

FILED

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

JAN 28 2019

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

LLOYD E. AUSTIN IV,

Petitioner-Appellant,

v.

BRIGITTE AMSBERRY,

Respondent-Appellee.

No. 18-35782

D.C. No. 2:17-cv-00039-HZ
District of Oregon,
Pendleton

ORDER

Before: CANBY and GRABER, Circuit Judges.

The request for a certificate of appealability is denied because appellant has not shown that “jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling.”

Slack v. McDaniel, 529 U.S. 473, 484 (2000); *see also* 28 U.S.C. § 2253(c)(2); *Gonzalez v. Thaler*, 565 U.S. 134, 140-41 (2012); *Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003).

Any pending motions are denied as moot.

DENIED.

*Post
Conviction Level*

APPENDIX D

IN THE SUPREME COURT OF THE STATE OF OREGON

LLOYD ERVIN AUSTIN, IV,
Petitioner-Appellant,
Petitioner on Review,

v.

JEFF PREMO, Superintendent, Oregon State Penitentiary,
Defendant-Respondent,
Respondent on Review.

Court of Appeals
A159693

S064455

ORDER DENYING REVIEW

Upon consideration by the court.

The court has considered the petition for review and orders that it be denied.

Thomas A. Balmer

12/08/2016
2:49 PM

THOMAS A. BALMER
CHIEF JUSTICE, SUPREME COURT

c: Jed Peterson
Jacob R Brown

tnb

ORDER DENYING REVIEW

REPLIES SHOULD BE DIRECTED TO: State Court Administrator, Records Section,
Supreme Court Building, 1163 State Street, Salem, OR 97301-2563
Page 1 of 1

Austin v. Amsberry

Decided Aug 14, 2018

HERNANDEZ, District Judge.

OPINION AND ORDER C. Renee Manes
Assistant Federal Public Defender
101 S.W. Main Street, Suite 1700
Portland, Oregon 97204

Attorney for Petitioner Ellen F. Rosenblum,
Attorney General
Samuel A. Kubernick, Assistant Attorney General
Department of Justice
1162 Court Street NE
Salem, Oregon 97310

2 Attorneys for Respondent *2 HERNANDEZ,
District Judge.

Petitioner brings this habeas corpus case pursuant to 28 U.S.C. § 2254 challenging the legality of his state-court conviction for Murder. For the reasons that follow, the Amended Petition for Writ of Habeas Corpus (#11) is denied.

BACKGROUND

In September 2009, the Lane County Grand Jury accused Petitioner of Murder, Attempted Unlawful Entry into Motor Vehicle, Carrying a Concealed Weapon, Escape in the Third Degree, and Resisting Arrest. Respondent's Exhibit 102. Petitioner was represented by two attorneys, Elizabeth Baker and Brad Cascagnette. On March 5, 2010, Baker moved the trial court to determine Petitioner's fitness to proceed, requesting that he be transported to the Oregon State Hospital for an evaluation pursuant to ORS 161.370. Respondent's Exhibit 119. In her supporting Declaration, she stated as follows:

3. My investigator and I have seen him three times since I was appointed — the first week of February, and I have tried to see him two additional times and he has refused to see me or my investigator and today, I had to speak to him through glass doors while he was in a jail cell. Twice he has been so difficult and dangerous that jail staff would not transport him to court — one of those times was at the jail court room. In our last conversation, Defendant made statements to myself and my investigator as if we had had several conversations we had never had with him. Defendant could not follow any of our conversations [or] stay focused. I consulted with Dr. Eric Johnson, whom I will be retaining for this case and he suggested to me that any plea or quick deal, given Defendant's behavior was ill-advised and that

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he should be evaluated - his choices, if intentional - are approaching the point [of] being without any reason and I do not believe he is able to aid and assist in making choices in his cases.

Id at 3.

Also on March 5, 2010, the Honorable Gregory Foote was due to conduct a settlement conference in Petitioner's case. Petitioner was "so uncooperative and violent," that he was not transported for the conference. Petitioner's Exhibit 1, p. 3. Judge Foote took the opportunity to have Sergeant Steve Davis of the Lane County Jail

testify as to Petitioner's behavior. According to Davis, Petitioner had demonstrated a general lack of cooperation and "affinity to collect and create dangerous weapons within the jail." *Id* at 4. Petitioner was indecisive about whether he would attend the settlement conference, and ultimately refused on the basis that the Honorable Karsten Rasmussen, not Judge Foote, was his trial judge.

Davis testified that Petitioner did not appear to understand what Davis explained to him about the purpose of the settlement conference. *Id* at 5. Baker took the opportunity to state her concerns on the record and, as in her Declaration supporting her Motion for a competency determination, she noted that Petitioner had spoken "about conversations we never had and serious conversations of serious subject matter and conversations which, to my investigator's knowledge, he had never had with previous counsel." *Id* at 8. She stated that "his behavior since that time has sort of deescalated, or he appears to be disassembling in his *4 ability to really gain insight or information." *Id*. Judge Foote explained that he would defer the matter to Judge Rasmussen, but explained that he had "wanted to get Sergeant Davis on the record so that Judge Rasmussen can consider that evidence without having to call the Sergeant to court." *Id* at 7.

For reasons that are not clear, Judge Rasmussen elected not hold a hearing to address the competency issue. Instead, on March 15, 2010, he issued a brief Order denying Petitioner's competency Motion. Respondent's Exhibit 121.

Five months later, on August 17, 2010, Petitioner filed his Petition to Consent to be Found Guilty by Stipulated Facts Trial. Respondent's Exhibit 104. In that Petition, he agreed there was sufficient evidence to find him guilty of Murder, and that the presumptive sentence for that charge was life in prison with a 25-year minimum. *Id* at 4. In exchange, the State dismissed the four remaining charges in the Indictment. *Id* at 3.

At the stipulated facts trial conducted the same day, Judge Rasmussen found Petitioner guilty of Murder. Respondent's Exhibit 106. The following

day, Judge Rasmussen sentenced Petitioner to the agreed-upon sentence of life with a 25-year minimum term. Respondent's Exhibit 107.

Petitioner took a direct appeal, but voluntarily dismissed the action. Respondent's Exhibits 108-110. He then proceeded to file for post-conviction relief ("PCR") in Marion County where the PCR Court denied relief. Respondent's Exhibit 155. The

5 Oregon *5 Court of Appeals summarily affirmed the PCR Court's decision, and the Oregon Supreme Court denied review. *Austin v. Premo*, 280 Or. App. 481, 380 P.3d 1253, *rev. denied*, 360 Or. 697, 388 P.3d 708 (2016).

Petitioner filed this 28 U.S.C. § 2254 habeas corpus case on January 9, 2017 and, with the assistance of appointed counsel, filed an Amended Petition three months later. Respondent asks the Court to deny relief on the Amended Petition because most of Petitioner's claims are procedurally defaulted, and the claims that are not defaulted do not have sufficient merit to entitle him to habeas corpus relief.

I. Unargued Claims

In his Amended Petition, Petitioner raises six grounds containing numerous sub-claims. In his supporting memorandum, however, Petitioner chooses to brief two claims of ineffective assistance of counsel: (1) whether counsel failed to ensure Petitioner was competent to proceed to a stipulated facts trial and sentencing (Ground 3(D)(iv)); and (2) whether counsel failed to ensure that Petitioner's plea was knowing, voluntary, and intelligent (Ground 3(D)(v)).

Petitioner does not argue the merits of his remaining claims, nor does he address any of Respondent's arguments as to why relief on these claims should be denied. As such, Petitioner has not carried his burden of proof with respect to these unargued claims. *See Silva v. Woodford*, 279

6 F.3d 825, 835 (9th *6 Cir. 2002) (Petitioner bears the burden of proving his claims). Even if Petitioner had briefed the merits of these claims, the court has examined them based upon the

existing record and determined that they do not entitle him to relief. **II. Exhaustion, Procedural Default, and Martinez**

A petitioner seeking habeas relief must exhaust his claims by fairly presenting them to the state's highest court, either through a direct appeal or collateral proceedings, before a federal court will consider the merits of habeas corpus claims pursuant to 28 U.S.C. § 2254. *Rose v. Lundy*, 455 U.S. 509, 519 (1982). A petitioner must also present his claims in a procedural context in which their merits can be considered. *Castille v. Peoples*, 489 U.S. 346, 351 (1989). A petitioner is deemed to have "procedurally defaulted" his claim if he failed to comply with a state procedural rule, or failed to raise the claim at the state level at all. *Edwards v. Carpenter*, 529 U.S. 446, 451 (2000); *Coleman v. Thompson*, 501 U.S. 722, 750 (1991).

As his Ground 3(D)(iv) claim, Petitioner asserts that trial counsel failed to ensure he was competent to proceed to the stipulated facts trial and sentencing. He does not dispute Respondent's characterization of this claim as procedurally defaulted, and instead asks the Court to excuse his default pursuant to *Martinez v. Ryan*, 566 U.S. 1 (2012).

Traditionally, the performance of PCR counsel could not be used to establish cause and prejudice

⁷ to excuse a procedural ^{*7} default. *Coleman v. Thompson*, 501 U.S. 722, 753-54 (1991) (only the constitutionally ineffective assistance of counsel constitutes cause); *Pennsylvania v. Finley*, 481 U.S. 551, 556 (1987) (there is no constitutional right to counsel in a PCR proceeding). However, in *Martinez*, the Supreme Court found "it . . . necessary to modify the unqualified statement in *Coleman* that an attorney's ignorance or inadvertence in a postconviction proceeding does not qualify as cause to excuse a procedural default." *Id* at 8. It concluded, "Inadequate assistance of counsel at initial-review collateral proceedings may establish cause for a prisoner's procedural default of a claim of ineffective assistance at trial." *Id*.

In order to establish cause to excuse his default pursuant to *Martinez*, Petitioner must show first that his underlying claim of ineffective assistance of trial counsel is substantial insofar as it has "some merit." Next, he must demonstrate that his PCR attorney was ineffective under the standards of *Strickland v. Washington*, 466 U.S. 668 (1984) for failing to raise the claim. "[T]o fulfill this requirement, a petitioner must not only show that PCR counsel performed deficiently, but also that this prejudiced petitioner, i.e., that there was a reasonable probability that, absent the deficient performance, the result of the post-conviction proceedings would have been different." *Runningeagle v. Ryan*, 825 F.3d 970, 982 (9th Cir. 2017) (quotation omitted). Such a finding, of course, would necessarily ^{*8} require the Court to conclude that there is a reasonable probability that the trial-level ineffective assistance claim would have succeeded had it been raised. *Id*.

Petitioner argues that where Baker doubted he was competent to proceed in March 2010, she had a constitutional obligation to: (1) do more to ensure a hearing; (2) obtain an expert evaluation; and (3) couch her request for a competency determination in terms of the 14th Amendment's Due Process Clause on the theory that it provides more robust protections for criminal defendants of questionable competency.

Petitioner assumes that because Baker believed he was likely not competent to proceed in March of 2010, she must also have thought he was incompetent to proceed with the stipulated facts trial. However, Petitioner's decision to waive his right to a jury and proceed to a stipulated facts trial did not occur until August 2010, five months after Baker's competency Motion. At the time of trial, neither Baker nor Cascagnette had reservations about Petitioner's competency to proceed. Not only did they not raise any competency issues with Judge Rasmussen at that time, but they specifically swore in Affidavits prepared for Petitioner's PCR-proceedings that Petitioner was competent to proceed with his jury waiver and stipulated facts trial. Cascagnette related the following:

6. Regarding Petitioner's mental health, I did not witness petitioner being unable to track during our discussions nor did I notice signs that petitioner might be suffering from

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delusions or hallucinations, or responding to internal stimuli. Petitioner created problems for the jail, but I did not pick up on any mental health issues that would rise to a level of defense, or his inability to aid and assist. He engaged in discussions about his case, his charges, and his options when he wanted to, and asked appropriate questions, which I did my best to answer.

9. . . . I do not think that Mr. Austin liked his choices, and the need to choose between a plea deal/stipulated facts trial versus a jury trial. On the other hand, it was my opinion that Mr. Austin was competent in August 2010 and was fully capable of making a knowing, voluntary, and intelligent decision to waive jury and have a stipulated facts trial on the Murder charge. I am certain that Mr. Austin understood that the stipulated facts trial would result in his conviction and a prison sentence of Life, with the possibility of parole after serving a minimum 25 years.

Respondent's Exhibit 151, pp. 3-4.

For her part, Baker also believed Petitioner while mentally ill and a difficult client, was aware of his situation and competent to proceed at the time of his trial:

6. I do want to say this, and I recall it specifically, I always thought Mr. Austin had serious mental health issues. He claimed to have mental health history but we could not locate it - it might have been in California - but we could not locate it.

I made a motion for fitness when the isolation began, which the court denied. I followed it up with a memo, but it was still denied.

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7. . . . The client asked me - do you think I'm crazy - and I said, "Yes, but I think you know very well you did this." He looked kind of shocked and I said, "You never asked me before." I tried to get him evaluated by Dr. Eric Johnson (who told me he was worried for my safety if I met with client without anyone present) but Mr. Austin refused to participate for fitness evaluation or mental health evaluation for a possible GEI defense. I reminded Mr. Austin of that when Mr. Austin seemed to insist he was mentally ill, and said, "Too late buddy, that won't work." Then he did the deal. I stand by that - I don't think he was fit through most of this, and I think he's mentally ill and he was very well aware of what the issues were. Mr. Austin had so many cases pending at the time we had the settlement conference that the deal ended up fairly favorable, but Mr. Austin is one sad, pathetic case.

8. It was my opinion that Mr. Austin was fit to proceed, and fully capable of knowingly and intelligently waiving his constitutional rights, on the date he entered into the plea agreement.

Respondent's Exhibit 152, pp. 3-4.

As illustrated by these Affidavits, although Baker thought Petitioner was not competent in March 2010 and wished to have him evaluated, she and Cascagnette both felt he was competent to proceed at the time of his trial in August of that year. This is critical to the retrospective competency inquiry where "defense counsel will often have the best-informed view of the defendant's ability to participate in his defense." *Medina v. California*, 505 U.S. 437, 450 (1992). A change in Baker's perception of Petitioner's competency over the course of five months does not render her 2010 Declaration inconsistent with her 2013 Affidavit. Indeed, where she showed an awareness of the competency issue in *11 March 2010 and sought a competency hearing at that time, her silence on the matter in August 2010 speaks to what she thought of Petitioner's competence to proceed at that point, and is consistent with her 2013 PCR Affidavit that she believed Petitioner was competent to proceed to trial in August 2010.

Similarly, at the August 17, 2010 stipulated facts trial, Judge Rasmussen likewise found Petitioner competent to proceed:

I further find as fact that the defendant does understand what he's doing here. I have taken his answers and responses as appropriate under the circumstances.

I take into account the assessment of professional counsel who are well experienced and have worked with Mr. Austin here for quite some while, and I also take into account the fact that he is resolving this case in a way that makes sense to me - would make sense to anyone - in light of the potential that he would, if convicted of all counts, including the ones that the State will plan - ask the Court to dismiss, could very well have been incarcerated for essentially the rest of his life.

So on that basis I find that he has - he does not have a does not present a mental disease or defect defense that he is making rational and appropriate choices[.]

Respondent's Exhibit 106, pp. 19-20.

Moreover, where Petitioner's competence was at issue in his PCR case, the PCR Court determined that Petitioner's mental health did not render him unable to understand his options. Respondent's Exhibit 155, p. 2. Such a determination of a factual issue, even where Petitioner did not present the particular claim currently at issue, is entitled to

12 a presumption of correctness *12 pursuant to 28 U.S.C. § 2254(e)(1). *See Sharpe v. Bell*, 593 F.3d 372, 378 (4th Cir. 2010) ("While Section 2254(d) thus has no application in the context of [an exception to procedural default] because it pertains only to a 'claim that was adjudicated' in state court, Section 2254(e)(1) does come into play because it refers to the 'determination of a factual issue'-that is, to a state court's findings of fact, rather than its conclusions of federal law."). Petitioner has not rebutted this presumption by clear and convincing evidence as required by the terms of 28 U.S.C. § 2254(e)(1).

Petitioner's trial attorneys were under no obligation to pursue the competency issue where both of them believed Petitioner to be competent to proceed to trial, as did two state-court judges. Where the claim is not substantial and PCR counsel was not ineffective for failing to raise the ineffective assistance of counsel claim Petitioner advocates, *Martinez* does not excuse Petitioner's default of his Ground 3(D)(iv) claim.

III. The Merits

A. Standard of Review

An application for a writ of habeas corpus shall not be granted unless adjudication of the claim in state court resulted in a decision that was: (1) "contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States;" or (2) "based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d). A state court's findings of fact are presumed correct, *13 and Petitioner bears the burden of rebutting the presumption of correctness by clear and convincing evidence. 28 U.S.C. § 2254(e)(1).

A state court decision is "contrary to . . . clearly established precedent if the state court applies a rule that contradicts the governing law set forth in [the Supreme Court's] cases" or "if the state court confronts a set of facts that are materially indistinguishable from a decision of [the Supreme] Court and nevertheless arrives at a result different from [that] precedent." *Williams v. Taylor*, 529 U.S. 362, 405-06 (2000). Under the "unreasonable application" clause, a federal habeas court may grant relief "if the state court identifies the correct governing legal principle from [the Supreme Court's] decisions but unreasonably applies that principle to the facts of the prisoner's case." *Id* at 413. The "unreasonable application" clause requires the state court decision to be more than incorrect or erroneous. *Id* at 410. Twenty-eight U.S.C. § 2254(d) "preserves authority to issue the writ in cases where there is no possibility fairminded jurists could disagree that the state

court's decision conflicts with [the Supreme] Court's precedents. It goes no farther." *Harrington v. Richter*, 562 U.S. 86, 102 (2011).

B. Analysis

As his final remaining claim, Petitioner alleges that trial counsel failed to ensure that the decision to forego a jury trial and effectively plead guilty was knowing, voluntary, and intelligent. As discussed above, Judge Rasmussen and both of

14 *14 Petitioner's trial attorneys felt he was competent to proceed with the stipulated facts trial. Addressing the claim Petitioner pursues here, the PCR Court specifically determined:

There's no proof the Petitioner's mental health in any way left him in any [way] unable to understand his options.

Segregation certainly [was] not an optimal way to live, but I don't see the evidence showing that it was enough to show that he was unable to understand his choices, and he made a choice in another case, so he also had some other experience that was stip[ulated] facts too I believe.

I find the decision to stipulate to facts of the case was a knowing and voluntary decision.

Respondent's Exhibit 154, pp. 36-37.

¹ Petitioner contends that the PCR court failed to adequately discuss the impact of trial counsel's purported failure to protect his right to be competent to proceed with a stipulated facts trial, thus no deference is owed to the state-court decision. Even where there is no analysis at all, federal habeas courts still defer to the state-court decisions being challenged. *Harrington v. Richter*, 562 U.S. 86, 102 (2011). -----

The record reflects that Petitioner was competent to waive his right to a jury trial, and that he knowingly, intelligently, and voluntarily proceeded with a stipulated facts trial. Counsel's

performance therefore did not fall below an objective standard of reasonableness, and the PCR Court's decision denying relief on Petitioner's Ground 3(D)(v) claim is therefore neither contrary to, nor an unreasonable application of, clearly established federal law.

CONCLUSION

For the reasons identified above, the Amended Petition for Writ of Habeas Corpus (#11) is 15 denied. The Court declines to *15 issue a Certificate of Appealability on the basis that petitioner has not made a substantial showing of the denial of a constitutional right pursuant to 28 U.S.C. § 2253(c)(2).

IT IS SO ORDERED.

DATED this 14th day of August, 2018.

/s/ Marco A. Hernandez

Marco A. Hernandez

United States District Judge

APPENDIX(E)

C. Renée Manes
Assistant Federal Public Defender
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Attorney for Petitioner

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON
PENDLETON DIVISION**

LLOYD ERVIN AUSTIN IV,

Case No. 2:17-cv-00039-HZ

Petitioner,

vs.

BRIDGET AMSBERRY,
as Superintendent,
Eastern Oregon Correctional Inst.,

**AMENDED PETITION FOR WRIT
OF HABEAS CORPUS BY A
PERSON IN STATE CUSTODY
PURSUANT TO 28 U.S.C. § 2254**

Respondent.

I. INTRODUCTION

Petitioner, Lloyd Ervin Austin IV, files the following Amended Petition for Writ of Habeas Corpus pursuant to Federal Rule of Civil Procedure 15(a)(2), as counsel for Respondent, Assistant Attorney General Samuel A. Kubernick, has consented in writing to the filing of this Amended Petition. The following amendment is presented to more appropriately state Mr. Austin's claims as violations of his federal

constitutional rights, and allow the parties to address, and this Court to resolve, those claims.

II. PROCEDURAL AND JURISDICTIONAL ALLEGATIONS

1. Court:

The court entering the decisions at issue is the Lane County Circuit Court, in *State v. Austin*, Lane County Circuit Court Case Nos. 2100915615 and 200919987.

2. Judgment/Decision at Issue:

Conviction after plea and trial on stipulated facts, occurring on August 18, 2010.

A. Information/Indictment:

On or about July 20, 2009, an information was filed in *State v. Austin*, Lane County Circuit Court Case No. 210915615, charging Mr. Austin with committing the misdemeanor crimes of:

Count 1: Assault in the Fourth Degree, in violation of Or. Rev. Stat. § 163.160(2)

Count 2: Assault in the Fourth Degree, in violation of Or. Rev. Stat. § 163.160(2)

Count 3: Assault in the Fourth Degree, in violation of Or. Rev. Stat. § 163.160(2)

Count 4: Interfere With Making Report, in violation of Or. Rev. Stat. § 165.572

Count 5: Assault in the Fourth Degree, in violation of Or. Rev. Stat. § 163.160(2)

Count 6: Strangulation, in violation of Or. Rev. Stat. § 163.187

The allegations were that such crimes were committed on or about June 9, 2009 (Count 1 and 2) and on or about July 20, 2009 (Counts 3-6).

On or about September 10, 2009, an Indictment was filed in *State v. Austin*, Lane County Circuit Court Case No. 200919987, charging Mr. Austin with committing one felony and four misdemeanors, specifically the crimes of:

Count 1: Murder, in violation of Or. Rev. Stat. § 163.115

Count 2: Attempt to Commit a Class A Misdemeanor, in violation of Or. Rev. Stat. § 161.405(2)(e)

Count 3: Carrying a Concealed Weapon, in violation of Or. Rev. Stat. § 166.240

Count 4: Escape in the Third Degree, in violation of Or. Rev. Stat. § 162.145

Count 5: Resisting Arrest, in violation of Or. Rev. Stat. § 162.315

The Indictment alleged that the crimes were committed on or about August 25, 2009.

Mr. Austin was arraigned and pled not guilty to the charges.

B. Trial Level Proceedings:

Prior to trial, and on or about March 3, 2010, counsel filed a motion requesting to determine the competency of Mr. Austin to proceed to trial in *State v. Austin*, Lane County Circuit Court Case No. 200919987. It appears that this motion was denied on or about March 15, 2010.

Also prior to trial, and on or about April 14, 2010, counsel for Mr. Austin filed a notice regarding an intent to rely on a defense of mental disease or defect in *State v.*

Austin, Lane County Circuit Court Case No. 2100915615.

On or about August 17, 2010, Mr. Austin entered into a plea that resolved both cases pursuant to a stipulated facts trial, after which Mr. Austin was found guilty of Counts 1-3, all charging Assault in the Fourth Degree, in *State v. Austin*, Lane County Circuit Court Case No. 210915615, and Count 1, charging Murder, in *State v. Austin*, Lane County Circuit Court Case No. 200919987. All other charges were dismissed.

Mr. Austin was sentenced on August 18, 2010, to a term of 300 months, or 25 years, on the Murder charge, and 12 months on the misdemeanor Assault in the Fourth Degree charges.

3. State Exhaustion Proceedings:

Mr. Austin filed two notices of appeal, which were assigned Oregon Court of Appeals Case Nos. A147015 (Murder charge) and A147015 (misdemeanor Assault charges). Appellate counsel moved to dismiss both appeals, and those motions were granted.

On or before August 27, 2012, Mr. Austin initiated post-conviction proceedings by filing a petition in the Marion County Circuit Court, in an action entitled *Austin v. Premo*, Marion County Circuit Court Case No. 12C20513. Mr. Austin was denied relief and filed a timely appeal in *Austin v. Premo*, which was assigned Oregon Court of Appeals Case No. A159693.

On August 31, 2016, the ruling of the post-conviction trial court was affirmed in a published opinion, *Austin v. Premo*, 280 Or. App. 481, 380 P.3d 1253 (Or. App.

2016). Mr. Austin filed a timely petition for review with the Oregon Supreme Court for review of that decision, in *Austin v. Premo*, Oregon Supreme Court Case No. S064455. Review was denied on December 8, 2016.

4. Prior Counsel:

A. Trial:

At the time of the plea/stipulated facts trial, Mr. Austin was represented by two attorneys: Elizabeth J.C. Baker (OSB 910582), Elizabeth JC Baker PC, P.O. Box 5381, Eugene, Oregon, 97405; and Bradley Cascagnette (OSB 022686), Gardner, Potter Budge, Spickard & Cascagnette LLC, 725 Country Club Road, Eugene, Oregon, 97401.

B. Direct Appeal:

Both direct appeal cases were assigned to a Robin Jones (deceased), who was employed by Office of Public Defense Services, 1175 Court Street NE, Salem, Oregon, 97301.

C. Post-Conviction Trial:

Post-conviction trial level counsel was Scott Howell (OSB 992859), Howell Law PC, 289 E. Ellendale, Ste. 604, P.O. Box 449, Dallas, Oregon, 97338.

D. Post-Conviction Appeal and Petition for Review:

On appeal from the ruling in the post-conviction proceeding, counsel was Ryan T. O'Connor (OSB 053353) and counsel Jed Peterson (OSB 084425), both with O'Connor & Weber, 522 SW 5th Ave., Ste. 1125, Portland Oregon, 97204.

5. Initiation of Current Federal Habeas Proceedings:

Mr. Austin filed his *pro se* petition, pursuant to the mail box rule, on December 28, 2016. (Clerk's Record 2.) Counsel was appointed on February 13, 2017 (CR 6), and current counsel was assigned and entered an appearance on March 20 2017. (CR 10.)

6. No Prior Petitions or Hearings:

Mr. Austin, either personally or through appointed counsel, has not litigated to conclusion on the merits any prior petitions for habeas corpus in any United States District Court in reference to the issues and claims raised herein.

III. CLAIMS FOR RELIEF

**First Claim For Relief:
Incompetency**

7. Petitioner incorporates the allegations contained in the Introduction, and the Procedural and Jurisdictional Allegations and the other Claims for Relief presented in this Petition. In addition, Mr. Austin pleads that:

8. Mr. Austin was deprived of his right under the Fourteenth Amendment to Due Process because he was incompetent at the time of his plea, stipulated facts trial, and sentencing.

A. Procedural Competency Claims: During the course of his pretrial incarceration in the Lane County Jail, Mr. Austin was subjected to solitary confinement and cruel and unusual punishment at the hands of his jailers, which

led to his complete mental decomposition. Any level of competency Mr. Austin possessed at the beginning of the criminal proceedings was lost as he decompensated through his incarceration. Mr. Austin's decompensation and his lack of competency were apparent on the face of the record such that the trial court had an obligation to conduct a competency hearing prior to proceeding to any plea, trial or sentencing.

B. Substantive Competence Claims: Mr. Austin was incompetent to enter a plea, proceed with a stipulated facts trial, or have a sentencing proceeding, due to the fact that he was suffering from significant mental diseases and disorders that were untreated.

C. Petitioner reserves the right to present additional allegations to establish his entitlement to relief on this claim, either in briefing or at an evidentiary hearing, after full investigation and discovery (including through the use of necessary subpoena powers).

9. Mr. Austin is entitled to relief on this claim, as the trial of an individual while incompetent, or likely incompetent, is a deprivation of fundamental constitutional rights and requires a grant of relief without any further assessment of prejudice.

**Second Claim For Relief:
Lack Of Knowing, Intelligent Or Voluntary Plea**

10. Petitioner incorporates the allegations contained in the Introduction, and the Procedural and Jurisdictional Allegations and the other Claims for Relief presented

in this Petition. In addition, Mr. Austin pleads that:

11. Mr. Austin's conviction and sentence violate his rights under the Fifth, Sixth and Fourteenth Amendments because the plea he entered was not knowing, intelligent or voluntary, for reasons including but not necessarily limited to:

A. Mr. Austin was not competent to proceed to a plea or stipulated facts trial.

B. Mr. Austin's entry of the plea and agreement to a stipulated facts trial was the result of coercion, duress, threats, and mistreatment during his pretrial detention at the Lane County jail.

C. Counsel failed to adequately advise Mr. Austin regarding the plea process; failed to ensure that he was competent to enter a plea; failed to ensure the constitutionality of the conditions of his pretrial detention; and failed to ensure that Mr. Austin's plea and agreement to a stipulated facts trial was freely, knowingly and voluntarily given and not the result of force, threats or coercion.

D. Petitioner reserves the right to present additional allegations to establish that his plea was not knowing, voluntary or intelligent, after full investigation and discovery (including through the use of necessary subpoena powers).

12. Mr. Austin contends that these violations require a grant of relief and setting aside of his plea without any further assessment of prejudice. In the event prejudice must be established, Mr. Austin contends that these errors had a substantial and injurious impact on his adjudication of guilt and sentencing, requiring relief under

Brecht, v. Abrahamson, 507 U.S. 619, 638 n.9 (1993).

**Third Claim for Relief:
Ineffective Assistance Of Trial Counsel**

13. Petitioner had the right to the effective assistance of counsel at all critical stages of the criminal process, a right guaranteed to him by the Sixth Amendment to the United States Constitution, made applicable to the State of Oregon by the Fourteenth Amendment to the United States Constitution.

14. Petitioner's trial counsel rendered constitutionally ineffective assistance of counsel for reasons including but not limited to:

 A. Counsel failed to ensure that Mr. Austin's constitutional rights were respected during his pretrial detention, for reasons including but not limited to:

 i. Counsel failed to ensure that Mr. Austin was not subjected to unconstitutional conditions of confinement, such as prolonged solitary confinement, and that his conditions of confinement were not intended as punishment, as opposed to merely for detention purposes.

 ii. Counsel failed to protect Mr. Austin from force, threats, intimidation, and unconstitutionally harsh treatment by his jailers.

 iii. Counsel failed to ensure that Mr. Austin received adequate mental health assistance, both evaluation and treatment, when it became clear that his mental condition was deteriorating during his pretrial confinement.

 B. Counsel failed to adequately investigate the charges against Mr. Austin

for reasons including but not limited to:

- i. Counsel failed to investigate all available defenses to the charges filed against Mr. Austin, including the possibility of a defense of self-defense to the homicide charge.
- ii. Counsel failed to investigate and interview necessary and appropriate witnesses, and failed to retain necessary and appropriate experts on issues such as self-defense.
- iii. Counsel failed to adequately review and test evidence, including failing to have the knife the prosecution contended was the murder weapon tested and/or analyzed.
- iv. Counsel failed to investigate Mr. Austin's background, including his employment, educational, and living status at the time of the alleged crimes, in order to both enter into pretrial plea negotiations and to prepare to rebut the prosecution's contentions at any trial or sentencing proceeding.

C. Counsel provided ineffective assistance of counsel in the plea bargaining process, for reasons including but not necessarily limited to:

- i. Because counsel failed to adequately investigate the evidence which could or would support the allegations, and failed to investigate Mr. Austin's background, counsel was unable to negotiate a plea to a less serious charge, such as manslaughter, and instead could only obtain a plea to the most serious charge, which was the homicide.

ii. Counsel failed to ensure that Mr. Austin received any benefit from entry of the plea. Counsel not only had Mr. Austin plead to the most serious charge and accept the longest possible sentence, but counsel agreed to a plea that purported to waive all of Mr. Austin's constitutional rights to challenge his conviction and sentencing on direct appeal, post-conviction or federal habeas. In short, counsel obtained and convinced Mr. Austin to enter a plea which provided him with no benefit that he could not have obtained after a trial on the merits, and left him in a worse legal posture than he would have been after any trial.

D. Counsel failed to adequately represent Mr. Austin during the course and scope of the entry of the plea, the stipulated facts trial, and the subsequent sentencing proceeding, for reasons including but not limited to:

- i. Because counsel had failed to adequately investigate the case, counsel were unable to provide appropriate advise to Mr. Austin regarding his options regarding entry of any plea versus contesting his guilt at the time of trial.
- ii. Counsel purported to advise Mr. Austin regarding a waiver of all forms of post-conviction review of his plea and sentence, including a purported waiver of Mr. Austin's right to pursue claims of ineffective assistance of counsel. Counsel advised Mr. Austin to enter a plea agreement that contained a facially unconstitutional waiver of the right to pursue claims

of ineffective assistance of counsel in post-conviction or federal habeas proceedings.

iii. Counsel advised Mr. Austin to proceed to a stipulated facts trial that was a *de facto* guilty plea without preserving any rights to contest any issues in subsequent appeal or post-conviction proceedings.

iv. Counsel failed to ensure that Mr. Austin was competent to enter a plea or proceed to a stipulated facts trial and sentencing, and failed to address the impact of the deterioration of his mental state during pretrial incarceration at the time of his plea, stipulated facts trial, and sentencing.

v. Counsel failed to ensure that Mr. Austin's plea was knowing, voluntary and intelligently made, and not the result of force, threats and coercion.

vi. Counsel failed to provide critical information to the court at the time of sentencing in rebuttal to allegations made by the prosecution regarding Mr. Austin.

E. Petitioner reserves the right to present additional allegations to establish that his counsel provided constitutionally ineffective assistance of counsel after full investigation and discovery (including through the use of necessary subpoena powers).

15. Each of these was a critical stage of criminal proceedings against Mr. Austin. Mr. Austin was prejudiced by his counsel's ineffectiveness at each stage

independently and in their cumulative impact. Had counsel provided effective assistance, Mr. Austin may have been acquitted of the charges filed against him, and at the least would have been sentenced to considerably less than the 3000 months that was imposed upon him by the trial court. Mr. Austin contends that these violations require a grant of relief and setting aside of his plea without any further assessment of prejudice. In the event prejudice must be established, Mr. Austin contends that these errors had a substantial and injurious impact on his adjudication of guilt and sentencing, requiring relief under *Brechit, v. Abrahamson*, 507 U.S. 619, 638 n.9 (1993).

**Fourth Claim For Relief:
Insufficient Evidence And Actual Innocence**

16. Petitioner incorporates the allegations contained in the Introduction, and the Procedural and Jurisdictional Allegations and the other Claims for Relief presented in this Petition. In addition, Mr. Austin pleads that:

17. Mr. Austin's conviction and sentence violate his rights under the Fifth and Fourteenth Amendments because there was insufficient evidence to convict him of homicide under Oregon law, and he is actually innocent of that charge under the required elements of Oregon law.

18. Petitioner contends that these violations constitute structural error in his trial, requiring relief from his conviction and sentence without any assessment of prejudice. In the event prejudice is required, Petitioner contends that these errors substantially effected or influenced his conviction and, therefore, require a grant of

relief under *Brechit, v. Abrahamson*, 507 U.S. 619, 638 n.9 (1993).

**Fifth Claim For Relief:
Cruel And Unusual Punishment**

17. Petitioner incorporates the allegations contained in the Introduction, the Procedural and Jurisdictional Allegations and the other Claims for Relief presented in this Petition. In addition Mr. Austin pleads that:

18. The total sentence imposed on Mr. Austin of over 25 years of incarceration, constitutes cruel and unusual punishment in violation of the Eighth Amendment, made applicable to the states through the Fourteenth Amendment to the United States Constitution.

19. Mr. Austin contends that these violations had a substantial and injurious impact on his adjudication of guilt and sentencing, requiring relief under *Brechit, v. Abrahamson*, 507 U.S. 619, 638 n.9 (1993).

**Sixth Claim For Relief:
Cumulative Error**

20. Petitioner incorporates the allegations contained in the Introduction, the Procedural and Jurisdictional Allegations and the other Claims for Relief presented in this Petition. In addition Mr. Austin pleads that:

21. While any one particular error may not, when viewed individually, require a grant of relief, Petitioner contends that the cumulative effect of the multiplicity of errors rendered his trial fundamentally unfair, had a substantial and injurious

impact on the adjudication of guilt and sentencing, and requires relief from his conviction and sentence.

IV. PRAYER FOR RELIEF

Petitioner Lloyd E. Austin, IV, respectfully requests that this Court:

1. Issue a Writ of Habeas Corpus to have Petitioner brought before this Court to the end that he might be discharged from his unconstitutional confinement and restraint.
2. Grant Petitioner the right to conduct discovery, including the right to take depositions, request admissions, and propound interrogatories, as well as the means to preserve the testimony of witnesses.
3. Permit Petitioner a reasonable opportunity to supplement this Petition to include claims that become known as a result of ongoing investigation and information that may hereafter become known to counsel.
4. Order and conduct an evidentiary hearing at which proof may be offered concerning each of the allegations in the Petition.
5. After full consideration of the issues raised in this Petition, order that Petitioner be granted relief from his conviction and sentence, and order that the State of Oregon has ninety (90) days after the issuance of the order to either retry him on these allegations or dismiss all charges based thereon.

6. Grant Petitioner such further relief as is appropriate and just in the interests of justice.

RESPECTFULLY SUBMITTED this 5th day of April, 2017.

/s/ C. Renée Manes
C. Renée Manes
Attorney for Petitioner

FEDERAL PUBLIC DEFENDER
DISTRICT OF OREGON

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Federal Public Defender
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In memoriam
Nancy Bergeson
1951 - 2009

▲ Eugene Office
+ Medford Office
★ Research/Writing Attorney

LEGAL MAIL / ATTORNEY-CLIENT PRIVILEGED

August 22, 2018

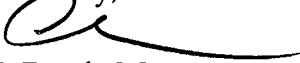
Lloyd E. Austin IV, #18067011
Two Rivers Correctional Institution
82911 Beach Access Road
Umatilla, Oregon 97882

Re: *Austin v. Amsberry*, USDC Case No. 2:17-cv-00039-HZ

Dear Mr. Austin:

First, I received your most recent letter and I am glad that you appreciate my briefing. Unfortunately, the district court has found it less persuasive, and have issued an Opinion and Order denying any relief, a copy of which is enclosed. The court grants deference to the state court ruling as not unreasonable under the evidence presented, which evidence was primarily the sworn statements of your attorneys and the trial court statements. The court also declines to grant us leave to appeal. I can request such leave from the Ninth Circuit, but that is a long shot at best. If you would like me to request leave, please let me know in the next two weeks. I am sorry the news is not better. Habeas cases are extremely difficult under the current legal standards, and the grant of deference is usually where we lose, as I mentioned in my first letter. If you have any questions about the decision, please give me a call.

Sincerely,


C. Renée Manes

Assistant Federal Public Defender

Enclosures (as noted)

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

LLOYD E. AUSTIN, IV,

Petitioner,

Case No. 2:17-cv-00039-HZ

OPINION AND ORDER

v.

MS. BRIDGET AMSBERRY,

Respondent.

C. Renee Manes
Assistant Federal Public Defender
101 S.W. Main Street, Suite 1700
Portland, Oregon 97204

Attorney for Petitioner

Ellen F. Rosenblum, Attorney General
Samuel A. Kubernick, Assistant Attorney General
Department of Justice
1162 Court Street NE
Salem, Oregon 97310

Attorneys for Respondent

HERNANDEZ, District Judge.

Petitioner brings this habeas corpus case pursuant to 28 U.S.C. § 2254 challenging the legality of his state-court conviction for Murder. For the reasons that follow, the Amended Petition for Writ of Habeas Corpus (#11) is denied.

BACKGROUND

In September 2009, the Lane County Grand Jury accused Petitioner of Murder, Attempted Unlawful Entry into Motor Vehicle, Carrying a Concealed Weapon, Escape in the Third Degree, and Resisting Arrest. Respondent's Exhibit 102. Petitioner was represented by two attorneys, Elizabeth Baker and Brad Cascagnette. On March 5, 2010, Baker moved the trial court to determine Petitioner's fitness to proceed, requesting that he be transported to the Oregon State Hospital for an evaluation pursuant to ORS 161.370. Respondent's Exhibit 119. In her supporting Declaration, she stated as follows:

3. My investigator and I have seen him three times since I was appointed – the first week of February, and I have tried to see him two additional times and he has refused to see me or my investigator and today, I had to speak to him through glass doors while he was in a jail cell. Twice he has been so difficult and dangerous that jail staff would not transport him to court – one of those times was at the jail court room. In our last conversation, Defendant made statements to myself and my investigator as if we had had several conversations we had never had with him. Defendant could not follow any of our conversations [or] stay focused. I consulted with Dr. Eric Johnson, whom I will be retaining for this case and he suggested to me that any plea or quick deal, given Defendant's behavior was ill-advised and that

he should be evaluated - his choices, if intentional - are approaching the point [of] being without any reason and I do not believe he is able to aid and assist in making choices in his cases.

Id at 3.

Also on March 5, 2010, the Honorable Gregory Foote was due to conduct a settlement conference in Petitioner's case. Petitioner was "so uncooperative and violent," that he was not transported for the conference. Petitioner's Exhibit 1, p. 3. Judge Foote took the opportunity to have Sergeant Steve Davis of the Lane County Jail testify as to Petitioner's behavior. According to Davis, Petitioner had demonstrated a general lack of cooperation and "affinity to collect and create dangerous weapons within the jail." *Id* at 4. Petitioner was indecisive about whether he would attend the settlement conference, and ultimately refused on the basis that the Honorable Karsten Rasmussen, not Judge Foote, was his trial judge.

Davis testified that Petitioner did not appear to understand what Davis explained to him about the purpose of the settlement conference. *Id* at 5. Baker took the opportunity to state her concerns on the record and, as in her Declaration supporting her Motion for a competency determination, she noted that Petitioner had spoken "about conversations we never had and serious conversations of serious subject matter and conversations which, to my investigator's knowledge, he had never had with previous counsel." *Id* at 8. She stated that "his behavior since that time has sort of deescalated, or he appears to-be-disassembling in his _____ . . .

ability to really gain insight or information." *Id.* Judge Foote explained that he would defer the matter to Judge Rasmussen, but explained that he had "wanted to get Sergeant Davis on the record so that Judge Rasmussen can consider that evidence without having to call the Sergeant to court." *Id* at 7.

For reasons that are not clear, Judge Rasmussen elected not hold a hearing to address the competency issue. Instead, on March 15, 2010, he issued a brief Order denying Petitioner's competency Motion. Respondent's Exhibit 121.

Five months later, on August 17, 2010, Petitioner filed his Petition to Consent to be Found Guilty by Stipulated Facts Trial. Respondent's Exhibit 104. In that Petition, he agreed there was sufficient evidence to find him guilty of Murder, and that the presumptive sentence for that charge was life in prison with a 25-year minimum. *Id* at 4. In exchange, the State dismissed the four remaining charges in the Indictment. *Id* at 3.

At the stipulated facts trial conducted the same day, Judge Rasmussen found Petitioner guilty of Murder. Respondent's Exhibit 106. The following day, Judge Rasmussen sentenced Petitioner to the agreed-upon sentence of life with a 25-year minimum term. Respondent's Exhibit 107.

Petitioner took a direct appeal, but voluntarily dismissed the action. Respondent's Exhibits 108-110. He then proceeded to file for post-conviction relief ("PCR") in Marion County where the PCR Court denied relief. Respondent's Exhibit 155. The Oregon

Court of Appeals summarily affirmed the PCR Court's decision, and the Oregon Supreme Court denied review. *Austin v. Premo*, 280 Or. App. 481, 380 P.3d 1253, *rev. denied*, 360 Or. 697, 388 P.3d 708 (2016).

Petitioner filed this 28 U.S.C. § 2254 habeas corpus case on January 9, 2017 and, with the assistance of appointed counsel, filed an Amended Petition three months later. Respondent asks the Court to deny relief on the Amended Petition because most of Petitioner's claims are procedurally defaulted, and the claims that are not defaulted do not have sufficient merit to entitle him to habeas corpus relief.

I. Unargued Claims

In his Amended Petition, Petitioner raises six grounds containing numerous sub-claims. In his supporting memorandum, however, Petitioner chooses to brief two claims of ineffective assistance of counsel: (1) whether counsel failed to ensure Petitioner was competent to proceed to a stipulated facts trial and sentencing (Ground 3(D)(iv)); and (2) whether counsel failed to ensure that Petitioner's plea was knowing, voluntary, and intelligent (Ground 3(D)(v)).

Petitioner does not argue the merits of his remaining claims, nor does he address any of Respondent's arguments as to why relief on these claims should be denied. As such, Petitioner has not carried his burden of proof with respect to these unargued claims. See *Silva v. Woodford*, 279 F.3d 825, 835 (9th

Cir. 2002) (Petitioner bears the burden of proving his claims). Even if Petitioner had briefed the merits of these claims, the court has examined them based upon the existing record and determined that they do not entitle him to relief.

II. Exhaustion, Procedural Default, and Martinez

A petitioner seeking habeas relief must exhaust his claims by fairly presenting them to the state's highest court, either through a direct appeal or collateral proceedings, before a federal court will consider the merits of habeas corpus claims pursuant to 28 U.S.C. § 2254. *Rose v. Lundy*, 455 U.S. 509, 519 (1982). A petitioner must also present his claims in a procedural context in which their merits can be considered. *Castille v. Peoples*, 489 U.S. 346, 351 (1989). A petitioner is deemed to have "procedurally defaulted" his claim if he failed to comply with a state procedural rule, or failed to raise the claim at the state level at all. *Edwards v. Carpenter*, 529 U.S. 446, 451 (2000); *Coleman v. Thompson*, 501 U.S. 722, 750 (1991).

As his Ground 3(D)(iv) claim, Petitioner asserts that trial counsel failed to ensure he was competent to proceed to the stipulated facts trial and sentencing. He does not dispute Respondent's characterization of this claim as procedurally defaulted, and instead asks the Court to excuse his default pursuant to *Martinez v. Ryan*, 566 U.S. 1 (2012).

Traditionally, the performance of PCR counsel could not be used to establish cause and prejudice to excuse a procedural

default. *Coleman v. Thompson*, 501 U.S. 722, 753-54 (1991) (only the constitutionally ineffective assistance of counsel constitutes cause); *Pennsylvania v. Finley*, 481 U.S. 551, 556 (1987) (there is no constitutional right to counsel in a PCR proceeding). However, in *Martinez*, the Supreme Court found "it . . . necessary to modify the unqualified statement in *Coleman* that an attorney's ignorance or inadvertence in a postconviction proceeding does not qualify as cause to excuse a procedural default." *Id.* at 8. It concluded, "Inadequate assistance of counsel at initial-review collateral proceedings may establish cause for a prisoner's procedural default of a claim of ineffective assistance at trial." *Id.*

In order to establish cause to excuse his default pursuant to *Martinez*, Petitioner must show first that his underlying claim of ineffective assistance of trial counsel is substantial insofar as it has "some merit." Next, he must demonstrate that his PCR attorney was ineffective under the standards of *Strickland v. Washington*, 466 U.S. 668 (1984) for failing to raise the claim. "[T]o fulfill this requirement, a petitioner must not only show that PCR counsel performed deficiently, but also that this prejudiced petitioner, i.e., that there was a reasonable probability that, absent the deficient performance, the result of the post-conviction proceedings would have been different." *Runnингeagle v. Ryan*, 825 F.3d 970, 982 (9th Cir. 2017) (quotation omitted). Such a finding, of course, would necessarily

require the Court to conclude that there is a reasonable probability that the trial-level ineffective assistance claim would have succeeded had it been raised. *Id.*

Petitioner argues that where Baker doubted he was competent to proceed in March 2010, she had a constitutional obligation to: (1) do more to ensure a hearing; (2) obtain an expert evaluation; and (3) couch her request for a competency determination in terms of the 14th Amendment's Due Process Clause on the theory that it provides more robust protections for criminal defendants of questionable competency.

Petitioner assumes that because Baker believed he was likely not competent to proceed in March of 2010, she must also have thought he was incompetent to proceed with the stipulated facts trial. However, Petitioner's decision to waive his right to a jury and proceed to a stipulated facts trial did not occur until August 2010, five months after Baker's competency Motion. At the time of trial, neither Baker nor Cascagnette had reservations about Petitioner's competency to proceed. Not only did they not raise any competency issues with Judge Rasmussen at that time, but they specifically swore in Affidavits prepared for Petitioner's PCR proceedings that Petitioner was competent to proceed with his jury waiver and stipulated facts trial. Cascagnette related the following:

6. Regarding Petitioner's mental health, I did not witness petitioner being unable to track during our discussions nor did I notice signs that petitioner might be suffering from

delusions or hallucinations, or responding to internal stimuli. Petitioner created problems for the jail, but I did not pick up on any mental health issues that would rise to a level of defense, or his inability to aid and assist. He engaged in discussions about his case, his charges, and his options when he wanted to, and asked appropriate questions, which I did my best to answer.

* * *

9. . . . I do not think that Mr. Austin liked his choices, and the need to choose between a plea deal/stipulated facts trial versus a jury trial. On the other hand, it was my opinion that Mr. Austin was competent in August 2010 and was fully capable of making a knowing, voluntary, and intelligent decision to waive jury and have a stipulated facts trial on the Murder charge. I am certain that Mr. Austin understood that the stipulated facts trial would result in his conviction and a prison sentence of Life, with the possibility of parole after serving a minimum 25 years.

Respondent's Exhibit 151, pp. 3-4.

For her part, Baker also believed Petitioner while mentally ill and a difficult client, was aware of his situation and competent to proceed at the time of his trial:

6. I do want to say this, and I recall it specifically, I always thought Mr. Austin had serious mental health issues. He claimed to have mental health history but we could not locate it - it might have been in California - but we could not locate it.

* * *

I made a motion for fitness when the isolation began, which the court denied. I followed it up with a memo, but it was still denied.

7. . . . The client asked me - do you think I'm crazy - and I said, "Yes, but I think you know very well you did this." He looked kind of shocked and I said, "You never asked me before." I tried to get him evaluated by Dr. Eric Johnson (who told me he was worried for my safety if I met with client without anyone present) but Mr. Austin refused to participate for fitness evaluation or mental health evaluation for a possible GEI defense. I reminded Mr. Austin of that when Mr. Austin seemed to insist he was mentally ill, and said, "Too late buddy, that won't work." Then he did the deal. I stand by that - I don't think he was fit through most of this, and I think he's mentally ill and he was very well aware of what the issues were. Mr. Austin had so many cases pending at the time we had the settlement conference that the deal ended up fairly favorable, but Mr. Austin is one sad, pathetic case.

8. It was my opinion that Mr. Austin was fit to proceed, and fully capable of knowingly and intelligently waiving his constitutional rights, on the date he entered into the plea agreement.

Respondent's Exhibit 152, pp. 3-4.

As illustrated by these Affidavits, although Baker thought Petitioner was not competent in March 2010 and wished to have him evaluated, she and Cascagnette both felt he was competent to proceed at the time of his trial in August of that year. This is critical to the retrospective competency inquiry where "defense counsel will often have the best-informed view of the defendant's ability to participate in his defense." *Medina v. California*, 505 U.S. 437, 450 (1992). A change in Baker's perception of Petitioner's competency over the course of five months does not render her 2010 Declaration inconsistent with her 2013 Affidavit. Indeed, where she showed an awareness of the competency issue in

March 2010 and sought a competency hearing at that time, her silence on the matter in August 2010 speaks to what she thought of Petitioner's competence to proceed at that point, and is consistent with her 2013 PCR Affidavit that she believed Petitioner was competent to proceed to trial in August 2010.

Similarly, at the August 17, 2010 stipulated facts trial, Judge Rasmussen likewise found Petitioner competent to proceed:

I further find as fact that the defendant does understand what he's doing here. I have taken his answers and responses as appropriate under the circumstances.

I take into account the assessment of professional counsel who are well experienced and have worked with Mr. Austin here for quite some while, and I also take into account the fact that he is resolving this case in a way that makes sense to me - would make sense to anyone - in light of the potential that he would, if convicted of all counts, including the ones that the State will plan - ask the Court to dismiss, could very well have been incarcerated for essentially the rest of his life.

So on that basis I find that he has - he does not have a does not present a mental disease or defect defense that he is making rational and appropriate choices[.]

Respondent's Exhibit 106, pp. 19-20.

Moreover, where Petitioner's competence was at issue in his PCR case, the PCR Court determined that Petitioner's mental health did not render him unable to understand his options. Respondent's Exhibit 155, p. 2. Such a determination of a factual issue, even where Petitioner did not present the particular claim currently at issue, is entitled to a presumption of correctness

pursuant to 28 U.S.C. § 2254(e)(1). See *Sharpe v. Bell*, 593 F.3d 372, 378 (4th Cir. 2010) ("While Section 2254(d) thus has no application in the context of [an exception to procedural default] because it pertains only to a 'claim that was adjudicated' in state court, Section 2254(e)(1) does come into play because it refers to the 'determination of a factual issue'—that is, to a state court's findings of fact, rather than its conclusions of federal law."). Petitioner has not rebutted this presumption by clear and convincing evidence as required by the terms of 28 U.S.C. § 2254(e)(1).

Petitioner's trial attorneys were under no obligation to pursue the competency issue where both of them believed Petitioner to be competent to proceed to trial, as did two state-court judges. Where the claim is not substantial and PCR counsel was not ineffective for failing to raise the ineffective assistance of counsel claim Petitioner advocates, *Martinez* does not excuse Petitioner's default of his Ground 3(D)(iv) claim.

III. The Merits

A. Standard of Review

An application for a writ of habeas corpus shall not be granted unless adjudication of the claim in state court resulted in a decision that was: (1) "contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States;" or (2) "based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d). A state court's findings of fact are presumed correct,

and Petitioner bears the burden of rebutting the presumption of correctness by clear and convincing evidence. 28 U.S.C. § 2254(e)(1).

A state court decision is "contrary to . . . clearly established precedent if the state court applies a rule that contradicts the governing law set forth in [the Supreme Court's] cases" or "if the state court confronts a set of facts that are materially indistinguishable from a decision of [the Supreme] Court and nevertheless arrives at a result different from [that] precedent." *Williams v. Taylor*, 529 U.S. 362, 405-06 (2000). Under the "unreasonable application" clause, a federal habeas court may grant relief "if the state court identifies the correct governing legal principle from [the Supreme Court's] decisions but unreasonably applies that principle to the facts of the prisoner's case." *Id* at 413. The "unreasonable application" clause requires the state court decision to be more than incorrect or erroneous. *Id* at 410. Twenty-eight U.S.C. § 2254(d) "preserves authority to issue the writ in cases where there is no possibility fairminded jurists could disagree that the state court's decision conflicts with [the Supreme] Court's precedents. It goes no farther." *Harrington v. Richter*, 562 U.S. 86, 102 (2011).

B. Analysis

As his final remaining claim, Petitioner alleges that trial counsel failed to ensure that the decision to forego a jury trial and effectively plead guilty was knowing, voluntary, and intelligent. As discussed above, Judge Rasmussen and both of

Petitioner's trial attorneys felt he was competent to proceed with the stipulated facts trial. Addressing the claim Petitioner pursues here, the PCR Court specifically determined:

There's no proof the Petitioner's mental health in any way left him in any [way] unable to understand his options.

Segregation certainly [was] not an optimal way to live, but I don't see the evidence showing that it was enough to show that he was unable to understand his choices, and he made a choice in another case, so he also had some other experience that was stip[ulated] facts too I believe.

I find the decision to stipulate to facts of the case was a knowing and voluntary decision.

Respondent's Exhibit 154, pp. 36-37.¹

The record reflects that Petitioner was competent to waive his right to a jury trial, and that he knowingly, intelligently, and voluntarily proceeded with a stipulated facts trial. Counsel's performance therefore did not fall below an objective standard of reasonableness, and the PCR Court's decision denying relief on Petitioner's Ground 3(D)(v) claim is therefore neither contrary to, nor an unreasonable application of, clearly established federal law.

CONCLUSION

For the reasons identified above, the Amended Petition for Writ of Habeas Corpus (#11) is denied. The Court declines to

¹ Petitioner contends that the PCR court failed to adequately discuss the impact of trial counsel's purported failure to protect his right to be competent to proceed with a stipulated facts trial, thus no deference is owed to the state-court decision. Even where there is no analysis at all, federal habeas courts still defer to the state-court decisions being challenged. *Harrington v. Richter*, 562 U.S. 86, 102 (2011).

issue a Certificate of Appealability on the basis that petitioner has not made a substantial showing of the denial of a constitutional right pursuant to 28 U.S.C. § 2253(c)(2).

IT IS SO ORDERED.

DATED this 14th day of August, 2018.

/s/ Marco A. Hernandez

Marco A. Hernandez

United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

LLOYD E. AUSTIN, IV,

Case No. 2:17-cv-00039-HZ

Petitioner,

JUDGMENT

v.

MS. BRIDGET AMSBERRY,

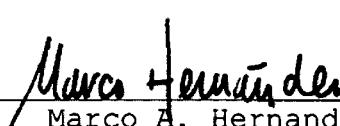
Respondent.

HERNANDEZ, District Judge.

Based on the Record,

IT IS ORDERED AND ADJUDGED that this Action is DISMISSED, with prejudice. The Court declines to issue a Certificate of Appealability on the basis that Petitioner has not made a substantial showing of the denial of a constitutional right pursuant to 28 U.S.C. § 2253(c)(2).

DATED this 14 day of August, 2018.


Marco A. Hernandez

United States District Judge

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