FILED
United States Court of Appeal
Tenth Circuit

March 8, 2024

Christopher M. Wolpert
Clerk of Court

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

WARREN DALE WATSON,

Petitioner - Appellant,

v.

MARK FAIRBAIRN; THE ATTORNEY GENERAL STATE OF COLORADO,

Respondents - Appellees.

No. 23-1392
(D.C. No. 1:22-CV-02695-DDD)
(D. Colo.)

ORDER DENYING CERTIFICATE OF APPEALABILITY*

Before **TYMKOVICH, EID,** and **ROSSMAN,** Circuit Judges.

Petitioner Warren Watson, appearing pro se, seeks a certificate of appealability ("COA") to challenge the district court's denial of his 28 U.S.C. § 2254 application for habeas relief on three grounds. Watson also requests leave to proceed in forma pauperis. Because no reasonable jurist could disagree with the district court's resolution of Watson's three habeas claims, we deny his request for a COA and dismiss this matter. We also deny his motion to proceed in forma pauperis on appeal.

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* This order is not binding precedent except under the doctrines of law of the case, res judicata, and collateral estoppel. It may be cited, however, for its persuasive value consistent with Fed. R. App. P. 32.1 and 10th Cir. R. 32.1.

I.

Watson faced a multiple-count indictment charging him with state felony offenses related to the murder, sexual assault, and robbery of an attorney in Lakewood, Colorado. R. Vol. II at 98. After being arrested, he waived his rights under *Miranda v. Arizona*, 384 U.S. 436 (1966), in an interview with Colorado detectives, which ended with two videotaped confessions lasting nine hours total.

As Watson awaited trial, he switched back and forth between being represented and appearing pro se. To start, after the public defender's office had represented Watson for eighteen months, he requested to proceed pro se. Next, he consulted with alternate defense counsel, and the trial court granted his second request and appointed advisory counsel to assist him throughout the state proceedings.

But that arrangement did not last long. Watson went back to the court and requested counsel after getting frustrated as a pro se litigant at a suppression hearing. At this point, the trial court reappointed the public defender. But again, months later, Watson requested to change things for a fourth time, asking the court yet again to proceed pro se. This time, however, the court denied his request. During this timeframe, Watson was evaluated as competent to stand trial.

The public defender went on to represent Watson, and a jury convicted him of first-degree murder, sexual assault, aggravated robbery, aggravated motor vehicle theft, and escape. Afterward, the court adjudicated Watson as a habitual criminal and sentenced him to life in prison without the possibility of parole. The Colorado Court

of Appeals affirmed his convictions, and the Colorado Supreme Court denied his petition for certiorari review.

Having had no success on appeal, Watson turned to postconviction relief. But the state trial court denied his motion for such relief, the Colorado Court of Appeals affirmed the trial court's order, and the Colorado Supreme Court denied Watson's petition for a writ of certiorari.

Watson then timely initiated a habeas corpus proceeding in federal court. Of relevance, he claimed that three constitutional violations occurred: (1) the state trial court violated his Sixth Amendment right to self-representation when it denied his fourth request to change his representation status; (2) trial counsel was constitutionally ineffective by misadvising him on the use of an "involuntary intoxication" affirmative defense; and (3) trial counsel was constitutionally ineffective by creating a conflict of interest by bribing him to accept a plea deal with the offer of money and a television in jail.

For each claim, the district court ordered that Watson's application for habeas corpus and a COA be denied. The court also certified pursuant to 28 U.S.C. § 1915(a)(3) that any appeal from its order would not be taken in good faith. Now, Watson petitions for a COA on the three constitutional grounds and files a motion for leave to proceed in forma pauperis on appeal.

II.

Watson must obtain a COA to appeal the district court's denial of his § 2254 application. 28 U.S.C. § 2253(c)(1). This Court can issue a COA only if a petitioner

has "made a substantial showing of the denial of a constitutional right." *Id.* § 2253(c)(2). Therefore, a petitioner must show "that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000).

Here, the district court dismissed Watson's application based on the merits of his habeas claims, not on procedural grounds. For each claim, Watson must therefore prove "something more than the absence of frivolity" or mere "good faith" to obtain a COA. *Miller-El v. Cockrell*, 537 U.S. 322, 338 (2003).

III.

Watson petitions for a COA based on three constitutional violations. He claims that (1) the state trial court violated his Sixth Amendment right to self-representation, and that his trial counsel was constitutionally ineffective by (2) misadvising him on the use of an "involuntary intoxication" affirmative defense and (3) creating a conflict of interest by bribing him with money and a television to coerce him into a plea deal. We explain how no reasonable jurist could disagree with the district court's denial of habeas relief for these claims.

A.

To begin, Watson argues that the state trial court violated his Sixth Amendment right to self-representation when it denied his fourth request related to his representation status—in which he again asked to proceed pro se. A criminal defendant has the right to "proceed without counsel when he voluntarily and intelligently elects to do so." *Faretta v. California*, 422 U.S. 806, 807 (1975). But

the right has its limits. *See, e.g.*, *Indiana v. Edwards*, 554 U.S. 164, 171 (2008) (collecting cases). Courts should "indulge in every reasonable presumption against waiver" of the Sixth Amendment right to counsel. *Brewer v. Williams*, 430 U.S. 387, 404 (1977); *see United States v. Reddeck*, 22 F.3d 1504, 1510 (10th Cir. 1994) ("We have repeatedly shown concern with the use of the right to waive counsel as a 'cat and mouse' game with the courts.").

In some situations, defendants attempt to vacillate or manipulate the right to proceed pro se. When that happens, courts "must ascribe a 'constitutional primacy' to the right to counsel because this right serves both the individual and collective good, as opposed to only the individual interests served by protecting the right of self-representation." *United States v. Mackovich*, 209 F.3d 1227, 1237 (10th Cir. 2000) (citation omitted). Similarly, when "a defendant [] deliberately engages in serious and obstructionist misconduct," a "trial judge may terminate self-representation." *Faretta*, 422 U.S. at 834 n.46; *see, e.g.*, *United States v. Bennett*, 539 F.2d 45, 51 (10th Cir. 1976) (affirming a trial court's conclusion that a defendant did not take a clear and unequivocal position on self-representation because he "forfeited his right to self-representation by his vacillating positions which continued until just six days before the case was set for trial").

Below, Watson challenged the trial court's denial of his request to proceed pro se at trial based on the finding that he "was manipulating the trial process by vacillating about whether he wanted to represent himself." R. Vol. II at 115. Watson argued that the trial court should have more strongly considered that "his medications

had been to blame for his conduct at the motions hearing, and that because his dosage had been reduced, he now felt that he could proceed in his own defense." *Id.*

After providing a detailed procedural history, the district court decided that the Colorado Court of Appeals reasonably determined the facts when considering the evidence presented. Specifically, the district court found it reasonable to conclude that Watson "was manipulating the trial process by vacillating about whether he wanted to represent himself; and his medications were not to blame for his conduct at the suppression hearing and his decision to request that defense counsel be reappointed [was] reasonable." *Id.* at 117.

To get there, the district court relied on a doctor's report that clarified that Watson's "medications typically would not cause significant neuropsychological impairment" and that Watson seemed "coherent, organized, logical, and goal-directed" and did not appear "to have any impairment in competency." *Id.* at 115. The court also relied on other competency reports that did not indicate any "causes of concern with [Watson's] competency abilities or the medication he was on." *Id.* And the district court relied on the state trial court's own assessment of Watson, namely, that it did not "perceive any differences in [his] functioning between any [prior court dates] and today." *Id.*

No reasonable jurist could disagree with the district court's determination. The record clearly demonstrates that Watson did not appear impaired or confused when taking his medication. And doctor reports and other competency reports showed that the medication could not cause an impairment in any event.

It is true that on one hearing day, Watson expressed that he had "problems being able to interview the witness" and another "problem" with fashioning arguments in a way the court could understand. *Id.* at 116. But these problems were not attributable to his medication, or at least, the record does not support that notion. Neither Watson nor his advisory counsel argued that his medication caused or contributed to his difficulties with cross-examination. He instead pinned the blame on his abilities (or rather the lack thereof), stating "I just didn't know I couldn't get [the information] out there." *Id.* Also, when Watson requested to proceed pro se the first time around, he declared that his medication did not affect his "ability to understand these proceedings." *Id.* at 117.

All considered, Watson made four requests related to his representation—two of them being the same request to proceed pro se. The state trial court had evidence that Watson vacillated on whether to proceed pro se, which allowed it to "ascribe a 'constitutional primacy' to the right to counsel." *Mackovich*, 209 F.3d at 1237 (citation omitted). Because no reasonable jurist could disagree with the district court's dismissal of Watson's first claim, we deny him a COA on this ground.

Watson responds that reasonable jurists could disagree with the district court's decision because his second pro se request had been deemed voluntary and intelligent. *See Faretta*, 422 U.S. at 807. Although that may be true, those factors do not limit a trial court's discretion to "terminate self-representation" if "a defendant [] deliberately engages in serious and obstructionist misconduct." *Id.* at 834 n.46; *see Mackovich*, 209 F.3d 1227, 1237; *United States v. Williams*, 201 F.3d 449, 449

(10th Cir. 1999) (unpublished) (stating that courts have this power even if the request to proceed pro se is "properly invoked"). And here, as the district court recognized, the record indicates that Watson "manipulat[ed] the trial process by vacillating about whether he wanted to represent himself." R. Vol. II at 115, 117.

Next, Watson contests the record. In his view, he "filed no pleading requesting that new counsel be appointed"; rather, he "was simply being presistent [sic] in his continuing request to represent himself." COA Application at 4. A review of the record indicates that his recollection is mistaken. *See* R. Vol. I at 169–70 (recounting the events). In fact, even his own brief filed in state court indicates that he made numerous requests related to his representation, going back and forth between pro se status and having counsel. *See id.* at 64 ("[Watson] filed numerous motions to proceed pro se . . . . His initial oral motion to proceed pro se with advisory counsel was granted . . . . He represented himself during a portion of the hearing on the motion to suppress statements, and approximately one hour into the hearing, he requested and was granted reappointment of the public defender . . . . Mr. Watson renewed his request to proceed pro se five months later.").

B.

Watson next brings two ineffective assistance of counsel claims. Generally, the Sixth Amendment requires defense counsel to effectively assist a criminal defendant at trial. *See Strickland v. Washington*, 466 U.S. 668, 685–86 (1984). To bring an ineffective assistance of counsel claim, Watson must show that (1) his counsel's performance was deficient by making "errors so serious that counsel was

not functioning as the 'counsel'" and (2) the deficient performance caused prejudice, meaning that there is "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 687, 694.

When assessing those elements, federal courts apply a "doubly deferential judicial review" standard. *Knowles v. Mirzayance*, 556 U.S. 111, 123 (2009). They "defer to the state court's determination that counsel's performance was not deficient and, further, defer to the attorney's decision in how to best represent a client." *Grant v. Royal*, 886 F.3d 874, 903 (10th Cir. 2018).

With that in mind, courts "considering a claim of ineffective assistance must apply a 'strong presumption' that counsel's representation was within the 'wide range' of reasonable professional assistance." *Harrington v. Richter*, 562 U.S. 86, 104 (2011) (quoting *Strickland*, 466 U.S. at 689). For there exist "countless ways to provide effective assistance in any given case," and "[e]ven the best criminal defense attorneys would not defend a particular client in the same way." *Strickland*, 466 U.S. at 689. That is why criminal defendants face the rebuttable presumption that "an attorney acted in an objectively reasonable manner and that an attorney's challenged conduct *might* have been part of a sound trial strategy." *Bullock v. Carver*, 297 F.3d 1036, 1046 (10th Cir. 2002). And "where it is shown that a particular decision was, *in fact*, an adequately informed strategic choice, the presumption that the attorney's decision was objectively reasonable becomes 'virtually unchallengeable.'" *Id.*

Watson's first ineffective assistance of counsel claim alleges that his trial counsel misadvised him on the use of an "involuntary intoxication" affirmative

defense. More specifically, Watson argues that his defense counsel initially "endorsed" using that affirmative defense and later informed the state trial court there was no basis for that defense. Aplt. Br. at 19. He then reasons that counsel informing the state trial court during pretrial proceedings that there was no basis for an involuntary intoxication defense resulted in an ineffective defense at trial. And he also contends that his counsel's initial advice caused him to decide about appearing pro se, which contributed to the state trial court's decision to deny his second pro se request.

In large part, the district court denied Watson's application because he did not allege that his counsel's deficient performance caused prejudice. The court explained that Watson failed to demonstrate that his counsel's assistance prevented him from proceeding pro se and that had he proceeded pro se, there was a substantial chance that the result of trial would have been different.

For support, the court looked to the record, where the Colorado Court of Appeals clearly stated that "trial counsel had nothing to do with [Watson's] decision to retract his request to go pro se because trial counsel had withdrawn by then, and thus [Watson] failed to show that counsel's statements at the October 2014 conflicts hearing prevented him from representing himself at trial." R. Vol. II at 124 (emphases omitted). The district court also looked to the state court's actual reasoning for denying Watson's second pro se request—again, that Watson had "vacillated" about whether to proceed pro se or proceed with appointed counsel. *Id.* And lastly, the district court saw that the record clearly showed that the involuntary

intoxication defense was advanced at trial, yet the jury still convicted him.[1] On all fronts, the district court found that the counsel's alleged deficient performance had no effect on the outcome of trial. And Watson did not dispute the state court's findings on which the district court relied.

Given that a petitioner must show prejudice to make out an ineffective assistance of counsel claim, *Strickland*, 466 U.S. at 687, 694, and Watson did not, no reasonable jurist could disagree with the district court's decision to deny habeas relief on this claim. Therefore, we deny Watson a COA on his second claim.

C.

Watson's next ineffective assistance of counsel claim alleges that his trial counsel created a "conflict of interest" by coercing him to accept a plea deal with bribes of money and a television. Aplt. Br. at 4. To recap, *Strickland* requires a showing of prejudice for an ineffective assistance of counsel claim to be successful. 466 U.S. at 687, 694. But when it comes to the Sixth Amendment right to have trial representation "free from conflicts of interest," *Wood v. Georgia*, 450 U.S. 261, 271 (1981), courts do not need to engage in the typical prejudice inquiry. *Mickens v. Taylor*, 535 U.S. 162, 166 (2002). Instead, courts apply the "*Cuyler* exception," *United States v. Williamson*, 859 F.3d 843, 856 n.3 (10th Cir. 2017) (cleaned up), in which courts presume prejudice if a criminal defendant can demonstrate that his trial

[1] Watson argues that his counsel's advice created ineffectiveness that later prejudiced Watson in his pursuit of this defense. That is simply not the case. Watson still presented the involuntary intoxication defense at trial. It just was not successful.

counsel "actively represented conflicting interests" and that "an actual conflict of interest adversely affected his lawyer's performance," *Strickland*, 466 U.S. at 692 (quoting *Cuyler v. Sullivan*, 446 U.S. 335, 347 (1980)).

An actual conflict of interest arises where "the interests of counsel and defendant [are] divergent in the current litigation, such that the attorney has an interest in the outcome of the particular case at issue that is adverse to that of the defendant." *Hale v. Gibson*, 227 F.3d 1298, 1313 (10th Cir. 2000). As of now, the Supreme Court has indicated that only the concurrent representation of multiple defendants creates an actual conflict of interest. *See Mickens*, 535 U.S. at 175–76. And if a trial court "knows or reasonably should know that a particular conflict exists," the court must "initiate an inquiry." *Cuyler*, 446 U.S. at 347.

Starting things off, the district court stated that whether Watson's proposed bribing conflict serves as an *actual conflict* under Supreme Court precedent remains an "open question." R. Vol. II at 127 (quoting *Mickens*, 535 U.S. at 176 (noting that it is an "open question" whether the *Cuyler* exception to *Strickland* for cases of actual conflicts of interest applies outside the context of concurrent representation of multiple defendants)). And so, instead of automatically assuming prejudice from Watson's proposed conflict under the *Cuyler* exception, the district court required Watson to show that the Colorado Court of Appeals unreasonably applied *Strickland*.

In terms of this application of law, no reasonable jurist could disagree with the district court's approach. Indeed, this Court has even noted what the district court did was correct. *Williamson*, 859 F.3d at 856 (concluding that "*Mickens* clarified that

the automatic reversal rule applies only to multiple representation conflicts of interest," not other proposed ethical conflicts between a criminal defendant and his counsel).[2]

Applying *Strickland*, the district court found that Watson failed to demonstrate prejudice. In reaching that conclusion, the district court looked to the Colorado Court of Appeals's decision, which determined that Watson failed to allege that plea counsel had created a conflict of interest and that the conflict had adversely affected counsel's representation by encouraging Watson to take a plea deal.

No reasonable jurist could disagree with the district court's denial of habeas relief on this claim. Watson could not show that the Colorado Court of Appeals unreasonably applied *Strickland* because he failed to show prejudice. That being so, we deny a COA on Watson's third claim.

In response, Watson argues that the state trial court did not further investigate his counsel's alleged bribes after getting confirmation from the counsel that "they provided Watson with funds on his account, and had offered him a television, but this was only because they liked Mr. Watson." COA Application at 6; *see* Aplt. Br. at 35. But, as the district court reasoned, what Watson identifies as a possible conflict has not been determined as an actual one under Supreme Court precedent. *See* R. Vol. II at 127; *Williamson*, 859 F.3d at 856. As a result, no reasonable jurist would disagree

[2] Because no reasonable jurist could disagree with how the district court applied *Strickland* and *Cuyler*, *see Mickens*, 535 U.S. at 176; *Williamson*, 859 F.3d at 856, Watson's argument that he did not need to show prejudice fails. The *Cuyler* exception did not apply to Watson's proposed ethical conflict.

with the district court's conclusion that *Cuyler*—which would require that a trial court investigate an actual conflict—did not apply to Watson's case because he did not allege an actual conflict. *See* 446 U.S. at 347 ("Unless the trial court knows or reasonably should know that a particular conflict exists, the court need not initiate an inquiry.").

IV.

For these reasons, we DENY Watson's request for a COA and dismiss this matter. We also DENY Watson's motion to proceed in forma pauperis on appeal.

Entered for the Court

Allison H. Eid
Circuit Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
Judge Daniel D. Domenico

Civil Action No. 22-cv-02695-DDD

WARREN DALE WATSON,

Applicant,

v.

MARK FAIRBAIRN, and
THE ATTORNEY GENERAL OF THE STATE OF COLORADO,

Respondents.

ORDER DENYING APPLICATION FOR A WRIT OF HABEAS CORPUS

This matter is before the Court on the Application for a Writ of Habeas Corpus Pursuant to 28 U.S.C. § 2254 filed *pro se* by Applicant Warren Dale Watson (ECF No. 1). Having considered the Application, Respondents' Answer (ECF No. 21), Applicant's Traverse (ECF No. 26) and "Request for Evidentiary Hearing" (ECF No. 27), and the state court record (ECF No. 19), the Court will deny the Application.

I. Background

In 2013, a grand jury returned a multiple-count indictment charging Applicant with various felony offenses related to the murder, sexual assault, and robbery of an attorney at her office in Lakewood, Colorado. (ECF No. 11-4 at 2-3; ECF No. 11-8 at 2-3). Applicant was arrested and interviewed in Idaho by Colorado detectives, where he waived his rights under *Miranda v. Arizona,* 384 U.S. 436 (1966)

and gave a six-hour videotaped confession and a three-hour videotaped confession. (*Id.*).

After being represented by the public defender's office for eighteen months, Applicant requested to proceed *pro se* at trial. (*Id.*). After Applicant consulted with alternate defense counsel, the trial court granted his request and appointed advisory counsel to assist Applicant throughout the proceedings. (*Id.*). After weekly status conferences and multiple continuances, Applicant proceeded *pro se* at a suppression hearing, where he became frustrated and requested counsel. (*Id.*). The trial court reappointed the public defender. (*Id.*). Several months later, Applicant again asked to proceed *pro se*, which the court denied. (*Id.*). During this timeframe, Applicant was evaluated and found to be competent to stand trial. (*Id.*).

In 2015, Applicant was represented by the public defender at his trial, and he was convicted by a jury in Jefferson County District Court Case No. 13CR796 of first-degree murder, sexual assault, aggravated robbery, aggravated motor vehicle theft, and escape. (ECF No. 11-8). He was adjudicated a habitual criminal and sentenced to life in prison without the possibility of parole. (*Id.*). The Colorado Court of Appeals affirmed Applicant's convictions in *People v. Warren Dale Watson*, No. 15CA1924 (Colo. App. Oct. 25, 2018) (unpublished) (ECF No. 11-4). Applicant's petition for certiorari review was denied by the Colorado Supreme Court. (ECF No. 11-5).

Applicant next filed a motion for postconviction relief pursuant to Colo. Crim. P. Rule 35(c) (ECF No. 11-6), which the district court denied in a written order

without holding a hearing. (ECF No. 11-8 at 3). The Colorado Court of Appeals affirmed the district court's order in *People v. Warren Dale Watson,* No. 20CA1117 (Colo. App. Dec. 16, 2021) (unpublished) (ECF No. 11-8). Finally, the Colorado Supreme Court denied Applicant's petition for a writ of certiorari on May 31, 2022. (ECF No. 11-9).

On October 13, 2022, Applicant initiated this habeas corpus proceeding. (ECF No. 1). He asserts the following four claims for relief in the Application:

> 1) trial counsel was constitutionally ineffective by misadvising Applicant on the use of an "involuntary intoxication" affirmative defense;
>
> 2) the state district court violated his Sixth Amendment right to self-representation at trial;
>
> 3) trial counsel was constitutionally ineffective by creating a conflict of interest by trying to coerce Applicant to accept a plea deal; and
>
> 4) trial counsel was constitutionally ineffective by failing to investigate law enforcement's destruction of evidence, i.e., a recorded interview.

(*Id.* at 7-12).

In a Pre-Answer Response, Respondents concede that this action is timely under 28 U.S.C. § 2244(d)(1), and that Applicant exhausted available state court remedies for all claims. (ECF No. 11).

Respondents filed the Answer on December 22, 2022 (ECF No. 21), and Applicant filed his Traverse (ECF No. 26) and "Request for Evidentiary Hearing" (ECF No. 27) on March 27, 2023. The Court has determined that it can resolve the Application without a hearing. *See* 28 U.S.C. § 2254(e)(2); Fed. R. Governing Section 2254 Cases 8(a). Thus, Applicant's request for an evidentiary hearing will be denied.

II. Applicable Legal Standards

A. 28 U.S.C. § 2254

Title 28 U.S.C. § 2254(d) provides that a writ of habeas corpus may not be issued with respect to any claim that was adjudicated on the merits in state court unless the state court adjudication:

> (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). The applicant bears the burden of proof under § 2254(d). *See Woodford v. Visciotti*, 537 U.S. 19, 25 (2002) (per curiam).

The court reviews claims of legal error and mixed questions of law and fact pursuant to 28 U.S.C. § 2254(d)(1). *See Cook v. McKune*, 323 F.3d 825, 830 (10th Cir. 2003). The threshold question the court must answer under § 2254(d)(1) is whether the applicant seeks to apply a rule of law that was clearly established by the Supreme Court at the time of the relevant state court decision. *See Greene v. Fisher*, 565 U.S. 34 (2011). Clearly established federal law "refers to the holdings, as opposed to the dicta, of [the Supreme] Court's decisions as of the time of the relevant state-court decision. *Id.* at 412. Furthermore,

> clearly established law consists of Supreme Court holdings in cases where the facts are at least closely-related or similar to the case *sub judice*. Although the legal rule at issue need not have had its genesis in

> the closely-related or similar factual context, the Supreme Court must have expressly extended the legal rule to that context.

House v. Hatch, 527 F.3d 1010, 1016 (10th Cir. 2008). If there is no clearly established federal law, that is the end of the court's inquiry pursuant to § 2254(d)(1). *See id.* at 1018.

If a clearly established rule of federal law is implicated, the court must determine whether the state court's decision was contrary to or an unreasonable application of that clearly established rule of federal law. *See Williams*, 529 U.S. at 404-05.

> A state-court decision is contrary to clearly established federal law if: (a) the state court applies a rule that contradicts the governing law set forth in Supreme Court cases or (b) the state court confronts a set of facts that are materially indistinguishable from a decision of the Supreme Court and nevertheless arrives at a result different from [that] precedent. *Maynard* [*v. Boone*], 468 F.3d [665], 669 [(10th Cir. 2006)] (internal quotation marks and brackets omitted) (quoting *Williams*, 529 U.S. at 405). "The word 'contrary' is commonly understood to mean 'diametrically different,' 'opposite in character or nature,' or 'mutually opposed.'" *Williams*, 529 U.S. at 405 (citation omitted).
>
> A state court decision involves an unreasonable application of clearly established federal law when it identifies the correct governing legal rule from Supreme Court cases, but unreasonably applies it to the facts. *Id.* at 407-08. Additionally, we have recognized that an unreasonable application may occur if the state court either unreasonably extends, or unreasonably refuses to extend, a legal principle from Supreme Court precedent to a new context where it should apply.

House, 527 F.3d at 1018.

The court's inquiry pursuant to the "unreasonable application" clause is an objective one. *See Williams*, 529 U.S. at 409-10. "[A] federal habeas court may not issue the writ simply because that court concludes in its independent judgment that the relevant state-court decision applied clearly established federal law erroneously

or incorrectly. Rather that application must also be unreasonable." *Id.* at 411. "[A] decision is 'objectively unreasonable' when most reasonable jurists exercising their independent judgment would conclude the state court misapplied Supreme Court law." *Maynard*, 468 F.3d at 671. In addition,

> evaluating whether a rule application was unreasonable requires considering the rule's specificity. The more general the rule, the more leeway courts have in reaching outcomes in case-by-case determinations. [I]t is not an unreasonable application of clearly established Federal law for a state court to decline to apply a specific legal rule that has not been squarely established by [the Supreme] Court.

Harrington, 562 U.S. at 101 (internal quotation marks omitted). In conducting this analysis, the court "must determine what arguments or theories supported or . . . could have supported[ ] the state court's decision and then ask whether it is possible fairminded jurists could disagree that those arguments or theories are inconsistent with the holding in a prior decision of [the Supreme] Court." *Id.*

Under this standard, "only the most serious misapplications of Supreme Court precedent will be a basis for relief under § 2254." *Maynard*, 468 F.3d at 671; *see also Harrington*, 562 U.S. at 88 (stating that "even a strong case for relief does not mean the state court's contrary conclusion was unreasonable").

> As a condition for obtaining habeas corpus from a federal court, a state prisoner must show that the state court's ruling on the claim being presented in federal court was so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement.

Harrington, 562 U.S. at 102.

"[R]eview under § 2254(d)(1) is limited to the record that was before the state court that adjudicated the claim on the merits." *Cullen v. Pinholster*, 563 U.S. 170, 181 (2011).

The court reviews claims asserting factual errors pursuant to 28 U.S.C. § 2254(d)(2). *See Romano v. Gibson*, 278 F.3d 1145, 1154 n. 4 (10th Cir. 2002). Section 2254(d)(2) allows the federal court to grant a writ of habeas corpus only if the relevant state court decision was based on an unreasonable determination of the facts in light of the evidence presented to the state court. The court "must defer to the state court's factual determinations so long as 'reasonable minds reviewing the record might disagree about the finding in question.'" *Smith v. Duckworth*, 824 F.3d 1233, 1241 (10th Cir. 2016) (quoting *Brumfield v. Cain*, 576 U.S. 305 (2015)). Nevertheless, "if the petitioner can show that 'the state courts plainly misapprehend[ed] or misstate[d] the record in making their findings, and the misapprehension goes to a material factual issue that is central to petitioner's claim, that misapprehension can fatally undermine the fact-finding process, rendering the resulting factual finding unreasonable.'" *Id.* (alterations in original) (internal quotation marks and citation omitted).

Pursuant to § 2254(e)(1), the court must presume that the state court's factual determinations are correct and the applicant bears the burden of rebutting the presumption by clear and convincing evidence. "The standard is demanding but not insatiable . . . [because] '[d]eference does not by definition preclude relief.'" *Miller-El*

v. Dretke, 545 U.S. 231, 240 (2005) (quoting *Miller- El v. Cockrell*, 537 U.S. 322, 340 (2003)).

B. *Pro Se* Litigant

Applicant is proceeding *pro se*. The court, therefore, "review[s] his pleadings and other papers liberally and hold[s] them to a less stringent standard than those drafted by attorneys." *Trackwell v. United States*, 472 F.3d 1242, 1243 (10th Cir. 2007) (citations omitted); *see also Haines v. Kerner*, 404 U.S. 519, 520-21 (1972). However, a *pro se* litigant's "conclusory allegations without supporting factual averments are insufficient to state a claim on which relief can be based." *Hall v. Bellmon*, 935 F.2d 1106, 1110 (10th Cir. 1991). A court may not assume that an applicant can prove facts that have not been alleged, or that a respondent has violated laws in ways that an applicant has not alleged. *Associated Gen. Contractors of Cal., Inc. v. Cal. State Council of Carpenters*, 459 U.S. 519, 526 (1983). *Pro se* status does not entitle an applicant to an application of different rules. *See Montoya v. Chao*, 296 F.3d 952, 957 (10th Cir. 2002).

III. Analysis of Claims

In Claims 1, 3, and 4, Applicant asserts three grounds for ineffective assistance of counsel, and in Claim 2, he asserts a denial of the right to self-representation. The Court will first address Claim 2, and then will analyze Claims 1, 3, and 4.

A. Sixth Amendment Right to Self-Representation

Applicant claims that the trial court deprived him of his Sixth Amendment right to self-representation at trial by denying his second request to proceed *pro se*.

(*See* ECF No. 1 at 8-10). He specifically challenges the trial court's findings that Applicant's medication did not interfere with his first attempt to proceed *pro se*, and that Applicant may have been attempting to delay or manipulate the proceedings. (*Id.*).

1. Applicable Supreme Court law

It is beyond dispute that "[t]he Sixth Amendment safeguards to an accused who faces incarceration the right to counsel at all critical stages of the criminal process." *Iowa v. Tovar*, 541 U.S. 77, 80-81 (2004); *see also Gideon v. Wainwright*, 372 U.S. 335, 344 (1963). It is just as well settled, however, that a criminal defendant also has the right to "proceed *without* counsel when he voluntarily and intelligently elects to do so." *Faretta v. California*, 422 U.S. 806, 807 (1975); *see also Johnson v. Zerbst*, 304 U.S. 458, 464 (1938) (holding that a valid waiver requires "an intentional relinquishment or abandonment of a known right or privilege."). Although the right to self-representation is a corollary of the Sixth Amendment right to counsel, *see Faretta,* 422 U.S. at 819, the right to represent oneself is not absolute. *Indiana v. Edwards,* 554 U.S. 164, 171 (2008). The Supreme Court has cautioned that the courts "should indulge in every reasonable presumption against waiver" of the Sixth Amendment right to counsel. *Brewer v. Williams*, 430 U.S. 387, 404 (1977); *see also Martinez v. Court of Appeal,* 528 U.S. 152, 161 (2000) ("Although we found in *Faretta* that the right to defend oneself at trial is 'fundamental' in nature, *see id.* at 817, it is clear that it is representation by counsel that is the standard, not the exception," and thus there is a "strong presumption against" a waiver of the right to

counsel.). Further, a criminal defendant must be competent to waive his right to be represented by counsel. *See Godinez v. Moran*, 509 U.S. 389, 396 (1993). Thus, the trial court may require a defendant to proceed to trial with counsel where the defendant is deemed competent to go to trial, but nonetheless lacks the mental capacity to represent himself. *See Indiana*, 554 U.S. 164.

To invoke the right to self-representation, the defendant must "clearly and unequivocally declare[ ]" his intention to proceed *pro se* and must "knowingly and intelligently" waive his right to be represented by counsel. *Faretta*, 422 U.S. at 835. When a criminal defendant expresses a clear and unequivocal desire to represent himself, the trial court must make him "aware of the dangers and disadvantages of self-representation, so that the record will establish that he knows what he is doing and his choice is made with eyes open." *Id.* (internal quotation marks and citation omitted). This requirement serves the dual purpose "of protect[ing] against an inadvertent waiver of the right to counsel by a defendant's occasional musings on the benefits of self-representation" and "also prevent[ing] a defendant from taking advantage of and manipulating the mutual exclusivity of the rights to counsel and self-representation." *United States v. Mackovich,* 209 F.3d 1227, 1236 (10th Cir. 2000). Thus, "[i]n ambiguous situations created by a defendant's vacillation or manipulation, we must ascribe a constitutional primary to the right of counsel because this right serves both the individual and collective good, as opposed to only the individual interests served by protecting the right of self-representation." *Id.* at 1237. *See also United States v. Bennett,* 539 F.2d 45, 51 (10th Cir. 1976) (holding that

where the record supports the trial court's finding that a defendant forfeited his right to self-representation by his "vacillating positions," the record does not show that the defendant took a clear and unequivocal position on self-representation).

The Tenth Circuit has summarized the issues as follows:

> A district court is not obliged to accept every defendant's invocation of the right to self-representation." *United States v. Purnett*, 910 F.2d 51, 55 (2d Cir. 1990). In fact, a court may terminate the right to self-representation, or the defendant may waive it, even after he has unequivocally asserted it. *See Faretta*, 422 U.S. at 834 n. 46, 95 S. Ct. 2525 ("[T]he trial judge may terminate self-representation by a defendant who deliberately engages in serious and obstructionist misconduct."); *United States v. Bennett*, 539 F.2d 45, 50-51 (10th Cir. 1976) (holding that the record supported findings that defendant forfeited his right to self-representation by vacillating on the issue), *cert. denied*, 429 U.S. 925, 97 S. Ct. 327, 50 L.Ed.2d 293 (1976); *United States v. Montgomery*, 529 F.2d 1404, 1406 (10th Cir.) (holding that defendant waived right to proceed pro se when he allowed public defender to conduct plea bargaining on his behalf and accepted the benefits of the plea bargaining by pleading guilty to a lesser offense), *cert. denied*, 426 U.S. 908, 96 S. Ct. 2231, 48 L.Ed.2d 833 (1976); *cf. Wilson v. Gomez*, 105 F.3d 668 (9th Cir. 1996) (Table) (holding that defendant waived his right to self-representation by making equivocal requests regarding self-representation). These cases demonstrate that a waiver or a termination of the right to self-representation may occur without the defendant's knowledge or consent. In fact, a waiver or termination may result merely from the defendant's equivocation. *See Callwood*, 66 F.3d at 1114.

Munkus v. Furlong, 170 F.3d 980, 984 (10th Cir. 1999).

2. State court proceedings

a. trial court

Beginning in March 2013 and for the next eighteen months, the Colorado public defender's office represented Applicant in his state court criminal proceedings. (ECF No. 11-4). During this time, Applicant underwent competency and

mental condition evaluations at the request of his counsel, and each time the evaluator concluded that Applicant was competent. (ECF No. 11-8).

In September 2014, Applicant first requested to waive his right to counsel and proceed *pro se*. (State Court R., 9/25/14 Transcript at 11-16). Applicant was given an opportunity to consult with alternate defense counsel about the waiver before he ultimately decided to waive counsel and represent himself. (*Id.*, 10/3/14 Transcript at 2-11, 10/9/14(2) Transcript at 5-12). In October 2014, the trial court advised Applicant of his rights, determined that Applicant had knowingly, voluntarily, and intelligently waived his right to counsel, granted Applicant's motion to proceed *pro se*, and appointed advisory counsel to assist Applicant. (*Id.*, 10/9/14(2) Transcript at 11, 10/24/14 Transcript at 2). On December 4, 2014, Applicant proceeded *pro se* at a suppression hearing. (*Id.*, 12/4/14 Transcript). During this hearing, Applicant become frustrated and requested counsel. (*Id.*, at 80-89). The trial court reappointed the public defenders that had previously represented Applicant. (*Id.*).

In March 2015, against counsel's advice, Applicant attempted to plead guilty to all charges. (ECF No. 11-8 at 8). The trial court held a hearing and refused to accept the plea because the court determined that Applicant repeatedly vacillated about his ability to knowingly, voluntarily, and intelligently waive his right to a trial and an appeal. (*Id.*).

Around this same time, defense counsel again raised the issue of Applicant's competency to stand trial in a motion under C.R.S. § 16-8.5-102(b). (State Court R.,

Court File at 383). The court made a preliminary finding of competency, and defense counsel moved for a third competency evaluation under C.R.S. § 16-8.5-103(1)(2), requesting that an expert at the Colorado Mental Health Institute at Pueblo ("CMHIP") be consulted to issue a report on Applicant's competence. (*Id.*, at 390). After ordering an evaluation of Applicant's competency, the court received, in May 2015, a report from Dr. Timothy Foster, a CMHIP psychologist, who opined that Applicant was competent to stand trial. (*Id.*, 5/18/15 Transcript at 5-6). The trial court agreed and found Applicant competent to proceed. (*Id.* at 6).

While the competency issues were being addressed, Applicant made his second request to waive defense counsel and proceed *pro se* in May 2015. (State Court R., Court File at 398). The trial court again considered the issue but ultimately denied Applicant's request to proceed *pro se* after finding "vacillation" and "indications of manipulation and delay." (*Id.*, 5/18/15 Transcript at 6-15, 5/28/15 Transcript at 2-52).

b. Colorado Court of Appeals

On direct appeal, the Colorado Court of Appeals rejected Applicant's claim that the trial court erred by denying his second request to discharge his court-appointed counsel and represent himself at trial. (ECF No. 11-4 at 7-8).

B. Discussion

> The United States Supreme Court has recognized the importance of providing counsel for an unrepresented defendant facing felony charges, grounding such a right in the Sixth Amendment of the United States Constitution. *Gideon v. Wainwright*, 372 U.S. 335, 339-40 (1963). But *Faretta* recognized that the Sixth Amendment also creates a right

for an accused to *refuse* court-appointed counsel and act in his own defense. 422
U.S. at 834 ("It is the defendant, therefore, who must be free personally to decide whether in his particular case counsel is to his advantage.").

In *Arguello*, 772 P.2d at 92, our supreme court said, "[t]he Colorado Constitution reinforces [the] right [of an accused to self-representation], stating that 'the accused shall have the right to appear and defend in person.'" (quoting Colo. Const. art. II, § 16). The *Arguello* court established a procedure for determining whether a defendant has made a voluntary, knowing, and intelligent waiver of the right to counsel. The court emphasized that, "[i]n each situation, the validity of the waiver must be determined on the basis of the particular facts and circumstances of the case, including the background, experience, and conduct of the defendant." 772 P.2d at 95.

The trial court here was faced with the dilemma of reconciling these conflicting rights of defendant to refuse counsel and to utilize appointed counsel, and scrutinized defendant's actions to determine whether he was using the tension between these conflicting rights in an effort to create appellate error.

Defendant demonstrated that he was quite familiar with the criminal justice system. In his interview with the officers, defendant indicated that he had spent time in prison and had studied constitutional principles. He acknowledged that he was "fairly well versed in the law"; said that during a certain period he had been "reading [the law] for twelve hours a day, every single day"; and described how he had formulated the basis for a motion filed by his counsel in a previous case in which he faced a sentence of 864 years.

The trial court relied in part on defendant's familiarity with the criminal justice system in deciding this issue. In the transcript of the May 28, 2015 hearing, the court made a fifteen-page record explaining why it was denying defendant's renewed request to proceed pro se. It further incorporated its findings from the March 18, 2015 hearing, in which it had noted defendant's familiarity with the law and his earlier success as a pro se litigant while he was incarcerated.

In sum, the court found that defendant was manipulating the trial process by vacillating about whether he wanted to represent himself. *See Arguello*, 772 P.2d at 94-95 (in determining validity of waiver, trial courts can consider whether the defendant has attempted to manipulate

the proceedings). The salient points mentioned in the court's analysis are as follows:

- Defendant had made an earlier motion to proceed pro se, which the court granted. In granting the motion, the court told defendant that it would not allow the re-entry of counsel.

- The court detailed the steps it had taken to facilitate defendant's ability to proceed pro se.

- According to the court, after defendant's counsel was dismissed, defendant demonstrated during a motions hearing that he could not proceed without counsel, "he just couldn't go on," and he was "in over his head." During the hearing, defendant "threw up his hands and said, 'You know what[? I] guess I can't do this; I guess I do need an attorney.'" The court then reappointed counsel to represent him.

- Defendant later filed a pro se motion, declaring that he wanted to plead guilty. The court declined to accept the guilty plea.

- In response to a defense motion, the court found defendant competent to proceed.

- The trial was reset numerous times in a six-month period.

- Referencing defendant's conduct in the previous six months, including the above-described events, the court said, "[s]o if that's not a delaying tactic or manipulation, I'm not sure what is."

- The court found that defendant's renewed motion to proceed pro se at trial was unequivocal, and was knowingly, voluntarily, and intelligently made.

- Defendant was making a new argument that his medications had been to blame for his conduct at the motions hearing, and that because his dosage had been reduced, he now felt that he could proceed in his own defense. The court rejected this argument because (1) in the earlier competency proceedings, the doctor who had examined defendant found that he was "coherent, organized, logical, and goal-directed," and that defendant "did not appear to have any impairment in competency abilities"; and (2) the doctor opined that defendant's medications typically would not cause significant neuropsychological impairment. Other reports,

including one from the state hospital, "didn't raise any causes of concern with his competency abilities or the medication he was on." The court noted, "I don't perceive any differences in [defendant's] functioning between any of [the previous court dates] and today."

- As to "whether to allow [defendant] to proceed pro se again," the court noted that defendant was "vacillating," and that there was "a great appearance of manipulation and delay."

- Quoting *People v. Adkins*, 551 N.W.2d 108, 117 (Mich. 1996), *abrogated on other grounds by People v. Williams*, 683 N.W.2d 597 (Mich. 2004), the court said, "'[w]e realize the potential for savvy defendants to use [the] competing rights [to counsel and to self-representation] as a means of securing an appellate parachute.'"

- The court denied defendant's request to proceed pro se at the trial, referencing the "constitutional primacy" of the right to counsel over the right to self-representation.

We conclude that the trial court did not err in rejecting defendant's request to again proceed pro se. The court's reasoning was sound and well-supported.

Clearly, the court was attempting to prevent defendant from salting the record with error to be raised in this appeal. The court properly paid heed to that potential for injection of error.

"'To permit a defendant in a criminal case to indulge in the charade of insisting on a right to act as his own attorney and then on appeal to use [that] very permission to defend himself [pro se] as a basis for reversal of conviction and a grant of another trial is to make a mockery of the criminal justice system and the constitutional rights sought to be protected.'" *Williams*, 683 N.W.2d at 603-04 (quoting *Atkins*, 551 N.W.2d at 118).

The trial court faced a catch-22: either permit defendant to proceed pro se at trial, which would have allowed him to later argue that the court violated his constitutional rights by *letting him do so*, or, as occurred here, deny him the ability to proceed pro se, which has prompted him to argue here that his constitutional rights were violated by *keeping him from doing so*. In this conundrum, the court made the right choice by giving priority to defendant's right to be represented by counsel,

particularly given the court's findings indicating that defendant was not equipped to present his own defense in this first degree murder trial.

The Fourth Circuit stated in *United States v. Frazier-El*, 204 F.3d 553, 559 (4th Cir. 2000): The requirement that a request for self-representation be clear and unequivocal also prevents a defendant from taking advantage of and manipulating the mutual exclusivity of the rights to counsel and self-representation. A defendant who vacillates at trial places the trial court in a difficult position because it "must 'traverse . . . a thin line' between improperly allowing the defendant to proceed *pro se*, thereby violating his right to counsel, and improperly having the defendant proceed with counsel, thereby violating his right to self-representation." *Fields v. Murray*, 49 F.3d 1024, 1029 (4th Cir. 1995) (en banc) (quoting *Cross v. United States*, 893 F.2d 1287, 1290 (11th Cir. 1990)). In ambiguous situations created by a defendant's vacillation or manipulation, we must ascribe a "constitutional primacy" to the right to counsel because this right serves both the individual
and collective good, as opposed to only the individual interests served by protecting the right of self-representation.

We agree with the Fourth Circuit's analysis and adopt it here.

Defendant's reliance on *Faretta*, *Harris*, *Johnson*, and other cases is unavailing. Unlike in those cases, defendant's behavior here indicated that he was engaged in the sort of manipulation about which the *Arguello* court warned. *See Arguello*, 772 P.2d at 94-95. *Johnson* is particularly inapposite, because unlike defendant here, that defendant "never wavered or vacillated" about his desire to represent himself. *Id.* at ¶ 23.

We conclude that the trial court properly exercised its discretion to deny defendant's motion to proceed pro se at trial.

(ECF No. 11-4 at 10-17).

3. AEDPA analysis

Applicant does not dispute that the Colorado Court of Appeals applied the correct, controlling legal standards as determined by the Supreme Court of the United States. Therefore, this Court must decide whether the Colorado Court of Appeals unreasonably applied clearly established Federal law or made an

unreasonable determination of the facts in light of the evidence presented. *See* 28 U.S.C. § 2254(d).

After a careful review of the record, this Court concludes that the decision of the Colorado Court of Appeals was not based on an unreasonable determination of the facts. Applicant primarily challenges the trial court's finding that Applicant "was manipulating the trial process by vacillating about whether he wanted to represent himself," in denying Applicant's second request to proceed *pro se* at trial. In reaching this conclusion, the Colorado Court of Appeals dismissed Applicant's "argument that his medications had been to blame for his conduct at the motions hearing, and that because his dosage had been reduced, he now felt that he could proceed in his own defense." (ECF No. 11-4 at 14). The state appellate court relied on the following factual findings to reject Applicant's argument:

- The doctor examining Applicant during earlier competency proceedings described Applicant as "coherent, organized, logical, and goal-directed" and not appearing "to have any impairment in competency."
- The doctor also opined that Applicant's medications typically would not cause significant neuropsychological impairment.
- Other competency reports "didn't raise any causes of concern with [Applicant's] competency abilities or the medication he was on."
- And the court noted that it did not "perceive any differences in [Applicant's] functioning between any of [the previous court dates] and today."

(*Id.*)

The state court record supports these factual findings and refutes Applicant's position. First, the record does not demonstrate any impairment or confusion based

on Applicant's use of the medication Depakote. Although Applicant's cross-examination during the December 2014 suppression hearing was not procedurally acceptable, it was coherent. (*See generally* State Court R., 12/4/14 Transcript). Further, advisory counsel for Applicant did not argue that Applicant's medications were causing or contributing to Applicant's difficulties with cross-examination. (*Id.*). And when questioned by the judge, Applicant explained his difficulties as follows:

> DEFENDANT: Just that I -- first of all, I'm sorry I'm taking up so much time. I apologize to that. And -- and believe me, I have been going to the library every day and researching.
>
> And I've got my information. I just – I'm having a problem being able to relate it to the Court in a fashion that you can understand and I can get across. And I'm having problems being able to interview the witness in a way that I'm not going over the same information and jumping around on my information.
>
> And I truly apologize for that. Because coming here today and researching the information that I had, I felt confident that I knew what it was. I just didn't know I couldn't get it out there. And I apologize for that.

(*Id.* at 82-83).

In addition, when Applicant requested to proceed *pro se* for the first time, he had been taking Depakote since April 2014, and he declared that the dosage at the time was not affecting his mental competence:

> Q: Okay. Are you under the influence of any drugs, alcohol, or medications today?
>
> A: No alcohol, sir. I have been on Depakote since April, but I don't believe this, in any way, impairs my judgment for today.
>
> Q: Depakote?
>
> A: Yeah.

> Q: Okay. And you don't think that affects your ability to understand these proceedings?
>
> A: No, sir.

(State Court R., 10/3/14 Transcript at 3-4).

Applicant's argument that his use of Depakote rendered him incapable of thinking during the December 2014 hearing is not supported by the record. And Applicant has not carried his burden of rebutting the presumption of correctness given to the state court's factual findings by clear and convincing evidence. Rather the state court's findings were reasonable—i.e., it appeared that Applicant was manipulating the trial process by vacillating about whether he wanted to represent himself; and his medications were not to blame for his conduct at the suppression hearing and his decision to request that defense counsel be reappointed is reasonable. Thus, Applicant has not shown that the state appellate court's decision was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding. *See* 28 U.S.C. § 2254(d)(2).

The Court further finds that the Colorado Court of Appeals' decision that the trial court properly exercised its discretion in denying Applicant's second request to proceed *pro se* at trial based on the "constitutional primacy" of the right to counsel over the right to self-representation was not so lacking in justification that it was beyond all possibility for fair-minded disagreement. *Harrington*, 562 U.S. at 102. The Court, therefore, concludes that the Colorado Court of Appeals' denial of

Applicant's Sixth Amendment self-representation claim was not an unreasonable application of controlling Supreme Court precedent.

Accordingly, Applicant is not entitled to federal habeas relief on Claim 2.

B. Sixth Amendment Ineffective Assistance of Counsel

Applicant also maintains that trial counsel provided constitutionally ineffective assistance on the following three grounds: (a) counsel misadvised Applicant on the use of the affirmative defense of involuntary intoxication (Claim 1); (b) counsel created a conflict of interest by attempting to coerce Applicant to take a plea deal (Claim 3); and (c) counsel failed to investigate the destruction of a recorded interview by a police officer (Claim 4).

1. Applicable Supreme Court law

The Sixth Amendment generally requires that defense counsel's assistance to the criminal defendant be effective. *See Strickland v. Washington*, 466 U.S. 668, 685-86 (1984). To prevail on a claim of ineffective assistance of counsel, a habeas petitioner must show both that (1) his counsel's performance was deficient (i.e., that identified acts and omissions were outside the wide range of professionally competent assistance), and (2) he was prejudiced by the deficient performance (i.e., that there is a reasonable probability that but for counsel's unprofessional errors the result would have been different). *Id.* Moreover, "because the *Strickland* standard is a general standard, a state court has even more latitude to reasonably determine that a defendant has not satisfied that standard." *Knowles v. Mirzayance,* 556 U.S. 111, 123 (2009).

"A court considering a claim of ineffective assistance must apply a 'strong presumption' that counsel's representation was within the 'wide range' of reasonable professional assistance." *Harrington*, 562 U.S. at 104 (quoting *Strickland*, 466 U.S. at 689). *See also Wiggins v. Smith*, 539 U.S. 510, 521 (2003). In other words, there is a rebuttable presumption that "an attorney acted in an objectively reasonable manner and that an attorney's challenged conduct might have been part of a sound trial strategy." *Bullock v. Carver*, 297 F.3d 1036, 1046 (10th Cir. 2002) (emphasis omitted). "There are countless ways to provide effective assistance in any given case," and "[e]ven the best criminal defense attorneys would not defend a particular client in the same way." *Strickland*, 466 U.S. at 689. The federal habeas court's review of the state appellate court's disposition of an ineffective assistance claim is "doubly deferential." *Cullen,* 563 U.S. at 190. The court "defer[s] to the state court's determination that counsel's performance was not deficient and, further, defer[s] to the attorney's decision in how to best represent a client." *Grant v. Royal*, 886 F.3d 874, 903 (10th Cir. 2018) (internal quotation marks and citations omitted).

"With respect to prejudice, . . . '[a] reasonable probability is a probability sufficient to undermine confidence in the outcome.'" *Strickland*, 466 U.S. at 694. "The likelihood of a different result must be substantial, not just conceivable." *Id.* at 693.

2. Claim 1: Defense Strategy

Applicant contends that trial counsel misadvised him on the use of the affirmative defense of involuntary intoxication. (ECF No. 1 at 7). He alleges that defense counsel initially "endorsed" the affirmative defense of involuntary

intoxication; later informed the court there was no basis for an involuntary intoxication defense; and then "used that defense that they had earlier adamantly argued they would not use." (*Id.* at 7-8). Applicant argues that counsel's advice (1) caused him "to make a determination between his Sixth Amendment right to counsel or to waive representation" during his first request to proceed *pro se*, which then contributed to the court's decision to deny his second request to proceed *pro se*; and (2) resulted in counsel being ineffective in advancing that defense at trial because they had informed the court during pretrial proceedings that there was no basis for an involuntary intoxication defense. (*Id.*).

a. Trial court proceedings

While Applicant was represented by counsel during the first eighteen months of pretrial proceedings, he underwent two competency evaluations, both of which concluded that Applicant was competent. (ECF No. 11-8 at 7). When Applicant expressed a desire to dismiss his counsel and proceed *pro se* in September 2014, a *Bergerud* conflicts hearing occurred on October 9, 2014. (State Court R., 10/9/14 Transcript). During this hearing, Applicant's lawyers explained that Applicant wanted to advance an involuntary intoxication defense based on his use of prescribed asthma medication, but, after investigation, counsel had uncovered no support for that defense. (*Id.* at 4-30). Shortly after Applicant's request to proceed *pro se* was granted, he submitted a notice of intent to advance an involuntary intoxication defense. (ECF No. 11-8 at 7-8). As explained above in detail, Applicant elected to have his

attorneys reappointed after he represented himself at the December 2014 suppression hearing. (*Id.* at 8).

In March 2015, against counsel's advice, Applicant attempted to plead guilty to all charges by submitting a letter to the court captioned" Motion to Plead Guilty." (State Court R., Court File at 379). The court conducted a hearing, found that Applicant repeatedly vacillated about his ability to knowingly, voluntarily, and intelligently waive his right to a trial, and thus, refused to accept Applicant's plea. (*Id.*, 3/18/15 Transcript at 2-14; ECF No. 11-8 at 8).

As noted above, Applicant was represented at trial in in August 2015 by the same lawyers who had represented him during the first eighteen months of pretrial proceedings. (ECF No. 11-8 at 9).

b. Colorado Court of Appeals

The Colorado Court of Appeals applied the *Strickland* standard and rejected Applicant's ineffective assistance of counsel claim on the following grounds:

> Watson contends that his trial counsel were ineffective in first refusing to pursue, and then changing course to pursue, an involuntary intoxication defense. His claim appears to raise two separate issues: (1) because his counsel initially explained to the court that there was no basis to pursue an involuntary intoxication defense, counsel's decision to later advance that defense necessarily constitutes ineffective assistance of counsel; and (2) his counsel's initial refusal to pursue the defense led Watson to decide to proceed pro se so that he could advance the defense, a decision that was later used to justify the denial of his second motion to proceed pro se.
>
> . . .
>
> Watson argues that because his lawyers had told the conflict court in October 2014 that there was no basis for an involuntary

intoxication defense, they were necessarily ineffective in advancing that defense at trial.

This claim fails on the prejudice prong. To demonstrate prejudice, Watson had to allege with specificity that a different theory of defense would have affected the outcome of the trial. *See, e.g.*, *People v. Thomas*, 2015 COA 17, ¶ 23. His only allegation in this regard is that counsel "inform[ed] the defendant and the court they had a defense that would win" and yet "they failed to use it."

In fact, though, what his lawyers told the conflict court was that no defense was likely to be successful, given the overwhelming evidence of guilt, including multiple detailed confessions. At the hearing, defense counsel confirmed that while they believed Watson had a "better chance of success on some of the charges" with a general denial/reasonable doubt defense, they had "told him that it appears he's going to be in prison for the rest of his life no matter what defense is run."

Because Watson has otherwise failed to allege that a different defense would have led to a different outcome, the trial court properly denied this claim without a hearing.

. . .

Watson's other argument is that counsel misled him about the viability of an involuntary intoxication defense, which led him to proceed pro se in October 2014 so that he could advance that defense. The harm from that decision, he says, was that the court denied his second request to proceed pro se on the basis that he had previously proceeded pro se and then changed his mind. In other words, he contends that if he had not been misled into representing himself the first time, the court would have allowed him to represent himself in May 2015.

We discern at least two flaws in this argument. First, even assuming that counsel's performance at the conflict hearing was deficient and that the deficient performance led Watson to exercise his right to proceed pro se, the court's concern was that Watson had "vacillated" about whether to proceed pro se or to proceed with appointed counsel. *See Watson*, No. 15CA1924, slip op. at ¶ 31 ("In sum, the court found that defendant was manipulating the trial process by vacillating about whether he wanted to represent himself."). In other words, it was Watson's choice to "bail[] out at the motions hearing," as the court put it, and to request reappointment of counsel after having decided to go pro se that underlaid the court's denial of his second motion. Trial counsel had

> nothing to do with Watson's decision to *retract* his request to go pro se — trial counsel had withdrawn by then. Indeed, if not for Watson's decision to request reappointment of counsel in December 2014, he would have continued to proceed pro se and would have represented himself at trial in 2015. Thus, even accepting the allegations as true, Watson has failed to show that counsel's statements at the conflict hearing, even if misleading, ultimately prevented him from representing himself at trial.
>
> Second, as we have explained, to state an ineffective assistance of counsel claim, the defendant must sufficiently allege that but for counsel's deficient performance, the outcome of the proceeding would have been different. *See Strickland*, 466 U.S. at 687-88. Here, Watson has not alleged that if counsel had performed competently, such that he was permitted to proceed pro se at trial, the outcome would have been different. Thus, his allegations are insufficient to state a claim for relief.
>
> Accordingly, Watson was not entitled to an evidentiary hearing on this claim either.

(ECF No. 11-8 at 6-13).

c. AEDPA analysis

Applicant argues that counsel's advice regarding the defense of involuntary intoxication amounted to deficient performance because (1) counsel advised the court that the involuntary intoxication defense was not viable at a hearing in December 2014 but later advanced that theory at trial in August 2015; and (2) this deficient performance "caused [Applicant] to make a determination between his Sixth Amendment right to counsel or to waive representation, something he would not have done at that time had counsel left open the option of maybe using that defense," which then caused prejudice when the trial court denied Applicant's second request to proceed *pro se*. (ECF No. 1 at 8).

As set forth above, the Colorado Court of Appeals applied *Strickland* and found that Applicant failed to show any prejudice. The state appellate court specifically determined that (1) even if counsel's advice was misleading, that advice did not ultimately prevent Applicant from representing himself at trial; and (2) Applicant failed to allege that if counsel had performed competently and he had been permitted to proceed *pro se* at trial, the outcome would have been different. (ECF No. 11-8 at 10-11). The Colorado Court of Appeals found that Applicant's second request to proceed *pro se* was denied because he "vacillated" about whether to proceed *pro se* or proceed with appointed counsel. (*Id.* at 11). The court concluded that "trial counsel had nothing to do with [Applicant's] decision to *retract* his request to go *pro se* because trial counsel had withdrawn by then, and thus Applicant failed to show that counsel's statements at the October 2014 conflicts hearing prevented him from representing himself at trial. (*Id.* at 12). The Colorado Court of Appeals further determined that Applicant did not allege that the outcome would have been different had counsel not provided deficient advice and had he been permitted to proceed *pro se* at trial. (*Id.* at 12-13).

Given the Colorado Court of Appeals detailed findings, which Applicant does not dispute, the state court's conclusion is not an unreasonable application of *Strickland.* To show prejudice, Applicant must demonstrate that he was prevented from proceeding *pro se* based on counsel's "misleading" advice, and had he proceeded *pro se,* the result of the trial would have been different, *i.e.*, he would have been acquitted of the first-degree murder charge based on the involuntary intoxication defense

make choices advancing other interests to the detriment of his client." *United States v. Alvarez*, 137 F.3d 1249, 1252 (10th Cir.1998). *See also Hale v. Gibson*, 227 F.3d 1298, 1313 (10th Cir. 2000) (explaining that an actual conflict of interest arises where "the interests of counsel and defendant [are] divergent in the current litigation, such that the attorney has an interest in the outcome of the particular case at issue that is adverse to that of the defendant."). If a habeas petitioner "cannot point to specific facts to substantiate his conflict of interest claim, he may attack his counsel's assistance through the 'general rule' of *Strickland*." *Green v. Snedeker*, 355 F. App'x 146, 149 (10th Cir. 2009) (citing *Mickens v. Taylor*, 535 U.S. 162, 166 (2002)).

a. Colorado Court of Appeals

The Colorado Court of Appeals resolved Applicant's claim on the following grounds:

> Finally, Watson contends that his lawyers attempted to bribe him into pleading guilty by offering him a television and money. The district court concluded that Watson had failed to show prejudice because he did not, in fact, plead guilty. (Indeed, when Watson attempted to plead guilty in March 2015, his lawyers advised the court that he was proceeding against their advice.)
>
> On appeal, Watson says that counsel's conduct created a conflict of interest. His theory is that for some reason connected to the alleged conflict, his lawyers "may have been tempted to be less zealous than they should have been in the presentation of the defendant's case."
>
> A defendant seeking postconviction relief based on ineffective assistance of counsel resulting from an attorney's alleged conflict must demonstrate that a conflict of interest adversely affected his lawyer's performance. *See Cuyler v. Sullivan*, 446 U.S. 335, 348 (1980); *see also West v. People*, 2015 CO 5, ¶ 28 ("[A] defendant who alleges that a conflict of interest deprived him of effective assistance of counsel must show (1) that counsel had a conflict of interest (2) that adversely affected the representation."). Because Watson has failed to allege that any

> purported conflict adversely affected counsel's representation, he has failed to state a claim of ineffective assistance of counsel based on a conflict of interest.

(ECF No. 11-8 at 18).

b. AEDPA analysis

The Court notes initially that there is no clearly established Supreme Court law holding that the *Cuyler* presumption of prejudice applies to the factual circumstances of this case. *See Mickens*, 535 U.S. at 175-76 (stating that it is "an open question" whether the *Cuyler* exception to *Strickland* for cases of actual conflicts of interest applies outside the context of concurrent representation of multiple defendants). Thus, *Cuyler* provides no basis for relief in this action. *See House*, 527 F.3d at 1018 (noting that the absence of a threshold showing of clearly established federal law by the Supreme Court ends the court's inquiry under § 2254(d)(1)).

Therefore, to prevail on this claim, Applicant must establish that the Colorado Court of Appeals' resolution of his claim was an unreasonable application of *Strickland*.

The Colorado Court of Appeals determined that Applicant failed to allege that plea counsel created a conflict of interest, which adversely affected counsel's representation by encouraging Applicant to take a plea deal. (ECF No. 11-8 at 18). The Court agrees that Applicant fails to demonstrate that an actual conflict existed, and that it adversely affected defense counsel's performance. Applicant does not point to anything in the record demonstrating that counsel performed deficiently at trial or that he was prejudiced. As such, fair-minded jurists could not disagree as to

whether the Colorado Court of Appeals' determination of Applicant's claim was reasonable under *Strickland.*

In sum, Applicant has not established an entitlement to federal habeas relief under § 2254(d)(1) and (2) for Claim 3.

4. Claim 4: Failure to Investigate

Applicant finally contends that trial counsel was constitutionally ineffective by failing to investigate law enforcement's destruction of evidence, *i.e.*, a recorded interview with Applicant immediately after his arrest. (ECF No. 1 at 11).

a. trial court proceedings

The state appellate court provided the following relevant background information.

1. Additional Background

> After the murder, Watson fled Colorado to a friend's house in Idaho. He was arrested there a couple of days later. Sergeant Richard Ferrera, a Caldwell, Idaho, police officer, placed Watson in a patrol car and, over the next half hour or so, Watson made inculpatory statements. Ferrera recorded the statements on a personal recorder and also on a recording device located in the patrol car.
>
> According to Ferrera's testimony at a later suppression hearing, he eventually transported Watson to the local police station where Watson was interrogated by two FBI agents. After the interview, an FBI agent told Ferrera that Watson had "confessed to everything," and that Ferrera could "just get rid of" the audio recording of the patrol car conversation. Ferrera erased the recording. Later, no one, including Ferrera, could identify the FBI agent who had ordered Ferrera to destroy the recording, though Ferrera recalled that he had come from Salt Lake City. And, as it turned out, the recording device in Ferrera's patrol car had malfunctioned and did not audio record the conversation.
>
> The trial court determined that the recording was not exculpatory evidence, that the patrol car recording device malfunctioned through no

> fault of Ferrera, and that Ferrera had not destroyed the recording on his personal recorder in bad faith; accordingly, the court declined to impose any sanctions against the prosecution based on destruction of the evidence. Still, the prosecution agreed not to introduce any statements Watson made to Ferrera, conceding that some of the statements were in response to questioning that was not preceded by *Miranda* warnings.

(ECF No. 11-8 at 13-14).

During pretrial proceedings, the trial court conducted a suppression hearing in which the FBI agents who conducted Applicant's interview at the police station each testified that they did not order any police officer to destroy a recording. (State Court R., 2/17/15 Transcript at 147-204). The trial court further concluded that Sgt. Ferrera had destroyed the recording in good faith based on his candor about the existence of the recording and its destruction. (*Id.*, 2/26/15 Transcript at 6-12).

b. Colorado Court of Appeals' decision

The Colorado Court of Appeals resolved Applicant's claim on the following grounds:

> Watson contends that his lawyers were ineffective for failing to show that no FBI agent had ordered Ferrera to destroy the recording of the conversation in the patrol car.
>
> At the suppression hearing, however, the FBI agents who conducted Watson's interview at the police station each testified that they did not order any police officer to destroy a recording. One of the agents testified that no other FBI agents were present at the police station when Ferrera was supposedly told by an agent to destroy the recording. Thus, defense counsel established that Ferrera's testimony was inconsistent with the testimony of the other witnesses. (Notwithstanding that inconsistency, the trial court concluded that Ferrera had destroyed the recording in good faith, based on Ferrera's candor about the existence of the recording and its destruction.) It is unclear what more counsel could have done to demonstrate that Ferrera was not instructed by an FBI agent to erase the recording.[2]

> [F2] Watson insists that if counsel had investigated, they would have learned, as he later did, that "there was no agent that had come from Salt Lake City Utah." But FBI Agent Douglas Hart testified that at the time of his contact with Watson, he worked "out of our Salt Lake City division," which could account for Ferrera's recollection. Regardless, as we have explained, counsel showed that neither of the agents present at the police station ordered Ferrera to destroy the recording. Thus, showing that no agent came from Salt Lake City would be cumulative information at best.

In the absence of more specific allegations that counsel acted incompetently, we conclude that Watson has failed to sufficiently allege deficient performance.

Nor has he alleged prejudice. Ferrera acknowledged that he destroyed the recording. The prosecution did not introduce at trial any inculpatory statements Watson made to Ferrera. Watson says that if counsel had "properly investigated Ferrera's testimony," they could have shown he was not a credible witness, which would have led to the suppression of not just Watson's statements to Ferrera but also his subsequent confessions to the FBI agents and Colorado law enforcement officers. But counsel made that argument at the suppression hearing: they contended that Ferrera's *Miranda* violation tainted the subsequent interrogations and sought suppression of Watson's three separate confessions. The trial court rejected the argument, not based on Ferrera's credibility, but because, pursuant to *Missouri v. Seibert*, 542 U.S. 600 (2004), and *Oregon v. Elstad*, 470 U.S. 298 (1985), Watson validly waived his *Miranda* rights during subsequent interrogations that were sufficiently independent of his initial conversation with Ferrera. Not only that, but on direct appeal, appellate counsel challenged the denial of the motion to suppress, and the division affirmed Watson's convictions. *See Watson*, No. 15C1924, slip op. at ¶¶ 11-18. Thus, Watson cannot show that but for counsel's failure to further investigate Ferrera's testimony, the three confessions would have been suppressed and the outcome of the proceeding would have been different.

Accordingly, the district court did not err by denying this claim without a hearing.

(ECF No. 11-8 at 15-17).

c. AEDPA analysis

The Colorado Court of Appeals concluded that counsel had not performed deficiently because (1) defense counsel established that Sgt. Ferrera's testimony was inconsistent with the testimony of the other witnesses, and (2) there was nothing more counsel could have done to demonstrate that Sgt. Ferrera was not instructed by an FBI agent to erase the recording. (ECF No. 11-8 at 15). The court further found that Applicant's suggested course of action—pretrial investigation that no Salt Lake City agent was sent to Idaho—was refuted by the record, or at best, cumulative to the evidence already presented because FBI Agent Douglas Hart testified that he worked "out of our Salt Lake City division" at the time of his contact with Applicant. (State Court R., 2/17/15 Transcript at 117).

Applicant does not offer any evidence to refute the Colorado Court of Appeals' determination of the facts. He also fails to show that the state appellate court's application of the facts to *Strickland's* deficient performance prong was objectively unreasonable.

Moreover, the Colorado Court of Appeals also concluded that Applicant failed to show that if counsel had further investigated Sgt. Ferrera's testimony, the three confessions would have been suppressed and the outcome of the proceeding would have been different. (ECF No. 11-8 at 16). The record shows that Applicant's counsel argued at the suppression hearing that the three confessions should be suppressed based on Sgt. Ferrera's *Miranda* violation. (State Court R., 2/18/15 Transcript at 24-49). However, the trial court rejected the argument based on Applicant's

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United States Court of Appeal
Tenth Circuit

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Clerk of Court

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

WARREN DALE WATSON,

Petitioner - Appellant,

v.

MARK FAIRBAIRN, et al.,

Respondents - Appellees.

No. 23-1392
(D.C. No. 1:22-CV-02695-DDD)
(D. Colo.)

ORDER

Before **TYMKOVICH**, **EID**, and **ROSSMAN**, Circuit Judges.

Appellant's petition for rehearing is denied.

The petition for rehearing en banc was transmitted to all of the judges of the court who are in regular active service. As no member of the panel and no judge in regular active service on the court requested that the court be polled, that petition is also denied.

Entered for the Court

CHRISTOPHER M. WOLPERT, Clerk