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UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

DANIEL LOREN JENKINS, Petitioner-Appellant, v. ERIN REYES, Superintendent Two Rivers Correctional Institution, Respondent-Appellee.	No. 22-35341 D.C. No. 2:16-cv-00247-YY MEMORANDUM*

Appeal from the United States District Court
for the District of Oregon
Marco A. Hernández, Chief District Judge, Presiding

Argued and Submitted April 3, 2024
Portland, Oregon

Before: OWENS and FRIEDLAND, Circuit Judges, and SILVER,** District Judge.

Oregon state prisoner Daniel Loren Jenkins appeals from the district court's denial of his 28 U.S.C. § 2254 habeas petition challenging his 2005 conviction for solicitation to commit aggravated murder. Applying the Antiterrorism and

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

** The Honorable Roslyn O. Silver, United States District Judge for the District of Arizona, sitting by designation.

Effective Death Penalty Act ("AEDPA"), the district court, as relevant here, denied habeas relief (and a certificate of appealability) on Jenkins's ineffective assistance of counsel and bill of attainder claims. We granted a partial certificate of appealability on the ineffective assistance of counsel claim. As the parties are familiar with the facts, we do not recount them here. We affirm.

1. Jenkins's ineffective assistance of counsel claim fails the "'doubly' deferential review" under the combination of *Strickland v. Washington*, 466 U.S. 668 (1984), and AEDPA. *Michaels v. Davis*, 51 F.4th 904, 939 (9th Cir. 2022) (per curiam) (quoting *Harrington v. Richter*, 562 U.S. 86, 105 (2011)), *petition for cert. filed*, No. 23-5038 (U.S. June 30, 2023).

To establish ineffective assistance of counsel, a defendant must show that "counsel's performance was deficient" and "the deficient performance prejudiced the defense." *Strickland*, 466 U.S. at 687. *Strickland* instructs that "[t]he proper measure of attorney performance" is "reasonableness under prevailing professional norms." *Id.* at 688. The Supreme Court has not "define[d] with greater precision the weight to be given to recognized canons of ethics, the standards established by the state in statutes or professional codes, and the Sixth Amendment, in defining the proper scope and limits on [attorney] conduct." *Nix v. Whiteside*, 475 U.S. 157, 165-66 (1986).

Under AEDPA, we may grant relief only if the state court's adjudication

"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," 28 U.S.C. § 2254(d)(1), or "was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding," *id.* § 2254(d)(2). The Oregon Circuit Court's denial of Jenkins's petition on collateral review provides the "relevant rationale" under AEDPA. *See Wilson v. Sellers*, 584 U.S. 122, 125 (2018).

The Oregon Circuit Court's decision denying post-conviction relief was neither contrary to, nor involved an unreasonable application of, clearly established law. The Oregon Circuit Court dismissed Jenkins's claim "for all of the reasons" offered by the state. Those reasons included:

> Before disclosing petitioner's actual threat of harm to the Bidwells and their children, Lynne Dickison took all available steps to determine whether she was ethically required to make that disclosure. The Oregon State Bar investigated the matter and found "no credible evidence of misconduct" by Ms. Dickison.

It was not unreasonable for the Circuit Court to conclude that Dickison did not depart from the applicable ethical norms. Dickison reasonably believed that she could disclose the communication under professional norms prevailing at the time and conducted a reasonable investigation and inquiry before coming to that conclusion. *See McClure v. Thompson*, 323 F.3d 1233, 1245-46 (9th Cir. 2003) ("Reasonableness of belief may be strongly connected to adequacy of investigation

or sufficiency of inquiry in the face of uncertainty."); *Michaels*, 51 F.4th at 931-33, 936-37.

Disciplinary Rule ("DR") 4-101(C)(3) of the 1999 Oregon Code of Professional Responsibility permitted the disclosure of "[t]he intention of the lawyer's client to commit a crime and the information necessary to prevent the crime." In her own professional judgment, Dickison understood Jenkins to have a "clear and serious intent at that time to follow through" with crimes of violence against Bidwell, his wife, and their children. Dickison also credited Dr. Colby's "professional opinion" that "given his testing of Mr. Jenkins he believed that Mr. Jenkins would carry out those threats as soon as he was able to."

Based on "the statement to Dr. Colby, Dr. Colby's opinion about dangerousness, Dr. Colby's opinion about intent to follow through, the police reports in this case and the history of this case, [and] the defendant's [violent] personal history," Dickison could have reasonably believed that DR 4-101(C)(3) permitted disclosure. Further, the Oregon State Bar had advised her that she could ethically disclose Jenkins's threats as long as she "believed that they were viable."

Jenkins counters that Dickison's letters to the State Bar—acknowledging that Jenkins's "release was not imminent nor contemplated"—indicate that her disclosure was unreasonable. But even if Jenkins's release from custody were not imminent, the record indicates that Dickison was concerned that Jenkins would be

able to "reach[] somebody in the outside and pay[] them to hurt somebody or kill somebody" or that he "might have contact with someone inside the jail who would then do his bidding once they were released." Dickison's concern was especially reasonable because Jenkins had been charged with soliciting murder prior to making the threats in question.

Dickison conducted a thorough and thoughtful inquiry before choosing to reveal the threats. *See McClure*, 323 F.3d at 1245-46. Prior to her disclosure, Dickison 1) had a law student at her firm investigate the ethical code; 2) called the Oregon State Bar for advice; 3) talked to her boss; and 4) asked the trial court judge whether (hypothetically) she could disclose. *See id.* at 1246. The Oregon Circuit Court reasonably denied Jenkins's claim on the ground that Dickison "took all available steps to determine whether she was ethically required to make that disclosure." Jenkins does not point to any case that would have required Dickison to consult with her client prior to disclosure.

Jenkins argues that the fact that the Oregon Court of Appeals already held that Jenkins's statements to Dr. Colby "were protected by the attorney-client privilege," *see State v. Jenkins*, 79 P.3d 347, 348 (Or. Ct. App. 2003), *opinion adhered to as modified on reconsideration*, 83 P.3d 390 (Or. Ct. App. 2004), indicates that Dickison's performance was necessarily deficient. But whether a

state court may have so ruled as a matter of evidentiary law does not pre-determine this court's analysis of the Sixth Amendment question under *Strickland*.

Though the relevant provision of the 1999 Oregon Evidence Code, § 503(4)(a), was stricter than DR 4-101(C)(3)—allowing disclosure only where professional services were "sought or obtained to enable or aid anyone to commit or plan to commit" a crime—Dickison could have reasonably thought that the Code of Professional Responsibility permitted her disclosure of Jenkins's statements regardless of whether they could later be used against him as a matter of state evidentiary law. *See Michaels*, 51 F.4th at 936 (inquiring into the existence of a "plausible exception to the attorney-client privilege *or* the duty of confidentiality under which" an attorney "might have reasonably been acting" (emphasis added)).

2. We decline to expand the certificate of appealability to include Jenkins's bill of attainder claim. *See* 9th Cir. R. 22-1(e). Jenkins has not made "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). Oregon Evidence Code § 504-5 neither imposed punishment on Jenkins nor was applied to him absent a judicial trial. *See Selective Serv. Sys. v. Minn. Pub. Int. Rsch. Grp.*, 468 U.S. 841, 846-47 (1984).

AFFIRMED.

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

DANIEL LOREN JENKINS,

Petitioner,

v.

JOHN MYRICK, *Superintendent Two Rivers Correctional Institution*,

Respondent.

No. 2:16-cv-00247-YY

ORDER

HERNÁNDEZ, District Judge:

Magistrate Judge You issued a Findings and Recommendation on December 16, 2021, in which she recommends that this Court deny Petitioner's Amended Petition for Writ of Habeas Corpus F&R, ECF 104. The matter is now before the Court pursuant to 28 U.S.C. § 636(b)(1)(B) and Federal Rule of Civil Procedure 72(b).

Petitioner filed timely objections to the Magistrate Judge's Findings and Recommendation. Pet. Obj., ECF No. 114. When any party objects to any portion of the Magistrate Judge's Findings & Recommendation, the district court must make a *de novo* determination of that portion of the Magistrate Judge's report. 28 U.S.C. § 636(b)(1); *Dawson v. Marshall*, 561 F.3d 930, 932 (9th Cir. 2009); *United States v. Reyna-Tapia*, 328 F.3d 1114, 1121 (9th Cir. 2003) (en banc).

The Court has carefully considered Petitioner's objections and concludes that there is no basis to modify the Findings & Recommendation. The Court has also reviewed the pertinent portions of the record *de novo* and finds no error in the Magistrate Judge's Findings & Recommendation.

CONCLUSION

The Court ADOPTS Magistrate Judge You's Findings and Recommendation [104]. Therefore, Petitioner's Amended Petition for Writ of Habeas Corpus [27] pursuant to 28 U.S.C. § 2254 is DENIED. Because Petitioner has not made a substantial showing of the denial of a constitutional right, a Certificate of Appealability pursuant to 28 U.S.C. § 2253(c)(1)(A) is also DENIED.

IT IS SO ORDERED.

DATED: March 27, 2022.

Marco Hernández

MARCO A. HERNÁNDEZ
United States District Judge

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

PENDLETON DIVISION

DANIEL L. JENKINS,

Petitioner,

v.

JOHN MYRICK, Superintendent,
Two Rivers Correctional Institution,

Respondent.

Civil No. 2:16-cv-00247-YY

FINDINGS AND RECOMMENDATION

YOU, Magistrate Judge.

FINDINGS

Petitioner, an adult in custody at the Two Rivers Correctional Institution, brings this habeas corpus action pursuant to 28 U.S.C. § 2254. For the reasons that follow, the Amended Petition for Writ of Habeas Corpus (ECF 27) should be DENIED.

I. Background

Petitioner challenges his 2005 Multnomah County conviction for soliciting aggravated murder, which occurred upon a retrial after his original conviction was reversed by the Oregon appellate courts.

A. Petitioner's First Trial and Appeal

The Oregon Court of Appeals summarized the facts adduced at Petitioner's first trial as follows:

> From 1996 to 1998, [petitioner] had a trading account at Bidwell and Company (the company), a discount stock brokerage firm. During 1998, [petitioner]'s investments through the company lost nearly $300,000 in value. Upset about his losses, [petitioner] complained to the company that it should have advised him against making certain investments. Company president H. Gerald Bidwell (Bidwell) wrote to [petitioner], explaining that he had reviewed the transactions and concluded that the company had acted appropriately. [Petitioner] then began to focus his anger on Bidwell. On September 8, 1998, [petitioner] called Warren, the ex-husband of Bidwell's current wife. He identified himself as "John" and asked Warren if he would be interested in participating in a scheme to "whack" Bidwell. Warren inferred that [petitioner] was asking him to assist [petitioner] in a murder-for-hire. Warren declined and later told Bidwell and the police about the call. An investigation ensued and, among other things, the police learned that [petitioner] had made numerous prank calls to Bidwell's home, sent Bidwell three e-mails with ominous messages predicting Bidwell's death, and stolen court records pertaining to the dissolution of Bidwell's marriage to his former wife. [Petitioner] was arrested on January 9, 1999, and charged with solicitation to commit murder, theft, forgery, tampering with public records, and menacing. The indictment identified Bidwell as the victim for the purpose of the solicitation and menacing charges.
>
> The state produced evidence that, while in jail awaiting trial, [petitioner] told at least two people that he planned to commit several murders in the future. First, in May 1999, he told another inmate, Rohrscheib, that he intended to kill Warren and his children after he was released from jail because Warren had gone to the police. Later, [petitioner] told Rohrscheib that he no longer wanted to hurt Warren's children but that he still wanted to kill Warren; in that conversation, he also stated that he wanted to kill Bidwell. Thereafter, on June 8, 1999, a psychologist, Dr. Colby, interviewed [petitioner]. [Petitioner]'s attorney had retained Colby to evaluate [petitioner] for the purpose of exploring possible defenses. During the interview, [petitioner] said that he wanted his statements to Colby to be privileged, and [petitioner] told Colby not to make a written report of their conversation. [Petitioner] then told Colby that he intended to kill Bidwell, his wife, and their children.
>
> Colby told [petitioner]'s attorney about the threats. She, in turn, reported them to the trial court in the presence of the prosecutor. The state then dismissed the charge

> against [petitioner] for solicitation to commit murder and, two days later, in a second indictment, charged him with solicitation to commit aggravated murder. The second indictment identified Bidwell as [petitioner]'s intended victim. The remaining charges in the first indictment were consolidated for trial with the solicitation to commit aggravated murder charge in the second indictment. The state subpoenaed Colby as a witness at trial. [Petitioner] moved to quash the subpoena, arguing that Colby was his attorney's representative and that both [Oregon Evidence Code (OEC)] 503(2)(a), the attorney-client privilege rule, and OEC 504, the psychotherapist-patient privilege rule, barred admission of [petitioner]'s statements to Colby. The state responded that [petitioner]'s threats fell within OEC 503(4)(a), the future crimes exception to the attorney-client privilege, as well as ORS 419B.040, the child abuse exception to the psychotherapist-patient privilege. The court ruled that both exceptions applied and denied [petitioner]'s motion to quash.
>
> At trial, the state called Rohrscheib and Colby as witnesses. As described above, Rohrscheib testified regarding [petitioner]'s statements about his intention to kill Warren, Warren's children, and Bidwell. Rohrscheib also testified that, in return for his cooperation, he had received a five-day reduction in the six-month sentence that he had been serving. Colby testified that, during his interview with [petitioner], [petitioner] told him that he intended to kill Bidwell and his wife. According to Colby, [petitioner] first stated that he was unsure about taking the lives of Bidwell's children but later stated, "Yes, I think I will kill the Bidwell children in a way that will make Mr. Bidwell suffer for what he has done." The state also adduced other evidence of [petitioner]'s preoccupation with Bidwell, including the prank calls, the e-mails, and the stolen court records. In his defense, [petitioner] conceded that he intended to harass Bidwell, but he contended that he was never serious about killing him.

State v. Jenkins, 190 Or. App. 542, 544-46 (2003), *adhered to as modified on reconsideration*, 191 Or. App. 617 (2004) (footnotes omitted). The jury found Petitioner guilty of solicitation to commit aggravated murder.[1]

Petitioner appealed, arguing that the admission of his statements to Dr. Colby violated the

[1] In a separate judgment, petitioner was also convicted of first-degree theft, first-degree forgery, and tampering with public records. *Jenkins*, 190 Or. App. at 544 n.1. At the close of the state's case, the trial judge granted Petitioner's motion for judgment of acquittal on a charge of menacing. *Id.* at 546, n.3.

attorney-client privilege. *Id*. at 544. The state conceded, and the Oregon Court of Appeals agreed, that the statements were covered by the attorney-client privilege under O.E.C. 503(2)(a). The state argued, however, that the future-crimes exception under O.E.C. 503(4)(a) applied.[2] The Oregon Court of Appeals disagreed, holding:

> There is no basis in the record to infer that [Petitioner's] request for confidentiality constituted a request for services to aid or enable [Petitioner] to commit crimes. To the contrary, the only reasonable inference is that [Petitioner] requested Colby's silence as a condition of disclosing his plan. Furthermore, there is no basis to infer that [Petitioner] sought to buttress his courage by taking with Colby[.]

Id. at 549. The Court of Appeals further held that admission of the statements was not harmless, and reversed and remanded the case for retrial. *Id*. at 549-50. The state sought review, but the Oregon Supreme Court denied review. *State v. Jenkins*, 337 Or. 160 (2004).

While the appeal from the first trial was pending, the Oregon legislature enacted a law that created a new exception to the attorney-client, psychotherapist-patient, and regulated social worker-client privileges. The new law provided that communications were admissible if:

> (a) In the professional judgment of the person receiving the communications, the communications reveal that the declarant has a clear and serious intent at the time the communications are made to subsequently commit a crime involving physical injury, a threat to the physical safety of any person, sexual abuse, or death;
>
> (b) In the professional judgment of the person receiving the communications, the declarant poses a danger of committing the crime; and
>
> (c) The person receiving the communications makes a report to another person based on the communications.

[2] Under O.E.C. 503(4)(a), there is no privilege if "the services of the lawyer were sought or obtained to enable or aid anyone to commit or plan to commit what the client knew or reasonably should have known to be a crime or fraud."

Former O.E.C. 504-5(a)(2002).[3] The law became effective January 1, 2002, but applied "to all communications, whether made before, on or after the effective date" in any trials "commenced on or after the effective date." 2001 Or. Laws ch. 640, § 3. Petitioner's case was, at least in part, an impetus for the new law. In fact, the prosecutors from Petitioner's first trial testified before the legislature in support of the law.

B. Petitioner's Trial on Remand

On remand, the issue of whether Petitioner's statements to Colby were admissible under the new law was extensively litigated to the trial court. Petitioner moved to quash subpoenas he anticipated would be issued to Colby, among others, and to exclude any testimony that would be based on or derived from Colby's communications with him.[4] Petitioner argued, *inter alia*, that his attorney violated his constitutional right to counsel by disclosing his statements to the court and prosecutors, and that excluding Colby's testimony was necessary to place Petitioner in the same position he would have been in had that violation not occurred. Pet. Ex. B, at 1, ECF 61-2; Tr. 674-701. Petitioner also argued that applying O.E.C. 504-5 to Colby's testimony would violate the state and federal prohibitions on *ex post facto* laws, that the requirements of O.E.C. 504-5 were not met in any event because Colby did not "report" the communication, and that, even if O.E.C. 504-5 could apply, the amount of time that had elapsed since the communication

[3] The law has since been amended, but those amendments have no bearing on the issues of this case

[4] The state initially subpoenaed both Colby and Petitioner's first trial attorney Lynne Dickison to be state's witnesses to Petitioner's statements. Tr. 44-45, 48. Subsequently, however, the state abandoned its attempt to call Dickison. Tr. 43-44, 48.

eliminated any danger of Petitioner committing a crime, rendering the provision inapplicable. Pet. Ex. B, at 10-11, ECF 61-2. The trial judge denied the motion in a written order outlining her reasoning why Colby's testimony was admissible under O.E.C. 504-5. Pet. Ex. D, ECF 61-4.

At trial, Colby again testified about Petitioner's statements to him. Tr. 2870-75, 2923-25. The remaining evidence presented by the prosecution essentially mirrored that presented at the first trial as described by the Oregon Court of Appeals. The state's witness Tiger Warren, however, had died in a plane crash between the first and second trials. Tr. 2423-25. Accordingly, Warren's testimony from the first trial was presented to the jury via audiotape and transcript. Also, unlike the first trial, Petitioner testified at the second trial.[5] Tr. 3598-3640. Petitioner admitted to gathering information about Bidwell, admitted making telephone calls to the Bidwell residence and sending email messages to Bidwell, and admitted speaking to Warren once as part of his attempt to gather information, but denied raising the topic of killing Bidwell. Tr. 3607-3640.

The jury again found Petitioner guilty. Resp. Ex. 159, ECF 18. Following a penalty phase trial, the jury found that seven different enhancement facts were present, that petitioner was a dangerous offender, and that he had several prior convictions including one that was not part of the same criminal episode. Resp. Exs. 160-62, ECF 18. The trial court sentenced Petitioner to an indeterminate term of imprisonment of up to 30 years, with a minimum, upward durational departure term of 240 months. Resp. Ex. 101, at 3-4, ECF 16.

Petitioner filed a direct appeal assigning error to, among other things, the admission of

[5] In the first trial, Petitioner testified only during the sentencing phase.

his statements to Colby. Resp. Ex. 122, at 17-24, ECF 16. He renewed his arguments that the testimony should have been excluded in order to place him in the same position he would have been in if his attorney had not violated his constitutional rights by disclosing the statements and that the application of the new law to his case violated state and federal prohibitions against *ex post facto* laws. *Id.* at 20-24. This time, the Oregon Court of Appeals affirmed without opinion, and the Oregon Supreme Court denied review. *State v. Jenkins*, 227 Or. App. 506, *rev. denied*, 346 Or. 362 (2009).

C. State Post-Conviction Relief Proceedings

Petitioner then sought state post-conviction relief ("PCR"). Appearing *pro se*, he raised numerous claims of ineffective assistance against seven different attorneys who represented him throughout the course of both trials and appeals. Resp. Ex. 130, ECF 16. The state moved for summary judgment as to a large number of Petitioner's claims on three bases, arguing: (1) his claims relating to the first trial were successive of his first PCR case; (2) his claims of trial court error had been litigated on appeal; and (3) several of his claims were incorrect as a matter of law. Resp. Ex. 136, ECF 17. The PCR trial court denied 29 of Petitioner's claims for the reasons argued by the state, leaving six claims of ineffective assistance of appellate counsel. Resp. Exs. 139 & 148, at 7-10, ECF 18. Following an evidentiary hearing, the PCR trial court denied relief on the remaining claims. Resp. Ex. 169, ECF 18.

Petitioner appealed. Appearing *pro se* on appeal, Petitioner initially filed an oversized brief that was approximately 78 pages long, setting forth 15 assignments of error. Pet. Ex. B, ECF 87-2. Petitioner sought approval from the Oregon Court of Appeals to exceed the permitted page-limit, but the Court of Appeals denied the request, ordered the brief stricken from the

record, and ordered Petitioner to file an opening brief in compliance with Oregon appellate rules. Pet. Ex. C, ECF 87-3. At first, Petitioner challenged this order, but ultimately filed a brief that was accepted and which set forth 12 assignments of error. Resp. Ex. 171, ECF 18. The Oregon Court of Appeals affirmed without opinion and the Oregon Supreme Court denied review. *Jenkins v. Franke*, 266 Or. App. 229 (2014), *rev. denied*, 358 Or. 70 (2015).

II. Federal Habeas Petition

Petitioner filed a *pro se* Petition for Writ of Habeas Corpus in this court alleging sixteen grounds for relief. Grounds One through Twelve, Fourteen, and Fifteen allege claims of ineffective assistance of trial and appellate counsel, and Ground Thirteen alleges a claim of trial court error. ECF 1. The Court appointed counsel to represent Petitioner who then filed an Amended Petition, also alleging fifteen grounds for relief. The Amended Petition dropped two claims of ineffective assistance and added one claim, and "incorporated by reference" all of the remaining claims and supporting facts alleged in the original *pro se* Petition with the addition of various clarifying language.[6] ECF 27. For ease of reference and given the length, extent, and at times confusing nature of the ensuing legal briefs, the claims alleged in the Amended Petition are set forth in summary as follows:

> **Ground One**: Petitioner's attorneys in his first trial rendered ineffective assistance of counsel in violation of Petitioner's Sixth Amendment rights to be free from conflict by disclosing confidential communications, which had a substantive and prejudicial effect on the second trial.

[6] The Amended Petition also states in a footnote, "We anticipate that, when Petitioner file [sic] his substantive brief, which under the amended scheduling order, will be done prior to the State responding, his claims will likely be further winnowed."

Ground Two: Appellate counsel rendered ineffective assistance on appeal from the second trial by failing to assert the claim that the Petitioner's constitutional rights were violated when the attorney disclosed Petitioner's confidential communications prior to the first trial.

Ground Three: Trial counsel rendered ineffective assistance by failing to sufficiently argue in pretrial hearings that the disclosure of Petitioner's confidential communications prior to the first trial violated his constitutional rights.

Ground Four: Trial counsel rendered ineffective assistance by failing to sufficiently argue in pretrial hearings that the amended O.E.C. 504-5 provision could not be applied retroactively.

Ground Five: Attorney Dickison rendered ineffective assistance of counsel when she testified at the pretrial hearing before the second trial, because in so doing she violated Petitioner's rights against compulsory self-incrimination under the Fifth Amendment and his right to a fair trial under the Due Process Clause to the Fourteenth Amendment.

Ground Six: At and after sentencing following the second trial, trial counsel rendered ineffective assistance when he failed to object on the basis that the imposition of a sentence longer than had been imposed after the initial trial was vindictive and violated the Fourteenth Amendment.

Ground Seven: Trial counsel rendered ineffective assistance at the second trial by failing to conduct an adequate investigation pertaining to the disclosure of Petitioner's prison medical records, and appellate counsel rendered ineffective assistance by failing to assign error to the disclosure of Petitioner's prison medical records.

Ground Eight: Trial counsel rendered ineffective assistance at the second trial by failing to object or otherwise make a record when the jury, during the penalty phase deliberations, heard extrinsic and prejudicial testimony from the first trial.

Ground Nine: Appellate counsel rendered ineffective assistance on appeal from the second trial by failing to brief the issue of the trial court's denial of Petitioner's right to testify fully in his own defense.

Ground Ten: Appellate counsel rendered ineffective assistance on appeal from the second trial by failing to brief the issue of the trial court's error in denying a motion for mistrial following the discovery that during deliberations the jury listened to extrinsic taped testimony from the first trial.

Ground Eleven: Appellate counsel rendered ineffective assistance on appeal from the second trial by failing to brief the issue that a harsher, vindictive sentence was imposed.

Ground Twelve: Appellate counsel rendered ineffective assistance on appeal from the second trial by failing to brief the issue that the enactment of O.E.C. 504-5 was an unlawful Bill of Attainder.

Ground Thirteen: The trial court violated Petitioner's rights under the *Ex Post Facto* Clause by allowing the retroactive application of O.E.C. 504-5 to admit evidence of Petitioner's 1999 communications to Colby.

Ground Fourteen: Appellate counsel rendered ineffective assistance on appeal from the second trial by failing to federalize the *Ex Post Facto* claim presented in Ground Thirteen.

Ground Fifteen: Trial counsel rendered ineffective assistance at the first trial by failing to move the trial court to obtain a transcript of the disclosure hearing, and on retrial, upon production of the transcript, trial counsel failed to move the court for suppression of Colby's testimony and for dismissal of the indictment based upon prior judicial misconduct and prior and ongoing prosecutorial misconduct.

In his Brief in Support, Petitioner did not specifically identify which particular grounds for relief were being addressed. Upon examining the grounds alleged in the original Petition (as incorporated and revised in the Amended Petition) and Petitioner's Brief, however, it appears that Petitioner presented argument on the following three claims:

(1) the claim alleged in Ground Thirteen that the trial court erred in applying O.E.C. 504-5 and allowing Colby's testimony;

(2) the claim alleged in Ground Ten that appellate counsel provided ineffective assistance in failing to assign error to the trial court's denial of a mistrial following the discovery that the jury was provided and listened to a tape recording from the earlier trial containing evidence that was not presented at the second trial; and

(3) the claim alleged in Ground Eleven that appellate counsel was ineffective in failing to appeal Petitioner's second sentence as vindictive.

With respect to his claim of trial court error alleged in Ground Thirteen, Petitioner argued that the admission of his statements to Colby violated his constitutional rights in five different respects:

> (1) the disclosure of his statements violated his Sixth Amendment right to counsel, requiring the exclusion of the fruits of that violation;
>
> (2) Colby's testimony violated his Fifth Amendment right against self-incrimination;
>
> (3) the use of O.E.C. 504-5 to allow Colby's testimony violated the *Ex Post Facto* Clause;
>
> (4) the enactment of O.E.C. 504-5 was an unlawful bill of attainder; and
>
> (5) the admission of Colby's statements violated due process, because the state did not meet the requirements of O.E.C. 504-5.[7]

In response, Respondent contends that, of those five arguments, only the one pertaining to the *Ex Post Facto* Clause is actually alleged as a trial court error in Ground Thirteen of the Amended Petition and, as such, the remaining four claims of trial court error are not properly before this Court. Respondent also argues that, in any event, those claims are procedurally defaulted. As to the three claims specifically alleged in Grounds Ten, Eleven, and Thirteen, Respondent contends they were denied in state court decisions that are entitled to deference. As to the remaining claims of ineffective assistance of trial and appellate counsel alleged in the Amended Petition but not addressed in the Brief in Support, Respondent argues Petitioner failed to satisfy his burden to establish that habeas corpus relief should be granted.

[7] At no point in his argument on these five issues does Petitioner address ineffective assistance of counsel.

In his Reply, Petitioner asserts it was in fact his intention to provide argument regarding grounds for relief other than the three identified above. Petitioner submits the following chart, which he contends summarizes the claims addressed in his Brief in Support:

Constitutional Provision at Issue	Pro Se Ground	Amend. Pet. Ground	For IAC claims name of Attorney at Issue	Brief in Support Argument
6th Amendment (also 5th and 14th Amends – because inadequate remedy)	1	1	Dickison, Vogt (first trial)	I A, B, F & G(1) & (2)
6th and 14th Amendments	2	2	Varner (direct appeal)	I A
6th and 14th Amendments	16	15	Hamalian, Barton	I E
5th and 6th Amendments	5	5	Dickison (retrial)	I A, B & G(2)
Bill of Attainder	12	12	Varner (direct appeal)	I D & G(4)
Ex Post Facto	13, 14	13, 14	Varner, Hamalian, Barton	I C & G(3)
14th Amendment (mistrial on extrinsic evid)	8, 10	8, 10	Hamalian, Barton Varner (direct appeal)	II
14th Amendment (vindictive sentencing)	11	11	Hamalian, Barton Varner (direct appeal)	III

As illustrated in this chart, plaintiff contends that the ineffective assistance of counsel claims alleged in Grounds One, Two, Five, Twelve, Fourteen, and Fifteen are all addressed in the portion of his Brief in Support that pertains to the claim of trial court error alleged in Ground Thirteen. However, that particular section of the Brief in Support does not even mention, let alone address how counsel was ineffective in any respect. Petitioner acknowledges the lack of analysis under the ineffective assistance standards, but submits that the Brief in Support nonetheless encompasses the ineffective assistance claims alleged in Grounds One, Two, Five, Eight, Ten, Eleven, Twelve, Fourteen, and Fifteen of the Amended Petition, noting that many of the claims overlap. Petitioner concedes "[i]t is true that [his] Brief in Support does not repeat the legal standards surrounding ineffectiveness claims over and over in the face of each instance of a constitutional challenge relating to the violation at the heart of this case," but instead the section

of the Brief addressing these claims "endeavored to assemble all of the constitutional subclaims . . . some of which were exhausted through the lens of ineffective assistance of subsequent counsel, without excessive repetition of the legal principles."

As Petitioner observes in his Reply, "[t]his is assuredly a complex case." The underlying record, the plethora of briefing before this Court, and the seemingly shifting arguments amply demonstrate and, perhaps unnecessarily, amplify the complexity. Nevertheless, the Court addresses individually each of the claims that Petitioner asserts he is pursuing in his Reply and subsequent briefing.[8]

III. Sufficiency of the Pleading—Claims Not Alleged in Amended Petition

Respondent asserts that four of the claims argued in Petitioner's Brief in Support are not contained in the Amended Petition and therefore not properly before this Court. A habeas petition must "specify all grounds for relief which are available to the petitioner" and must "state the facts supporting each ground." Rule 2(c), Rules Governing Section 2254 Cases, 28 U.S.C. foll. § 2254. "A court need not consider a claim that is not contained within the operative habeas corpus petition." *Harwood v. Hall*, Case No. 6:15-cv-00970-HZ, 2017 WL 37096068, at *2 (D. Or. Aug. 28, 2017) (citing *Greene v. Henry*, 302 F.3d 1067, 1070 n.3 (9th Cir. 2002).

As noted, in his Brief in Support, Petitioner appears to argue claims that differ from those presented in the Amended Petition. Specifically, Petitioner argues that the admission of his statements to Colby violated his constitutional rights in four respects not alleged in the Amended

[8] While Petitioner does not expressly state that he is not providing argument on the five remaining claims (Grounds Three, Four, Six, Seven, and Nine), Petitioner nonetheless does not present argument on those claims. Pet. Reply 17, ECF 87.

Petition: (1) the disclosure of his statements violated his Sixth Amendment right to counsel, requiring the exclusion of the fruits of that violation; (2) Colby's testimony violated Petitioner's Fifth Amendment right against self-incrimination; (3) the enactment of O.E.C. 504-5 was an unlawful bill of attainder; and (4) the admission of Colby's statements violated due process, because the state did not meet the requirements of O.E.C. 504-5. In his Reply, Petitioner refined his argument, explaining that he intended to address these claims in the context of ineffective assistance of trial counsel, rather than claims of trial court error.[9] Accordingly, to the extent Petitioner's Brief in Support may be construed as arguing claims of trial court error, habeas corpus relief may not be granted because such claims are not properly before the Court. As noted above, however, the Court addresses these claims in the context in which they were originally pleaded, *i.e.*, ineffective assistance of counsel. Because, as Petitioner notes, several of the claims overlap and due to the difficulty of ascertaining which particular grounds for relief the parties are addressing in the myriad briefs, except where the parties specifically identify a particular ground for relief in the context of an argument, the Court addresses the arguments by category.

[9] Despite this "clarification," however, the Court notes that, in the same Reply brief in which Petitioner affirmatively states that the apparent trial court errors addressed in his Brief in Support were actually argued in the context of ineffective assistance of counsel, Petitioner proceeds to again discuss the claims in the context of trial court error. For example, at page 12 of his Reply, Petitioner states, "[i]n this Court, [Petitioner] raises a claim that his right to not be compelled to incriminate himself under the Fifth Amendment, as applied to the states through the Fourteenth Amendment, was violated by the disclosure of his privileged communication. Amended Petition Ground Five." As noted above, however, Ground Five of the Amended Petition alleges Attorney Dickison rendered ineffective assistance of counsel when she testified at the pretrial hearing before the second trial, because in doing so she violated Petitioner's rights against compulsory self-incrimination under the Fifth Amendment.

IV. Relief on the Merits[10]

A. Legal Standards

Under the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), habeas corpus relief "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.

28 U.S.C. § 2254(d).

A state court decision is "contrary to" established federal law if it fails to apply the correct Supreme Court authority, or if it reaches a different result in a case with facts "materially indistinguishable" from relevant Supreme Court precedent. *Brown v. Payton*, 544 U.S. 133, 141 (2005); *Williams v. Taylor*, 529 U.S. 362, 405-06 (2000). A state court decision is an "unreasonable application" of clearly established federal law if the state court identifies the correct legal principle but applies it in an "objectively unreasonable" manner. *Woodford v. Visciotti*, 537 U.S. 19, 24-25 (2002) (per curiam); *Williams*, 529 U.S. at 407-08, 413; *see also*

[10] As noted, Respondent contends that several of Petitioner's claims were procedurally defaulted. Because it is apparent that petitioner is not entitled to relief on the merits of his claims, the Court does not address procedural default. *See* 28 U.S.C. § 2254(b) (2) ("[a]n application for writ of habeas corpus may be denied on the merits, notwithstanding the failure of the applicant to exhaust the remedies available in the courts of the State"); *Runningeagle v. Ryan*, 686 F.3d 758, 778 n.10 (9th Cir. 2012) (exercising discretion afforded under § 2254(b) (2) to decline to address procedural default issue where relief denied on the merits), *cert. denied*, 569 U.S. 1026 (2013).

Early v. Packer, 537 U.S. 3, 11 (2002) (per curiam) (state court decisions that are not "contrary to" Supreme Court law may be set aside only "if they are not merely erroneous, but 'an unreasonable application' of clearly established federal law, or are based on 'an unreasonable determination of the facts'").

It is clearly established federal law that a claim of ineffective assistance of counsel requires a habeas petitioner to prove that counsel's performance fell below an objective standard of reasonableness and there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. *Strickland v. Washington*, 466 U.S. 668, 687-88 (1987). Failure to satisfy either prong of this test obviates the need to consider the other. *Id*. at 687.

The *Strickland* standard also applies to claims of ineffective assistance of appellate counsel based on the failure to raise a particular claim on appeal. *See Smith v. Robbins*, 528 U.S. 259, 285 (2000). A habeas petitioner must show that, but for appellate counsel's objectively unreasonable failure to raise the omitted claim, there is a reasonable probability that the petitioner would have prevailed on appeal. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland*, 466 U.S. at 694. In the absence of such a showing, neither *Strickland* prong is satisfied. *See Pollard v. White*, 119 F.3d 1430, 1435-37 (9th Cir. 1997); *Miller v. Keeney*, 882 F.2d 1428, 1434-35 (9th Cir. 1989).

This Court's inquiry under *Strickland* is highly deferential. When *Strickland's* general standard is combined with the standard of review governing 28 U.S.C. § 2254 habeas corpus cases, the result is a "doubly deferential judicial review." *Knowles v. Mirzayance*, 556 U.S. 111, 122 (2009).

B. Sixth Amendment Violation

Petitioner contends that his attorneys in his first trial rendered ineffective assistance of counsel in violation of his right to be free from conflict by disclosing confidential communications, which had a substantive and prejudicial effect on the second trial. He also alleges that trial counsel rendered ineffective assistance by failing to argue in pretrial hearings that the disclosure of his confidential communications prior to the first trial violated his constitutional rights, and that appellate counsel rendered ineffective assistance of counsel on appeal from the second trial by failing to assert that his constitutional rights were violated when his attorney disclosed his confidential communications prior to the first the trial. Because each of these three claims relies upon the underlying claim that Petitioner's Sixth Amendment right to conflict-free counsel was violated, the Court considers them together.

"The Supreme Court has long held attorneys to stringent standards of loyalty and fairness with respect to their clients." *Damron v. Herzog*, 67 F.3d 211, 214 (9th Cir. 1995); *see also Strickland*, 466 U.S. at 688 ("a duty of loyalty" is an essential component of reasonable performance by criminal defense counsel). However, "[a]n attorney's duty of confidentiality, which totally covers the client's admission of guilt, does not extend to a client's announced plans to engage in future criminal conduct." *Nix v. Whiteside*, 475 U.S. 157, 174 (1986). Moreover, "[s]tanding alone, the attorney-client privilege is merely a rule of evidence; it has not yet been held a constitutional right." *Clutchette v. Rushen*, 770 F.2d 1469, 1471 (9th Cir. 1985) (citing *Maness v. Meyers*, 419 U.S. 449, 466 n.1 (1975); *Beckler v. Superior Court*, 568 F.2d 661, 662 (9th Cir. 1978)). "The scope of the privilege is a function of state law, not federal law," and a violation of the privilege "implicates the Sixth Amendment right to counsel only under certain

circumstances—specifically, when the government interferes with the relationship between a criminal defendant and his attorney." *Partington v. Gedan*, 961 F.2d 852, 863 (9th Cir. 1992); *see also Clutchette*, 770 F.2d at 1471 ("In some situations . . . government interference with the confidential relationship between a defendant and his counsel may implicate Sixth Amendment rights.").

In *McClure v. Thompson*, 323 F.3d 1233 (9th Cir. 2003), the Ninth Circuit considered the Sixth Amendment duty of loyalty in the context of an attorney's disclosure of confidential client information. In analyzing the issue, the court looked not to the attorney-client privilege, but to the rules of professional conduct. *Id*. at 1241-43. The court noted that, despite the critical importance of client confidentiality and loyalty to our legal system, the duty to refrain from disclosing information is not absolute. *Id.* at 1242. Thus, an attorney may disclose a confidence "to the extent the lawyer reasonably believes necessary to prevent the client from committing a criminal act that the lawyer believes is likely to result in imminent death or substantial bodily harm." *Id*. In determining whether counsel was deficient under the first prong of *Strickland*, focus must be placed on the reasonableness of counsel's actions in light of consistently recognized ethical standards. *Id*.

The Ninth Circuit found, under the facts in *McClure*, it was a close question whether counsel's belief that disclosure of his client's communications was reasonable under the circumstances, but ultimately concluded it was and therefore the disclosure did not violate the duty of confidentiality or amount to ineffective assistance. *Id*. at 1245-47. The Ninth Circuit reached a similar result in *United States v. Alexander*, 287 F.3d 811 (9th Cir. 2002), in which it concluded that threats of future harm were not privileged because they related to future criminal

conduct and the attorney's disclosure of those threats did not deprive the defendant of his Sixth Amendment right to counsel.

Here, as in *McClure* and *Alexander*, the record establishes that counsel reasonably believed disclosure of Petitioner's communications to Colby was necessary to prevent Petitioner from committing a criminal act against the Bidwell family. Petitioner expressly informed Colby, who was working on behalf of Petitioner's trial attorney, that he intended to kill Bidwell and Bidwell's wife and children. Resp. Ex. 134, at 72-74, ECF 17. Petitioner admitted to Colby that he had been inside the Bidwell home when Bidwell and his wife were sleeping. *Id.* at 73. Colby informed counsel that in his professional opinion, he believed Petitioner would carry out threats of future crimes against Bidwell, his wife, and the children. *Id.* at 15. Trial counsel was aware that Petitioner had followed Bidwell home and that children lived with Bidwell. *Id.* at 12. Counsel was concerned there was a viable possibility that Petitioner could be released on bail and act on these threats. *Id.* at 19-20. Under these circumstances, counsel's disclosure of Petitioner's communications was reasonable and Petitioner's rights under the Sixth Amendment were not violated.

Petitioner argues that the Oregon Court of Appeals' decision on direct appeal precludes this Court from finding there was no violation of his Sixth Amendment rights. The trial judge in the first trial found that counsel's duty of confidentiality did not extend to the threats of future crimes that Petitioner communicated to Colby. On appeal, the Oregon Court of Appeals disagreed, and found that the communications did not fall within the exception to the attorney-client privilege as described in the evidentiary rule in effect at the time. At the time of the first trial, the future-crime exception to the attorney-client privilege, codified at O.E.C. 503, provided:

> (4) There is no privilege under this section:
>
> (a) If the services of the lawyer were sought or obtained *to enable or aid anyone to commit or plan to commit* what the client knew or reasonably should have known to be a crime or fraud[.]

(Emphasis added). The Oregon Court of Appeals found that the exception did not apply because "there is no basis in the record to infer that defendant's request for confidentiality constituted a request for services to aid or enable defendant to commit crimes." *Jenkins*, 190 Or. App. at 549.

Petitioner contends that the Oregon Court of Appeals, in reaching this decision, necessarily concluded that the disclosure of his communications violated his rights under the Sixth Amendment. As such, he argues, the admission of his communications at his subsequent trial perforce continued that violation, and trial and appellate counsels' failure to object violated his right to effective assistance of counsel.

To the contrary, the Oregon Court of Appeals' decision leads to no such conclusion. The Court of Appeals specifically held that the admission of Petitioner's communications violated the terms of the evidentiary rule; at no time did the court discuss or address, let alone hold, that the introduction of the evidence violated Petitioner's Sixth Amendment right to counsel. Further, the Court of Appeals specifically discussed the applicability of the newly-enacted evidentiary rule at trial on remand, and affirmatively stated that it would apply. *Jenkins*, 190 Or. App. at 551. Had the Court of Appeals found that admission of the communications violated Petitioner's Sixth Amendment rights, there is no reason to believe that the subsequent change in the language of the evidence code would somehow "cure" the constitutional violation, such that the evidence would then be admissible if it satisfied the requirements of the new rule, as the Oregon Court of Appeals concluded.

For these reasons, trial counsel's disclosure of Petitioner's communications to Colby do not rise to the level of a Sixth Amendment violation. Accordingly, Petitioner cannot prevail on any of the claims alleged in his Amended Petition based on this premise.

C. Fifth Amendment

Petitioner contends trial counsel violated his Fifth Amendment right against self-incrimination by disclosing his communications to Colby. "The Fifth Amendment, made applicable to the States by the Fourteenth Amendment, *Malloy v. Hogan*, 378 U.S. 1 (1964), requires that '[n]o person . . . shall be compelled in any criminal case to be a witness against himself.'" *Chavez v. Martinez*, 538 U.S. 760, 765 (2001) (quoting U.S. Const. amend. V) (emphasis in original). The Fifth Amendment privilege against self-incrimination exists to prohibit *the government* from forcing the defendant to talk and then using the defendant's own statements to satisfy its burden of establishing guilt. *See Oregon v. Elstad*, 470 U.S. 298, 304-05 (1985). Thus, for example, the admission of statements made by a defendant to a psychiatrist who has been designated by the trial court to conduct a neutral competency examination may violate the privilege against compelled testimony absent the necessary appraisal of rights and a knowing waiver. *Estelle v. Smith*, 451 U.S. 454, 467 (1981); *see also Pens v. Bail*, 902 F.2d 1464, 1466 (9th Cir. 1990) (per curiam) (statements made during court-ordered, confidential therapy could not be used against defendant).

Here, Colby was retained by Petitioner's trial attorney to examine Petitioner in preparation for trial. Accordingly, the admission of Petitioner's statements to Colby did not violate Petitioner's Fifth Amendment right against self-incrimination.

D. Bill of Attainder

Petitioner alleges in Ground Twelve that appellate counsel was ineffective in failing to argue that the statute amending the future crimes exception to the attorney-client privilege constituted an unlawful bill of attainder. A bill of attainder is a legislative act that applies "either to named individuals or to easily ascertainable members of a group in such a way as to inflict punishment on them without a judicial trial." *United States v. Lovett*, 328 U.S. 303, 315 (1946). To be a bill of attainder, the law must: (1) specify the affected persons, (2) impose punishment, and (3) lack a judicial trial. *Selective Serv. Sys. v. Minn. Pub. Interest Research Group*, 468 U.S. 841, 847 (1984). "[W]hen past activity serves as a 'point of reference for the ascertainment of particular persons ineluctably designated by the legislature' for punishment," the enactment may be an unlawful attainder. *Id*. (quoting *Communist Party v. Subversive Activities Control Bd.*, 367 U.S. 1, 86 (1961)).

Here, the newly-enacted law made admissible a narrow class of evidence that was previously inadmissible; it did not impose punishment on Petitioner or anyone else. While it appears that in enacting the new rule, the legislature considered its potential effect on Petitioner's case, the law does not actually punish Petitioner or even provide definitively that the evidence would be admissible. Indeed, the Oregon Court of Appeals remanded the case because, despite concluding that the new rule "will apply to a new trial on remand," *Jenkins*, 190 Or. App. at 551, it could not assume that the trial court would find that the disputed evidence met the standard required under the new rule. *Id.* at 552. Moreover, the statute had no effect on Petitioner "without a judicial trial." *Lovett*, 328 U.S. at 315.

Thus, application of the newly-enacted evidentiary rule that altered the exception to the

attorney-client privilege at Petitioner's second trial did not constitute a bill of attainder. *See Palmer v. Clarke*, 408 F.3d 423, 433-34 (8th Cir. 2005) (new law permitting testimony previously privileged as marital privilege was not a bill of attainder even where the legislature specifically considered the defendant's individual case in enacting the new law). Accordingly, Petitioner cannot prevail on a claim that appellate counsel rendered ineffective assistance of counsel in failing to assert this claim.

E. Ground Ten—Ineffective Assistance of Appellate Counsel for Failure to Assign Error to the Denial of the Motion for Mistrial

In Ground Ten, Petitioner alleges appellate counsel was ineffective in failing to assign error to the trial court's denial of his motion for mistrial after the jury heard extra-record evidence while deliberating.

At the beginning of jury deliberations, a state's exhibit containing the tape recording of Warren's testimony from the first trial was sent into the jury room where the jurors listened to it before collectively realizing it contained extraneous testimony that "they shouldn't be listening to." Tr. 4182-83. The jurors informed the trial judge by note, and the judge instructed them to stop listening. Upon listening to the tape recording with the attorneys, the trial judge realized that, just before Warren's tape-recorded testimony, the tape recording contained testimony by Rohrscheib, the jailhouse informant, whom the state called at the first trial but not the second. Tr. 4189-90.

With the agreement of both the prosecution and defense, the trial judge asked each juror to privately provide written answers to two questions: "Please write down everything you heard on the tape," and "Please write down everything someone else heard and told you about from the

tape." Tr. 4190. One of the jurors wrote: "[W]as there any other deals made by you and the district attorney's office." Tr. 4192. Another juror wrote a lengthy statement explaining she did not think what she heard was relevant. Tr. 4193. A third juror wrote that "[i]t sounded like something from a previous trial." Tr. 4194.

Petitioner's counsel moved for a mistrial, which the trial judge denied. Tr. 4205. The trial judge considered the jurors' responses to the questions and concluded as follows:

> Looking at the forms, there's only one about which I feel sufficient information tells us that the person actually understood anything. The only one that indicates they heard anything that was understandable, and that's the one that says questions asked: Do you make any other-do you make any other deals? Answer: No.
>
> The others talk about hearing voices, but not about anything they were able to understand. If - truly if they had head what we heard yesterday, this case would have to be mistried. And that's the reason we all decided we needed to know what they heard. I am concerned about one juror. And there is nothing that indicates the other jurors heard anything prejudicial.

Tr. 4204-05. The trial judge offered Petitioner the opportunity to request empaneling an alternate juror in lieu of the one juror who had heard a reference to "other deals." Tr. 4205. After conferring with Petitioner, trial counsel declined the court's offer and continued to request a mistrial. Tr. 4206. Trial counsel objected to a curative instruction, but over that objection the trial judge sent the jury the following written instruction: "A tape was given to you in error. Do not consider or discuss the content of the tape." Tr. 4210.

Trial by an impartial jury is fundamental to the fair administration of criminal justice. *Turner v. Louisiana*, 379 U.S. 466, 472-73 (1965); *Irvin v. Dowd*, 366 U.S. 717, 722 (1961). The introduction of extrinsic influences or evidence into the jury's deliberative process may jeopardize that fundamental right. *Remmer v. United States*, 347 U.S. 227, 229 (1954). Due

process, however, "does not require a new trial every time a juror has been placed in a compromising situation. Were that the rule, few trials would be constitutionally acceptable. . . . [I]t is virtually impossible to shield jurors from every contact or influence that might theoretically affect their vote." *Smith v. Phillips*, 455 U.S. 209, 217 (1982). To prevail on a claim that the introduction of extrinsic evidence rises to the level of a due process violation, a criminal defendant bears the burden to establish actual bias. *See Smith*, 455 U.S. at 215 ("This Court has long held that the remedy for allegations of juror partiality is a hearing in which the defendant has the opportunity to prove actual bias."). Moreover, the court must presume that juries follow instructions. *Weeks v. Angelone*, 528 U.S. 225, 234 (2000); *see also Richardson v. Marsh*, 481 U.S. 200, 211 (1987) (juries are presumed to follow cautionary and curative instructions).

The determination whether a juror is impartial, and not biased, is a factual one. *Wainwright v. Witt*, 469 U.S. 412, 426-32 (1985). A state court's factual findings as to whether the exposure to extrinsic evidence affected the juror's impartiality are presumed correct. 28 U.S.C. § 2254(d); *Sumner v. Mata*, 449 U.S. 539 (1981). A petitioner must rebut this finding of fact by clear and convincing evidence. 28 U.S.C. § 2254(e)(1).

Guided by these legal principles, the PCR trial court found the trial judge did not do "anything wrong," and rejected Petitioner's claim that appellate counsel was ineffective in failing to assign error to the denial of mistrial:

> I guess in that you [Petitioner] argue that a juror came to the judge and said, gee, this doesn't sound right. There's not - that's not his [Warren's] testimony, it's somebody else. And the juror said I'm the only one that heard it.
>
> And you're saying that's impossible. They all heard it. I don't know where

> you get that, but as a practical matter, I think any experienced trial judge has things that happen like that where one juror will report something. You make an investigation. You decide whether or not there is a fairness/due process issue. You issue a curative instruction if necessary.
>
> I think all the competent judges allow the defense or whoever it is, maybe it's the prosecution, to either say, you know, you want me to give a curative instruction or not.
>
> When you give the curative instruction, sometimes that makes the point even more glaring to the jury.
>
> But the point is, I can't find that the judge did anything wrong.
>
> The Court of Appeals is going to go with the discretion of the Court, 99.999 percent of the time on issues like this because the Court was there. The Court is the one that talked to the juror. The Court is the one that looked that juror in the eye and said anybody else hear it.
>
> And so again, I cannot say that that issue should have been raised. And the fact that it wasn't raised is not ineffective counsel.

Resp. Ex. 169, at 58-59, ECF 18.

Where the trial court did not error, appellate counsel was not ineffective for failing to assert this claim. Thus, the state court's rejection of Petitioner's ineffective assistance of counsel claim alleged in Ground Ten was neither contrary to nor involved an unreasonable application of clearly established Supreme Court law.

F. Ground Eleven—Ineffective Assistance for Failing to Assign Error to the Sentence as Vindictive

In Ground Eleven, Petitioner alleges that appellate counsel should have assigned error to the court's increased sentence following the second trial as constitutionally vindictive in violation of his due process rights.

Generally speaking, the Due Process Clause bars a court from imposing a more severe

sentence on a defendant in response to a successful challenge on appeal. *Alabama v. Smith*, 490 U.S. 794, 82 (1989); *North Carolina v. Pearce*, 395 U.S. 711, 725-26 (1969) (limited by *Smith*, 490 U.S. 794). A presumption of vindictiveness applies where there is a "'reasonable likelihood' that the increase in sentence is the product of actual vindictiveness on the part of the sentencing authority." *Smith*, 490 U.S. at 799 (internal citation omitted). However, that presumption does not attach every time the second sentence is more severe. *Id.* If the presumption applies, it may be rebutted by "objective information . . . justifying the increased sentence." *Texas v. McCullough*, 475 U.S. 134, 142 (1986).

Here, following the first trial, the judge found that Petitioner's criminal history score was a "D," indicating that he had committed one prior "person felony," based on his prior California conviction for false imprisonment. Resp. Exs. 103, at 22-23, ECF 16, and 147, at 3, ECF 18; O.A.R. 213-004-0007. The trial judge sentenced Petitioner to an indeterminate sentence of 30 years with a minimum determinate sentence of 220 months, and ordered that Petitioner would not be eligible for SB 936 credits ("936 credits"), i.e., earned time credit, for 110 months.[11]

After the first judgment was issued, but prior to the second trial, Petitioner was convicted of assault in the third degree in Multnomah County. Resp. Ex. 101, at 1, ECF 16. Third-degree assault is also a "person felony" for the purposes of the sentencing guidelines. O.A.R. 213-003-0014(14). Thus, at the time of Petitioner's sentencing following remand, he had two prior person

[11] Senate Bill 936 (1997) included a provision, codified at O.R.S. 137.75(10), requiring the court to order that the defendant may be considered for various programs and reductions in sentence, most notably earned time, unless it states substantial and compelling reasons why the defendant should not be eligible. *See State v. Johnson*, 288 Or. App. 220, 224-25 (2017) (discussion continuing use of phrase "936 credits" to refer to those programs and reductions).

felonies, meaning that his criminal history score was "B." O.A.R. 213-004-0007.

At Petitioner's second sentencing hearing, the parties engaged in extensive argument over whether Petitioner's California conviction should be classified as a person felony. The trial judge concluded that the California conviction was a person felony and that petitioner was a dangerous offender, and imposed an indeterminate sentence of 30 years with a minimum determinate sentence of 240 months. Initially, the trial judge stated Petitioner would not be eligible for 936 credits, but after being reminded that the original sentence allowed for 936 credits after 120 months[12], the trial judge agreed the new sentence could not exceed the prior sentence in that regard. Due to confusion regarding the original sentence, the trial court indicated the new judgment would not be signed until after the parties had an opportunity to review it. A further hearing took place about a month later outside Petitioner's presence, but because that hearing was not transcribed on appeal and not otherwise submitted by either party in any of the state proceedings, it is not part of the record before this Court. In any event, five days later, the trial judge signed the judgment imposing an indeterminate sentence of 30 years with a minimum of 240 months, and indicating that Petitioner would be eligible for 936 credits after 120 months.

Petitioner points to the trial judge's acknowledgment that she could not exceed the prior sentence, and contends this establishes a presumption of vindictiveness because the trial judge ultimately increased the minimum term he was ordered to serve. However, as the PCR judge concluded, the trial judge was talking about the fact she could not preclude Petitioner from

[12] In fact, the original judgment allowed for 936 credits after 110 months.

earning 936 credits because the prior sentence allowed for them, not about the minimum term of imprisonment. Resp. Ex. 169, at 49, ECF 18. Moreover, the PCR judge reasonably found that the trial judge increased Petitioner's minimum term solely as a result of the change in his criminal history score, and that competent appellate counsel would not have unreasonably declined to assert such a claim. *Id.* at 62. The PCR trial court also concluded that even if such a claim could have been asserted on appeal, it would not have changed the outcome of the appeal. *Id.* at 61-62.

The PCR court's denial of relief on this claim was not contrary to or an unreasonable application of *Strickland*. Accordingly, Petitioner is not entitled to relief on the claim alleged in Ground Eleven.

G. Grounds Thirteen—The Trial Court's Use of O.E.C. 504-5 to Allow Colby's Testimony Violated the Ex Post Facto Clause

In Ground Thirteen, Petitioner alleges the trial court violated his rights under the *Ex Post Facto* Clause by allowing the retroactive application of O.E.C. 504-5 to admit evidence of his communications to Colby. Petitioner raised this objection at trial, but the trial judge did not directly address the issue; instead the judge noted that in its decision on appeal from the first conviction, the Oregon Court of Appeals necessarily decided the change in law could be applied retroactively. Pet. Ex. D, at 3-4, ECF 61. Petitioner asserted the *ex post facto* claim on appeal but, as noted, the Oregon Court of Appeals affirmed without opinion and the Oregon Supreme Court denied review.

"The *Ex Post Facto* Clause bars the government from passing laws that impose a new punishment or increase punishment for a crime committed before passage of the law." *Gentry v.*

Sinclair, 705 F.3d 884, 908 (9th Cir. 2018) (citing *Weaver v. Graham*, 450 U.S. 24, 28 (1981)); *Collins v. Youngblood*, 497 U.S. 37, 43 (1990)). A law violates the *Ex Post Facto* Clause if it "alters the legal rules of evidence, and receives less, or different, testimony, than the law required at the time of the commission of the offense, in order to convict the offender." *Calder v. Bull*, 3 U.S. 386, 390 (1798).[13] In *Gentry*, the Ninth Circuit explained:

> Only certain types of changes in the rules of evidence fall into this fourth category. There is a violation under this category when laws that require a minimum type or amount of evidence for conviction are changed by eliminating a type of evidence or decreasing the amount of evidence needed for conviction. However, an *ex post facto* problem does not arise for a law that "does nothing more than admit evidence of a particular kind in a criminal case . . . which was not admissible under the rules of evidence as enforced by judicial decisions at the time the offense was committed." *Thompson v. Missouri*, 171 U.S. 380, 387 (1898); *see Hopt v. People*, 110 U.S. 574, 589 (1884) (holding no *ex post facto* violation for a law allowing for convicted felons to testify as competent witnesses because the law did not affect the "quantity or the degree of proof necessary to establish . . . guilt").

Gentry, 705 F.3d at 909.

In *Thompson*, the defendant was convicted of murder based in part on the admission of "certain letters written by him to his wife . . . for the purpose of comparing them with the writing" in a prescription for strychnine and a threatening letter. 171 U.S. at 380-81. The Missouri Supreme Court reversed, holding that under then-existing state law, the letters the defendant had written to his wife were inadmissible for the purpose of comparison. *Id*. at 381. Before the retrial on remand, the state legislature passed a law "providing that 'comparison of a disputed writing with any writing proved to the satisfaction of the judge to be genuine shall be

[13] In *Calder*, the Supreme Court also described three other categories of *ex post facto* violations, none of which apply here.

permitted to be made by witnesses, and such writings and the evidence of witnesses respecting the same may be submitted to the court and jury as evidence of the genuineness or otherwise of the writing in dispute.'" *Id.* The defendant was again convicted and claimed a violation of the *Ex Post Facto* Clause. *Id*.

The Supreme Court held that application of the new law to the defendant's second trial was not an *ex post facto* violation because the new law "did not require 'less proof, any amount or degree,' than was required at the time of the commission of the crime," but instead "left unimpaired the right of the jury to determine the sufficiency or effect of the evidence declared to be admissible." *Id.* at 387. The new law "did nothing more than remove an obstacle arising out a rule of evidence that withdrew from the consideration of the jury testimony which, in the opinion of the legislature, tended to elucidate the ultimate, essential fact to be established, namely, the guilt of the accused." *Id*.

In *Gentry*, the Ninth Circuit Court of Appeals reviewed a district court's denial of a § 2254 habeas petition that alleged a similar claim of *ex post facto* violation. There, a state law was changed to allow, during the penalty phase of a capital sentencing proceeding, a victim impact statement that was previously inadmissible. The Ninth Circuit found that the state court decision denying relief on an *ex post facto* claim was not contrary to or an unreasonable application of *Thompson*, noting that "[w]hile the admission of the victim impact statement may have adversely affected [the petitioner's] presentation at the penalty phase, the State's evidentiary burden remained the same." *Gentry*, 705 F.3d at 910 (citations omitted).

Here, as in *Thompson* and *Gentry*, the new evidentiary rule did not change or in any way affect the quantum of evidence necessary to convict Petitioner of solicitation to commit

aggravated murder. The new rule merely changed the body of evidence that could lawfully be presented to and considered by the jury; it "did nothing more than remove an obstacle arising out of a rule of evidence." *Thompson*, 171 U.S. at 387. Accordingly, the admission of Petitioner's communications to Colby did not violate the *Ex Post Facto* Clause, and the state court decision denying relief on this claim was not contrary to or an unreasonable application of federal law.

V. Claims Alleged But Not Addressed

The remaining claims alleged in the Amended Petition are not addressed in Petitioner's briefing. 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 942, 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.

RECOMMENDATION

For these reasons, the Petition for Writ of Habeas Corpus should be DENIED and a judgment of dismissal should be entered. Because Petitioner has not made a substantial showing of the denial of a constitutional right, a certificate of appealability should be DENIED. *See* 28 U.S.C. § 2253(c)(2).

SCHEDULING ORDER

These Findings and Recommendations will be referred to a district judge. Objections, if any, are due by January 5, 2022. If no objections are filed, then the Findings and Recommendations will go under advisement on that date.

If objections are filed, then a response is due within 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 Recommendations will go under advisement.

DATED this 16th day of December, 2021.

/s/ Youlee Yim You
Youlee Yim You
United States Magistrate Judge

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED

JUL 17 2024

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

DANIEL LOREN JENKINS, Petitioner-Appellant, v. ERIN REYES, Superintendent Two Rivers Correctional Institution, Respondent-Appellee.	No. 22-35341 D.C. No. 2:16-cv-00247-YY District of Oregon, Pendleton ORDER

Before: OWENS and FRIEDLAND, Circuit Judges, and SILVER,* District Judge.

The panel has voted to deny the petition for panel rehearing. Judges Owens and Friedland voted to deny the petition for rehearing en banc, and Judge Silver so recommends.

The full court has been advised of the suggestion 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 the petition for rehearing en banc are therefore DENIED.

* The Honorable Roslyn O. Silver, United States District Judge for the District of Arizona, sitting by designation.

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

DANIEL LOREN JENKINS,

Petitioner

v.

JOHN MYRICK, *Superintendent Two Rivers Correctional Institution,*

Respondent.

No. 2:16-cv-247-YY

OPINION & ORDER

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HERNÁNDEZ, District Judge:

Petitioner, an adult in custody at Two Rivers Correctional Institute in Oregon, brought this habeas corpus action under 28 U.S.C. § 2254. On December 16, 2021, Magistrate Judge You issued a Findings and Recommendation, in which she recommended the Court deny the habeas petition. F&R, ECF 104. On March 27, 2022, this Court adopted the Magistrate Judge's Findings and Recommendation without modification and entered a Judgment dismissing the case. ECF 122, 123. Petitioner filed a Motion for Reconsideration on April 6, 2022, and then subsequently filed a Notice of Appeal to the Ninth Circuit Court of Appeals on April 26, 2022. The Court finds that it has jurisdiction over Petitioner's Motion for Reconsideration and denies the motion.

BACKGROUND

Petitioner seeks relief from his 2005 state court conviction for soliciting aggravated murder. A brief summary of the facts is as follows. *See* F&R 1-8; *State v. Jenkins*, 190 Or. App. 542, 544-46, 79 P.3d 347-49 (2003).

In 1998, Petitioner lost nearly $300,000 in investments through the discount brokerage firm Bidwell and Company. When he complained to the company, its president H. Gerald Bidwell wrote to Petitioner, explaining that the company had invested his funds appropriately. Petitioner then became angry with Bidwell. In addition to threatening and harassing Bidwell directly, Petitioner called the ex-husband of Bidwell's wife to ask if he would participate in a murder-for-hire scheme. The ex-husband informed both Bidwell and the police about the call, which led to Petitioner's arrest in January 1999. Petitioner was charged with solicitation to commit murder, theft, forgery, tampering with public records, and menacing.

While in jail awaiting trial, Petitioner told another inmate that he planned to commit several murders in the future. Then, in June 1999, in preparation for his defense, his attorney hired psychologist Dr. Faulder Colby to evaluate Petitioner. After stating that he wanted the conversation to remain privileged, Petitioner told Dr. Colby that he intended to kill Bidwell, his wife, and their children. Dr. Colby revealed Petitioner's statements to his attorney, Lynne Dickison, who reported the threats to the trial court in the presence of the prosecuting attorney. Ms. Dickison, then withdrew from representing Petitioner.

The State then withdrew the indictment for solicitation to commit murder and issued a second indictment, charging Petitioner with solicitation to commit aggravated murder. The State subpoenaed Dr. Colby as a witness at trial, to which Petitioner objected under Oregon Code of Evidence ("OEC") 503(2)(a), the attorney-client privilege rule. Or. Rev. Stat. § ("O.R.S.") 40.225(2)(a). The trial court ruled that the Petitioner's threats fell within the future crimes exception to the attorney-client privilege provided by OEC 503(4)(a) (codified at O.R.S. 40.225(4)(a)) and denied Petitioner's motion to quash. Dr. Colby testified that Petitioner made statements threatening to kill Bidwell, his wife, and his children. A jury found Petitioner guilty of solicitation to commit aggravated murder.

The Oregon Court of Appeals reversed the conviction and remanded for a new trial. *Jenkins*, 190 Or. App. at 554. The court determined that under the applicable law at the time, the future crimes exception only abrogated the attorney-client privilege "if the services of the lawyer were obtained to . . . aid anyone to commit or plan to commit . . . a crime or fraud." O.R.S. 40.225(4)(a). The court held that Petitioner's statements did not constitute "a request for services to aid or enable [Petitioner] to commit crimes." *Jenkins*, 190 Or. App. at 549. However, while the case was pending on appeal, the Oregon legislature enacted OEC 504-5(a), which added a

new exception to the attorney-client privilege if "[i]n the professional judgment of the person receiving the communications" the declarant "has a clear and serious intent" of committing a violent crime and "poses a danger of committing the crime." *Id.* at 552; O.R.S. 40.252(1)(a). The law applied to all trials moving forward. When it remanded Petitioner's case for a new trial, the Oregon Court of Appeals specifically instructed the trial court to apply the new standard in OEC 504-5(a) to determine whether Petitioner's statements were admissible at his second trial. *Id.* at 553. The admissibility of Petitioner's statements to the psychologist was extensively argued before his second trial, and ultimately, the trial court admitted the statements. At the second trial, a jury found Petitioner guilty of solicitation to commit aggravated murder. On direct appeal, the Oregon Court of Appeals affirmed without an opinion and the Oregon Supreme Court denied review. *State v. Jenkins*, 227 Or. App. 506, 206 P.3d 286 (2009), *rev. denied*, 346 Or. 362, 211 P.3d 931 (2009).

Petitioner filed a state post-conviction relief ("PCR") petition, bringing multiple claims for ineffective assistance of counsel against attorneys involved in both of his trials and appeals. After an evidentiary hearing, the PCR trial court denied relief. The Court of Appeals affirmed without opinion, and the Oregon Supreme Court denied review. Petitioner originally filed his federal habeas case *pro se*, asserting sixteen grounds for relief. He was later appointed counsel who filed an Amended Complaint, which asserted fifteen grounds for relief.

The Magistrate Judge issued a Findings and Recommendation in which she determined that Petitioner was not entitled to habeas corpus relief on any of his claims. Petitioner filed timely objections to the Findings and Recommendation, asserting two substantive objections. Petitioner objected to the Magistrate Judge's findings that (1) the disclosure and admission of Petitioner's privileged statements at his first trial was not a Sixth Amendment violation and (2)

the Oregon law enacted to expand the future crimes exception to the attorney-client privilege was not a Bill of Attainder.[1] With his objections, Petitioner asked the court to consider additional evidence that was available in his state PCR proceedings but was not presented in support of his § 2254 federal habeas petition. The new evidence included three letters from Ms. Dickison to the Oregon State Bar in response to a bar complaint that Petitioner filed against her. Pet. Ex. H, ECF 114-2.[2] As an exhibit to his Motion for Reconsideration, Petitioner submits the State's motion at his second trial to admit the testimony of Dr. Colby, attached to which are the letters from Ms. Dickison. Pet. Ex. K, ECF 124-2.

DISCUSSION

Plaintiff does not identify the legal basis for his Motion for Reconsideration, and the Federal Rules of Civil Procedure do not explicitly provide that parties may file such motions. 11 Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 2810.1 (3d ed. 2022). But federal courts consider any motion seeking to modify an issued judgment or order as a "motion to alter or amend a judgment" under Rule 59(e). *Id.*; *see Piper v. U.S. Dept. of Justice*, 312 F. Supp. 2d 17 (D.D.C. 2004) ("[A]ny motion that draws into question the correctness of the

[1] With this motion, Petitioner seeks reconsideration of the Court's holding on the Sixth Amendment issue. Petitioner only asks for reconsideration of the Court's holding that OEC 504-5 was not a Bill of Attainder in the Conclusion section of his reply brief. Pet. Reply 7, ECF 128. But Petitioner makes no argument as to why the Court should reconsider its holding denying his Bill of Attainder claim.

[2] The Oregon State Bar dismissed Petitioner's bar complaint against Ms. Dickison, concluding:

> [I]t was not improper for Dickison to reveal, in a somewhat limited fashion, the information obtained by Dr. Colby as a result of his examination. Admittedly, the client was incarcerated when Dr. Colby learned of the client's intent and so, at least for the time being, the client could not act on his intent. However, the fact that the client could not immediately act does not, in my opinion, mean that it was improper for Dickison to do as she did. Moreover, there is a paucity of legal authority in this area. Dickison was presented with a moral dilemma and she chose to protect the specific individuals who were the subject of her client's threat.

Pet. Ex. K at 21-23.

judgment is functionally a motion under Rule 59(e), whatever its label.") (citation omitted). "A motion for reconsideration filed within ten days of judgment is treated as a motion to alter or amend under Rule 59(e)." *Edward H. Bohlin Co., Inc. v. Banning Co., Inc.*, 6 F.3d 350, 353 (5th Cir. 1993). Petitioner filed this motion within ten days of this Court's judgment. Thus, the Court analyzes Petitioner's motion under the standard for motions filed under Rule 59(e).

I. Jurisdiction

As a threshold matter, the Court must determine whether it has jurisdiction to consider Petitioner's motion, given that he has filed a notice of appeal to the Ninth Circuit. "The filing of a notice of appeal is an event of jurisdictional significance—it confers jurisdiction on the court of appeals and divests the district court of its control over those aspects of the case involved in the appeal." *Griggs v. Provident Consumer Disc. Co.*, 459 U.S. 56, 58 (1982) (per curiam) (citations omitted). However, if a timely motion under Rule 59 has been made, the case lacks finality, even if the court has entered a judgment. 11 Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 2821 (3d ed. 2022). Federal Rule of Appellate Procedure 4(a)(4) provides that "if a timely motion is made to alter or amend the judgment under Fed. R. Civ. P. 59(e), a notice of appeal filed before disposition of that motion is a nullity." *Bordallo v. Reyes*, 763 F.2d 1098, 1101 (9th Cir. 1985). Federal Rule of Appellate Procedure 4 states:

> If a party files a notice of appeal after the court announces or enters a judgment—but before it disposes of any motion listed in Rule 4(a)(4)(A)[3]—the notice becomes effective to appeal a judgment or order, in whole or in part, when the order disposing of the last such remaining motion is entered.

Fed. R. App. P. 4(a)(4)(B)(i). Thus, the federal appellate court lacks jurisdiction over a case until after the district court disposes of a party's Rule 59(e) motion. *See Griggs*, 459 U.S. at 59. ("In

[3] Rule 4(a)(4)(A)(iv) includes motions "to alter or amend the judgment under Rule 59."

order to prevent unnecessary appellate review," a district court has "express authority to entertain a timely motion to alter or amend the judgment under Rule 59, even after a notice of appeal had been filed."). Accordingly, the Court holds that it has jurisdiction to rule on Petitioner's motion.

II. Motion to Reconsider

"Altering or amending a judgment under Rule 59(e) is an extraordinary remedy." *Rishor v. Ferguson*, 822 F.3d 482, 491. District courts have considerable discretion in deciding whether to grant or deny a Rule 59(e) motion. *See Herbst v. Cook*, 260 F.3d 1039, 1044 (9th Cir. 2001) ("[D]enial of a Rule 59(e) motion is reviewed only for abuse of discretion."). A motion under Rule 59(e) should be granted only "in highly unusual circumstances." *Id.* Such remedies are usually only available for four reasons: (1) the court committed manifest errors of law or fact; (2) the court is presented with newly discovered or previously unavailable evidence; (3) the decision was manifestly unjust; or (4) there is an intervening change in the controlling law. *Rishor*, 822 F.3d at 491-92 (citation omitted). Rule 59(e) motions may not be used to relitigate older matters, raise new arguments, or present evidence that was available prior to the entry of judgment. 11 Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 2810.1 (3d ed. 2022).

A. New Evidence

To consider new evidence under Rule 59, the evidence must have been in existence at the time of the case was filed. But if the evidence was in the possession of the party seeking relief before judgment was entered, it is not newly discovered and does not entitle the party to relief. 11 Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 2859 (3d ed. 2022). In deciding whether to consider new evidence in support of a Rule 59 motion, courts in the Ninth Circuit apply the same standard as for Rule 60(b)(2) motions for relief from a final

judgment. *Jones v. Aero/Chem. Corp.*, 921 F.2d 875, 878 (9th Cir. 1990). Under this standard, the new evidence "must be of such magnitude that production of it earlier would have been likely to change the disposition of the case." *Coastal Transfer Co. v. Toyota Motor Sales, U.S.A.*, 833 F.2d 208, 211 (9th Cir. 1987).

The evidence that Petitioner asks the Court to consider are three letters from Ms. Dickison, Petitioner's initial trial attorney, to the Oregon State Bar in response to Petitioner's bar complaint against her. In the letters, Ms. Dickison explains the reasoning behind her disclosure of petitioner's threats, which led to his conviction for solicitation of aggravated murder. Pet. Ex. H, ECF 114-2. Petitioner argues that these letters prove his Sixth Amendment right to effective counsel was violated because they show that his counsel's disclosure was not reasonable.

The record of Petitioner's bar complaint, which included these letters, was submitted by the State at Petitioner's second trial in support of the State's motion to admit the testimony of Dr. Colby. The State also submitted the bar complaint record in response to Petitioner's state PCR proceedings. But Ms. Dickison's letters were not included with the State's exhibits in this federal habeas case and therefore, were not before the Magistrate Judge when she issued her Findings and Recommendation. Petitioner submitted the letters to the Court with his objections to the Magistrate Judge's Findings and Recommendation. *See* Pet. Ex. H. Thus, they were provided to the Court before judgment was entered. At that time, under 28 U.S.C. § 636(b)(1)(C), the Court had discretion to consider this evidence, which had not been presented to the Magistrate Judge. *See United States v. Howell*, 231 F.3d 615, 621 (9th Cir. 2000) (concluding that in the Ninth Circuit, "a district court has discretion, but is not required, to consider evidence presented for the first time in a party's objection to a magistrate judge's recommendation").

Because the letters were presented to and considered by the Court before it adopted the Magistrate Judge's Findings and Recommendation and entered judgment dismissing the case, they do not constitute new evidence that would justify granting a motion to modify the judgment under Rule 59(e). But because the Court did not directly address the Petitioner's evidence in its Order adopting the Findings and Recommendation, it discusses this evidence here.

B. Ineffective Assistance of Counsel

To be entitled to relief based on ineffective assistance of counsel, Petitioner must show: (1) his counsel's performance was deficient and (2) the deficient performance prejudiced the defense. *Strickland v. Washington*, 466 U.S. 668 (1984). When claiming ineffective assistance as a constitutional violation, a criminal defendant "must show that counsel's representation fell below an objective standard of reasonableness." *Id.* at 688. A court must assess "the reasonableness of counsel's challenged conduct on the facts of the particular case, viewed as of the time of counsel's conduct." *Id.* at 690.

Petitioner's post-conviction claims stem from his underlying assertion that his Sixth Amendment right to effective counsel was violated when his initial trial attorney disclosed the privileged statements he made to Dr. Colby and the trial court admitted those incriminating statements. Petitioner contends that the ineffective assistance, based on violation of the attorney-client privilege at his first trial, had a substantive and prejudicial effect on his second trial.

In claiming a constitutional violation, Petitioner relies on the Oregon Court of Appeals' finding that the first trial court erred in admitting the privileged statements. But the Court of Appeals did not hold that Petitioner's Sixth Amendment right to effective counsel had been violated. Rather, the court found that an exception to the attorney-client privilege was not available under applicable Oregon law at the time. But the court also noted that the statements

may be admissible under the new law enacted while the case was pending on appeal. If the court had found a constitutional violation, it would not have stated that the statements could potentially be admitted under the new state law. If his attorney's disclosure of Petitioner's statements violated his Sixth Amendment right at his first trial, a new statute could not have overcome the constitutional violation.

"Standing alone, the attorney-client privilege is merely a rule of evidence; it has not yet been held a constitutional right." *Cluchette v. Rushen*, 770 F.2d 1469, 1471 (9th Cir. 1985). Only under certain circumstances, such as "when the government deliberately interferes with the confidential relationship between a criminal defendant and defense counsel," the defendant's Sixth Amendment right to counsel may have been violated. *Williams v. Woodford*, 384 F.3d 567, 584-85 (9th Cir. 2004).

Moreover, "[a]n attorney's duty of confidentiality . . . does not extend to a client's announced plans to engage in future criminal conduct." *Nix v. Whiteside*, 475 U.S. 157, 174 (1986). In *McClure v. Thompson*, the Ninth Circuit analyzed a Sixth Amendment ineffective assistance claim based on the attorney's disclosure of confidential information. 323 F.3d 1233, 1246 (9th Cir. 2003). The court determined that, based on American Bar Association Model Rule 1.6(b)(1), courts must assess whether the attorney reasonably believed disclosure was necessary to prevent a future crime. *Id.* If so, an exception to the general standard of maintaining confidentiality applies, and the attorney did not deprive the defendant of effective assistance of counsel under the Sixth Amendment. *Id.*; *see United States v. Alexander*, 287 F.3d 811, 821 (9th Cir. 2002) (holding that an attorney's disclosure to probation officers that his client threatened to kill several people did not violate the client's Sixth Amendment right to counsel).

With his Objections to the Findings and Recommendation and in his Motion for Reconsideration, Petitioner argues that his attorney could not have reasonably believed his statements indicated that there was imminent risk that he would engage in criminal conduct. Petitioner claims the "new evidence" he presents demonstrates that his counsel knew he could not have carried out the threats he made.

In her response to the Oregon State Bar dated August 7, 2000, Ms. Dickison wrote:

> I did employ Dr. Faulder Colby to do an Aid and Assist evaluation and general psychological evaluation of Mr. Jenkins. During the course of this evaluation, Mr. Jenkins spoke of his intentions to commit crimes of murder in the future against specific named individuals. These intentions, coupled with Dr. Colby's assessment of Mr. Jenkins psychological makeup, indicated to Dr. Colby and myself that Mr. Jenkins could and would commit these crimes given the opportunity (i.e., release from custody).

Pet. Ex. H. at 3. On January 18, 2011, Ms. Dickison wrote: "At the time of my limited disclosure, Mr. Jenkin's release was not imminent nor contemplated. My motivation for releasing this information was solely the prevention of future acts of violence." Pet. Ex. H at 1.

According to Petitioner, these communications show that his counsel could not have "reasonably" believed that he posed an immediate danger of committing the crimes because he was incarcerated with no prospect of imminent release. But OEC 504-5, the statutory exception to the attorney-client privilege, only requires an attorney to reasonably believe the client "poses of a danger of committing the crime" at some point. O.R.S. 40.252(1)(b). Even under OEC 503(4)(a), the applicable future crimes exceptions exception at the time of Ms. Dickison's disclosure, the prospective crime need not be imminent. *See* O.R.S. 40.225(4)(a) ("There is no privilege . . . [i]f the services of the lawyer . . . were sought or obtained to enable or aid anyone to commit or plan to commit what the client knew or reasonably should have known to be a crime[.]"). Neither statute includes the words "imminent" or "immediate." Under the *Strickland*

standard for ineffective assistance, the question is whether Counsel's assistance was *reasonable* considering all the circumstances." *McClure*, 323 F.3d at 1245 (quoting *Strickland*, 466 U.S. at 688) (emphasis in original). If Ms. Dickison's reasonably believed that Petitioner was capable of committing the crime at some point and that under the circumstances, she had a duty to disclose Petitioner's threats, his Sixth Amendment right to counsel was not violated. Counsel's acknowledgment that Petitioner's release from custody was not imminent does not change that analysis.

Ms. Dickison's letters to the Oregon State Bar were available to the second trial court, which determined that Petitioner's statements to Dr. Colby were admissible. They were available when Petitioner's conviction was upheld on appeal and when relief was denied in state post-conviction proceedings. At each stage, even considering counsel's statements in the letters, the state courts found no violation of Petitioner's Sixth Amendment right to counsel. Petitioner cannot show that a state court decision at any stage that upheld admission of his incriminating statements was contrary to or an unreasonable application of federal law or was an unreasonable determination of the facts. Thus, even in light of Petitioner's "new evidence" submitted with this motion, the Court finds no basis to reconsider its decision to deny habeas relief under 28 U.S.C. § 2254.

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CONCLUSION

Petitioner's Motion to Reconsider [124] is DENIED. Petitioner's Notice of Appeal is effective upon entry of this Order.

IT IS SO ORDERED.

DATED: June 22, 2022.

MARCO A. HERNÁNDEZ
United States District Judge

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED

OCT 27 2022

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

DANIEL LOREN JENKINS, Petitioner-Appellant, v. JOHN MYRICK, Superintendent Two Rivers Correctional Institution, Respondent-Appellee.	No. 22-35341 D.C. No. 2:16-cv-00247-YY District of Oregon, Pendleton ORDER

Before: SCHROEDER and BYBEE, Circuit Judges.

This appeal is from the denial of appellant's 28 U.S.C. § 2254 petition and subsequent Federal Rule of Civil Procedure 59(e) motion. The request for a certificate of appealability (Docket Entry No. 12) is granted with respect to the following issue: whether appellant's Sixth Amendment right to effective counsel was violated in connection with the admission of his confidential communications. *See* 28 U.S.C. § 2253(c)(3); *see also* 9th Cir. R. 22-1(e).

The opening brief is due January 24, 2023; the answering brief is due February 23, 2023; the optional reply brief is due within 21 days after service of the answering brief.

The Clerk will serve on appellant a copy of the "After Opening a Case - Counseled Cases" document.

If John Myrick is no longer the appropriate appellee in this case, counsel for appellee must notify this court by letter of the appropriate substitute party within 21 days of the filing date of this order. *See* Fed. R. App. P. 43(c).

190 Or.App. 542
Court of Appeals of Oregon.

STATE of Oregon, Respondent,
v.
Daniel L. JENKINS, Jr., aka Daniel J. Jenkins,
aka Daniel Loren Jenkins, Jr., Appellant.

9901-30573 and 9906-34654;
A112291 (Control), A112292.
|
Argued and Submitted July 24, 2003.
|
Decided Nov. 13, 2003.

Synopsis
Defendant was convicted in the Circuit Court, Multnomah County, David Gernant, J., of solicitation to commit aggravated murder, and he appealed. The Court of Appeals, Brewer, J., held that future crimes exception to attorney-client privilege was inapplicable, and as such, defendant's comments to psychologist, who was retained by defendant's attorney, were protected by attorney-client privilege.

Vacated and remanded; otherwise affirmed.

Attorneys and Law Firms

****348** ***543** Jesse Wm. Barton, Chief Deputy Appellate Defender, argued the cause for appellant. With him on the brief was David E. Groom, Appellate Defender.

Daniel J. Casey, Assistant Attorney General, argued the cause for respondent. With him on the brief were Hardy Myers, Attorney General, and Mary H. Williams, Solicitor General.

Before LANDAU, Presiding Judge, and ARMSTRONG and BREWER, Judges.

Opinion

***544** BREWER, J.

Defendant appeals from a judgment of conviction for solicitation to commit aggravated murder.[1] ORS 161.435; ORS 163.095(1)(a). Defendant makes four assignments of error, three of which we reject without discussion. In the fourth, defendant argues that the trial court erred in denying his motion to quash a subpoena issued by the state to a psychologist retained by his trial attorney and, as a result, admitting into evidence at trial statements that he made to the psychologist. The state contends that the court correctly ruled that the statements fell within the future crimes exception to the attorney-client privilege and the child abuse exception to the psychotherapist-patient privilege. We review for errors of law. *Frease v. Glazer,* 330 Or. 364, 369, 4 P.3d 56 (2000); *State v. Langley,* 314 Or. 247, 263, 839 P.2d 692 (1992), *adh'd to on recons.,* 318 Or. 28, 861 P.2d 1012 (1993). We need not address the psychotherapist-patient privilege because we conclude that defendant's statements were protected by the attorney-client privilege and were not subject to the future crimes exception to that privilege. Accordingly, we reverse and remand for a new trial.

1 In a separate judgment, defendant also was convicted of first-degree theft, first-degree forgery, and tampering with public records. Those convictions are not relevant to the issue that we address in this opinion.

From 1996 to 1998, defendant had a trading account at Bidwell and Company (the company), a discount stock brokerage firm. During 1998, defendant's investments through the company lost nearly $300,000 in value. Upset about his losses, defendant complained to the company that it should have advised him against making certain investments. Company president H. Gerald Bidwell (Bidwell) wrote to defendant, explaining that he had reviewed the transactions and concluded that the company had acted appropriately. Defendant then began to focus his anger on Bidwell. On September 8, 1998, defendant called Warren, the ex-husband of Bidwell's current wife. He identified himself as “John” and asked Warren if he would be interested in participating in a scheme to “whack” Bidwell. Warren inferred that defendant was asking him to assist defendant in a murder-for-hire. ***545** Warren declined and later told Bidwell and the police about the call. An investigation ensued and, among other things, the police learned that defendant had made numerous prank calls to Bidwell's home, sent Bidwell three e-mails with ominous messages predicting Bidwell's death, and stolen court records pertaining to the dissolution of Bidwell's marriage to his former wife. Defendant was arrested on January 9, 1999, and charged with solicitation to commit murder, theft, forgery, tampering with public records, and menacing. The indictment identified Bidwell as the victim for the purpose of the solicitation and menacing charges.

****349** The state produced evidence that, while in jail awaiting trial, defendant told at least two people that he

planned to commit several murders in the future. First, in May 1999, he told another inmate, Rohrscheib, that he intended to kill Warren and his children after he was released from jail because Warren had gone to the police. Later, defendant told Rohrscheib that he no longer wanted to hurt Warren's children but that he still wanted to kill Warren; in that conversation, he also stated that he wanted to kill Bidwell. Thereafter, on June 8, 1999, a psychologist, Dr. Colby, interviewed defendant. Defendant's attorney had retained Colby to evaluate defendant for the purpose of exploring possible defenses. During the interview, defendant said that he wanted his statements to Colby to be privileged, and defendant told Colby not to make a written report of their conversation. Defendant then told Colby that he intended to kill Bidwell, his wife, and their children.

Colby told defendant's attorney about the threats. She, in turn, reported them to the trial court in the presence of the prosecutor. The state then dismissed the charge against defendant for solicitation to commit murder and, two days later, in a second indictment, charged him with solicitation to commit aggravated murder. The second indictment identified Bidwell as defendant's intended victim. The remaining charges in the first indictment were consolidated for trial with the solicitation to commit aggravated murder charge in the second indictment. The state subpoenaed Colby as a witness at trial. Defendant moved to quash the subpoena, arguing that Colby was his attorney's representative and that both OEC 503(2)(a), the attorney-client privilege rule, and OEC 504, the psychotherapist-patient privilege ***546** rule, barred admission of defendant's statements to Colby.[2] The state responded that defendant's threats fell within OEC 503(4)(a), the future crimes exception to the attorney-client privilege, as well as ORS 419B.040, the child abuse exception to the psychotherapist-patient privilege. The court ruled that both exceptions applied and denied defendant's motion to quash.

2 The text of the pertinent rules and exceptions is set out below.

At trial, the state called Rohrscheib and Colby as witnesses. As described above, Rohrschreib testified regarding defendant's statements about his intention to kill Warren, Warren's children, and Bidwell. Rohrscheib also testified that, in return for his cooperation, he had received a five-day reduction in the six-month sentence that he had been serving. Colby testified that, during his interview with defendant, defendant told him that he intended to kill Bidwell and his wife. According to Colby, defendant first stated that he was unsure about taking the lives of Bidwell's children but later stated, "Yes, I think I will kill the Bidwell children in a way that will make Mr. Bidwell suffer for what he has done." The state also adduced other evidence of defendant's preoccupation with Bidwell, including the prank calls, the e-mails, and the stolen court records. In his defense, defendant conceded that he intended to harass Bidwell, but he contended that he was never serious about killing him. The jury found defendant guilty of solicitation to commit aggravated murder.[3]

3 As noted, defendant also was convicted of first-degree theft, first-degree forgery, and tampering with public records for having stolen Bidwell's divorce records. However, at the close of the state's case-in-chief, the court granted defendant's motion for judgment of acquittal on the menacing charge.

On appeal, the parties renew their arguments concerning the attorney-client and psychotherapist-patient privileges. The state further argues that, if the trial court erred in admitting Colby's testimony, the error was harmless. The state also asserts that, even if the admission of Colby's testimony was not harmless, that testimony would be admissible in a new trial under OEC 504-5, which creates a new limitation on evidentiary privileges. *See* Or. Laws 2001, ch. 640, § 3. ***547** Therefore, the state argues, a remand would serve no useful purpose.

We begin with defendant's argument that his statements to Colby were protected by the attorney-client privilege. OEC 503 provides, in part:

> ****350** "(2) A client has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made for the purpose of facilitating the rendition of professional legal services to the client:
>
> "(a) Between the client or the client's representative and the client's lawyer or a representative of the lawyer[.]"

The state implicitly concedes that, by its terms, OEC 503(2)(a) applies to the statements that defendant made to Colby. The record supports that concession. The communication was (1) made confidentially (2) for the purpose of facilitating the rendition of legal services to defendant and (3) between defendant and a representative of defendant's lawyer. *See State v. Jancsek,* 302 Or. 270, 275, 730 P.2d 14 (1986) (stating that, to successfully invoke the attorney-client privilege, the

person seeking to exclude the evidence must show that (1) the communication is confidential within the meaning of OEC 503(1)(b), (2) the communication was made for the purpose of facilitating the rendition of professional legal services to the client, and (3) the communication was between persons described in OEC 503(2)(a) through (e)).

The state nonetheless urges that defendant's statements to Colby do not fall within the scope of the attorney-client privilege because, even if they satisfy the plain language of OEC 503(2)(a), threats of violence were not protected communications at common law. That argument is unpersuasive. In *State ex rel N. Pacific Lbr. v. Unis,* 282 Or. 457, 579 P.2d 1291 (1978), the Supreme Court construed the predecessor to OEC 503, ORS 44.040(1)(b) (1975), *repealed by* Or. Laws 1981, ch. 892, § 98. That statute did not explicitly provide for any exceptions to the attorney-client privilege. The court acknowledged that, "when the Oregon privilege statute was enacted [in 1862,] there was a recognized exception to the common-law privilege covering attorney-client ***548** communications when the communication was made *in furtherance of* an intended crime." *Unis,* 282 at 462, 579 P.2d 1291 (emphasis added). The court then stated:

> "Consistent with the recognition * * * that [ORS 44.040(1)(b)] is merely declaratory of the common law attorney-client privilege, and with our practice of construing the statute in light of the underlying policies which it is intended to serve, we hold, as an exception to the attorney-client privilege, that an attorney may, *under appropriate circumstances,* be required to testify about a client's communications which relate to future wrongdoing."

Unis, 282 Or. at 462-63, 579 P.2d 1291 (emphasis added). In construing the scope of the common-law exception, the court also stated that Uniform Rules of Evidence Rule 502(d) (1974) reflected the common-law rule. Rule 502(d) (1974) is identical to OEC 503(4)(a). Because, as pertinent here, the common-law exception is of a piece with the statutory exception, our disposition of the state's argument concerning OEC 503(4)(a) obviates the need to consider the common-law exception separately. Accordingly, we now turn to the statutory exception.

OEC 503 provides, in part:

> "(4) There is no privilege under this section:
>
> "(a) If the services of the lawyer were sought or obtained to enable or aid anyone to commit or plan to commit what the client knew or reasonably should have known to be a crime or fraud[.]"

The state, as the proponent of the exception, had the burden of showing that it is applicable. *See Kahn v. Pony Express Courier Corp.,* 173 Or.App. 127, 134, 20 P.3d 837, *rev. den.,* 332 Or. 518, 32 P.3d 898 (2001) (holding that it is incumbent on party seeking disclosure of privileged material to show that material is subject to exception to privilege); *see also State v. Hansen,* 82 Or.App. 178, 186, 728 P.2d 538 (1986), *rev'd in part on other grounds,* 304 Or. 169, 743 P.2d 157 (1987) (holding that the defendant, as proponent, "had the burden of showing that [an] exception to the patient-psychotherapist privilege is applicable"). The state contends that, in two distinct respects, defendant sought Colby's assistance in his plan to murder the Bidwell family. First, the state asserts that "defendant's request for Dr. Colby's silence about his plan to commit mass ***549** murder upon his release from jail constitutes seeking a 'service' from 'a representative ****351** of the lawyer' 'to enable or aid' in the commission of multiple future crimes." In the state's view, "at least one of defendant's purposes [in requesting confidentiality] was to prevent interference with his plan * * *." Second, the state contends that defendant revealed his plan to Colby in order to buttress his courage to follow through with it.

We conclude that the future crimes exception is inapplicable here. There is no basis in the record to infer that defendant's request for confidentiality constituted a request for services to aid or enable defendant to commit crimes. To the contrary, the only reasonable inference is that defendant requested Colby's silence as a condition of *disclosing* his plan. Furthermore, there is no basis to infer that defendant sought to buttress his courage by talking with Colby; thus, the state's assertion to that effect is speculative. Because the state has not shown that the exception applies, we conclude that defendant's statements to Colby were protected by the attorney-client privilege. [4]

4 That conclusion makes it unnecessary to consider the parties' arguments concerning the psychotherapist-patient privilege.

We turn to the state's argument that the admission of Colby's testimony was harmless evidentiary error. The Supreme Court recently has explained the focus of that inquiry. In *State v. Davis,* 336 Or. 19, 32, 77 P.3d 1111 (2003), the court stated:

> "Oregon's constitutional test for affirmance despite error consists of a single inquiry: Is there little likelihood that the particular error affected the verdict? The correct focus of the inquiry regarding affirmance despite error is on the possible influence of the error on the verdict rendered, not whether this court, sitting as a fact-finder, would regard the evidence of guilt as substantial and compelling.
>
> "In determining whether the error affected the verdict, it is necessary that we review the record. However, in so doing, we do not determine, as a fact-finder, whether the defendant is guilty. That inquiry would invite this court to ***550** engage improperly in weighing the evidence and, essentially, retrying the case, while disregarding the error committed at trial, to determine whether the defendant is guilty. Rather, when we review the record, we do so in light of the error at issue. We ask whether there was little likelihood that the error affected the jury's verdict. We recognize that, if the particular issue to which the error pertains has no relationship to the jury's determination of its verdict, then there is little likelihood that the error affected the verdict. However, that is not a finding about how the court views the weight of the evidence of the defendant's guilt. It is a legal conclusion about the likely effect of the error on the verdict."

The state asserts that other evidence adduced by the prosecution to show that defendant intended to kill Bidwell was sufficiently strong that the jury would have found defendant guilty beyond a reasonable doubt even without Colby's testimony. We disagree with that assessment of the evidence. Contrary to the state's assertion, Rohrscheib's testimony regarding defendant's intentions did not render Colby's related testimony redundant. A jury would be more likely to find persuasive the word of a licensed psychologist than that of a convicted offender who has conceded that he received a shortened sentence in exchange for his testimony. *Cf. State v. Keller,* 315 Or. 273, 286, 844 P.2d 195 (1993) (testimony of medical professional presumably was persuasive to jury). Moreover, Rohrscheib's and Colby's testimony was not precisely the same. According to Rohrscheib, defendant stated that he wanted to kill Warren and Bidwell and, at first, *Warren's* children. Only Colby testified that defendant threatened to kill Bidwell's children. The jury may particularly have been influenced by Colby's testimony that defendant told him that "I think I will kill the Bidwell children in a way that will make Mr. Bidwell suffer for what he has done." Because we cannot say that there is little likelihood that Colby's testimony affected the jury's verdict, the error in admitting it was not harmless.

****352** We turn to the state's argument that remand would be purposeless because, on remand, Colby's testimony will be admissible under OEC 504-5. That rule provides, in part:

> "(1) In addition to any other limitations on privilege that may be imposed by law, there is no privilege under ***551** ORS 40.225 [attorney-client], 40.230 [psychotherapist-patient] or 40.250 [physician-patient] for communications if:
>
> "(a) In the professional judgment of the person receiving the communications, the communications reveal that the declarant has a clear and serious intent at the time the communications are made to subsequently commit a crime involving physical injury, a threat to the physical safety of any person, sexual abuse or death;
>
> "(b) In the professional judgment of the person receiving the communications, the declarant poses a danger of committing the crime; and
>
> "(c) The person receiving the communications makes a report to another person based on the communications."

The legislature enacted OEC 504-5(1) after defendant's trial had ended, but it "applies to all communications, whether made before, on or after" its effective date, January 1, 2002, and "to trials or proceedings commenced on or after the effective date * * *." Or. Laws 2001, ch. 640, § 3. The state contends that a new trial in this case would be a "trial commenced after" that date and that, as such, the rule necessarily would apply to it. Relying on *State v. Meyers,* 153 Or.App. 551, 958 P.2d 187 (1998), defendant counters that OEC 504-5 would not apply to a new trial.

We agree that, by its terms, OEC 504-5 will apply to a new trial after remand. The question remains whether remand therefore is unnecessary. In *Meyers,* the trial court had convicted the defendant based on evidence that we concluded was erroneously admitted. *Meyers,* 153 Or.App.

at 555-56, 958 P.2d 187. The state nevertheless urged us to affirm the conviction based on ORS 136.432, which took effect while the defendant's appeal was pending. *Meyers,* 153 Or.App. at 556, 958 P.2d 187. We considered the legislature's directive that ORS 136.432 "appl[ies] to all criminal actions pending or commenced on or after December 5, 1996." We concluded that the term "criminal actions" referred only to criminal trials, not appeals, and thus did not apply because the defendant's trial was no longer pending. We said:

> "To read [the statute's effective date provision] as the state suggests would mean that the legislature intended to ***552** change the rules of evidence retroactively, that is, after the trial courts already have ruled on evidentiary issues under the earlier law. Thus, rulings of the trial courts that were entirely correct at the time could be 'transformed' into errors after the fact, and defendants would have no opportunity to respond. Such a moving of the proverbial goal posts after the contest is over raises serious questions of due process. *See Jones v. General Motors Corp.,* 139 Or.App. 244, 264, 911 P.2d 1243 (1996), *aff'd on other grounds* 325 Or. 404, 939 P.2d 608 (1997) (applying revised summary judgment standard retroactively on appeal would violate due process). When faced with competing constructions of a statute, we generally are required to 'choose the interpretation which will avoid any serious constitutional difficulty.' *State v. Duggan,* 290 Or. 369, 373, 622 P.2d 316 (1981)."

Meyers, 153 Or.App. at 559-60, 958 P.2d 187.

Here, the state does not contend that OEC 504-5 applies to this appeal. The quoted principle nevertheless informs our decision whether to remand this case for a new trial. Again, by its terms, OEC 504-5 applies only if, "[i]n the professional judgment of the person receiving the communications," the declarant has a clear and serious intent to commit a violent crime and poses a danger of committing the crime. To decline to remand this case would have the effect of assuming what Colby would have testified regarding those issues, that defendant would have been unable to rebut that testimony, and that the trial court, in the exercise of its function under OEC 104, would have found that Colby's testimony met the required standard. On this record, as a matter of fundamental ****353** fairness, we cannot properly assume the occurrence of those events.

Finally, the state argues that, if we remand this case, we should do so with instructions that, if the trial court determines that Colby's testimony pursuant to OEC 504-5 is admissible, it simply reenter the judgment convicting defendant of solicitation to commit aggravated murder. The state bases its argument, in part, on *State v. Cole,* 323 Or. 30, 37, 912 P.2d 907 (1996), where the court remanded a case for a new hearing on a motion to suppress and instructed the trial ***553** court to reenter a judgment of conviction if the motion to suppress was denied. However, *Cole* is distinguishable from the circumstances here. In *Cole,* the issue was whether the trial court had erred in failing to suppress certain evidence. On remand, the trial court was not required to apply a new legal standard to the suppression decision; rather, the court was instructed to apply correctly the legal standard that existed at the time of the original trial. *Id.* at 37, 912 P.2d 907. Thus, *Cole* did not involve the possible retroactive application of a new legal rule to a retrial.

The state also argues that this court held in *State v. Fuller,* 56 Or.App. 719, 643 P.2d 382, *rev. den.,* 293 Or. 340, 648 P.2d 853 (1982), under circumstances similar to those here, that the applicability of a new evidentiary rule made remand for a new trial unnecessary. In *Fuller,* the trial court improperly permitted the state to impeach its own witness.[5] *Id.* at 722, 643 P.2d 382. While the case was pending on appeal, the 1981 Evidence Code took effect; under newly enacted OEC 607, a party could impeach its own witness. As here, the new rule applied to proceedings commenced after their effective date but not retroactively to earlier proceedings. Or. Laws 1981, ch. 892, § 101. We concluded that "[t]he only evidence improperly received in the first trial would be properly received in the second, and no purpose would be served in ordering a new trial." *Fuller,* 56 Or.App. at 723, 643 P.2d 382.

5 Under *former* ORS 45.590, *repealed by* Or. Laws 1981, ch. 892, § 98, a party could not impeach its own witness unless the witness's testimony was affirmatively damaging to that party's case.

However, *Fuller* also is distinguishable from the circumstances here. In *Fuller,* this court was able to determine on the existing record that the erroneously admitted evidence would be admissible in a new trial. Here, on the other hand, the trial court must determine on remand whether defendant's statements to Colby are admissible based on an evidentiary record that is tailored to the requirements of OEC 504-5. The state cites no authority, and we are aware of none, for the proposition that a new trial would be unnecessary if the trial court were to determine, based on a *new* evidentiary record, that the challenged evidence is admissible.

***554** Judgment of conviction for solicitation to commit aggravated murder vacated and remanded for new trial; otherwise affirmed.

All Citations

190 Or.App. 542, 79 P.3d 347

191 Or.App. 617
Court of Appeals of Oregon.

STATE of Oregon, Respondent,
v.
Daniel L. JENKINS, Jr., aka Daniel J. Jenkins,
aka Daniel Loren Jenkins, Jr., Appellant.

9901–30573, 9906–34654; A112291 (Control), A112292.
|
On Appellant's Petition for
Reconsideration Nov. 26, 2003.
|
Decided Jan. 28, 2004.

***617** Appeal from Circuit Court, Multnomah County.
David Gernant, Judge. (Trial).
Robert W. Redding, Judge. (Sentencing).

Attorneys and Law Firms

Jesse Wm. Barton, Salem, for petition.

Before LANDAU, Presiding Judge, and ARMSTRONG and BREWER, Judges.

Opinion

***619** BREWER, J.

Defendant petitions for reconsideration of our decision in *State v. Jenkins,* 190 Or.App. 542, 79 P.3d 347 (2003). Specifically, he seeks reconsideration of our disposition of three of his assignments of error. We allow the petition, modify our opinion, and adhere to it as modified.

Defendant was convicted of first-degree theft, first-degree forgery, and tampering with public records. In a separate judgment, he also was convicted of solicitation to commit aggravated murder. Both judgments resulted from a single trial and were connected to the same underlying events. On appeal, defendant made four assignments of error. The first assignment pertained only to the latter conviction. The second and third pertained to the sentence imposed for that conviction. The fourth assignment of error pertained to an evidentiary ruling that was relevant to both judgments. In our opinion, we stated, "Defendant makes four assignments of error, three of which we reject without discussion." *Id.* at 544, 79 P.3d 347. We wrote only to address the first assignment, on the merits of which we reversed the conviction for solicitation to commit aggravated murder and remanded for a new trial. In his petition for reconsideration, defendant contends that, because we reversed that conviction, we should not have reached the sentencing issues connected to it. Consequently, he argues, we should not have rejected his second and third assignments of error on their merits.

We did not, in fact, reach the sentencing issues that were the subjects of the second and third assignments of error. However, because our opinion suggests that we did reach them, we delete the above quoted sentence and insert the following in its place:

> "Defendant makes four assignments of error. We reject without discussion the assignment pertaining to his motion to suppress evidence. Because we reverse defendant's conviction for solicitation to commit aggravated murder, we do not reach his two assignments of error concerning the sentence imposed for that conviction."

Reconsideration allowed; former opinion modified and adhered to as modified.

All Citations

191 Or.App. 617, 83 P.3d 390 (Mem)

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IN THE CIRCUIT COURT OF THE STATE OF OREGON

FOR THE COUNTY OF MULTNOMAH

STATE OF OREGON,	)	
	)	
Plaintiff,	)	Case No. 9906-34654
	)	
vs.	)	**ORDER ALLOWING**
	)	**TESTIMONY OF**
DANIEL LOREN JENKINS,	)	**DR. FALDER COLBY**
	)	
Defendant.	)	

On April 21, 2005, this matter came before the court on State's motion to admit the testimony of the defense psychologist, Dr. Falder Colby. The defendant was personally present, represented by his attorney Mr. Alexander Hamalian and Mr. Jesse Barton. The State was represented by Deputy District Attorneys Charles Sparks and John Bradley.

This case was sent back to the trial court by the Court of Appeals (*State v. Jenkins*, 190 Or App 542 (2003) for determination of whether or not Dr. Colby's testimony is admissible. The Court of Appeals held that it was not admissible under OEC 503(4)(a) (the future crimes exception to the psychotherapist-patient privilege) and sent it back for

additional factual findings to determine if the testimony was admissible under newly enacted 504-5(1).

Now on retrial, the State maintains that the evidence is admissible based on, 1) defendant's waiver of the attorney-client privilege by his filing of a bar complaint, 2) the child abuse reporting exception of 419B 040 and, 3) OEC 504-5.

The defense argues that the statements are absolutely privileged under any legal theory.

1) **Waiver**

Mr. Jenkins did file a pro se complaint to the bar concerning his attorney, Ms. Dickison, to whom Dr. Colby reported his concerns. Ms. Dickison then brought those concerns to a judge and the District Attorney. The original trial court allowed the testimony of Dr. Colby. The bar complaint involved the disclosures by Ms. Dickison of Dr. Colby's concerns. This court does not consider this a waiver on Mr. Jenkins' part. He disclosed much less than was already public and he did that in order to protect what he felt to be a violation of his constitutional rights. A criminal defendant should not be required to give up his right to challenge the conduct of his lawyer for fear of waiving the privilege.

2) **Child Abuse Reporting**

The first trial court found that the statements to Dr. Colby fell within the child abuse reporting requirement and were not privileged. Based on its ruling concerning the attorney-client privilege, the Court of Appeals did not address this issue.

ORS 419B 040 states that the psychotherapist-patient privilege is not grounds for excluding evidence regarding child abuse. "Abuse" includes "threatened harm to a child which

means subjecting a child to a substantial risk of harm to the child's health or welfare" (ORS 419B.005 (1)(a)(G).

Based on Dr. Colby's testimony, this court FINDS that the threats by Mr. Jenkins constitute "abuse." The threats were communicated to the State (District Attorney office). They are not privileged.

3) **OEC 504-5**

This statute was enacted as a result of this case. The District Attorney represented to the legislature that the fact pattern presented in the first trial did not fit neatly into OEC 503 and so proposed OEC 504-5. The new provisions relate to any trial commenced on or after January 1, 2002. On appeal of this case, the Court of Appeals determined that the new section would apply to this case since the retrial would commence after January 1, 2002. After stating ". . . by its terms, OEC 504-5 will apply to a new trial after remand" (pg 551), the court sent the case back to the trial court to determine at an evidentiary hearing whether or not the state could establish the necessary facts under sections (1)(a)(b) and (c).

After reading the opinion, the memoranda and hearing the testimony of Dr. Colby and the arguments of the attorneys, this court is struck by what the Court of Appeals didn't say in its opinion.

That court, after determining that the trial court erred, went on to consider whether the new statute would apply on retrial. That issue was briefed and argued. The court then decided whether the retrial would have been a trial "that commenced after" January 1, 2002. What it did not do is decisive in this court's thinking. Without even discussing retroactivity, the court could have decided whether the new statute was applicable, based on what this court has considered the

basic principal of privilege; does the privilege attach at the time of the communication or at the time of potential disclosure? This court has always believed that it attached at the time of the communication; for example, in termination of parental rights cases, the State routinely tries to introduce treatment records from years earlier. They introduce a waiver of confidentiality form that has long since expired but was in effect at the time of the communication. This court has always ruled that if the patient waived confidentiality at the time of the communication by knowing that the waiver was in effect and talking anyway, the communications are admissible if made during the time covered by the waiver, even if the waiver had expired at the time of the termination case. But, obviously this is not the view of the Court of Appeals, or they would have said that, regardless of any evidentiary findings the new statute couldn't apply since the critical time period was when the statement was made, not when the state tries to introduce it.

The ruling would appear to say that no privilege is truly protected in the law - the legislature, especially following a notorious case, can make any supposedly privileged communication admissible by enacting a provision like this one. Presently OEC 504-5 affects only the attorney-client, psychotherapist-patient and clinical social worker-client privilege. It does not presently cover others such as clergy-penitent or husband-wife; but could by simply including them in the statute.

Based on the directives of the Court of Appeals, after taking testimony, the court FINDS according to OEC 504-5(1):

a) In the professional judgment of both Ms. Dickison and Dr. Colby, the communications reveal that Mr. Jenkins has a clear and serious intent at the time

the communications were made to subsequently commit a crime involving physical injury or death to Mr. and Ms. Bidwell and their children.

b) In the professional judgment of both Dr. Colby and Ms. Dickison, Mr. Jenkins poses a danger of committing the crime.

c) Both Ms. Dickison and Dr. Colby reported to another person based on the communication.

It is hereby ordered and adjudged that:

1) Dr. Colby may be called to testify as to Mr. Jenkins' statements under OEC 504-5.

2) Dr. Colby may be called to testify to Mr. Jenkins' statements concerning the children under ORS 419B 040.

3) Defendant's motion to quash the subpoena of Dr. Colby is denied.

DATED This 19 Day July, 2005.

HON. LINDA L. BERGMAN
Circuit Court Judge