IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

LADON ANDRE STEPHENS,

Petitioner,

v.

JOHN MYRICK,

Respondent.

Case No. 2:14-cv-01808-AC

FINDINGS AND RECOMMENDATION

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ACOSTA, Magistrate Judge.

Petitioner is currently in the custody of the Oregon Department of Corrections. He brings this habeas corpus proceeding pursuant to 28 U.S.C. § 2254. For the reasons set forth below, the Petition for Writ of Habeas Corpus (ECF No. 2) should be DENIED, and judgment should be entered dismissing this action.

BACKGROUND

On April 21, 2004, a Multnomah County jury convicted Petitioner of nine counts of Aggravated Murder, three counts of Sodomy in the First Degree, six counts of Rape in the First Degree, one count of Kidnapping in the First Degree, six counts of Attempted Aggravated Murder, three counts of Burglary in the First Degree, one count of Assault in the Fourth Degree, and one count of Unlawful Sexual Penetration in the First Degree. Resp't Exs. (ECF No. 16), Resp't Ex. 101. The trial court sentenced him to a total of 180 years of imprisonment, followed by a term of life in prison without parole, followed by five additional consecutive 30-year indeterminate maximum terms. *Id.* Petitioner's convictions stem from the rape of four women, and the rape and murder of a fifth.

Petitioner directly appealed his convictions, assigning eighteen trial court errors in a brief prepared by appointed counsel, and an additional two errors in a *pro se* supplemental brief. Resp't Exs. 103, 104. The Oregon Court of Appeals affirmed without opinion, and the Oregon Supreme Court denied review. *State v. Stephens*, 223 Or. App. 644 (2008), *rev. denied*, 346 Or. 11 (2009).

Petitioner then sought state post-conviction relief ("PCR"). Resp't Ex. 111. Following an evidentiary hearing, the PCR trial court denied relief. Resp't Ex. 139, 140. The Oregon Court of

Appeals affirmed without opinion, and the Oregon Supreme Court denied review. *Stephens v. Franke*, 259 Or. App. 306 (2013), *rev. denied*, 355 Or. 317 (2014).

On November 13, 2013, Petitioner filed his Petition for Writ of Habeas Corpus, raising the following grounds for relief:

> **Ground One**: Ineffective Assistance of Counsel
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> **Supporting Facts**: Trial attorney was ineffective because he told jurors in closing arguments that this was just a case of "rough sex" even though allege[d] victim's nails had another male[']s DNA underneath them. *Victim testified she fought her attacker for 5 minutes, and scratched her attacker so hard she broke her nail. Police recovered the broken nail and ran test and it did not match defendant. Trial attorney knew this and chose to make false admissions w[h]ich caused defendant not to get a fair trial.*
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> **Ground Two**: Ineffective Assistance of Counsel
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> **Supporting Facts**: Appeal [*sic*] attorney was ineffective for not appealing [the trial court's] ruling on defendant's clergy-client penitent motion. Even though Oregon law supported defendant[']s claims. Trial attorney was ineffective for not challenging forged documents being allowed as evidence. Did not file motion, or challenge, or object.
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> **Ground Three**: Ineffective Assistance of Counsel
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> **Supporting Facts**: Trial attorney was ineffective for not filing motion to have charges dismissed for lack of *Miranda* warnings. Trial attorney was ineffective for not challenging photos produced at trial, where defendant was made to undress without any *Miranda* warnings being read. Defendant was questioned during this process and statements were used at trial.
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> **Ground Four**: Ineffective Assistance of Counsel
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> **Supporting Facts**: Trial court [*sic*] was ineffective by not objecting to evidence not supporting verdict. Trial attorney was ineffective for not objecting to judge speaking to family, and asking them to get defendant to take plea bargain or defendant will spend the rest of his life in a 6 x 9 cell. Trial attorney was ineffective for not challenging 60 day waiver.

Pet. (ECF No. 2) at 6-7 (emphasis added).

In his supporting brief, Petitioner presents argument only on a portion of ground one, and on ground two. Pet'r's Br. in Supp. (ECF No. 36). Respondent urges this court to deny relief on all claims because Petitioner fails to meet his burden of proof. Resp't Resp. (ECF No. 53) at 1.

DISCUSSION

I. Un-argued Claims

Petitioner does not provide argument in support of the italicized portion of ground one, above, or on grounds three or four in his Petition, and he makes no attempt to refute Respondent's argument that he is not entitled to habeas relief on these claims. Accordingly, Petitioner has failed to sustain his burden of demonstrating he is entitled to relief on his unargued claims. *See Lampert v. Blodgett*, 393 F. 3d 943, 970 n. 16 (9th Cir. 2004) (petitioner bears burden of proving his case); *Davis v. Woodford*, 384 F. 3d 628, 638 (9th Cir. 2003) (same). Nevertheless, the court has reviewed Petitioner's unargued claims and is satisfied that they do not entitle Petitioner to relief.

II. Relief on the Merits – Grounds One and Two

A. Legal Standards

Pursuant to 28 U.S.C. § 2254(d), a petition for writ of habeas corpus filed by a state prisoner shall not be granted with respect to any claim that was adjudicated on the merits in state court, unless the adjudication resulted in a decision that was "contrary to, or involved an unreasonable application of, clearly established Federal law," or "resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented." 28 U.S.C. § 2254(d)(1) & (2). A state court unreasonably applies clearly established federal law if its decision is "so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement." *Harrington*

v. Richter, 562 U.S. 86, 103 (2011). "Clearly established Federal law" refers to the holdings, as opposed to the dicta, of the Supreme Court. *White v. Woodall*, 134 S.Ct. 1697, 1702 (2014); *Woods v. Donald*, 135 S. Ct. 1372, 1376 (2015) (*per curiam*). "Factual determinations by state courts are presumed correct absent clear and convincing evidence to the contrary...." *Miller-El v. Cockrell*, 537 U.S. 322, 340 (2003); 28 U.S.C. § 2254(e)(1) (same).

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

B. Analysis

1. Ground One: Ineffective Assistance of Trial Counsel

In ground one, Petitioner alleges his Sixth Amendment right to effective assistance was violated by the following portion of trial counsel's closing argument regarding L.B., the only victim who knew Petitioner[1] prior to being attacked:

> Now, this lady says, "Gee, I saw Mr. Stephens there that night and he did all of these things to me, including he choked me till I passed out." And so the State charges the Attempted Aggravated Murder. Well, had there really been an intent to kill this lady, it could have been done really easily. There was no intent or attempt to kill this lady. *If* it was sex between these two, rough? Yeah, maybe so. Maybe an argument had ensued afterward. I don't know, but it certainly didn't come down quite the way the State says it came down. Therefore, there is reasonable doubt to believe this happened just in the way the State said it happened.

[1] L.B. testified that she knew Petitioner because he was dating her cousin. Trial Tr. at 1956. The other four victims did not know Petitioner.

Trial Tr. at 2548 (emphasis added). According to Petitioner, this was a concession of the elements of rape, burglary, and assault as to L.B., in contravention of Petitioner's not guilty plea and his statement to police that he had not visited L.B.'s apartment for several weeks prior to the night she was raped. Pet'r's Br. in Supp. at 14-20. This court disagrees.

"[C]ounsel has wide latitude in deciding how best to represent a client, and deference to counsel's tactical decisions in his closing presentation is particularly important because of the broad range of legitimate defense strategy at that stage." *Yarborough v. Gentry*, 540 U.S. 1, 5-6 (2003). "Judicial review of a defense attorney's summation is therefore highly deferential - and doubly deferential when it is conducted through the lens of federal habeas." *Id.*

This court agrees with Respondent that the PCR court was not unreasonable when it determined that trial counsel was adequate. Resp't Resp. at 18; Resp't Ex. 140 at 2. Counsel did not concede that Petitioner broke into L.B.'s house with the intent to rape and murder her. Instead, he offered the jury an alternative theory about how Petitioner sustained injuries L.B. reportedly inflicted upon him in self-defense, and why L.B.'s blood was on his shorts. To be sure, this alternative theory called into question Petitioner's report about when he had last entered L.B.'s apartment. However, to address the physical evidence and raise doubts about L.B.'s credibility, counsel had to offer the jury an explanation for any contact Petitioner had with L.B. the night before he was arrested. Suggesting that L.B. might have initially consented to Petitioner's presence in her home was a reasonable way to accomplish this goal.

Petitioner argues counsel should have instead focused on L.B.'s motive to frame Petitioner, because she knew Petitioner was cheating on her cousin. Pet'r's Reply at 2. However, this argument overlooks uncontroverted physical evidence: L.B. had the signs and symptoms of someone who had been severely choked, her fingernail had been ripped off, her blood was later

discovered on Petitioner's shorts, and Petitioner sustained injuries L.B. reportedly inflicted upon him in self-defense. In sum, Petitioner fails to establish that trial counsel's performance fell below an objective standard of reasonableness.

Petitioner further argues that the court should presume prejudice, or, in the alternative, find prejudice based upon other alleged examples of ineffective assistance during the course of counsel's representation. Pet'r's Br. in Supp. at 18. This argument is not supported by the facts or the law. *See, e.g., United State v. Cronic*, 466 U.S. 648, 659 (1984) (prejudice is presumed where counsel "entirely fails to subject the prosecution's case to meaningful adversarial testing").

In sum, Petitioner has failed to demonstrate that the PCR court's determination that trial counsel was not ineffective and that Petitioner was not prejudiced was based upon an unreasonable determination of the facts, or that it was contrary to, or an unreasonable application of, clearly established law. *See* 28 U.S.C. § 2254(d)(1) & (2). Consequently, Petitioner is not entitled to habeas corpus relief on the claim alleged in ground one.

2. Ground Two: Ineffective Assistance of Appellate Counsel

In ground two, Petitioner claims appellate counsel was ineffective in failing to raise a challenge to the trial court's denial of his "clergy-client penitent motion." Pet. at 6. The trial court conducted a hearing on Petitioner's motion to suppress a conversation in which he told his mother and brother that he wanted to avoid providing his parole officer with a DNA sample because he "killed somebody" or "hurt them badly." Resp't Ex. 126; Trial Tr. at 312-573. The trial court concluded that although Petitioner's brother may qualify as a clergyman, Petitioner's statements did not qualify as "confidential communications" under Oregon Evidence Code (OEC) 506. Trial Tr. at 566-69.

Appellate counsel explained in an affidavit to the PCR trial court that he elected not to assign error to this ruling because he did not believe doing so would be worthwhile. Resp't Ex. 123. Appellate counsel averred that he explained this to Petitioner at the time of the appeal, and advised him how to raise the issue *pro se* if he chose. Resp't Ex. 123 at 1-2. Ultimately, Petitioner submitted a *pro se* supplemental brief to the Oregon Court of Appeals that did not include this issue. Resp't Ex. 104.

The PCR trial court found:

> "Appellate attorney filed all issues he felt relevant. Reasonable decisions. Att. gave petitioner more than enough info/ help to raise in *pro se* brief. Petitioner never included claim. No inadequacy, no prejudice."
>
> "Priest/ penitent issue litigated + preserved over course of 1+ day."

Resp. Ex. 140 at 1-2.

To prevail on a claim of ineffective assistance of appellate counsel, a habeas petitioner must show appellate counsel failed to raise claims that were clearly stronger than the claims presented. *Smith v. Robbins*, 528 U.S. 259, 288 (2000) (citing *Jones v. Barnes*, 463 U.S. 745 (1983)). He must also demonstrate prejudice, or a reasonable probability that but-for appellate counsel's failure "he would have prevailed on appeal." *Smith,* 528 U.S. at 286. Petitioner has not met either of these requirements.

The clergy-penitent claim was not "clearly stronger" than the claims appellate counsel raised challenging DNA evidence, the use of Petitioner's writings, and the upward departure sentences. Resp't Ex. 103. Nor is there a reasonable probability Petitioner would have prevailed on this claim on appeal. To the contrary, based on the evidence, the trial court may well have been generous in finding Petitioner's brother qualified as a clergyman under the privilege.

Although an Oregon appellate court has yet to construe its limits, under OEC 506(1)(b)[2] a "member of the clergy" is "a minister of any church . . . who in the course of the discipline or practice of that church . . . is authorized or accustomed to hearing confidential communications . . . ." Petitioner's brother was a volunteer youth pastor with no formal theological education or training, who had been instructed by the church minister to refer all confidential matters to him. In other words, Petitioner's brother was expressly *not* authorized to hear confidential communications. *Cf. In re Roman Catholic Archbishop of Portland in Oregon,* 335 B.R. 814 (Bankr. D. Or., 2005) (finding clergy-penitent privilege protects "confidential disclosures to religious practitioners") (internal citations omitted).

Moreover, Petitioner's argument that his mother "helped to arrange the meeting" between Petitioner and his brother, and "encouraged [Petitioner] to confide in [his brother]" is not supported by the record. Pet'r's Br. in Supp. at 23. Instead, as the trial court found, Petitioner first called the house his mother and brother lived in asking to speak to his brother, then came to the house and eventually made his incriminating statements while his mother and brother were seated on their living room couch. Trial Tr. 559-62. Petitioner's mother did not "arrange" this encounter or even know what Petitioner came to her house to discuss, such that her presence was needed to further "the purpose of the communication" as required by OEC 506 (1)(a)[3].

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[2] Under OEC 506(1)(b), "'Member of the clergy' means a minister of any church, religious denomination or organization or accredited Christian Science practitioner who in the course of the discipline or practice of that church, denomination or organization is authorized or accustomed to hearing confidential communications and, under the discipline or tenets of that church, denomination or organization, has a duty to keep such communications secret."

[3] Under OEC 506(1)(a), "'Confidential communication' means a communication made privately and not intended for further disclosure except to other persons present in furtherance of the purpose of the communication."

In sum, Petitioner has failed to demonstrate that the PCR trial court's determination that appellate counsel was not ineffective and that Petitioner was not prejudiced was based upon an unreasonable determination of the facts, or that it was contrary to, or an unreasonable application of, clearly established law. *See* 28 U.S.C. § 2254(d)(1) &(2). Consequently, Petitioner is not entitled to habeas corpus relief on the claim alleged in ground two.

RECOMMENDATION

Based on the foregoing, Petitioner's Petition for Writ of Habeas Corpus (ECF No. 2) should be DENIED, and judgment should enter DISMISSING this case. In addition, the district judge should DENY a certificate of appealability, because Petitioner has not made a substantial showing of the denial of a constitutional right pursuant to 28 U.S.C. § 2253(c)(2).

SCHEDULING ORDER

The Findings and Recommendations will be referred to a district judge. Objections, if any, are due fourteen (14) days from service of the Findings and Recommendation. If no objections are filed, then the Findings and Recommendation will go under advisement on that date. If objections are filed, then a response is due fourteen (14) days after being served with a copy of the objections. When the response is due or filed, whichever date is earlier, the Findings and Recommendation will go under advisement.

NOTICE

A party's failure to timely file objections to any of these findings will be considered a waiver of that party's right to *de novo* consideration of the factual issues addressed herein and will constitute a waiver of the party's right to review of the findings of fact in any order or judgment entered by a district judge. These Findings and Recommendation are not immediately

appealable to the Ninth Circuit Court of Appeals. Any notice of appeal pursuant to Rule 4(a)(1) of the Federal Rules of Appellate Procedure should not be filed until entry of judgment.

DATED this 18th day of January, 2018.

John Acosta
United States Magistrate Judge