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Attorneys for Petitioner

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

KIPLAND KINKEL,

USDC Case No. 11-6244

Petitioner,

v.

**GERALD LONG, Acting Superintendent
Oregon State Correctional Institution,**

Respondent.

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

**FIRST AMENDED PETITION FOR WRIT OF HABEAS CORPUS
Pursuant to 28 U.S.C. § 2254
USDC-OREGON**

CONVICTION UNDER ATTACK

1. Name and location of court which entered the judgment of conviction you are challenging: Lane County Circuit Court.
2. Criminal docket or case number: Case No. 20-98-09574.
3.
 - a. Date of judgment of conviction: September 24, 1999.
 - b. Date of sentencing: November 2, 1999.
4. Length of sentence: 1,340 months incarceration, life term post-prison supervision.
5. Identify all crimes of which you were convicted and sentenced in this case: On each of the four murder convictions, the trial court imposed a 25-year prison term, run concurrently with one another, and a life term of post-prison supervision. On each of the 26 attempted aggravated murder convictions the court imposed a 90-month prison term and a three year term of post-prison supervision. The court ordered that 40 months of each of the 26 90-month prison terms run consecutive with each other and with the four 25-year terms on the murder convictions. The trial court thus imposed a total prison term of 1,340 months (25 years = 300 months, plus 26 X 40 = 1,040 months, or 111 years and 8 months).
6.
 - a. What was your plea? Guilty.
 - b. If you entered a guilty plea to one count or indictment, and a not guilty plea to another count or indictment, give details:
7. Did you testify at trial? No.

EXHAUSTION OF STATE REMEDIES

FIRST AMENDED PETITION FOR WRIT OF HABEAS CORPUS

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USDC-OREGON

DIRECT APPEAL

8. Did you appeal from the judgment of conviction? Yes.
9. If you did appeal, answer the following:
 - a. Name of the court: Oregon Court of Appeals
 - b. Docket or Case number: A108593
 - c. Result: affirmed in a written opinion.
 - d. Date of Result: October 16, 2002.
 - e. Citation to the case: *State v. Kinkel*, 184 Or App 277, 56 P3d 463 (2002).
 - f. Grounds raised:

Petitioner's counsel raised and argued that Article I, section 16 of the Oregon Constitution and the Eighth Amendment to the United States Constitution prohibited petitioner's true-life sentence.

10. Did you seek further review by a higher state court?
 - a. Name of court: Oregon Supreme Court.
 - b. Docket or case number: S49923.
 - c. Result: conviction and sentences affirmed.
 - d. Date of result: December 24, 2002 (judgment issued January 29, 2003).
 - e. Citation to the case: *State v. Kinkel*, 355 Or 142, 61 P3d 938 (2002).
 - f. Grounds raised: Same as those presented on appeal.
11. Did you file a petition for certiorari in the United States Supreme Court? No.

POST-CONVICTION RELIEF

12. Did you file a petition for state post-conviction relief? Yes.

- a. Name of court: Marion County Circuit Court.
- b. Docket or case number: 03C-21079.
- c. Nature of the proceeding: Post-conviction proceeding
- d. Did you receive an evidentiary hearing? Yes.
- e. Result: Denied relief.
- f. Date of result: January 2, 2008.
- e. Grounds raised:

A. Petitioner was denied effective assistance of trial counsel, who failed to meet the minimum constitutional standards for effective assistance of counsel, in violation of petitioner's rights under Article I, § 11 of the Oregon Constitution and the Sixth and Fourteenth Amendments to the United States Constitution in each of the following respects, among others to be proved at trial:

1) Petitioner's trial counsel failed to request that the trial court order a mental examination to determine petitioner's competency to stand trial, his ability to aid and assist in his own defense, and his fitness to proceed by reason of incapacity due to a mental disease or defect. Had such an examination been obtained, it would have revealed that petitioner was mentally incompetent to stand trial, mentally unable to aid and assist in his own defense, unfit to proceed by reason of incapacity due to a mental disease or defect, and mentally unable to knowingly, voluntarily and intelligently waive his constitutional rights. Effective trial counsel would have relied upon such examination and

neither advised nor permitted petitioner to enter the guilty pleas which resulted in a 111 year prison sentence.

2) Petitioner's trial counsel failed to object to the trial court's acceptance of the guilty plea and the trial court's plea colloquy with petitioner, which did not adequately determine whether petitioner's mental condition affected his ability to knowingly, voluntarily and intelligently waive his constitutional rights. Had trial counsel made such an objection, the trial court would have conducted a more extensive plea colloquy, which would have revealed that petitioner was suffering from paranoid schizophrenia, auditory hallucinations, and impaired neurological function, such that the trial court would not have accepted petitioner's guilty plea, and if the trial court had nonetheless accepted the plea, appellate counsel could have raised the trial court's acceptance of the plea on direct appeal.

3) Petitioner's trial counsel failed to object to the trial court's acceptance of petitioner's plea without the knowing, voluntary and intelligent consent and waiver, in writing and on the record, by petitioner's guardian ad litem, Claudia Jurowski. Had trial counsel made such an objection, the guardian ad litem would not have consented to the plea agreement, the trial court would not have accepted petitioner's plea, and if the trial court had nonetheless accepted the plea, appellate counsel could have raised the trial court's acceptance of the plea on direct appeal.

4) Petitioner's trial counsel advised petitioner to accept a plea agreement in which petitioner gave up a substantial mental defense without receiving

adequate consideration. Had trial counsel not advised petitioner to plead guilty, he would not have pled guilty.

B. Petitioner was denied effective assistance of appellate counsel, who failed to meet the minimum constitutional standards for effective assistance of counsel, in violation of petitioner's rights under Article I, § 11 of the Oregon Constitution and the Sixth and Fourteenth Amendments to the United States Constitution in each of the following respects, among others, to be proved at trial:

1) Petitioner's appellate counsel failed to raise as an error on appeal the trial court's failure to order a mental examination of petitioner, who was incompetent to stand trial, unable to aid and assist in his own defense, unfit to proceed by reason of incapacity due to a mental disease or defect, unable to knowingly, voluntarily, and intelligently waive his constitutional rights, unable to understand the nature of the proceedings, unable to assist and cooperate with counsel, and unable to participate in his defense. Had appellate counsel raised such issues, the appellate courts would have reversed petitioner's conviction.

2) Petitioner's appellate counsel failed to raise as an error on appeal the trial court's erroneous acceptance of the guilty plea and the trial court's insufficient plea colloquy with petitioner, which did not adequately determine whether petitioner's mental condition affected his ability to knowingly, voluntarily and intelligently waive his constitutional rights. Had appellate counsel raised such issues, the appellate courts would have reversed petitioner's conviction.

3) Petitioner's appellate counsel failed to raise as an error on appeal the trial court's acceptance of petitioner's plea without the knowing, voluntary and intelligent consent and waiver, in writing and on the record, by petitioner's guardian ad litem, Claudia Jurowski. Had appellate counsel raised this issue, the appellate courts would have reversed petitioner's conviction.

C. The trial court's failure to order a mental examination of petitioner, who was incompetent to stand trial, unable to aid and assist in his own defense, unfit to proceed by reason of incapacity due to a mental disease or defect, unable to knowingly, voluntarily, and intelligently waive his constitutional rights, unable to understand the nature of the proceedings, unable to assist and cooperate with counsel, and unable to participate in his defense, was a substantial denial in the proceedings resulting in petitioner's conviction in violation of petitioner's right to trial by jury, his right to confront his accusers, his right against compulsory self-incrimination, his right to counsel, and his right to due process of law, under Article I, § 11 and 12 of the Oregon Constitution and the Fifth, Sixth and Fourteenth Amendments to the United States Constitution. Had the trial court ordered a mental examination of petitioner, the examination would have revealed that petitioner was incompetent to stand trial, unable to aid and assist in his own defense, unfit to proceed by reason of incapacity due to a mental disease or defect, unable to knowingly, voluntarily, and intelligently waive his constitutional rights, unable to understand the nature of the proceedings, unable to assist and cooperate with counsel, and unable to participate in his defense. Had the trial court

ordered a mental examination, the trial court would not have accepted petitioner's guilty plea.

D. The trial court's acceptance of petitioner's guilty plea, when petitioner was incompetent to stand trial, unable to aid and assist in his own defense, unfit to proceed by reason of incapacity due to a mental disease or defect, unable to knowingly, voluntarily, and intelligently waive his constitutional rights, unable to understand the nature of the proceedings, unable to assist and cooperate with counsel, and unable to participate in his defense was a substantial denial in the proceedings directly resulting in petitioner's conviction in violation of petitioner's right to trial by jury, his right to confront his accusers, his right against compulsory self- incrimination, his right to counsel, and his right to due process of law, under Article I, 21 § 11 and 12 of the Oregon Constitution and the Fifth, Sixth and Fourteenth Amendments to the United States Constitution.

E. The trial court's plea colloquy, which directly resulted in petitioner's conviction, did not adequately determine whether petitioner's mental condition affected his ability to knowingly, voluntarily and intelligently waive his constitutional rights, and was a substantial denial in the proceedings in violation of petitioner's right to trial by jury, his right to confront his accusers, his right against compulsory self- incrimination, his right to counsel, and his right to due process of law, under Article I, § 11 and 12 of the Oregon Constitution and the Fifth, Sixth and Fourteenth Amendments to the United States Constitution.

F. The trial court's acceptance of petitioner's guilty plea without first obtaining a knowing, voluntary, and intelligent waiver from the person whom the court had appointed as petitioner's guardian ad litem for this case, Claudia Jurowski, was a substantial denial in the proceedings resulting in petitioner's conviction in violation of petitioner's right to trial by jury, his right to confront his accusers, his right against compulsory self-incrimination, his right to counsel, and his right to due process of law, under Article I, § 11 and 12 of the Oregon Constitution and the Fifth, Sixth and Fourteenth Amendments to the United States Constitution. Had the trial court asked for the guardian *ad litem's* waiver before taking the plea, she would not have given it.

13. Did you appeal the result of your state post-conviction case? Yes.

a. Name of court: Oregon Court of Appeals.

b. Docket or case number: A137866.

c. Result: Affirmed.

d. Date of result and citation: *Kinkel v. Lawhead*, 240 Or App 403, 246 P3d 746 (2011) (January 12, 2011).

e. Grounds raised:

A. The PCR court erred when it denied petitioner's inadequate and ineffective assistance of counsel claim. Its key factual holding is not supported by the record, and its legal conclusion disregarded highly relevant evidence and controlling state and federal law.

B. The PCR court erred when it denied petitioner's claim that his pleas were involuntary.

C. The PCR court erred as a matter of law when it denied petitioner's claim that his trial counsel provided inadequate and ineffective assistance, when they failed to obtain the consent of petitioner's guardian *ad litem* before accepting the state's plea agreement.

D. The PCR court erred as a matter of law when it denied petitioner's claim that the trial court improperly accepted petitioner's plea without first obtaining the consent of petitioner's guardian *ad litem*.

14. Did you seek further review of the decision on appeal by a higher state court? Yes.

a. Name of court: Oregon Supreme Court.

b. Docket or case number: S059210

c. Result: review denied.

d. Date of result and citation: *Kinkel v. Lawhead*, 350 Or 408, 256 P3d 121

(May 26, 2011).

e. Grounds raised:

A. Were trial counsel inadequate and ineffective for failing to consult their experts, to request a competency hearing, or to inform the trial court of their client's deteriorating mental health, when they learned that their seriously mentally ill client's mental health had seriously decompensated after he was removed from his powerful antipsychotic medications, before proceeding with a guilty plea?

FIRST AMENDED PETITION FOR WRIT OF HABEAS CORPUS

Pursuant to 28 U.S.C. § 2254

USDC-OREGON

B. Can a seriously mentally ill individual, whose mental illness, if not controlled by powerful antipsychotic medications, will never permit him to choose to go trial, enter a voluntary plea, if his counsel: (1) discontinued his powerful antipsychotic medications, causing prolonged deterioration to his mental health; (2) mislead the trial court during the plea colloquy by failing to tell the court what they did and its adverse effect of their client's mental health; (3) withheld the guardian *ad litem* objection to the plea agreement from the trial court; and (4) interjected themselves into the colloquy to disingenuously inform the court that their client was taking medications that did not adversely affect this ability to this clearly?

C. Is the "any evidence" standard of appellate review under ORS 138.650, taken from *Pratt v. Armenakis*, 201 Or App 217, 220, 118 P3d 821 (2005), contrary to the standard of review prescribed by this court in *Ball v. Gladden*, 250 Or 485, 487, 443 P2d 621 (1968) and *Moen v. Peterson*, 312 Or 503, 511, 824 P2d 404 (1991)?

D. Under either the "any evidence" standard of review or the "supported by the evidence" standard, can the Court of Appeals properly uphold a trial court's post-conviction findings when they are based on trial counsel's conclusory denials, to the exclusion of all other evidence to the contrary?

SUCCESSIVE POST-CONVICTION RELIEF

15. Did you file a petition for successive post-conviction relief? Yes.

a. Name of court: Marion County Circuit Court.

- b. Docket or case number: 13C13698
- c. Nature of proceeding: Successive post-conviction relief.
- d. Did you receive an evidentiary hearing? No.
- e. Result: Denied relief on procedural grounds.
- f. Date of result and citation or case number: September 30, 2013.
- g. Grounds raised:

Petitioner's sentence violated the proscription against cruel and unusual punishment under the Eighth and Fourteenth Amendments to the United States Constitution as explained in *Graham v. Florida*, 560 US 48 (2010) and *Miller v. Alabama*, 132 S Ct 2455 (2012).

16. Did you appeal the result of your state post-conviction case? Yes.

- a. Name of court: Oregon Court of Appeals.
- b. Docket or case number: A155449.
- c. Result: Affirmed.
- d. Date of result and citation: *Kinkel v. Persson*, 276 Or App 427, 367 P3d

956 (February 10, 2016).

- e. Grounds raised:

A. Does the rule of *Graham v. Florida*, 560 US 48 (2010) apply retroactively?

B. May a post-conviction petitioner file a successor petition beyond the initial two-year limitation period if the successor petition is based on a newly announced principle of law that applies retroactively?

C. Does petitioner's nearly 112-year sentence violate the Eighth Amendment's proscription against cruel and unusual punishments?

17. Did you seek further review of the decision on appeal by a higher state court? Yes.

a. Name of court: Oregon Supreme Court.

b. Docket or case number: S063943

c. Result: Affirmed.

d. Date of result and citation: *Kinkel v. Persson*, 361 Or 1, 417 P3d 401 (May 10, 2018).

e. Grounds raised:

A. Does a 112-year prison sentence without any possibility of parole imposed on a juvenile offender violate the Eighth Amendment's proscription against cruel and unusual punishment?

B. May the State of Oregon insist that petitioner serve a sentence that violates the Eighth Amendment?

GROUND FOR RELIEF

18. For this petition, state *concisely* every ground on which you claim that you are being held in violation of the Constitution, laws, or treaties of the United States. Attach additional pages if you have more than four grounds. State the facts supporting each ground.

A. Ground One: During the petitioner's post-conviction appeal, the Oregon appellate courts deprived the petitioner of due process of law when they failed to apply the statutorily required standard of review but instead applied one that was more favorable to the state.

Supporting FACTS: The Oregon Court of Appeals applied an "any evidence" standard of appellate review. Application of this standard of review was contrary to the standard of review required by Or. Rev. Stat. 138.650. That standard, described by the Oregon Supreme Court in *Ball v. Gladden*, 250 Or. 485, 487, 443 P.2d 621 (1968) and *Moen v. Peterson*, 312 Or. 503, 5 II, 824 P.2d 4A4 (1991), provides that the court reviews the record to determine whether the post-conviction court's findings are "supported by the evidence."

The Court of Appeals upheld the PCR trial court's finding that trial counsel "had *no indications whatsoever* that petitioner was unable to aid and assist them and fully participate in the entry of his guilty pleas" by citing one piece of evidence, trial counsel's self-serving denial that they had any indication of their client's incompetence, but refusing to take into account substantial evidence to the contrary. *See* Ground Two, *infra*, for a description of this evidence. It held that "even if petitioner were correct about the PCR court's error in finding "no indications whatsoever", the fact that the court's factual finding was contradicted by other evidence in the record is beside the point," because "[t]he determinative question on an appeal from a judgment dismissing a petition for post-conviction relief is whether there is *any* evidence in the record that supports the court's finding. *Pratt*, 201 Or. App at 220." Slip op at 11 (emphasis in original).

The Court of Appeals similarly used this "any evidence" standard to reject petitioner's contention that the evidence established that his plea was not voluntarily entered. It stated: "In reviewing a post-conviction court's determination that a plea was knowing and voluntary, we are bound by the court's findings of fact if there is any evidence in the record to support them...." *Id.* at 12 (emphasis added). It then ruled: "Again, however, as in petitioner's first assignment of error, petitioner's contentions founder against our standard of review." *Id.* at 13.

The opinion of the Court of Appeals derived the "any evidence" standard from *Pratt v. Armenakis*, 201 Or. App.217,22A,118 P.3d 821 (2005).¹ The *Pratt* decision was the result of extensive post-conviction litigation in an aggravated murder case. In response to that petitioner's vigorous complaints, the Oregon Court of Appeals stated: "What petitioner fails to appreciate in his petition for reconsideration is that our review is limited to determining whether there is any evidence in the record to support the post-conviction court's findings. *Ball v. Gladden*, 250 Or. 485, 443 P.2d 621 (1968)." 201 Or. App. at 220 (emphasis in original).

Significantly, while the *Pratt* opinion emphasized the word "any" in the term "any evidence," it failed to cite a specific page in *Ball* using that word or concept. *Id.* In fact, the word "any" does not even appear in *Ball*, which holds: "[w]hat actually transpired is a

¹ Interestingly, the state did not suggest the "any evidence" standard in its Court of Appeals' brief: "[t]he issues for the reviewing court are whether the facts found by the post-conviction court are supported by the record," and "[t]his court is bound by the factual findings of the post-conviction court if there is evidence in the record to support them." Stat's Br. at 7.

question of fact for the trial court or jury. If the evidence sustains such historical factual findings they will not be disturbed by this court." *Ball* then analyzed the historical facts "to see if they are sufficient to justify the trial court's finding of voluntariness." 255 Or. at 488.

Twenty-three years after *Ball*, the Oregon Supreme Court used essentially the same standard in *Moen v. Peterson*, 312 Or. 503, 511 (1991), in reviewing a post-conviction court's findings pursuant to Or. Rev. Stat. 138.650. *Moen* held that the Court of Appeals must determine whether the findings are "supported by the evidence." 312 Or. at 511. *Moen* pointed out that "[t]he inquiry whether a finding is supported by the evidence is a question of law, properly within the Court of Appeals' scope of review." 312 Or. at 511.

B. Ground Two: Trial counsel provided ineffective assistance, in violation of the Sixth Amendment. They failed to consult their experts, to request a competency hearing, or to inform the trial court of their client's deteriorating mental health, after they learned that their seriously mentally ill client's mental health had seriously deteriorated when he was removed from his powerful antipsychotic medications, but before they proceeded with the petitioner's guilty plea.

Supporting FACTS: Kip Kinkel has been diagnosed as a paranoid schizophrenic. He suffers delusions and auditory hallucinations. His most prominent delusion is that the government planted a computer chip in his brain. He believes the chip is connected to two satellites: one controls him by transmitting three distinct voices into his head; the other observes all his actions. His paranoia causes him, *inter alia*, to fear people with

cameras, particularly people wearing eyeglasses, who he believes are photographing him through cameras concealed in their glasses.

He also receives command hallucinations. These hallucinations are extremely upsetting. *Id.* He has tried to escape from them. He found in some cases that the only way to escape the hallucinatory voices was to carry out their commands.

The petitioner asserted that his trial counsel were ineffective for failing to request that the trial court conduct a mental competency inquiry. Trial counsel possessed a great deal of evidence raising a substantial doubt about petitioner's mental competence. They believed their client's severe mental illness provided the most compelling mental defense they had ever seen. They knew he had been off his very strong antipsychotic medication for several months right up to the time of his guilty plea, knew he was getting progressively worse, knew he would only be able to make it through a trial if he was heavily medicated, and knew their main mental health experts for trial had not seen their client during the several months he was off his medication. Yet trial counsel took no obvious and readily available measure, such as consulting one of their experts, obtaining a competency evaluation, or simply telling the trial court what they knew, to ensure that the plea would be voluntary.

The evidence known to petitioner's trial counsel that would have raised a substantial doubt about petitioner's competence to any adequate and effective defense lawyer included:

1. Jail treatment records from trial counsel's file, which they received before the guilty plea, showing that petitioner was having hallucinations and begging to restart his antipsychotic medications.
2. Dr. James McDonald's private treatment records from counsel's file, sent to counsel just days before the plea, which confirmed the mental deterioration revealed by the jail treatment records.
3. Dr. McDonald's affidavit, admitted as his PCR trial testimony, showing that petitioner was doing very poorly in the period before the guilty plea: his "mental state was compromised in the four months leading up to his guilty plea;" and "as Kip got closer to the plea agreement and his anxieties increased, the probability is that his psychosis increased and his capacity dropped." Dr. McDonald's affidavit disclosed that he conferred regularly with trial counsel about petitioner's mental health status, and would likely have done so around the time of the guilty plea.
4. Less than 30 days before the plea, the defense investigator told trial counsel that petitioner "was much worse ... so agitated that he would pace, hit one wall, turn, pace to the next wall, hit it, etc. He was in anguish and it was disconcerting to me." In response, counsel "acknowledged that he had seen Kip in this state, as well."
5. Months before the plea, the state's premier child psychologist who had evaluated petitioner, Dr. Orin Bolstad, told trial counsel that petitioner would need "a large amount of antipsychotic medication before he went into the courtroom."² Yet, trial counsel failed to consult Dr. Bolstad about whether petitioner was capable of entering a voluntary plea without his powerful antipsychotic medication.³

Despite being confronted with this substantial evidence – obvious indications to trial counsel that petitioner's serious mental illness was worsening in the days before

² Similarly, Dr. McDonald informed counsel that, with "the medications [petitioner] was on he was able to control the voices."

³ Petitioner re-started his medication only a few days before his plea. Undisputed expert testimony established that it takes at least two weeks "before [the antipsychotic medications] have an impact."

entry of his guilty plea – the PCR trial court found that counsel had “no indications whatsoever” of incompetence:

33. Trial counsel had *no indications whatsoever* that petitioner was unable to aid and assist them and fully participate in the entry of his guilty pleas. If either attorney had seen any evidence whatsoever pointing to petitioner’s inability to proceed, they would have conducted a competency evaluation on their own or ask the court to order one. Slip op. at 9 (emphasis added).

The Court of Appeals rejected the petitioner’s attack on this finding: “even if petitioner was correct about that, the fact of the court’s factual finding was contradicted by other evidence in the record is beside the point,” because “[t]he determinative question on an appeal from a judgment dismissing a petition for post-conviction relief is whether there is *any* evidence in the record that supports the court’s finding. *Pratt*, 201 Or. App. at 220.” *Id.* at 11 (emphasis added in original).

C. Ground Three: The petitioner’s plea was not voluntarily entered, in violation of the due process clause of the Fourteenth Amendment.

Supporting FACTS: The petitioner contended that his serious paranoid schizophrenia, combined with the lack of antipsychotic medication for a prolonged period, left him incapable of making “a reasoned choice among the alternatives presented to him.” Renowned OHSU child psychiatrist, Dr. William Sack, opined that petitioner did not enter his plea voluntarily. The State presented no testimony to the contrary.

Dr. Sack explained that petitioner’s paranoia compelled him to hide his illness, so much so that he was unwilling to consider any sentence that would require him to be

committed to a mental hospital. “He was terrified of being labeled mentally ill” because others would discover that he was “nuts,” explaining:

“He was not going to the state hospital. Nobody was going to see that he was nuts.

* * * * *

“He didn’t have the capacity to do that [make a reasoned plea choice] because of his mental illness, because of the secrecy, because of his attitude toward mental illness and being frightened of being in a state hospital.”

Dr. Bolstad agreed. He explained that petitioner did not understand his disease then and did not want anybody to see him as mentally ill and did not want to be so labeled. Petitioner thought mental illness was like mental retardation and “certainly wanted to avoid being acknowledged for that.”

Dr. Bolstad explained a second reason why petitioner would never willingly go to trial — his mental illness caused a tremendous fear of going to court:

“. . . the real motivator – the real reason why he was willing to accept these terms and agree that he understood all of these things was simply because of his mental illness . . . he had an irrational fear of going to court. . . he had tremendous fear of court causing his voices to escalate. . . he had tremendous fear of the DA’s office and the conspiracies he saw taking place. He had tremendous fear of people misrepresenting him and saying inaccurate things about him. And I would say the way he responded to all those things was irrational. It was part and parcel of his mental illness.

* * * * *

“. . . his mission in life at that time was to avoid going to court.

* * * * *

“. . . first and foremost he had great fear of the voices coming on very strongly to him. This is a fear that was extremely consistent throughout his history of having mental illness. He had tremendous fear of the voices ganging up on him. So much

so that – I think a large part of the reason why he killed his parents was to get the voices to leave him alone. That’s a pretty strong fear of voices, and I think he wanted to avoid that at all costs.”

The State’s expert psychologist, Dr. Johnson, agreed “that Kip does hear hallucinations – auditory hallucinations,” acknowledged that hearing the hallucinatory voices for Kip “is painful and torturous and very difficult,” and agreed that “[Kip] hates going to court”.

At his attorneys’ direction, the petitioner stopped taking his antipsychotic medication on July 2, 1999. By July 21, he was reporting that the auditory hallucinations had returned, even though his attorneys had instructed him not to discuss them. He continued to report them throughout August. By September 8, 1999, just 15 days before he accepted the plea offer, he “experienced active hallucinations during evaluation.” By September 21, two days before he accepted the plea offer, he was curled in a ball having difficulty breathing following a panic attack and reporting the “voices.”

The petitioner’s numerous mental health experts were unaware of the petitioner’s deteriorations. They had not seen the petitioner for many months. They believed the case was going to trial and that, consistent with Dr. Bolstad’s advice, the petitioner would be heavily medicated to enable him to withstand the pressure from the voices. They were not consulted regarding the petitioner’s ability to decide on a complex plea offer, particularly at this point in time, when the voices inside his head were raging because he had been without his antipsychotic medication for several months.

Because trial counsel failed to consult their experts regarding whether petitioner was capable of making a voluntary plea decision without the benefit of his medications, neither defense counsel nor the trial court learned that the petition's mental illness, without the benefit of medication, would not allow him to consider a trial, both because it would require him to endure the pounding voices, and because, if successful, it would require him to go to a mental hospital where his mental illness would be revealed. They did not learn that his mental illness would compel him to always choose to plead guilty to avoid a trial and to avoid hospitalization, and that therefore, he could not make a "reasoned choice" without his medication.

The petitioner's plea colloquy consisted of one-word "yes" answers to the trial court's numerous leading questions, with one exception. That exception occurred when the court asked whether petitioner's mind was clear and whether he was under the influence of any drugs that would affect his ability to enter the plea. Before petitioner could answer, his counsel interjected and informed the court that "the record should be clear that [the petitioner] has recently taken the prescription medications Zyprea, which is an antipsychotic, and Ativan, which is a tranquilizer." Counsel then told the court that counsel had "discussed that with [petitioner]," and "[i]t does not affect his ability to reason, his ability to understand the proceedings that are before the court." *Id.*

Thus, the one time when the issue of petitioner's clear mindedness and medication was addressed, counsel stepped in and answered for the petitioner. Counsel did not advise the court that the medication, which made petitioner's mind clearer, had been

discontinued for months; that petitioner's mental illness had worsened during that period, including the return of active hallucinations; or that, while restarted a few days before, the antipsychotic medication had not taken effect at the time of the plea.⁴

D. Ground Four: Petitioner's sentence violates the proscription against cruel and unusual punishment under the Eighth and Fourteenth Amendments to the United States Constitutional as set forth in *Graham v. Florida*, 560 US 48 (2010), *Miller v. Alabama*, 132 S Ct 2455 (2012), and *Montgomery v. Louisiana*, 136 S Ct 2455 (2012).

Supporting FACTS:

Petitioner was fifteen years old at the time of his offenses. On review from the successive post-conviction action, the Oregon Supreme Court determined that Petitioner's 112-year sentence did not violate the Eighth Amendment's ban on sentences of mandatory life without parole for juvenile offenders. This ruling is contrary to and an unreasonable application of clearly established federal law and is based on an unreasonable determination of the facts in light of the evidence presented in state court, entitling petitioner to relief under 28 U.S.C. § 2254(d).

The Oregon Supreme Court determined that petitioner's offenses reflected irreparable corruption and that his serious mental illness was unrelated to his youth. The court essentially ruled petitioner's mental illness to be a proxy for permanent incorrigibility, thereby overcoming the *Graham* and *Miller* limitations on the imposition

⁴ Attorney Sabbitt did not even ask petitioner if he was hearing voices for "weeks before he entered his plea," including the time when he presented the plea offer to petitioner and when petitioner entered his guilty plea. In fact, he did not even observe petitioner's demeanor during the plea hearing, because, in counsel's words, "it's time to close it."

of life without parole sentences on children. These determinations are wrong. In reaching its decision, the Oregon Supreme Court relied on the transcript from a 1999 sentencing hearing. At that hearing, the sentencing court made no such determinations. Moreover, the proceedings at the 1999 sentencing hearing did not adequately satisfy the requirements of *Miller* and *Montgomery*. Additional facts in support of this claim are described below and hereby incorporated, and will be presented if petitioner is granted an evidentiary hearing.

E. Ground Five: Petitioner's 87-year sentence for non-homicide crimes violates the proscription against cruel and unusual punishments under the Eighth and Fourteenth Amendments to the United States Constitution, as articulated in *Graham v. Florida*, 560 US 48 (2010).

As noted above, petitioner was sentenced to 112 years of incarceration. His sentence included 25 years for four homicide crimes and nearly 87 years for non-homicide crimes. Under that portion of his sentence, Oregon law does not authorize parole or early release. Consequently, petitioner has no possibility for parole and will die in prison before he completes service of that prison term. *Graham* categorically bans imposition of such a sentence on a juvenile convicted of non-homicide crimes.

The Oregon Supreme Court decision misapplied the principle in *Miller* to petitioner's non-homicide sentences in rejecting his argument based on *Graham*. This ruling is contrary to and an unreasonable application of clearly established federal law and is based on an unreasonable determination of the facts in light of the evidence presented in state court, entitling petitioner to relief under 28 U.S.C. § 2254(d).

F. Ground Six: Petitioner was denied due process when the Oregon Supreme Court made a determination that petitioner qualified for a life without parole sentence under *Miller* without providing him a meaningful opportunity to be heard.

Supporting FACTS:

Petitioner filed a successive state post-conviction petition challenging his sentence based on both *Graham* and *Miller*, but was denied relief on procedural grounds. As a result, he was not provided an evidentiary hearing to address the substantive issues required under those cases. He had no meaningful opportunity to offer evidence and provide argument about whether he is in fact one of the rare child offenders who is not capable of reform as required under *Miller* and *Montgomery*.

The Oregon Court of Appeals affirmed the post-conviction court's decision, concluding that the state statutory rule against successive petitions bars the grounds for relief that petitioner raised under *Miller* and *Montgomery*.

On review of the Court of Appeals decision, the Oregon Supreme Court did not address the procedural issue relied upon by the lower courts in denying petitioner relief. Instead, the Oregon Supreme Court reached the merits of petitioner's claim, concluding that the facts in this case, coupled with the sentencing court's findings, bring petitioner within the narrow class of juveniles who, as *Miller* recognized, may be sentenced to life without the possibility of parole. This determination was made without affording petitioner a meaningful opportunity to present evidence of his mental health condition, how it is treatable as demonstrated by the historic record of his incarceration, and how he

does not fall within the narrow class of juvenile offenders whom Miller still deems eligible for a sentence of death in prison.

Had petitioner been given a meaningful opportunity to be heard on that issue, he would have shown to the post-conviction court that: (1) at the time of sentencing, the evidence presented did not support a finding that he was irreparably corrupt or permanently incorrigible; (2) at the time of sentencing, the evidence overwhelmingly supported a finding that petitioner's crime arose from a severe mental illness that was treatable; and (3) petitioner has demonstrated over the course of his incarceration that he has reformed and matured.

G. Ground Seven: Petitioner's enhanced sentence violates the Eighth and Fourteenth Amendments because it is based on petitioner suffering from a treatable, but not curable, mental illness.

Supporting FACTS:

The Oregon Supreme Court held that a treatable mental illness disqualifies this youthful offender from the protections of the Eighth Amendment. To the contrary, sentencing individuals who have diminished culpability based on their mental illness violates the Eighth Amendment.

At the time of his offenses, Petitioner suffered from paranoid schizophrenia. This is a mental illness which includes both schizophrenia and depression; individuals suffering from paranoid schizophrenia experience auditory hallucinations and other psychotic symptoms. It is uncontroverted that Petitioner's mental

illness played a role in the commission of these offenses. Multiple experts testified that petitioner's illness was treatable and he would even be a candidate for release.

Under now-prevailing United States Supreme Court case law, a fifteen-year-old offender like petitioner must be afforded a meaningful opportunity for release unless and until a sentencing court determines that the offender is one of the rare and uncommon children who are permanently incorrigible and incapable of rehabilitation. The Eighth Amendment bars sentencing a child to even virtual or de facto life without parole based on a treatable mental illness that does not preclude growth, maturity, and rehabilitation.

OTHER INFORMATION

19. Please answer these additional questions about the petition you are filing:
- a. Have all grounds for relief that you have raised in this petition been presented to the highest state court having jurisdiction? No.

With respect to Ground One, there was no opportunity to present it. The violation itself occurred during the post-conviction appeal, when the Oregon appellant courts failed to apply the standard of review required by the state post-conviction court.

With respect to Grounds Six and Seven, the Oregon Supreme Court rendered a decision on the merits of petitioner's post-conviction claims even though the lower courts had denied petitioner relief based on procedural grounds and thus never addressed the merits. Petitioner was never provided an evidentiary hearing, yet the Oregon Supreme Court effectively conducted a sentencing hearing – without the benefit of any new evidence presented on the central issue — and concluded that petitioner qualified under

FIRST AMENDED PETITION FOR WRIT OF HABEAS CORPUS

Pursuant to 28 U.S.C. § 2254

USDC-OREGON

Miller for an enhanced sentence of life without parole. The Oregon Supreme Court's findings, based on portions of petitioner's original sentencing proceedings where the threshold questions of his capacity for rehabilitation or permanent incorrigibility were not before the court, were reached without petitioner having any opportunity to be heard on the matters decided.

- b. Is there any ground in this petition that has not been presented in some state or federal court? If so, indicate which ground or grounds have not been presented, and state your reasons for not presenting them: Yes. See above.
20. Do you have any petition or appeal now pending (filed and not decided yet) in any court, state or federal, for the judgment you are challenging here? Yes.

If the answer is "Yes," state the name and location of the court, the docket or case number, the type of proceeding, and the issues raised:

Petitioner has filed a Petition for a Writ of Certiorari in the United States Supreme Court. The case is *Kinkel v. Laney*, Supreme Court Case No. 18-5634. The following issues have been raised:

1. Does a treatable, but not curable, mental illness constitute "irreparable corruption" under *Miller v. Alabama* and *Montgomery v. Louisiana*?
 2. Do *Graham v. Florida*, *Miller v. Alabama*, and *Montgomery v. Louisiana* apply to a juvenile under the age of 18 sentenced to 112 years in prison?
 3. Is a juvenile under the age of 18 entitled to a meaningful opportunity under *Miller v. Alabama* and *Montgomery v. Louisiana* to present evidence showing they are not "irreparably corrupt" or "permanently incorrigible" before the state can impose a sentence of life without the possibility of parole?
21. Give the name and address if you know, of each attorney who represented you in the following states of the judgment you are challenging:
- a. At preliminary hearing: N/A.

- b. At arraignment and plea: Mark Sabbitt, 747 Willamette St. Eugene, OR 97401, and Richard Mullen, 72-A Centennial Loop, Ste. 140, Eugene, OR 97401.
 - c. At trial: same.
 - d. At sentencing: same.
 - e. On appeal: Jesse Barton, P.O. Box 5545, Salem, OR 97304.
 - f. In any post-conviction proceeding: Dennis Balske and Lawrence Matasar, 621 SW Morrison, Suite 1025, Portland, Oregon 97205. Andy Simrin, 405 NW 18th Ave, Portland, Oregon 97209.
 - g. On appeal from adverse ruling in a post-conviction proceeding: See f.
- 22. Have you previously filed any type of petition, application, or motion in a federal court regarding the conviction that you challenge in this petition? No.
 - 23. Do you have any future sentence to serve after you complete the sentence imposed by the judgment under attack? No.
 - 24. TIMELINESS OF PETITION: If your judgment of conviction became final over one year ago, you must explain why the one-year statute of limitations as contained in 28 U.S.C. § 2244(d) does not bar your petition: N/A.
 - 25. Date you are filing this petition to the Court: August 4, 2011 (original); September 6, 2018(amended/supplemental).

WHEREFORE, petitioner prays that the Court will grant such relief to which he may be entitled in this federal petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254 by a person in state custody, including the following:

- A. Order the state to answer this petition and enter a new scheduling order;
- B. Order the state to conduct a full and fair sentencing hearing in accordance with *Graham, Miller and Montgomery*;
- C. Vacate petitioner's conviction, sentence, and guilty plea arising therefrom;

FIRST AMENDED PETITION FOR WRIT OF HABEAS CORPUS
Pursuant to 28 U.S.C. § 2254
USDC-OREGON

- D. Hold an evidentiary hearing on all claims involving disputed issues of fact;;
- E. Grant such discovery as is necessary for full and fair resolution of petitioner's claims; and
- F. Grant such other relief as may be appropriate and to dispose of the matter as law and justice require.

s/ Thaddeus Betz
Thaddeus Betz
Counsel for Petitioner
OSB No. 062745

s/ Marsha Levick
Marsha Levick
Counsel for Petitioner
pro hac vicae
Pa. Bar No. 22535