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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

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| KIPLAND KINKEL,<br><br>Petitioner,<br><br>v.<br><br>GERALD LONG,<br><br>Respondent. | Case No. 6:11-cv-06244-AA<br><br>RESPONDENT'S REPLY TO PETITIONER'S BRIEF IN SUPPORT OF AMENDED PETITION FOR WRIT OF HABEAS CORPUS |

## I. INTRODUCTION

Respondent replies to petitioner's *Brief in Support of Petition for Writ of Habeas Corpus* (ECF # 130), filed with this Court on March 15, 2021. In the *Brief in Support*, petitioner provides argument on Grounds Three through Seven. In reply to the arguments on those claims, respondent largely relies on his prior briefing, but provides additional argument below. Ultimately, for the reasons provided in respondent's prior substantive briefing—including the *Response to Petition for Writ of Habeas Corpus* (ECF # 20), and the *Response to Amended*

*Petition for Writ of Habeas Corpus* (ECF # 103)—and the additional reasons provided below, the Court should deny relief on petitioner's Grounds Three through Seven.

However, in the *Brief in Support*, petitioner does not further develop his Grounds One and Two. Because he does not provide argument on Grounds One and Two, he has not met his burden on those claims, and the Court should deny relief on them for that reason. In short, the Court should deny relief on all of petitioner's grounds, and dismiss this action with prejudice.

## II. PETITIONER HAS NOT MET HIS BURDEN OF PROOF ON THE UNARGUED CLAIMS (GROUNDS ONE AND TWO)

In Grounds One and Two, petitioner respectively alleges that, in the course of his first-in-time PCR proceedings, Oregon's appellate courts deprived him of Due Process by applying an incorrect standard of review, and his trial attorneys provided ineffective assistance in their handling of the plea proceedings. (*First Amended Petition for Writ of Habeas Corpus*, ECF # 90, pp. 14-19). Respondent thoroughly responded to those claims—which were also contained in the initial petition—in the *Response to Petition for Writ of Habeas Corpus* (ECF # 20).

In the *Brief in Support*, petitioner states only that, as to Grounds One and Two, he "relies on his allegations in the Amended Complaint and arguments in the record to support those grounds." (ECF # 130, PDF pp. 96). Under those circumstances, he has not met his burden on those claims, and the Court should deny relief on the unargued claims. *See* 28 U.S.C. § 2248 ("[t]he allegations of a return to the writ of habeas corpus or of an answer to an order to show cause in a habeas proceeding, if not traversed, shall be accepted as true except to the extent that the judge finds from the evidence that they are not true"); *see also Renderos v. Ryan*, 469 F.3d 788, 800 (9th Cir. 2006) (counsel for petitioner waived claims in petition for writ of federal habeas corpus, where counsel did not attempt to set forth the legal standards for such claims or



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attempt to meet them); *Silva v. Woodford*, 279 F.3d 825, 835 (9th Cir. 2002) (recognizing that a habeas petitioner bears the burden of proof).[1]

## III. THE STATE COURTS' DENIALS OF RELIEF ON GROUNDS THREE, FOUR, AND FIVE WERE NOT OBJECTIVELY UNREASONABLE

### A. The Court of Appeals' resolution of Ground Three was not objectively unreasonable.

In Ground Three, petitioner alleges that, in light of his mental-health issues, his plea was "not voluntarily entered, in violation of the due process clause of the Fourteenth Amendment." (ECF # 90, p. 19). Respondent responded to this claim in his initial *Response* (ECF # 20), asserting that the Oregon Court of Appeals opinion from petitioner's initial post-conviction proceedings (*Kinkel v. Lawhead*, 240 Or. App. 403, 246 P.3d 746 (hereafter "*Kinkel I*")), was not objectively unreasonable. Respondent incorporates that argument herein, and also replies to the arguments in the *Brief in Support*.

In the *Brief in Support*, petitioner contends that the post-conviction court misunderstood the "voluntary-plea standard, and, in turn, that the Oregon Court of Appeals "did not address the actual merits of the claim, or alternatively, relied on the wrong legal standard" to resolve the involuntary plea claim. (ECF # 130, PDF pp. 51). However, the record reveals that, in addressing the claim underlying petitioner's current Ground Three, both the post-conviction court and the Court of Appeals understood and applied the correct standard. The Court of Appeals decision—which is the last reasoned decision on this claim, and thus the one that this Court reviews, *see Delgadillo v. Woodford*, 527 F.3d 919, 925 (9th Cir. 2008)—was not objectively unreasonable.

In that regard, and as previously argued in the *Response to Petition* (ECF # 20), the Court of Appeals in *Kinkel I* identified the correct law for assessing the voluntariness of guilty pleas—

[1] In any event, respondent continues to rely on the argument advanced in his *Response* (ECF # 20), that the unargued claims either fail to state a cognizable claim for relief (Ground One), or that the state courts' resolution of the claim was not objectively unreasonable (Ground Two).



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citing *Brady v. United States*, 397 US 742 (1970)—which petitioner acknowledges is the correct source of law. *Kinkel I*, 240 Or. App at 414-15. Petitioner devotes much of the argument on this claim to whether, considering his mental-health issues, he was competent to waive his right to trial. But, currently, there is no claim that petitioner was not competent to *stand trial*, had he chosen to go to trial. And "the competency standard to plead guilty is the same as that to stand trial." *See Doe v Woodford*, 508 F.3d 563, 571 (9th Cir. 2007) (internal citations omitted).

In any event, as the Oregon Court of Appeals explained in *Kinkel I*, "[a] guilty plea is voluntary for purposes of due process if entered by one who is fully aware of the direct consequences without being induced by fraud or improper threats." 240 Or. App. at 414 (citing *Brady*, 397 US at 742, 755). As that court further explained, the post-conviction court had found that petitioner

> understood the nature of his plea agreement, noting that—among other things—the sentencing court engaged in a thorough examination of petitioner and determined that petitioner knew what he was doing and that petitioner himself indicated that he clearly understood the plea process and was clearly able to recall and understand the nature of the pleas that he entered and the reasons why he and his lawyers decided to choose a plea agreement over going to trial.

*Id*. at 414-15.

Relatedly, the Court of Appeals reasoned that there was evidence in the record to support those findings. *Id*. That evidence includes petitioner's deposition testimony, in which he testified that he understood that pleading guilty would be a way to avoid going to trial, and to possibly get a reduced sentence. (Resp. Ex. 177, Deposition of Petitioner, pp. 36-37).[2] Petitioner also testified that he understood the plea offer that was ultimately agreed upon, and that—in retrospect—while he believed it was the "wrong decision to make," he acknowledged

[2] Other evidence also supported those findings, including the deposition testimony of both of petitioner's trial attorneys (Rich Mullen and Mark Sabitt), an affidavit from the circuit court judge who presided over petitioner's plea and sentencing (the Honorable Jack Mattison), the signed plea petition, and the transcript of the plea colloquy itself. Defense counsel will "often have the best-informed view of the defendant's ability to participate in his defense." *Medina v California*, 505 US 437, 450 (1992).



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that it was his "best shot" of getting a reduced sentence. (*Id*., pp. 46-47). He additionally acknowledged that he "pretty much" understood everything his attorneys were telling him about the plea negotiations and offer, and also that he understood what he was admitting to when he pleaded guilty to each individual count. (*Id*., pp. 48-49, 76-77). Although he stated that he was hearing voices around the time of his guilty pleas, petitioner explained that they did not "interfere with [his] ability to talk with [his] attorneys," or to understand what they were telling him. (*Id*., pp. 67-68).

Under all of those circumstances, it was not objectively unreasonable for the Court of Appeals to conclude that petitioner's plea was knowing and voluntary. While he may have been experiencing mental-health issues—and even hearing some voices—that does not mean that the plea was involuntary or unknowing. *See US v. Rodriguez*, 751 F.3d 1244, 1252 (11th Cir. 2014) (allegation of "mental illness or other mental disability does not invalidate a guilty plea if the defendant was still competent to enter that plea") (internal citations omitted); *Deere v. Cullen*, 718 F.3d 1124, 1146-47 (9th Cir. 2013) (when assessing voluntariness of guilty plea, "what matters is not whether [defendant] had a mental illness that affected his decision, but whether he had a mental illness that affected his capacity to understand his situation and make rational choices"); *Pardo v Sec'y, Fla. Dept. of Corr.*, 587 F.3d 1093, 1101 (11th Cir. 2009) (absent evidence of "present inability to assist counsel or understand the charges, "evidence of low intelligence, mental deficiency, bizarre, volatile, or irrational behavior, or the use of anti-psychotic drugs is not sufficient to show incompetence to stand trial"). Given the intentionally high and difficult bar for obtaining relief under AEDPA, the Court—in light of the extensive record that was before the Court of Appeals in *Kinkel I*—should deny relief on petitioner's Ground Three. *See Burt v. Titlow*, 571 US 12, 15-16 (2013) (if AEDPA's "standard is difficult to meet—and it is—that is because it was meant to be") (internal citations and quotations omitted).



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**B. The Oregon Supreme Court's resolution of Ground Four was not objectively unreasonable.**

As previously argued in the *Response to Amended Petition* (ECF # 103), the Oregon Supreme Court's resolution of Ground Four—a claim that petitioner's sentence violates the Eighth and Fourteenth Amendments under *Graham v. Florida*, 560 US 48 (2010), *Miller v. Alabama*, 132 S.Ct. 2455 (2012), and *Montgomery v. Louisiana*, 136 S.Ct. 2455 (2012) (ECF # 90, p. 23)—was not objectively unreasonable. In reply to petitioner's briefing on that claim, respondent incorporates and relies on the arguments from his *Response*.

In addition, in *Jones v. Mississippi*, 141 S.Ct. 1307 (2021)—which petitioner cites in his *Brief in Support*—the United States Supreme Court held that, contrary to the petitioner's argument, a sentencer is not required to make "a finding of fact regarding a child's incorrigibility" before imposing a discretionary sentence of life without parole. *Jones*, 141 S.Ct. 1307, 1311. Rather, as the Supreme Court had held in *Miller*, "an individual who commits a homicide when he or she is under 18 may be sentenced to life without parole, but only if the sentence is not mandatory and the sentencer therefore has discretion to impose a lesser punishment." *Jones*, 141 S.Ct. at 1311 (describing *Miller*, 567 US 460). Thus, contrary to petitioner's argument in the *Brief*, the sentencing court was not required to find that petitioner was "permanently incorrigible" before sentencing him to approximately 112 years of imprisonment for the four murders and twenty-six attempted murders. Instead, "[i]n a case involving an individual who was under 18 when he or she committed a homicide, a State's discretionary sentencing system is both constitutionally necessary and constitutionally sufficient." *Id*. at 1313.

Ultimately, for that reason, as well as those previously set out in the *Response* (ECF # 103), the Oregon Supreme Court's resolution of Ground Four—contained in *Kinkel v. Persson*, 363 Or. 1, 417 P.3d 401 (2018) (a copy of which has been submitted as



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Exhibit 227)—was not objectively unreasonable. Therefore, the Court should deny relief on petitioner's Ground Four.

**C. Whether or not Ground Five was fairly presented in state court, the claim lacks merit.**

In Ground Five, petitioner alleges that the portion of his sentence imposed for the twenty-six attempted murders—approximately 87 years of imprisonment—violates *Graham*. (ECF # 90, p. 24). Respondent previously argued that petitioner may not have fairly presented that particular claim in state court, and that it may now be procedurally defaulted. In the alternative, respondent argued that, if presented in state court, the state courts' resolution of Ground Five was not objectively unreasonable. (ECF # 130, pp. 10-18).

Again, assuming that Ground Five was fairly presented in Oregon's courts, the Oregon Supreme Court's resolution of it was not objectively unreasonable. First, as that court was aware, in *Graham*, the US Supreme Court stated that "[j]uvenile offenders who commi[t] both homicide and nonhomicide crimes present a different situation for a sentencing judge than juvenile offenders who committed no homicide." *Kinkel*, 363 Or. at 21-22 (citing *Graham*, 560 US at 63). Thus, it reasoned that *Miller* and *Graham* permit "consideration of the nature and number of a juvenile's crimes in addition to the length of the sentence that the juvenile received and the general characteristics of juveniles in determining whether a juvenile's aggregate sentence is constitutionally disproportionate." *Id*.[3]

Additionally, it explained that, given the sentencing court's findings, it was persuaded "that petitioner comes within the class of juveniles who, as *Miller* recognized, may be sentenced to life without possibility of parole for homicide." *Id*., at 24. Ultimately,

> [g]iven the trial court's findings and the severity of petitioner's acts, [the Oregon Supreme Court could not] say that petitioner's sentence is constitutionally

[3] That court was aware of varying opinions from other jurisdictions on whether *Graham* permits an aggregate sentence for a number of distinct nonhomicide offenses that equates to a life without parole sentence. *See Kinkel*, 363 Or. at 22 n. 17 & n. 18. Respondent is aware of such jurisprudence, and cites it in his *Response to Amended Petition* (ECF # 103, pp. 15-16).



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> disproportionate to his crimes for the reasons that underlie the Court's decisions in *Miller* and *Graham*.

*Id*., at 30.

In sum, for the reasons previously expressed in the *Response*—as well as those provided herein—even if petitioner's Ground Five claim was fairly presented in state court, the Oregon Supreme Court did not unreasonably apply *Graham*, *Miller*, or any other clearly established US Supreme Court precedent in concluding that his sentence was lawful. Therefore, the Court should deny relief on Ground Five.

## IV. PETITIONER IS NOT ENTITLED TO RELIEF ON GROUNDS SIX OR SEVEN

### A. Regardless of whether Ground Six is procedurally defaulted, non-cognizable, or reviewable on the merits, petitioner is not entitled to relief.

In Ground Six, petitioner alleges that, on appeal from his second-in-time post-conviction proceedings, the Oregon Supreme Court denied him due process by determining that he "qualified for a life without parole sentence under *Miller* without providing him a meaningful opportunity to be heard." (ECF # 90, pp. 25-26).

In his *Response to Amended Petition*, respondent argued that that ground was procedurally defaulted. (ECF # 103, pp. 8-12). Then, in response to petitioner's *Motion to Expand the Record* (ECF # 129), respondent renewed his argument that Ground Six was procedurally defaulted, but also argued in the alternative that it may have been fairly presented in state court, but lacked merit, or that it may not be a cognizable claim. (*Response to Motion to Expand the Record*, ECF # 141). In reply to petitioner's arguments concerning Ground Six, respondent incorporates the arguments from both the *Response to Amended Petition*, and the *Response to Motion to Expand the Record* herein, and relies on those arguments. Regardless of how the Court construes Ground Six, the claim does not entitle him to relief.

Briefly, before the Oregon Supreme Court, petitioner argued that Due Process required "Oregon to afford him a procedure to properly resolve his claim" under *Miller* and other US Supreme Court precedent. (Resp. Ex. 222, Brief on the Merits of Petitioner on Review,



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pp. 7, 32-33). Additionally, he argued before that court that, in his second-in-time post-conviction relief proceedings, the post-conviction court had violated his right to due process by denying relief "without an adjudication on the merits." (*Id*., pp. 37-38).

Respondent acknowledged—and still acknowledges—that the precise claim that petitioner raises regarding the Oregon Supreme Court's decision could not have been raised until after that court issued its decision. Nevertheless, as respondent argued in his *Response to Motion to Expand the Record*, the issue before that court—in particular, the constitutionality of petitioner's 112-year prison term—was raised and fairly presented in state court. If this Court views petitioner's Ground Six as having been adjudicated on the merits in state court, the Oregon Supreme Court's decision was not objectively unreasonable, largely for the reasons expressed in response to petitioner's arguments on Ground Four.

Alternatively, in the event that this Court determines that Ground Six was not fairly presented in state court, it is procedurally defaulted, and petitioner has not demonstrated any viable basis to excuse the default. Finally, if the Court construes Ground Six as a challenge to Oregon's post-conviction appellate review process, it is not cognizable. (*See* ECF # 141, pp. 6-7). Under any circumstance, Ground Six does not entitle petitioner to relief.

**B. Ground Seven is procedurally defaulted, and, in any event, it lacks merit.**

As previously argued in the *Response to Amended Petition* and the *Response to Motion to Expand the Record*, petitioner's Ground Seven—a claim that the Eighth Amendment forbids life without parole for those suffering from treatable but not curable mental illnesses (ECF # 90, pp. 26-27)—was not fairly presented and is now procedurally defaulted. While the parties were aware that petitioner was suffering from—and apparently continues to suffer from—mental-health issues, in state court petitioner did not raise any specific claim regarding the legality of his sentence in light of those mental-health issues. Under those circumstances, the claim was not fairly presented in state court and is now procedurally defaulted.



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Nevertheless, even assuming petitioner had fairly presented Ground Seven in state court, he would not be entitled to relief. That is so because petitioner fails to demonstrate that the US Supreme Court has clearly established that the Eighth Amendment prohibits life without parole sentences for those suffering from mental illness. While petitioner may be attempting to rely on *Atkins v. Virginia*, 536 US 304 (2002) for that proposition, that argument lacks merit, because *Atkins* applies "only when a mentally-disabled offender is sentenced to die, for death is simply different." *US v. Davis*, 531 Fed. Appx. 601, 608 (6th Cir. 2013) (internal citations and quotations omitted); *cf. Jefferson v. Kernan*, 432 Fed. Appx. 687, 688-89 (9th Cir. 2011) (California petitioner's "three-strikes sentence of 50 years to life is not contrary to or an unreasonable application of clearly established federal law," where the Supreme Court had "never held that the mentally ill are not subject to the three strikes law.").[4] Ultimately, and regardless of procedural default, petitioner has not established any entitlement to relief on Ground Seven.

[4] Moreover, and as at least one federal circuit court of appeals has stated, *Atkins* only protects the intellectually disabled (formerly known as "mentally retarded"), not the "mentally ill." *See Ripkowski v. Thaler*, 438 Fed. Appx. 296, 303 (5th Cir. 2011) ("[T]he Fifth Circuit has recognized the distinction between the mentally ill and the mentally retarded and has held that *Atkins* only protects the latter") (internal citation omitted). While petitioner may suffer from mental illness, there is nothing in the record to suggest that he is intellectually disabled, which is yet another reason why *Atkins* does not apply to him.



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## V. CONCLUSION

Based on the foregoing, as well as on the reasons provided in respondent's prior substantive pleadings cited herein, the Court should deny relief on all of petitioner's claims, and dismiss this action with prejudice.

DATED May 12, 2021.

Respectfully submitted,

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