IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

CARLOS DEWAYNE NASH,

Petitioner,

v.

MARK NOOTH,

Respondent.

Case No. 2:14-cv-02002-MA

OPINION AND ORDER

MARSH, Judge.

Petitioner, an inmate currently confined at the Oregon State Penitentiary, brings this habeas corpus proceeding pursuant to 28 U.S.C. § 2254. For the reasons set forth below, this Court denies Petitioner's Second Amended Petition for Writ of Habeas Corpus (ECF No. 60).

BACKGROUND

On November 7, 2007, a Multnomah County jury convicted Petitioner of fifteen counts of Robbery in the First Degree with a Firearm, twenty-eight counts of Robbery in the Second Degree, two counts of Burglary in the First Degree with a Firearm, three counts of Sexual Abuse in the First Degree, two counts of Felon in Possession of a Firearm, and one count of Possession of a Prohibited Firearm stemming from three armed robberies, a traffic stop, and a search of his residence. Resp't Ex. (ECF No. 19) 101; Tr. (ECF No. 20) at 1107-15; Pet'r's Br. in Supp. of

Second Am. Pet. (ECF No. 56) at 4. The Court imposed consecutive sentences totaling 600 months of imprisonment and forty-five months post-prison supervision. Resp't Ex. 101; Tr. at 1153-37.

Petitioner timely appealed from his convictions. Resp't Exs. 103-110. The Oregon Court of Appeals affirmed without opinion (*State v. Nash*, 236 Or. App. 478 (2010)), and the Oregon Supreme Court denied review (349 Or. 370 (2010)). The appellate judgment issued on January 31, 2011. Resp't Ex. 110. On May 3, 2011, Petitioner filed a petition for state post-conviction relief (PCR). Resp't Ex. 142 at 13. The PCR court denied relief, the Oregon Court of Appeals affirmed without opinion (*Nash v. Nooth*, 264 Or. App. 783 (2014)), and the Oregon Supreme Court denied review (356 Or. 400 (2014)). Resp't Exs. 141-146. The appellate judgment issued on February 5, 2015. *Nash v. Nooth*, No. S062565 (Oregon Supreme Court docket).

In the interim, on or about December 10, 2014, Petitioner filed his *pro* se Petition for Writ of Habeas Corpus alleging that he received ineffective assistance of trial and appellate counsel, and that the trial court violated his right to due process and equal protection in several particulars during the course of the trial. Habeas Pet. (ECF No. 1) at 6-7. On February 19, 2015, this Court granted Respondent's motion to dismiss the Petition and deem it refiled as of February 6, 2015, because Petitioner filed the Petition before the appellate mandate issued in the state PCR proceeding. Resp't Mot. to Dismiss and Deem Refiled (ECF No. 11), Order (ECF No. 12).

On June 8, 2015, with the assistance of appointed counsel, Petitioner filed an Amended Petition for Writ of Habeas Corpus dropping his trial court error claims and alleging only that trial counsel was ineffective for failing to "respond adequately when jurors witnessed [P]etitioner being transported in handcuffs and shackles during trial and the jury then discussed [P]etitioner's shackling," and that appellate counsel was ineffective for failing to raise shackling-related claims

of error. Am. Habeas Pet. (ECF No. 24) at 3-4. On February 19, 2016, this Court granted Petitioner's motion to terminate appointed counsel. Order (ECF No. 39). Several months later, this Court appointed alternate counsel and Petitioner filed a Second Amended Petition for Writ of Habeas Corpus reasserting his ineffective assistance of counsel claims and adding two claims of trial court error for admitting evidence obtained during an unconstitutional vehicle inventory search and prejudicial misjoinder. Order (ECF No. 46), Second Am. Habeas Pet. at 4-5.

Respondent argues that the two new claims raised in the Second Amended Petition are untimely and the Fourth Amendment claim is not cognizable on habeas review. Resp't Resp. to Second Am. Pet. (ECF No. 62) at 5-7. Additionally, Respondent argues that habeas relief should be denied on Petitioner's ineffective assistance claims because the PCR court's rejection of the claims is neither contrary to, nor an unreasonable application of, clearly established federal law. Resp't Resp. to Am. Pet. (ECF No. 32) at 8-14.

DISCUSSION

I. Statute of Limitations – Failure to Suppress/Prejudicial Misjoinder

Respondent moves the Court to deny habeas relief on the basis that Petitioner's claims of trial court error contained in his Second Amended Petition are untimely and do not relate back to his First Amended Petition. Pursuant to 28 U.S.C. § 2244(d)(1), a one-year limitation period applies to a state prisoner's federal habeas petition. A habeas petition "may be amended or supplemented as provided in the rules of procedure applicable to civil actions." 28 U.S.C. § 2242. Pursuant to Rule 15(c) of the Federal Rules of Civil Procedure, a petitioner may amend his petition to add an otherwise untimely claim if the new claim relates back to a timely-filed claim. *Alfaro v. Johnson*, No. 15-55337-CFC, 2017 WL 2989742, at *5-*6 (9th Cir. 2017). An amendment "relates back to a timely-filed claim when the newly-asserted claim 'arose out of the

conduct, transaction, or occurrence set out' in the previous filing." *Id.* at *5 (*citing* Fed. R. Civ. P. 15(c)(1)(B)). Habeas claims arise out of the same "conduct, transaction, or occurrence," if they "arise from the same core facts as the timely filed claims, [but] not when the new claims depend upon events separate in both time and type from the originally raised episodes." *Mayle v. Felix*, 545 U.S. 644, 657 (2005).

It is undisputed that Petitioner timely filed both his original *pro* se Petition and his First Amended Petition. Respondent argues that the new claims alleging trial court error contained in Petitioner's Second Amended Petition are untimely because they do not relate back to any of the claims in his First Amended Petition. Resp't Resp. (ECF No. 62) at 1-2, 5. Respondent does not address, however, whether the new claims asserted in the Second Amended Petition relate back to claims raised in the original *pro* se Petition.

Based on this Court's review of the relevant case law, it appears that some courts have simply assumed that a second amended petition may relate back to any previous petition which contains a timely claim. *See e.g. Alfaro*, 2017 WL 2989742, at *5-*6 (holding claim was untimely because it did not relate back to any timely filed claims in original or amended petitions); *Law v. Nooth*, No. 3:11-cv-00825-CL, 2015 WL 4603348, at *2 (D. Or. July 29, 2015) (examining all previous petitions for relation back); *Garcia v. Johnson*, No. 13-6864-JFW (FFM), 2016 WL 3751953, at *3-*4 (C.D. Cal. June 16, 2016) (concluding claim was untimely because it did not relate back to either the original or amended petitions). In *Cole v. Allison*, however, the Eastern District of California specifically addressed whether claims raised in a *second* amended petition, but omitted in the *amended* petition, may relate back to timely claims in the *original* petition. The court held:

> [C]ounsel for respondent argues that the first and third claims of petitioner's second amended petition cannot relate back to his second, third, or fourth claims in his original petition because he abandoned those claims when he filed his amended petition asserting only one claim regarding self-incrimination. This court disagrees. As the Ninth Circuit has recognized, Abandonment has a specific meaning in the law: The relinquishment of a right or interest with the intention of never again claiming it. It is not at all clear that the pro se petitioner in this case intended to abandon the claims in his original petition when he filed his amended petition.

Cole, No. S-09-2549 LKK DAD P., 2011 WL 703665, at *5 (E.D. Cal. Feb. 18, 2011) (internal quotations and citations omitted); *see also West v. Dickinson*, No. 2:09-cv-3147 KJM DAD P., 2012 WL 5308061, at *5-*6 (E.D. Cal. Oct. 29, 2012) (holding that claims in a second amended petition relate back to the original petition because there was no evidence petitioner intentionally abandoned the claims and the case remained active).

Here, there is no evidence Petitioner intentionally abandoned the claims when he filed the intervening Amended Petition. On the contrary, after appointed counsel filed the Amended Petition, Petitioner moved to terminate counsel on the basis that he omitted claims Petitioner sought to assert. *See Pro Se* Mot. for Disqualification of Counsel (ECF No. 38); *see also* Pet'r's Mem. in Supp. of Mot. to Am. (ECF No. 55). Accordingly, to the extent that the issue of abandonment is relevant to the relation-back doctrine, there is no evidence that Petitioner intended to abandon the claims in his *pro se* original Petition.

Further, the new grounds raised in Petitioner's Second Amended Petition—alleging that the trial court erred in admitting evidence based on an unconstitutional vehicle inventory search and allowing a prejudicial misjoinder—relate back to Ground Two (h) and (k) in the original *pro se* Petition (alleging that the trial court erred in failing to grant motion to sever and trial counsel rendered ineffective assistance by failing to properly argue the motion to suppress) because they arise out of the same core facts. *See Nguyen v. Curry*, 736 F.3d 1287, 1297 (9th Cir. 2013)

(holding that ineffective assistance of counsel claim for failure to raise double jeopardy claim on appeal related back to double jeopardy claim); *Martinez v. McGrath*, 391 F. App'x 596, 597 (9th Cir. 2010) (holding that ineffective assistance of counsel claim for failure to investigate juror misconduct related back to juror misconduct claim); *but see Rodriguez-Caro v. Mills*, No. 3:09-cv-00133-ST, 2011 WL 1630790, at *2 (D. Or. Feb. 25, 2011) (holding that due process violation by trial court at sentencing was not sufficiently similar in time and type to claim that counsel rendered ineffective assistance at sentencing). Accordingly, the new claims raised in Petitioner's Second Amended Petition are timely.

II. Procedural Default - Misjoinder

Generally, a state prisoner must exhaust all available state court remedies either on direct appeal or through collateral proceedings before a federal court may consider granting habeas corpus relief. *See* 28 U.S.C. § 2254(b)(1)(A). In his Answer to the Second Amended Petition, Respondent raised the defense of procedural default. *See* Answer (ECF No. 63) at 2. Petitioner concedes that he procedurally defaulted his misjoinder claim by failing to (1) assign it as a trial court error on direct appeal; and/or (2) raise it as a trial court error in the state post-conviction proceeding. *See* Pet'r's Br. in Supp. of Second Am. Pet. at 14. Accordingly, habeas relief is precluded unless Petitioner can demonstrate (1) cause and prejudice to excuse his default; or (2) that the failure to consider the defaulted claim will result in a fundamental miscarriage of justice. *See Coleman v. Thompson*, 501 U.S. 722, 750 (1991).

Petitioner collapses these tests, arguing that cause and prejudice exist because "counsel's failure to advance the claim resulted in a clear miscarriage of justice." Pet'r's Br. in Supp. of Second Am. Pet. at 15. Petitioner does not specify whether he is faulting appellate counsel's failure to raise the issue on direct appeal or PCR counsel's failure to raise it as a trial court error

in the state PCR proceeding. In either case, Petitioner has failed to demonstrate cause and prejudice sufficient to excuse his procedural default for the following reasons.

First, in order for ineffective assistance of appellate counsel on direct appeal to constitute cause to excuse the procedural default of a trial court error, the ineffective assistance of appellate counsel claim itself must be exhausted in state court. *See Edwards v. Carpenter*, 529 U.S. 446, 451-52 (2000) (claim of ineffective assistance of counsel must be presented to the state courts before it may be used to establish cause for a procedural default); *Graves v. Swarthout*, 471 F. App'x 768, 772 (9th Cir. 2012) (same). It was not exhausted in this case. *See* Resp't Ex's 111, 142, 144.

Second, Petitioner cannot excuse the procedural default of his misjoinder claim on the basis of ineffective assistance of PCR counsel because (1) he has no constitutional right to effective assistance of counsel in a state collateral proceeding; and (2) to the extent the Supreme Court recognized in *Martinez v. Ryan*, that ineffective assistance of PCR counsel may be cause to excuse a procedural default, it can only excuse a claim of ineffective assistance of trial counsel, not a claim of trial court error. *Martinez*, 566 U.S. 1, 9 (2012); s*ee also Davila v. David*, 137 S. Ct. 2058, 2067 (June 26, 2017) (declining to extend *Martinez* beyond its narrow scope).

Finally, Petitioner has not otherwise demonstrated that the failure to consider his misjoinder claim would result in a miscarriage of justice. Accordingly, habeas relief is precluded. Nevertheless, this Court elects to address the merits of all claims presented in Petitioner's Second Amended Petition. 28 U.S.C. § 2254(b)(2) ("An application for a writ of habeas corpus may be denied on the merits, notwithstanding the failure of the applicant to exhaust the remedies available in the courts of the State."); s*ee also Bell v. Cone*, 543 U.S. 447, 451 n.3 (2005) (same).

III. Merits

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*). A habeas court may look to "Ninth Circuit case law as persuasive authority for purposes of determining whether a particular state court decision is an unreasonable application of Supreme Court law. *Davis v. Woodford*, 384 F.3d 628, 638 (9th Cir. 2003). Petitioner has the burden to prove habeas relief is warranted. *Lambert v. Blodgett*, 393 F.3d 943, 970 n.16 (9th Cir. 2004).

A. Fourth Amendment Exclusionary Rule

Petitioner alleges that "[t]he trial court erred in admitting evidence obtained in violation of the 4th Amendment of the U.S. Constitution where the arresting officers conducted an unconstitutional inventory search of a vehicle [Petitioner] was driving." Second Am. Pet. at 10.

It is well settled that habeas relief is not available to redress violations of the Fourth Amendment exclusionary rule if the petitioner was afforded a "full and fair opportunity to

litigate" the Fourth Amendment issue in state courts. *Stone v. Powell*, 428 U.S. 465, 494 (1976). This Court reviews the record of the state court proceedings in order to make this determination. *Ponce v. Cupp,* 735 F.2d 333, 335 (9th Cir. 1984). "The relevant inquiry is whether petitioner had the opportunity to litigate his claim, not whether he did in fact do so or even whether the claim was correctly decided." *Ortiz–Sandoval v. Gomez,* 81 F.3d 891, 899 (9th Cir. 1996).

The record reveals that trial counsel moved to suppress the evidence police seized during the inventory search of the van Petitioner was driving the night he was apprehended, which included a ski mask, a black hat and black gloves, a sawed-off shotgun, and a duffle bag containing two handguns, a silencer, and a crowbar. The trial court conducted a hearing, took testimony from the arresting officer, and entertained arguments from both the district attorney and Petitioner's counsel. Tr. at 178-211. The trial court denied the motion, finding that the search was legal, regardless of whether the arresting officer categorized it as a "search incident to arrest" or an "inventory search." *Id.* at 229. Petitioner has failed to demonstrate that he did not receive a full and fair opportunity to litigate his claim on the merits. Accordingly, he is barred from re-litigating it here.

B. Fifth Amendment Impermissible Joinder

Petitioner alleges that "[t]he trial court erred in allowing a prejudicial spillover from the misjoinder of five separate and distinct incidents that took place between March 2006 and January 2007 where the incidents were not only separated by a number of weeks, but were markedly different in character." Second Am. Pet. at 10. Petitioner argues "the sexual abuse charges had a substantial and injurious effect on the jury's perceptions as they deliberated charges from unrelated incidents." Pet'r's Br. in Supp. of Second Am. Pet. at 17. Petitioner

argues that the misjoinder violated his constitutional rights to a fair trial and due process. *Id.* at 16-17.

As noted above, pursuant to 28 U.S.C. § 2254(d)(1), a state prisoner is not entitled to habeas relief unless adjudication of the constitutional claim resulted in a decision that was contrary to, or involved an unreasonable application of clearly established law as determined by the Supreme Court. There is no clearly established Supreme Court precedent dictating when a state court must sever criminal charges relating to separate incidents. *Martinez v. Yates*, 585 F. App'x 460, 460-61 (9th Cir. 2014); *Collins v. Uribe,* 564 F. App'x 343, 343 (9th Cir. 2014); *Hollie v. Hedgpeth*, 456 F. App'x 685, *1 (9th Cir. 2011); *Northup v. Taylor*, 2016 WL 6915320, at *5 (D. Or. Aug. 8, 2016). Accordingly, habeas relief is not warranted on Petitioner's claim that the trial court violated his right to due process by permitting a prejudicial joinder of counts.

Petitioner relies upon a number of older Ninth Circuit cases wherein the court recognized a due process right against improper joinder. *See e.g. Featherstone v. Estelle*, 948 F.2d 1497 (9th Cir. 1991) (finding the petitioner was not deprived of a fair trial where the trial court refused to sever charges even though evidence of a similar prior offense was only admissible as to one of the two charges); *Davis v. Woodford*, 384 F.3d 628 (9th Cir. 2004) (finding the trial court's denial of petitioner's motion to sever capital offense from non-capital charges did not violate his due process rights where evidence of identity and intent were cross-admissible, and weight of evidence as to both counts was roughly equivalent); *Sandoval v. Calderon*, 241 F.3d 765 (9th Cir. 2000) (finding the petitioner was not prejudiced by joinder of murder and attempted murder charges relating to different victims where some evidence was cross-admissible, and evidence

was strong on all charges).[1] However, even assuming that it is clearly established federal law that a prejudicial joinder of claims violates the Due Process Clause, Petitioner has not demonstrated that his due process rights were violated.

First, Petitioner's misjoinder claim rests on the inaccurate assertion that the sex abuse charges were unrelated to the other charges. The sex abuse charges stemmed from a May 1, 2016, home invasion—the second of three robberies charged—in which two armed robbers entered a private residence claiming to be FBI, held the family hostage, sexually abused the females, and threatened to rape them if money and weapons were not turned over. Tr. at 28. Second, evidence from the May 1, 2016 robbery—including but not limited to evidence of *modus operandi*, DNA, and firearms—was cross-admissible to the other crimes charged. *Id.* at 32, 37-38. Third, there is no basis to conclude the jury was unable to deliberate each count separately, as the trial court instructed it to do. *Id.* at 1082. Accordingly, Petitioner has failed to demonstrate that the trial court's denial of the motion to sever was contrary to, or an unreasonable application of, clearly established federal law.

C. Ineffective Assistance of Counsel

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

[1] Petitioner also cites a footnote in *United States v. Lane*, 474 U.S. 438, 446 n. 8 (1986), claiming it is clearly established federal law on this issue. It is not. *Lane* addressed misjoinder of defendants, not multiple counts against a single defendant. Moreover, the Ninth Circuit has opined that the footnote in *Lane* does not constitute clearly established federal law. *Martinez v. Yates*, 585 F. App'x 460, 461 (9th Cir. 2014); *Collins v. Runnels*, 603 F.3d 1127, 1132 (9th Cir. 2010); *Northup*, 2016 WL 6915320 at *5, n. 5.

U.S. 668, 687-88 (1987). Failure to satisfy either prong of this test obviates the need to consider the other. *Id.* at 687.

This Court's inquiry under *Stickland* is highly deferential. The Court must indulge a strong presumption that counsel's conduct fell within the wide range of reasonable professional assistance. *Hibbler v. Benedetti*, 693 F.3d 1140, 1149 (9th Cir. 2012). The issue is not whether this Court believes the state court's determination under *Stickland* is incorrect, but whether that determination was unreasonable – a substantially higher threshold. [2] *Knowles v. Mirzayance*, 556 U.S. 111, 123-24 (2009); *Hibbler*, 693 F.3d at 1150.

Petitioner alleges "trial counsel did not respond adequately when jurors witnessed Mr. Nash being transported in handcuffs and shackles during trial and then discussed this issue among themselves." Second Am. Pet. at 4. Petitioner also claims appellate counsel was ineffective for failing to raise "shackling related claims of error to the extent that trial counsel did preserve them for appellate review." *Id.*

The PCR court determined that both trial and appellate counsel effectively handled this issue. The PCR court stated:

> When shackles issue first arose, att[orney] brought it to court's attention and with the pet[itioner's] consent agreed not to pursue it further. When it arose the 2nd time, att[orney] moved for mistrial and court declined to grant without individual questioning of jurors. After questioning, att[orney] renewed motion [and] court denied. Att[orney] consulted pet[itioner] at all necessary decision points. Clear court was not going to grant because court believed all jurors committed to being fair and impartial.

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[2] This Court rejects Petitioner's request for *de novo* review "of the trial court's failure to fairly consider the Motion for Mistrial on the merits." Br. in Supp. of Second Am. Pet. at 20. This Court's review of a claim of ineffective assistance of counsel is "doubly deferential" in that the Court takes a highly deferential look at counsel's performance under the deferential lens of § 2254(d). *Cullen v. Pinholster*, 563 U.S. 170, 196 (2011); *Zapien v. Davis*, 849 F.3d 787, 795 (9th Cir. 2015), *pet. for cert. filed* May 13, 2017 (No. 16-9146).

> This court finds no inadequacy of trial att[orney]. No prejudice.
>
> Appellate attorney did not raise shackling issue. Pet[itioner] did raise in pro se brief. Decision was not an unreasonable one based on findings of trial court. C[ourt] of Appeals affirmed.
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> This court finds no inadequacy by appellate att[orney]. [N]o prejudice.

Resp't Ex. 141 at 2-3.

The question at bar is whether the PCR court's ruling was contrary to, or an unreasonable application of clearly established federal law, or based on an unreasonable determination of the facts in light of the evidence presented in the state court proceedings. 28 U.S.C. § 2254(d)(1) & (2). This Court finds that it was not.

The morning after a jury was impaneled, but before the jurors had been sworn in, trial counsel brought to the court's attention that one of the jurors had seen Petitioner in custody in the courthouse hallway. Tr. at 234-35. In response, the court told Petitioner he could select a new jury or question the juror who saw him in shackles. *Id.* at 235-36. Trial counsel moved for mistrial, but the court denied the motion because the trial had not yet begun. *Id.* After conferring with Petitioner, trial counsel elected to proceed without drawing further attention to the matter. *Id.* at 235-239. Several days into trial it came to the court's attention that the spouse of one of the jurors saw Petitioner being transported through the courthouse in shackles. *Id.* at 473. The court questioned that juror, who confirmed that he told the thirteen other jurors what his wife had seen, but that this knowledge would not affect his consideration of the case. *Id.* at 474. Trial counsel immediately renewed her motion for mistrial, which the court ultimately denied, after questioning each juror and explaining that it was routine for a person on trial for the charges in this case to be transported through the courthouse in restraints. *Id.* at 480-601, 607-09.

Petitioner contends trial counsel should have requested the empanelment of a new jury when the court gave her that option. The record does not contain an affidavit from trial counsel explaining why she chose not to, however the trial transcript reveals that first she had an off-the-record consultation with Petitioner. *Id.* at 239. This Court presumes counsel made a tactical decision, given the high stakes associated with empaneling a suitable jury, and the fact doing so would have taken away from the limited time available for trial. *See Strickland*, 466 U.S. at 689 (habeas petitioner must overcome presumption that, under the circumstances, the challenged action might be considered sound trial strategy).

Petitioner also argues trial counsel should have done more research and cited federal case law to the trial court regarding the prejudicial impact of shackling. Pet'r's Br. in Supp. of Am. Pet. at 6. However, Petitioner's argument relies on cases involving defendants who were shackled inside the courtroom. *See e.g. Deck v. Missouri*, 544 U.S. 622, 633 (2005) (holding the Constitution forbids the use of visible shackles during a capital case unless the risk posed by the specific defendant so requires); *Dyas v. Poole*, 317 F. 3d 934, 937 (9th Cir. 2003) (holding that defendant's shackling during trial, not during transport to and from the courtroom, caused the jury to be prejudiced against her); *Rhoden v. Rowland*, 172 F. 3d 633, 637 (9th Cir. 1999) (finding defendant was shackled during entire trial, shackles were visible from jury box, and court failed to state a compelling need specific to defendant).

There is no dispute Petitioner was not shackled during trial. Petitioner does not point to any case law regarding a hallway sighting of a defendant in shackles that would have made the motion for mistrial stronger. To be sure, courts have found that a jury's brief or inadvertent glimpse of a defendant in physical restraints outside the courtroom is not inherently or presumptively prejudicial. *See United States v. Olano*, 62 F.3d 1180, 1190 (9th Cir. 1995)

(holding that habeas relief is not warranted when a jury sees a defendant in handcuffs outside the courtroom unless he can demonstrate "actual prejudice"); *see also United States v. Halliburton*, 870 F.2d 557, 560-61 (9th Cir. 1989) (holding that jurors' inadvertent observation of defendant in handcuffs outside the courtroom did not prejudice him where the court carefully explained that shackling had no bearing on guilt). Further, Petitioner has failed to show that there is a reasonable probability that the motion would have been granted and the results of the trial would have been different if trial counsel had cited courtroom shackling cases. Thus, the PCR court's determination that trial counsel was not ineffective in her handling of the shackling issue was not an unreasonable determination of the facts, nor an objectively unreasonable application of *Strickland.*

Petitioner also fails to show the PCR court's holding that appellate counsel was not ineffective by failing to assign error to the trial court's ruling on the motion for mistrial is contrary to or an unreasonable application of clearly established federal law. Under Oregon law, denial of a mistrial motion is reviewed on direct appeal for abuse of discretion. *See State v. Veatch*, 223 Or. App. 444, 455-56 (2008). It is unlikely the Oregon appellate courts would have found the trial court abused its discretion here, where the court questioned each juror about what (if anything) they saw and how they felt about it, cited the relevant case law, and made a well-reasoned ruling on the record denying the motion. *See* Tr. at 480-601, 607-09, s*ee also Jones v. Barnes*, 463 U.S. 745, 752-54 (1983) (holding that appellate counsel is not required to raise every colorable or non-frivolous claim on appeal). Accordingly, appellate counsel's failure to raise the issue on appeal did not fall below an objective standard of reasonableness.

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IV. Evidentiary Hearing

Petitioner's request for an evidentiary hearing is denied because this Court finds the written record—containing the entire transcript of Petitioner's trial proceedings, as well as forty-four post-conviction exhibits, and the parties' extensive briefing—is sufficient to conclude that Petitioner has failed to meet his burden under 28 U.S.C. § 2254(d)(1) or (2). *See Griffin v. Johnson*, 350 F.3d 956, 966 (9th Cir. 2003) (finding no need for evidentiary hearing because it would not produce evidence more reliable or more probative than the testimony and affidavits already presented).

CONCLUSION

Based on the foregoing, Petitioner's Second Amended Petition for Writ of Habeas Corpus (ECF No. 60) is DENIED, and this proceeding is DISMISSED, with prejudice. The Court declines to issue 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).

IT IS SO ORDERED.

DATED this 18 day of July, 2017.

Malcolm F. Marsh
United States District Judge