two continuances of Petitioner's trial date, both at the request of Petitioner's attorneys, to allow time to evaluate if Petitioner was able to aid and assist, to allow Petitioner to substitute

counsel, and to allow newly appointed counsel time to prepare for trial. Thus, the second *Barker* factor weighs against Petitioner. Further, although Petitioner asserted her right to a speedy trial, her assertions must be viewed in light of her other conduct, and much of the delay here resulted from her own conduct, including firing her appointed lawyer. *See U.S. v. Lam*, 251 F.3d 852, 859 (9th Cir. 2001) ("Here, because we find that Lam's counsel's actions are properly attributable to Lam, his successive requests for continuances considerably diminish the weight of Lam's assertions of his speedy trial right."). Thus, the third *Barker* factor weighs only slightly in Petitioner's favor, and she has submitted no evidence in support of her allegation that the pre-trial delay of less than six months resulted in prejudice by hampering her defense or causing anxiety and concern (i.e., the fourth *Barker* factor). *See U.S. v. Sutcliffe*, 505 F.3d 944, 957 (9th Cir. 2007) ("While Defendant argues that he suffered from anxiety and concern due to his long period of pre-trial incarceration, we conclude, under the circumstances of this case, that this allegation is insufficient to demonstrate that Defendant suffered impermissible prejudice as a result of the delays he caused.").

On balance, in light of the relatively benign pretrial delay, Petitioner's role in causing the delay, and a lack of demonstrable prejudice, the *Barker* factors do not support a finding that Petitioner was denied her right to a speedy trial here. *See U.S. v. Cramer*, Nos. 3:17-cr-267-SI and 3:17-cr-271-SI, 2019 WL 470902, at *7 (D. Or. Feb. 6, 2019) (applying *Barker* analysis to conclude 21-month delay was not a speedy trial violation, noting that "[a]fter applying the *Barker* balancing test, the Supreme Court and the Ninth Circuit have held that similar—and even longer—delays have not violated the Sixth Amendment[,]" and citing Supreme Court and Ninth Circuit cases finding no speedy trial violations despite five-year, 90-month, 30-month, 22-month, and 20-month delays) (citations omitted). Thus, the Oregon courts' denial of Petitioner's speedy

trial claim was not based on an unreasonable determination of the facts nor contrary to clearly established federal law, and Petitioner is not entitled to habeas relief on Ground (c). *See Hale v. Franke*, No. 3:11-cv-00811-CL, 2013 WL 3348430, at *4 (D. Or. June 28, 2013) ("In this case, the state court's rejection of petitioner's speedy trial claim was not an unreasonable application of the *Barker* test and therefore entitled to deference by this court.").

## III. CLAIMS PETITIONER DID NOT ADDRESS

Petitioner does not address the claims alleged in Grounds (a) and (b) of her Amended Petition. Additionally, Petitioner does not attempt to refute Respondent's argument that both Grounds (a) and (b) are procedurally defaulted, and that she has not demonstrated cause and prejudice to excuse the procedural default, or that a fundamental miscarriage of justice would result if the Court declined to address those grounds. Accordingly, the district judge should deny habeas relief on Grounds (a) and (b) because they are procedurally defaulted and because Petitioner has failed to sustain her burden to demonstrate why she is entitled to habeas relief. *See Silva v. Woodford*, 279 F.3d 825, 835 (9th Cir. 2002) (noting that the petitioner carries the burden of proving her case).

## CONCLUSION

Based on the foregoing, the district judge should DENY the Amended Petition for Writ of Habeas Corpus (ECF No. 34) with prejudice, and decline to issue a Certificate of Appealability because Petitioner has not made a substantial showing of the denial of a constitutional right. *See* 28 U.S.C. § 2253(c)(2).

## SCHEDULING ORDER

The Court will refer its Findings and Recommendations to a district judge. Objections, if any, are due within fourteen (14) days. If no objections are filed, the Findings and

Recommendation will go under advisement on that date. If objections are filed, a response is due fourteen (14) days after being served with a copy of the objections. When the response is due or filed, whichever date is earlier, the Findings and Recommendation will go under advisement.

DATED this 27th day of July, 2020.

Stacie F. Beckerman

STACIE BECKERMAN
United States Magistrate Judge