

IN THE SUPREME COURT OF THE UNITED STATES

ERNEST N. LOTCHES,

Petitioner,

v.

COREY FHUERE, Superintendent, Oregon State Penitentiary,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION

On Petition for Writ of Certiorari to the
United States Court of Appeals for the Ninth Circuit

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QUESTIONS PRESENTED

1. Can a claim that a criminal defendant was not competent to stand trial be procedurally defaulted in a habeas corpus proceeding?
2. The state courts rejected petitioner's claim that his trial counsel were ineffective under the Sixth Amendment by not raising a "cultural" defense to aggravated murder when that theory would have been inconsistent with the available evidence and with Oregon law. Has petitioner shown that the state court's ruling was so clearly wrong under the AEDPA standard that this Court should summarily reverse petitioner's 34-year-old convictions?

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RESPONDENT’S BRIEF IN OPPOSITION

INTRODUCTION

In 1993, a jury convicted petitioner of, among other crimes, aggravated murder, for which the jury imposed a death sentence.¹ Over the course of the next 34 years, petitioner challenged his convictions and sentences on direct appeal, state post-conviction relief, and federal habeas corpus. Ultimately, in 2026, the Ninth Circuit affirmed the district court’s denial of federal habeas corpus relief.

Petitioner now asks this Court to grant certiorari to address two issues. First, he asks this Court to address the question whether the ordinary procedural-default rules in a federal habeas proceeding can apply to a claim that a criminal defendant was not competent to stand trial. Second, in the alternative, he asks this Court to summarily reverse the lower courts’ rejection of a claim of ineffective assistance of counsel for not raising a “cultural” defense to his crimes. Neither of petitioner’s questions presented warrant certiorari by this Court.

¹ As noted below, Oregon’s governor later commuted all pending death sentences, including petitioner’s, to life without the possibility of parole.

Initially, this case is a poor vehicle to resolve a question about the application of the procedural-default rule because it was not ultimately necessary to the district court's decision. The district court also resolved the *merits* of petitioner's competence-related claims, concluding that the state court's determination about petitioner's competence was correct. Indeed, the state court's findings and the evidentiary record demonstrate that petitioner was competent to stand trial. And if petitioner is correct that the procedural-default question is a significant issue nationwide, this Court will undoubtedly have a future opportunity to address it in a case in which the answer will affect the outcome.

With respect to petitioner's ineffective-assistance argument, he does not ask this Court to independently grant certiorari to resolve a significant legal question. Instead, he asks only that this Court summarily vacate and remand the lower courts' decisions because, in his view, the record clearly shows that his trial counsel were constitutionally ineffective by not raising a "cultural" defense to aggravated murder. But under the highly deferential standard applicable to a federal court's review of state-court rulings in habeas corpus, the state court correctly determined that counsel acted reasonably by not considering or pursuing a cultural defense to account for petitioner's crimes. Indeed, the available evidence—including petitioner's own statements—

conflicted with a culturally based defense. And in any event, petitioner's claim of prejudice depends on his misunderstanding of Oregon law about what defenses would be available. For the foregoing reasons, this Court should deny certiorari.

STATEMENT OF THE CASE

A. The state charged petitioner with aggravated murder and other crimes after he shot and killed a Portland Guide.

In August 1992, petitioner had been recently released from prison, and he was subject to various post-prison conditions, including not drinking alcohol, violating any laws, or possessing weapons. (1-SER-219–20; 8-ER-2110; 9-ER-2483).² On the afternoon of August 22, petitioner was drinking alcohol in downtown Portland when he got involved in an altercation with a man (Hedges). (3-ER-560–61; 4-ER-891). Petitioner slapped the back of the motorcycle helmet that Hedges was wearing, which resulted in an argument between the two men. (3-ER-563–69, 571). Petitioner threatened Hedges and left the park. (3-ER-565–69, 571).

² Because the District Court record is voluminous, the superintendent has, where possible, cited the Excerpts of Record (found at 9th Cir. Dkt. 11) and the Supplemental Excerpts of Record (found at 9th Cir. Dkt. 23) in the Ninth Circuit appeal, *Lotches v. Premo*, 9th Cir. Case No. 24-2652. Those citations reference the volume number followed by “ER” or “SER” and the corresponding page number. For the few documents not found in those locations, the superintendent cites the District Court docket number in *Lotches v. Premo*, D. Or. Case No. 6:14-cv-00369-MO.

Hedges reported to a nearby “Portland Guide” (Cramer) that he wanted to file a complaint against petitioner. (2-ER-431; 3-ER-567–68; 4-ER-1139). The Portland Guides, who were employed by an organization called Portland Progress, provided information to people downtown. (2-ER-430). Although the guides also provided “[p]roactive security,” they were unarmed and were not dressed like police officers. They wore green hats, white shirts, and blue pants. (2-ER-430, 475).

When petitioner saw Hedges talking to Cramer, petitioner started walking away. Cramer followed him, and he radioed to the Portland Guide headquarters that someone had reported an assault. (2-ER-431–32; 4-ER-1142–44). Three other Portland Guides who were a few blocks away heard Cramer and they walked in that direction. (See 2-ER-433–36). At about that point, William Hall, a Portland Guide “Patrol Officer,” also walked toward the location. (See 2-ER-437).

Although not a police officer, Hall was wearing a blue uniform similar to a police officer’s and, unlike the other guides, he was armed with a pistol (at that time, holstered). (2-ER-431; see 2-ER-482). Hall approached petitioner from the direction petitioner was heading and said, “Excuse me, sir, I would like to have a word with you.” (2-ER-436–38, 530–32). In response, petitioner swung his arm at one of the other Portland Guides, who raised his hands to

block the blow. (2-ER-440, 532). Petitioner then ran across the street and down Fourth Avenue. (2-ER-440–41, 533). Hall and another guide (Riley) chased petitioner, about 10 or 15 feet behind. (2-ER-441).

At that point, petitioner reached into the back of his waistband and pulled out a paper bag that he ripped open, revealing a gun. (2-ER-515–16, 533–34). Hall yelled, “He has got a gun” and “Get down,” and he and Riley ran *away* from petitioner, as petitioner shot two or three rounds. (2-ER-440, 532–34). Hall hid behind a car with another Portland Guide who had also heard the shots, at which point, the other guide saw Hall unholster his gun. (2-ER-482). Petitioner, meanwhile, chased Riley, who ran around the corner towards another guide (Edwards). (2-ER-440, 442). Petitioner shot Edwards, hitting her in the arm and the chest, and prompting Riley and Edwards to hide in a nearby store. (2-ER-443–46, 535–36).

At that time, Hall fired his first shots at petitioner, missing him, and petitioner ran away. (2-ER-482, 485–86). Hall—by himself, with no other Portland Guides—then ran after petitioner. (2-ER-482). He continued to chase petitioner through the downtown area, and the two exchanged gunfire,

eventually resulting in petitioner shooting and killing Hall. (*E.g.*, 2-ER-482–84; 3-ER-591, 598, 603, 837; 4-ER-1042–43, 1046–49, 1057, 1094–98, 1105).³

At that point, petitioner forced a couple out of their truck at gunpoint, and he drove away. (3-ER-624, 639–40, 646, 649; 6-ER-1454, 1462). Petitioner sped across the Burnside Bridge, by that time being followed by police officers in cars. After crossing the bridge, petitioner was unable to negotiate a turn, and he crashed into parked cars. (3-ER-661–62). He got out of the truck, at which point, a police officer approached in a squad car. Petitioner shot at him, narrowly missing. (3-ER-665–66, 690–94, 711–13, 724). Other officers then arrived, and they took petitioner into custody. (3-ER-715–18).

Analysis of petitioner’s blood showed a blood-alcohol content of about .17 percent at the time of the incident. (4-ER-889–91). Detectives interviewed him about seven hours later, after he had slept. (4-ER-963–94). Petitioner told an officer that he did not remember what had happened earlier that day. (4-ER-

³ Petitioner’s blanket characterization of the Portland Guides is inaccurate. Petitioner refers to the various Portland Guides as “[s]everal armed officers” who “pursued [petitioner] through the streets”; and he refers collectively to “guards” and “officers” (plural) who fired at petitioner. (Pet. Cert. 5). The record refutes those assertions. It shows, by contrast, that only Hall was armed, and only Hall continued to chase petitioner after petitioner fired his weapon.

976). When the officers told petitioner what he had done, he responded by saying that it was “not my style, using a gun.” (4-ER-976).

Based on that evidence, the state charged petitioner with three counts of aggravated murder, attempted aggravated murder, two counts of attempted murder, first-degree assault with a firearm, two counts of first-degree robbery (one dismissed by the prosecutor), and felon in possession of a firearm. (2-ER-271). The court appointed two experienced defense attorneys, William Brennan and John Manning, to represent petitioner.

B. After petitioner’s attorneys obtained an expert’s opinion that petitioner was competent, the case proceeded to trial and the jury convicted petitioner.

Shortly after the court appointed attorneys Brennan and Manning to represent petitioner, they arranged for a psychological expert, Dr. Lazere, to evaluate petitioner. (14-ER-3923). Among other things, the doctor addressed petitioner’s ability to “aid and assist” his counsel at trial.⁴ The doctor thereafter

⁴ “Aid and assist” is the term that the Oregon statute uses to refer to competence to stand trial. The statutory standard mirrors the due process standard for competency. *Compare* Or. Rev. Stat. § 161.360(2) (requiring the defendant to have the ability to “understand the nature of the proceedings,” “assist and cooperate with counsel,” and “participate in the defense.”), *with Dusky v. United States*, 362 U.S. 402, 402 (1960) (per curiam) (requiring a showing of sufficient ability to “consult with [a] lawyer with a reasonable degree of rational understanding,” and to have “a rational as well as factual understanding of the proceedings”).

informed counsel that, despite petitioner's history of mental-health issues, he was able to aid and assist his counsel in light of his understanding of the legal proceedings, his experience with the criminal-justice system, and his ability to cooperate and testify:

[Petitioner] is able to understand the nature of the legal proceedings resultant from the incident alleged to have happened on 8/22/92. He is experienced with the justice system and is aware of his position vis-à-vis the legal proceedings and the role of the principals in any forthcoming trial. He is able to cooperate with his attorney in a rational manner and is able to work with his attorney in the preparation of his defense. He will be able to consult with his attorney during the course of any legal proceedings, will be able to give testimony and will be able to understand the testimony of others.

(14-ER-3923–24). The doctor's opinion was consistent with trial counsel's observations, as they never saw any indication—either before or during trial—that he was not competent to stand trial. (14-ER-3847–50, 3918, 3921).

In counsel's ongoing conversations with petitioner, he repeatedly told them—consistently with what he had told the police—that he could not remember what had happened on August 22 after the incident with Hedges, as he had blacked out. (13-ER-3627, 3657–58, 3668–69, 3674; 14-ER-3916; 17-ER-4802). His lack of memory made it difficult for counsel to choose a defense. But based on the available facts and on their investigation about petitioner's mental-health history, counsel raised a combined defense of self-defense and insanity.

To support the self-defense claim, counsel called witnesses and presented evidence in attempts to establish that the circumstances showed that petitioner was trying to escape and was in a defensive mode when he shot Hall. (7-ER-1919, 1924, 1949; 9-ER-2435–36). Counsel also relied on the statement of a woman named Gates, who had told a defense investigator that she thought that she had heard a gunshot *before* she saw petitioner pull out his pistol and start shooting (supporting the defense’s argument that Hall shot first). (*E.g.*, 4-ER-1054; 9-ER-2406–09).⁵ To support the insanity defense, counsel relied on several experts who had succeeded in persuading juries in some of petitioner’s earlier criminal cases that he was legally insane when he had committed the crimes. (*See* 5-ER-1161, 1318–26; 6-ER-1562; 7-ER-1739; 7-ER-1753; 9-ER-2406–10; *see generally* 9-ER-2379–2437, counsel’s closing argument).

Still, the jury found petitioner guilty of all but one of the offenses (acquitting him of the attempted murder of Riley). The case then proceeded to the penalty phase, for the jury to decide what sentence to impose.

⁵ No other witness shared Gates’s assessment of the timing. Other witnesses testified that they saw petitioner pull the gun out of his pants *before* they heard any shots fired; and one witness testified that she heard shots before Hall unholstered his gun. (*See* 2-ER-482, 516, 533–34). Gates ultimately testified that she was unsure of the sequence of events. (2-ER-1054–55, 1059).

Only at that point, just prior to the start of the penalty phase, did an issue about petitioner's competence to stand trial arise. Specifically, on the evening after the guilty verdicts, petitioner told his counsel that he did not want them to mount a defense in the penalty phase. (9-ER-2543). Counsel Brennan did *not* think that petitioner's decision was the result of incompetence, and he believed that petitioner was speaking logically. But he suggested that—out of an “overabundance of caution”—the trial court might “find it prudent” to have petitioner examined for competency. (9-ER-2545–46). Petitioner disagreed that he needed a competence evaluation. (9-ER-2547). He explained that his desire not to put up a defense in the penalty phase was because he believed that the jury would return a death sentence regardless, and he was ready to accept that. (9-ER-2547–49).

The trial court denied defense counsel's cautionary request for a competence evaluation, and it ruled that petitioner was competent to proceed. (9-ER-2551–52). The court explained that it was aware of the evidence about petitioner's “numerous examinations” over the years, but that, based on the court's observations during the previous several months, petitioner was “competent to aid and assist counsel[.]” (9-ER-2551). The court explained that petitioner “is aware of what's going on, he does not suffer from a mental

disease or defect, and he’s perfectly capable of making these decisions.” (9-ER-2251–52).⁶

Eventually, petitioner allowed his counsel to mount a defense in the penalty phase. But the jury nonetheless imposed a death sentence. (1-ER-153; 9-ER-2535–36). Oregon’s governor later commuted all of the pending death sentences in the state, including petitioner’s, leaving him with a sentence of life without the possibility of parole. (Appx. B App. 054).

C. Petitioner subsequently sought direct review and state post-conviction relief, but both were unsuccessful.

Petitioner sought automatic direct review in the Oregon Supreme Court, raising various claims of trial-court error. (Dist. Ct. Dkt. 28, Vol. 6, Doc. 28-6, Doc 28-7). Notably, petitioner did not assign error to the trial court’s pre-penalty-phase ruling on his competency, nor did he raise any claim that the trial court had committed any error in that respect.⁷

⁶ The trial judge, who had years of experience and had written articles about competency, later explained that he never saw anything during the trial that gave him pause about petitioner’s competence; and if he had, he would have “taken steps to investigate and alleviate any problems.” (Dist. Ct. Dkt. 28, Vol 44, Doc. 28-46 at 123–28).

⁷ After filing his opening brief, petitioner filed an original-jurisdiction habeas corpus petition in the Oregon Supreme Court on the basis that he was not competent. (Dist. Ct. Dkt. 28, Vol. 64, Doc. 31-5 at 9). But the Oregon Supreme Court denied that petition without explanation. (Dist. Ct. Dkt. 28, Vol. 64, Doc. 31-5 at 96).

With respect to the majority of the claims that petitioner raised on direct appeal, the Oregon Supreme Court affirmed. That court reversed two of the three counts of aggravated murder based on inadequate jury instructions, but it affirmed his convictions on the remaining charges, including one count of aggravated murder. *State of Oregon v. Lotches*, 17 P.3d 1045 (Or. 2000), *cert. denied*, 534 U.S. 833 (2001).

Petitioner subsequently sought state post-conviction relief, alleging various claims, only two of which are pertinent to his petition for certiorari. (11-ER-3049). First, petitioner alleged that his counsel provided ineffective assistance by not investigating petitioner's competence and moving the trial court for a competency hearing. (11-ER-3053).⁸ In response to that claim, petitioner's trial attorneys testified by deposition that they had no concerns about petitioner's competence. In the ample time that counsel Brennan spent with petitioner, he saw no indication that petitioner was not able to assist them.

⁸ Oregon law would have prevented petitioner from raising that issue as a claim that the *criminal trial court* erred because petitioner could have raised it at trial or on direct appeal. See Or. Rev. Stat. § 138.550(2) ("When the petitioner sought and obtained direct appellate review of the conviction and sentence of the petitioner, no ground for relief may be asserted by petitioner in a petition for relief under [Or. Rev. Stat. § 138.510 to 138.680] unless such ground was not asserted and could not reasonably have been asserted in the direct appellate review proceeding"). Still, as will be explained below, the evidence presented about the ineffective-assistance-of-counsel claim is pertinent to underlying competence issues.

(9-ER-2545–46; 13-ER-3667–69; 14-ER-3918). Counsel Manning added that petitioner understood what was going on and was actively involved with counsel throughout the trial. (See 14-ER-3850–52; 3854–55; 3905–06; 14-ER-3921). He explained that petitioner was not intimidated by “the process, the prosecutor, or the judge,” and that petitioner knew “exactly” what he was doing; as an example of petitioner’s understanding of the process, Manning pointed out that petitioner would wait until the jury had left the courtroom to raise issues with the trial judge. (14-ER-3921).

Other evidence supported trial counsel’s view of petitioner’s competence. Specifically, the superintendent submitted the transcripts of several exchanges between petitioner and the trial court, showing that he well understood the nature of the proceedings, that he was assisting his attorneys and participating in his defense, and that he was capable of intelligently addressing the court. (Dist. Ct. Dkt. 28, Vol. 48, Doc. 28-50 at 3–117). The state post-conviction court ultimately credited counsel’s explanations, and it found that petitioner had submitted “no credible evidence to show that he was ever unable to aid and assist his counsel.” (1-ER-77).

Petitioner’s second pertinent claim was a claim that his trial counsel were constitutionally ineffective by failing to present a “cultural” defense during the guilt phase of his trial, based on evidence about petitioner’s Native American

background and the generational trauma that Native Americans had suffered. (11-ER-3060–61; *see* 11-ER-3056–57). In support of that claim, petitioner offered evidence about the history of the relationship between Native Americans and white settlers and about petitioner’s interactions with white police during his lifetime. And petitioner offered testimony from Dr. LaDue, a clinical psychologist, who testified about petitioner’s mental-health issues and the history of the Klamath-Modoc tribe (of which petitioner was a member). (*See* 18-ER-4965–5076).

In response, the superintendent argued that counsel was not deficient for not pursuing a cultural defense because it did not fit the available facts of the case. (1-SER-58–59). In particular, the superintendent pointed to evidence showing that petitioner consistently had told his attorneys, experts with whom he had spoken, and (eventually) the jury members that *he did not remember* the events during which he had committed his crimes. (1-SER-22–23, 58–59, 185). In addition, the superintendent offered petitioner’s deposition testimony from his post-conviction proceeding, during which he attributed his reaction to Hall to the years he spent in prison. (12-ER-3398–99). He also expressly *denied* that his Native American heritage or culture had anything to do with his crimes:

[SUPERINTENDENT’S COUNSEL]: So it’s not possible that based on your background growing up as a Native American in the Klamath Falls area that you saw [the victim] as a white man and overreacted, that’s not possible?

[PETITIONER]: *No, not at all.* When someone is trying to shoot you in the back . . . you're going to defend yourself . . . Plain and simple.

(12-ER-3369, emphasis added). And the superintendent argued that, in any event, Oregon law would not have permitted a “cultural” defense (or so a reasonable attorney could have concluded). (1-SER-59–60, 62–63; see 1-SER-185–86, 199).

The state post-conviction trial court rejected petitioner’s claim, first concluding that his counsel reasonably did not pursue a cultural defense after conducting a reasonable investigation, and thus, they were not deficient. (1-ER-70, 72, 92–93; 18-ER-5139). In that respect, the state post-conviction court made a number of related findings of fact, including that a cultural defense did not fit with the facts of the case (as reported by petitioner and otherwise). (1-ER-78–80). And on that basis, the post-conviction court determined that counsel’s performance did not fall below an objectively reasonable standard. (1-ER-92–93; 1-ER-218–21). The post-conviction court also concluded that petitioner did not carry his burden to show prejudice. (1-ER-92–93).

Petitioner appealed from the post-conviction court’s judgment, challenging the court’s rejection of his ineffective-assistance claim based on the

absence of a cultural defense.⁹ (Dist. Ct. Dkt. 28, Vol. 59, Doc. 28-62 at 122–240, and Vol. 60, Doc. 28-63 at 3–54). But the Oregon Court of Appeals affirmed, concluding that the post-conviction court had correctly denied that claim. The court of appeals noted (as had the post-conviction trial court) that a “culturally attuned” defense was inconsistent with the available evidence, including petitioner’s own deposition testimony, and that petitioner “presented no evidence to show that he had told his attorneys about any connection between his conduct * * * and his Native American heritage.” *Lotches v. Premo*, 306 P.3d 768, 772 (Or. App.), *rev. denied*, 318 P.3d 749 (Or. 2013). “Nor did [petitioner] present,” the court continued, “any evidence that his attorneys knew, or should have known, in the exercise of reasonable professional performance that the plight of the Klamath-Modoc tribe had any significant relationship to the conduct for which petitioner was tried and convicted.” *Id.*

Petitioner filed a petition for review in the Oregon Supreme Court (1-SER-249), but that court denied review. (18-ER-5141).

⁹ He did not make any arguments on appeal about his competence claim.

D. Petitioner sought federal habeas corpus relief, but the district court denied his claims and the Ninth Circuit affirmed.

Next, petitioner sought federal habeas corpus relief, raising numerous claims, including the two that he raises in this Court: (1) a claim that he was not competent to proceed to trial in 1993, and (2) a claim that his trial counsel were ineffective by not raising a cultural defense at trial. (18-ER-5225, 5327; *see* 19-ER-5327–34). The district court rejected both claims.

With respect to the claim of alleged incompetence, the district court first ruled that petitioner had procedurally defaulted that claim because he did not raise it at every necessary level of state review. (Appx. B App. 015–019). But notably, because the district court viewed the procedural-default issue as complex, and because the issue of petitioner’s competency “is serious and permeates this case,” the court went on to resolve the claim on its merits. (Appx. B App. 020). In that respect, the court ruled that the criminal trial court found petitioner to be competent to stand trial, and that four categories of evidence supported that determination: (1) the trial transcript, with numerous examples of petitioner engaging with the court; (2) Dr. Lazere’s expert opinion that petitioner was able to aid and assist his counsel; (3) the evidence showing that petitioner had been found competent in several previous criminal proceedings; and (4) the opinions of petitioner’s trial counsel, who never doubted his competence. (Appx. B App. 021–024).

With respect to the claim of ineffective assistance for not presenting a “culturally attuned defense,” the district court denied it, concluding that the state court’s denial of that claim was not contrary to, or an unreasonable application of, *Strickland v. Washington*, 466 U.S. 668 (1984), and because the claim conflicted with the state court’s factual findings. (Appx. B App. 119). The court noted that a culturally attuned defense “did not square easily with either petitioner’s repeated representations that he had no memory of the critical portions of the incident” or his later statements that his reaction was “borne out of his years of incarceration surrounded by inmates and specifically *not* related to his Native American background or family history of abuse.” (Appx. B App. 123–24). The court also noted petitioner’s reluctance to delve into his personal background and the fact that he was “heavily invested” in an insanity defense. (Appx. B App. 123–24). Finally, the district court noted that a cultural defense was “wrought with risks and problems,” and that even petitioner’s own post-conviction expert suggested that its value was not as a defense in the *guilt* phase but as mitigation evidence in the *penalty* phase. (Appx. B App. App. 123–24). The district court granted a certificate of appealability on that issue (Appx. B App. 169), and petitioner appealed.

The Ninth Circuit affirmed. Applying the standard from the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), 28 U.S.C. §

2254, that court held that the state court’s rejection of petitioner’s ineffective-assistance-of-counsel claim was neither contrary to nor an unreasonable application of *Strickland*. (Appx. A App. 001–03). That court also denied petitioner’s request to expand the certificate of appealability to include the competency issue, stating that the claim was procedurally defaulted and that petitioner had presented no argument to the contrary. (Appx. A App. 003).

Petitioner now asks this Court to allow certiorari to address both of those issues. For the reasons explained below, this Court should decline to do so.

REASONS FOR DENYING THE PETITION

As explained below, this Court should deny certiorari on both of the issues that petitioner raises. First, this case presents a poor vehicle to address the procedural-default issue because the district court correctly ruled, in the alternative, that the underlying competence claim also failed on its merits. Second, with respect to petitioner’s request for summary reversal on the ineffective-assistance claim, his arguments fall well short of justifying that extraordinary remedy.

A. This is a poor vehicle to address the procedural-default question because the district court also ruled, alternatively, on the merits.

Petitioner’s first question presented pertains to the application of the “procedural default” rule in federal habeas corpus cases. That rule provides that a habeas petitioner is required to exhaust a federal constitutional claim in the

state courts at all levels that state law permits, giving the state “the opportunity to pass upon and correct” alleged constitutional violations. *Baldwin v. Reese*, 541 U.S. 27, 29 (2004) (quoting *Duncan v. Henry*, 513 U.S. 364, 365 (1995 (per curiam))). If the petitioner fails to comply with that requirement, and if the state’s rules would thereafter prohibit the petitioner from raising the claim in state court, then the claim is procedurally defaulted. *Coleman v. Thompson*, 501 U.S. 722, 750 n.1 (1991). A federal court cannot address a procedurally defaulted claim unless the petitioner shows both “cause” for failing to present the claim and “actual prejudice” resulting from that failure. *Id.* at 750.

According to petitioner, this Court should address the question whether it should adopt another exception to the procedural-default rule—that procedural default cannot bar a claim that the petitioner was incompetent to stand trial in the underlying criminal court. He points out that several circuits have disagreed about the application of that rule. (Pet. 11–15). And he contends that the question is important for this Court because of the “large number of litigants” who are affected by the circuit split. (Pet. 15).

But this case presents a poor vehicle for resolving a dispute about the procedural-default rule, because that rule was not ultimately dispositive in this case. To be sure, the district court initially ruled that petitioner had procedurally defaulted his incompetence claim; and the Ninth Circuit declined

to expand the certificate of appealability to address the competence issue due to that default. But the district court nonetheless addressed the competence issue on its merits, concluding that the record amply demonstrated that the state court's determination about petitioner's competence was correct. And indeed, the record reveals no genuine question about petitioner's competence before or during his trial, particularly given the modest standard for competency and the deferential review of the state court's finding of competence.

Initially, the standard for competency is a modest one. *See Godinez v. Moran*, 509 U.S. 389, 402 (1993) (requirement of competence has a “modest aim”). A person is not incompetent merely because they may have been diagnosed with a mental-health issue. Rather, competence requires only that the criminal defendant have “sufficient present ability to consult with [a] lawyer with a reasonable degree of rational understanding” and to have “a rational as well as factual understanding of the proceedings against him.” *Dusky v. United States*, 362 U.S. 402, 402 (1960) (per curiam). In this case, ample evidence demonstrated that petitioner met that low standard.

Specifically, the available contemporaneous evidence—including the opinions of petitioner's own attorneys and their expert—shows that petitioner was competent. *See Medina v. California*, 505 U.S. 437, 450 (1992) (“defense

counsel will often have the best-informed view of the defendant’s ability to participate in the defense”). As detailed earlier, that evidence showed that:

- Dr. Lazere unequivocally told petitioner’s counsel that he was competent.
- None of counsel’s numerous interactions with petitioner prompted them to be concerned that he was incompetent. To the contrary, their observations showed that petitioner understood the proceedings and was invested in the case and his defense.
- The trial-court judge, who had experience with competence issues and had extensive interactions with petitioner, expressly found petitioner to be competent.
- Numerous on-the-record exchanges between petitioner and the trial court showed that he understood the proceedings and was not shy about advocating for his own interests in the case.

That evidence amply supports the state court’s finding—to which a habeas court must defer—that petitioner was competent to stand trial. 28 U.S.C. § 2254(d)(2) and (e)(1); *see, e.g., Thompson v. Keohane*, 516 U.S. 99, 108-10 (1995) (describing competence determination as within category of “factual issues” to which courts afford “presumptive weight”).

Notwithstanding that, petitioner argues that he has an “unusually strong competency claim on the merits” because, by the time of his trial, petitioner had been found to be “insane” at least three times in other criminal proceedings. (Pet. 18). But legal insanity *at the time of criminal activity* does not equate to subsequent *incompetence to stand trial* for that activity. *See Medina*, 505 U.S.

at 448 (discussing distinction between trial competency and insanity at the time of the crime). And indeed, the fact that petitioner’s previous criminal proceedings resulted in convictions (of either guilty or guilty except for insanity) confirms that petitioner *had* been competent to stand trial in those previous cases. *See id.* at 448–49 (“The entry of a plea of not guilty by reason of insanity . . . presupposes that the defendant is competent to stand trial and to enter a plea”).¹⁰

For the foregoing reasons, this case is a poor vehicle in which to resolve a circuit split about the procedural-default rule’s application to competence claims. If petitioner is correct that procedural default in that context is a common problem, this Court will undoubtedly have more opportunities in which to address it. It should do so in a case where the issue would be dispositive, and not in a case like this one, which deserves finality 34 years after the crimes.¹¹

¹⁰ In addition, the record contained evidence that petitioner had been convicted numerous times *without* being found insane; and at least one of convictions occurred after earlier findings of guilty but for insanity. (*See* Dist. Ct. Dkt. 28, Vol. 44, Doc. 28-46 at 77–78; Dist. Ct. Dkt. 28, Vol 62, Doc. 31-3 at 44).

¹¹ The superintendent also notes that a circuit split on the procedural-default issue may well resolve without this Court’s intervention. The circuits to have held that the procedural-default rule does not apply to competence claims were all based on the same underlying decision from 1979. (*See* Pet. 11–12,

Footnote continued...

B. Petitioner has not provided a basis for this Court to summarily vacate based on the ineffective-assistance claim.

With respect to the ineffective-assistance claim based on the absence of a “cultural” defense, petitioner does not contend that this Court should grant certiorari for some compelling reason of nationwide importance, to resolve a circuit split, or to address an important federal question. Instead, he contends only that, if the Court denies certiorari on the first issue, it should summarily reverse on this one. (Pet. 19). Petitioner’s arguments in that respect cannot surmount the “highly deferential” review of the state court’s decision under AEDPA. *See Woodford v. Viscotti*, 537 U.S. 19, 25 (2002) (noting AEDPA’s “highly deferential standard” that requires federal courts to give state-court decisions “the benefit of the doubt”). But at a minimum, this is not one of the rare cases where this Court should grant certiorari based on the alleged “misapplication of a properly stated rule of law.” Sup. Ct. R. 10.

discussing line of cases relying on *Zapata v. Estelle*, 588 F.2d 1017 (5th Cir. 1979)). One of those circuits already appears to have abandoned that rule. *See Lyons v. Luebbers*, 403 F.3d 585, 593 (8th Cir. 2005) (rejecting competency claim as procedurally defaulted before alternatively rejecting the claim on its merits). And every circuit to address the issue within the last 29 years has concluded that no exception to the procedural-default rule applies to competency claims. (See Pet. 13–14, addressing four most recent circuit decisions).

Initially, petitioner is unable to clear the hurdles required to show that the state court's performance ruling was erroneous under the "doubly" deferential AEDPA standard. *Harrington v. Richter*, 562 U.S. 86, 105 (2011) (quoting *Knowles v. Mirzayance*, 556 U.S. 111, 123 (2009)). Under that standard, the state court reasonably determined that trial counsel were not constitutionally deficient by not considering a "cultural" defense based on petitioner's Native American heritage, which the available evidence did not support. As noted, petitioner repeatedly told his attorneys that he did not remember the critical events surrounding his crimes, and he later expressly denied that his Native American history or culture had any bearing on them.

Still, in an attempt to show that the state court's ruling does not deserve deference under AEDPA, petitioner contends that the Oregon Court of Appeals engaged in "revisionist history" by stating that "even if petitioner's trial attorneys had considered a 'culturally attuned' defense, they would have rejected such an approach because it would have been inconsistent with the other evidence and inconsistent with establishing credibility with the jury." (Pet. 19–20). But petitioner impermissibly reads that statement in isolation.

The larger point that the court of appeals was making (and that the state post-conviction court had made before it) was that petitioner's counsel acted reasonably in not considering or pursuing a cultural defense because the

evidence (including petitioner's own statements) conflicted with it, and his attorneys had no other reason to believe it would apply:

[T]hat defense was inconsistent with the petitioner's own deposition testimony regarding his reactions. In his deposition, petitioner claimed that his reaction that resulted in the murder was a function of the years that he had spent in prison. He presented no evidence to show that he had told his attorneys about any connection between his conduct on August 22, 1992, and his Native American heritage. Nor did he present any evidence that his attorneys knew, or should have known, in the exercise of reasonable professional performance that the plight of the Klamath–Modoc tribe had any significant relationship to the conduct for which petitioner was tried and convicted.

Lotches, 306 P.3d at 772. In context, then, the state court's ruling was not an improper *post hoc* explanation for counsel's performance that contradicts the available evidence about counsel's actions. *Harrington*, 562 U.S. at 109. In fact, it was consistent: Counsel was not unreasonable in not considering a defense that did not fit with the available facts and petitioner's own story.

Petitioner implies, however, that his counsel were obligated to learn about some alleged connection between petitioner's crimes and his heritage on their own. (Pet. 21, 22, 23). But the information that petitioner claims that his counsel should have learned would depend on petitioner's *own thought processes* during the event. That would necessarily come from him (or so counsel could reasonably determine). *See Strickland*, 466 U.S. at 691 (“Counsel’s actions are usually based, quite properly, on . . . information supplied by the defendant.”). And as noted, petitioner repeatedly told his

counsel, as well as their expert witness, that he did not remember the event. As such, counsel reasonably pursued the other defenses in which petitioner was personally invested.

Petitioner's prejudice argument likewise does not provide a basis for this Court to summarily reverse. Initially, petitioner assumes that review of that issue would be *de novo* because the last-reasoned state-court decision (the Oregon Court of Appeals' opinion) did not address the prejudice issue. (Pet. 19, 25). But the case on which he relies to support that proposition, *Wiggins v. Smith*, 539 U.S. 510, 534 (2003), does not say that. Instead, this Court in *Wiggins* applied *de novo* review to the prejudice inquiry because "*neither* of the state courts below" had reached that prong of *Strickland*. *Id.* (Emphasis added.) Here, by contrast, the state post-conviction trial court *did* alternatively resolve petitioner's claim on prejudice grounds. (1-ER-93; "In addition, with respect to each of petitioner's claims, petitioner did not prove that he suffered prejudice as a result of his counsel's representation"). The fact that the Oregon Court of Appeals did not *need* to address that alternative ground should not render AEDPA inapplicable to the state post-conviction trial court's express ruling.

Regardless, petitioner could not establish prejudice for reasons bound up with Oregon's substantive criminal law: Under Oregon law, a person's personal history is not relevant to a claim of self-defense. *See, e.g., State of*

Oregon v. Strickland, 463 P.3d 537, 539 (Or. App.), *rev. denied*, 470 P.3d 375 (Or. 2020), *cert. denied*, 529 U.S. 1310 (2021) (the standard is measured from the perspective of a person of ordinary intelligence and understanding, not accounting for “the unique history or mental characteristics of any particular defendant” (quotation omitted)). And to the extent that he contends that counsel could have raised an “imperfect” self-defense (Pet. 25), Oregon does not recognize that defense, as self-defense must be based on a *reasonable* belief. See Or. Rev. Stat. § 161.209 (requiring the defendant to have “reasonably believed” that another person was using, or was about to use, unlawful physical force); Or. Rev. Stat. § 161.219(1)–(3) (same, with respect to use of deadly force).¹²

Finally, petitioner’s prejudice argument also fails because it depends on evidence that the state court excluded and that is not properly before this Court. Petitioner contends that his “strongest” evidence of prejudice comes from an affidavit from a California attorney, who described his defense of a defendant in that state. (Pet. 25). But the post-conviction trial court excluded that exhibit, and petitioner did not challenge that ruling on appeal. (18-ER-5086, 5088).

¹² To the extent that petitioner contends that counsel could have raised an “extreme emotional disturbance” defense (Pet. 24), that defense could not have applied to his aggravated-murder charges. *State of Oregon v. Moore*, 927 P.2d 1073, 1084 (Or. 1996).

Thus, it is not before this Court. *Cullen v. Pinholster*, 563 U.S. 170, 181–82 (2011). In any event, the fact that a particular cultural defense may have been available or successful in California has no bearing on whether it would be available or successful in Oregon.

For any of those reasons, this Court should decline petitioner’s invitation to summarily reverse the decision in this case.

CONCLUSION

For the foregoing reasons, this Court should deny the petition for certiorari.

Respectfully submitted,

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