No. _____

IN THE SUPREME COURT
OF THE UNITED STATES

ERIC THORTON VON HALL,

Petitioner,

v.

MARK NOOTH,

Respondent.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

In this habeas corpus litigation, the petitioner asserted that, under *Kimmelman v. Morrison*, 477 U.S. 365 (1986), the failure to appeal from the denial of a suppression motion under the Oregon Constitution constituted ineffective assistance of counsel. During oral argument in the Ninth Circuit, the three-judge panel raised an argument for the first time based on a case not cited by either party. Although never made by the state, the panel then relied on what the petitioner asserted on rehearing was an incorrect interpretation of state law. The question presented for review is:

> Whether Article III of the Constitution and the party presentation principle foreclose appellate court judges from relying on an argument not presented in the adversarial context that results in a mistake of law upon which the court relied to deny habeas corpus relief.

TABLE OF CONTENTS

INDEX TO APPENDIX

TABLE OF AUTHORITIES

Page(s)

CASES

STATUTES

OTHER

No. _____

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The petitioner, Eric Von Hall, respectfully requests this Court to issue a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit entered on November 7, 2018, affirming the District Court's denial of habeas corpus relief.

1. Opinions Below

The District Court denied habeas corpus relief in an unpublished opinion on July 31, 2017. App. 1. The Ninth Circuit three-judge panel subsequently affirmed the denial of

habeas corpus relief in an unpublished memorandum opinion on November 7, 2018. App. 5. The Ninth Circuit denied panel and en banc rehearing on January 18, 2019. App. 9.

2. Jurisdictional Statement

This Court's jurisdiction is timely invoked under 28 U.S.C. §1254(1).

3. Relevant Constitutional Provisions

The Fourth Amendment to the U.S. Constitution reads, in relevant part: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated...." Article III, Section 1, of the U.S. Constitution states, in relevant part: "The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish."

4. Statement of the Case

A. State Criminal Case

In 2008, Mr. Von Hall was found guilty by a jury of identity theft; false information to police; fourth degree assault; second degree assault; delivery of a controlled substance to a minor (six counts); and contributing to the sexual delinquency of a minor (six counts). The evidence underlying his convictions was seized by police during a warrantless search of his bedroom. Before trial, his lawyer moved to suppress the evidence on the grounds that another occupant of the apartment lacked authority to consent to the search. The trial court denied the motion, admitted the evidence, and subsequently sentenced him to a total of 236 months' imprisonment.

Mr. Von Hall appealed, but his attorney failed to raise the issue of the denial of the suppression motion. Instead, his appellate lawyer raised only one issue: whether the sentence imposed constituted cruel and unusual punishment, in violation of the Eighth Amendment. The Oregon Court of Appeals affirmed without opinion, and the Oregon Supreme Court denied a petition for review.

B. State Post-Conviction Proceedings

Mr. Von Hall petitioned for post-conviction relief. He challenged his lawyer's effectiveness in failing to appeal the denial of his motion to suppress the evidence seized from his bedroom without a warrant. He specifically asserted that his appellate lawyer should have "argued [that] the State had not met its burden of proving the police had consent to enter [his] apartment and that the third party consent the police relied upon had no actual authority to allow entry into [his] bedroom." ER 416.[1]

The post-conviction court denied relief after a hearing. ER 30; ER 546. Its Findings of Fact and Conclusion of Law state:

> Appellate counsel was not inadequate for not raising the denial of the motion to suppress. Appellate counsel could not argue that the testimony from [the other tenant] at the trial made the trial court's denial of the motion to suppress error. The trial court based the denial of the motion to suppress in part on the credibility of the officers, and the Court of Appeals was not going to overrule that finding.

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[1] ER refers to the Excerpts of Record filed in the Ninth Circuit case *Von Hall v. Nooth*, No. 17-35692.

ER 26. Mr. Von Hall timely appealed, but the Oregon Court of Appeals affirmed without opinion, and the Oregon Supreme Court denied his petition for review.

C. Federal Habeas Corpus Proceedings

Mr. Von Hall petitioned for a writ of habeas corpus, continuing to assert ineffective assistance of appellate counsel. ER 796. A magistrate judge entered findings and a recommendation to deny the petition. ER 6. The magistrate judge stated that the trial court's finding that the other tenant gave the officers permission to contact the other occupants inside the apartment was due a presumption of correctness because it was not overcome by clear and convincing evidence to the contrary. ER 20. The magistrate judge also found that the record indicated that the other tenant "consented to the officers' initial search of the apartment." *Id.* He found that "the Fourth Amendment issue was unlikely to prevail on appeal where [the other tenant] consented to the search of the apartment with apparent authority to do so." ER 22. The magistrate judge determined that the post-conviction court's decision to deny the petition was, therefore, neither contrary to, nor an unreasonable application of, clearly established federal law. *Id.*

The District Court adopted, in part, the magistrate judge's findings and recommendation and denied the petition. ER 2. The District Court also made one relevant modification: it held that the other tenant had actual authority over the entire apartment, including the bedroom. ER 3-4.

The Ninth Circuit three-judge panel affirmed the denial of the habeas petition in an unpublished memorandum opinion. App. at 5. It found Mr. Von Hall failed to meet his burden under the deficient performance and prejudice prongs of *Strickland v. Washington*, 466 U.S. 668 (1984), and the Antiterrorism and Effective Death Penalty Act of 1996, 28 U.S.C. § 2254. The court first determined the other tenant of the apartment had apparent authority to consent to the warrantless search. App. at 7. Citing *State v. Beylund*, 158 Or. App. 410, 417, 976 P.2d 1141 (1999), the court also found that Mr. Von Hall's statement to police hours after the warrantless search "provided evidence of the tenant's actual authority to consent." *Id.* The Ninth Circuit subsequently denied both Mr. Von Hall's petition for panel rehearing and his petition for rehearing en banc. App. at 9.

5. Reason for Granting the Writ

Article III of the Constitution and the party presentation principle foreclose appellate court judges from relying on an argument not presented in the adversarial context that results in a mistake of law upon which the court relied to deny habeas corpus relief.

The Ninth Circuit's opinion correctly states that Article I, section 9, of the Oregon Constitution requires actual authority to consent to a warrantless search. App. at 7. The court then cites a single case not cited by either party in the District Court or on appeal: *Beylund*. The holding of *Beylund* supports Mr. Von Hall's argument that the evidence failed to establish that the other tenant had actual authority over his bedroom. "The question of whether a person has actual authority at the time consent is given is ultimately a question of law...." 158 Or. App. at 416-417. Other Oregon courts have since cited *Beylund* for that

same proposition, namely, that "whether [a] person has actual authority to consent is ultimately a question of law." *State v. Jenkins*, 179 Or. App. 92, 100, 39 P.3d 868, 872 (2002); *see also State v. Surface*, 183 Or. App. 368, 373, 51 P.3d 713, 715 (2002) (same).

But the Ninth Circuit does not cite *Beylund* for its holding. Instead, it cites the case for an entirely different proposition, one not previously argued by either party, namely, "that actual authority 'can be proven by facts established after the search.'" App. at 7 (quoting *Beylund*, 158 Or. App. at 417). The court of appeals describes the language it quotes as the "holding" in *Beylund*, but it is not the holding. The quoted language is dictum. Although the Oregon Court of Appeals wrote that "the consenting person's relationship to the premises or items to be searched can be proven by facts established after the search," the court cited no supporting authority for the proposition. 158 Or. App. at 417. It is for that reason that no subsequent Oregon state case has characterized the language quoted by the Ninth Circuit as the "holding" in *Beylund*. *See Surface*, 183 Or. App. at 373; *Jenkins*, 179 Or. App. at 100. In fact, the only case that has ever referenced the same language not only did so in a footnote, but it also described the language as the court's "reasoning" in *Beylund*, not its holding. *State v. Rocha-Ramos*, 161 Or. App. 306, 310 n.3, 985 P.2d 217, 220 n.3 (1999).[2]

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[2] The fact that the Oregon Court of Appeals in *Rocha-Ramos* characterized the language quoted by the Ninth Circuit as the "reasoning" rather than the "holding" in *Beylund* is significant for at least two other reasons. First, the decision in *Rocha-Ramos* was authored by the same judge who authored the decision in *Beylund* less than five months

The Ninth Circuit's misreading of *Beylund* undermines its legal conclusion that the isolated statement that Mr. Von Hall made to police hours after their warrantless search of his bedroom "provided evidence of the [other] tenant's actual authority to consent." App. at 7 (citing *Beylund*). Because *Beylund* does not support the legal proposition for which the court of appeals cites the case (*i.e.*, that actual authority may be proven by "facts established after the search"), the issuance of a writ of certiorari is appropriate to remedy its erroneous legal conclusion.

In addition to correcting the erroneous legal conclusion, the issuance of a writ is appropriate because the Ninth Circuit's reliance on an argument not made by either party violates the party presentation principle. *Greenlaw v. United States*, 554 U.S. 237, 243 (2008) (the Judiciary relies "on the parties to frame the issues for decision and assign to courts the role of neutral arbiter of matters the parties present."). Neither Mr. Von Hall nor the State of Oregon ever cited *Beylund* in any brief or argument to the various state and federal courts that considered the issue of authority to consent that Mr. Von Hall consistently raised. As a result, no state or federal court ever considered what legal effect, if any, *Beylund* might have on the consent issue. It was not until oral argument that the Ninth Circuit *sua sponte* mentioned *Beylund* for the first time and suggested its deleterious impact on Mr. Von Hall's position. https://www.youtube.com/watch?v=Rk__9S2BhkQ

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earlier. Second, *Rocha-Ramos* was argued and submitted to the Oregon Court of Appeals only 12 days before the court issued its decision in *Beylund*.

By injecting an argument not advanced by either party, the appellate court ruled without proper adversarial proceedings and beyond its neutral and detached judicial role. "[T]o perform its high function in the best way, justice must satisfy the appearance of justice." *Liljeberg v. Health Servs. Acquisition Corp.*, 486 U.S. 847, 865 n. 12 (1988) (internal quotation marks omitted).

6. Conclusion

For the foregoing reasons, the Court should grant, vacate, and remand for reconsideration based solely on the arguments presented by the parties below or allow supplemental briefing with an adversarial hearing. In the alternative, the Court should issue a writ of certiorari.

Dated this 18th day of April, 2019.

Ruben L. Iñiguez
Attorney for Petitioner

APPENDIX

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

ERIC THORNTON VON HALL, Petitioner, v. **MARK NOOTH,** Respondent.	Case No. 2:15-cv-0469-JE **ORDER**

Michael H. Simon, District Judge.

United States Magistrate Judge John Jelderks issued Findings and Recommendation in this case on June 20, 2017. ECF 69. Judge Jelderks recommended that Petitioner's Petition for Writ of Habeas Corpus be denied and that certificate of appealability ("COA") be denied.

Under the Federal Magistrates Act ("Act"), the Court may "accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate." 28 U.S.C. § 636(b)(1). If a party files objections to a magistrate's findings and recommendations, "the court shall make a de novo determination of those portions of the report or specified proposed findings or recommendations to which objection is made." *Id.*; Fed. R. Civ. P. 72(b)(3).

For those portions of a magistrate's findings and recommendations to which neither party has objected, the Act does not prescribe any standard of review. *See Thomas v. Arn*, 474

U.S. 140, 152 (1985) ("There is no indication that Congress, in enacting [the Act], intended to require a district judge to review a magistrate's report to which no objections are filed."); *United States. v. Reyna-Tapia*, 328 F.3d 1114, 1121 (9th Cir. 2003) (en banc) (holding that the court must review de novo magistrate's findings and recommendations if objection is made, "but not otherwise"). Although in the absence of objections no review is required, the Act "does not preclude further review by the district judge[] *sua sponte* . . . under a *de novo* or any other standard." *Thomas*, 474 U.S. at 154. Indeed, the Advisory Committee Notes to Fed. R. Civ. P. 72(b) recommend that "[w]hen no timely objection is filed," the Court review the magistrate's recommendations for "clear error on the face of the record."

Both Petitioner and Respondent timely filed objections to the findings and recommendation. Petitioner objects to most of Judge Jelderk's findings relating to the testimony of the police officers, the consent given by Mr. Gordon Pawpa to search the apartment, and the authority of Officer Trent Magnuson to conduct the search beyond the living room. Petitioner also objects to Judge Jelderk's recommendation denying Petitioner's petition and COA. Respondent objects that Judge Jelderks erroneously found that the issue of Mr. Pawpa's apparent authority was sufficiently preserved for appeal and objects that Judge Jelderks did not make a finding relating to the actual authority of Mr. Pawpa to give consent to search.

The Court has reviewed the objections of the parties and the underlying briefing before Judge Jelderks. The Court agrees with the reasoning and analysis of Judge Jelderks, with two modifications. First, the Court adds to the analysis the finding that Mr. Pawpa had actual authority over the entire apartment, including the bedroom. Although Judge Jelderks did not explicitly find actual authority, he did note that "it was evident that Pawpa had control over the apartment, including the bedroom." ECF 69 at 17. Thus, Judge Jelderks implicitly found that

Mr. Pawpa had actual authority over the apartment. The express finding of actual authority, however, does not materially change the analysis of the findings and recommendation. Much of Judge Jelderks' discussion considers whether *Officer Magnuson*, as opposed to Officer Dustin Ballard, heard Mr. Pawpa give any consent to search the apartment at all. That analysis applies whether Mr. Pawpa's authority to give consent was actual or apparent.[1]

Second, the Court will issue a COA. It is appropriate for the district court to issue a COA when the petitioner has made a "substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). "[T]he 'substantial showing' standard for a COA is relatively low . . . ." *Jennings v. Woodford*, 290 F.3d 1006, 1010 (9th Cir. 2002). It is whether "reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong." *Miller–El v. Cockrell*, 537 U.S. 322, 338 (2003); *see also Jennings*, 290 F.3d at 1010 (noting that the standard "permits appeal where petitioner can 'demonstrate that the issues are debatable among jurists of reason; that a court could resolve the issues [differently]; or that the questions are adequate to deserve encouragement to proceed further'" (quoting *Barefoot v. Estelle*, 463 U.S. 880, 893 n.4 (1983))).

The Court finds that reasonable jurists could debate whether Mr. Pawpa gave constitutionally-sufficient consent to search the apartment, and thus whether there was a Fourth Amendment violation. If there was a Fourth Amendment violation, then reasonable jurists could also debate whether appellate counsel gave constitutionally-sufficient assistance of counsel and whether Oregon's post-conviction relief court's decision finding that appellate counsel did provide constitutionally-sufficient assistance was contrary to or an unreasonable application of clearly established federal law.

[1] The Court makes no finding regarding the knowledge of the two police officers of Mr. Pawpa's actual authority.

CONCLUSION

The court ADOPTS IN PART Judge Jelderk's Findings and Recommendations (ECF 69), as supplemented herein. Petitioner's habeas corpus petition is DENIED. The Court issues a Certificate of Appealability pursuant to 28 U.S.C. § 2253(c)(2) on Petitioner's claim of ineffective assistance of counsel based on Petitioner's appellate counsel's failure to raise the Fourth Amendment issue in Petitioner's direct appeal. The Court declines to issue a Certificate of Appealability on Petitioner's other claims because Petitioner has not made a substantial showing of the denial of a constitutional right relating to those claims.

IT IS SO ORDERED.

DATED this 31st day of July, 2017.

/s/ Michael H. Simon
Michael H. Simon
United States District Judge

FILED

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U.S. COURT OF APPEALS

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

ERIC THORTON VON HALL, Petitioner-Appellant, v. MARK NOOTH, Respondent-Appellee.	No. 17-35692 D.C. No. 2:15-cv-00469-JE MEMORANDUM*

Appeal from the United States District Court
for the District of Oregon
Michael H. Simon, District Judge, Presiding

Argued and Submitted October 11, 2018
Portland, Oregon

Before: FISHER, CLIFTON, and CALLAHAN, Circuit Judges.

A jury found Eric Thornton Von Hall guilty of six counts of delivery of a controlled substance to a minor, six counts of contributing to the sexual delinquency of a minor, sodomy, assault, identity theft, and giving false information to a police officer. Von Hall appeals from the district court's denial of his habeas corpus petition, in which he alleged ineffective assistance of counsel on

* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

direct appeal. We have jurisdiction under 28 U.S.C. §§ 1291 and 2253, and we affirm.[1]

We review de novo a district court's denial of a habeas petition. *Murray v. Schriro*, 882 F.3d 778, 801 (9th Cir. 2018). Our review is governed by the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), 28 U.S.C. § 2254. Under AEDPA, habeas relief cannot be granted "unless the state court decision: '(1) was contrary to clearly established federal law as determined by the Supreme Court, (2) involved an unreasonable application of such law, or (3) . . . was based on an unreasonable determination of the facts in light of the record before the state court.'" *Murray*, 882 F.3d at 801 (quoting *Fairbank v. Ayers*, 650 F.3d 1243, 1251 (9th Cir. 2011)).

To establish a claim for ineffective assistance of counsel, a petitioner must show (1) constitutionally deficient performance by counsel (2) that prejudiced the defense. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). Von Hall's trial counsel filed an unsuccessful motion to suppress evidence obtained from an apartment where Oregon police found Von Hall and the victim. Von Hall argues that his counsel was ineffective by failing to challenge the trial court's denial of the motion to suppress in his direct appeal.

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[1] Because the parties are familiar with the factual and procedural history of the case, we need not recount it here.

Von Hall fails to meet his burden under both the deficient performance and prejudice prongs of *Strickland* and AEDPA. The tenant of the apartment consented to the search of the apartment, and it is clear the tenant had *apparent* authority to do so.[2] Von Hall argues, however, that the tenant lacked *actual* authority to consent to the search, which is required under Article 1, section 9 of the Oregon Constitution. After the officer's initial entry into the apartment bedroom, an officer asked Von Hall if he would consent to a search of the bedroom for contraband or items that belonged to the victim. Von Hall's response, "[Y]eah, but you're going to have to ask [the tenant] because it's his apartment," provided evidence of the tenant's actual authority to consent. *See State v. Beylund*, 158 Or. App. 410, 417 (1999) (holding that actual authority "can be proven by facts established after the search"). In light of such evidence, the state post-conviction review court reasonably concluded that, had Von Hall's appellate counsel challenged the denial of the motion to suppress, the appellate court would not have reversed the decision. Von Hall thus fails to show ineffective assistance of counsel under *Strickland* and AEDPA.

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[2] The search thus did not violate the Fourth Amendment. *See United States v. Arreguin*, 735 F.3d 1168, 1175 (9th Cir. 2013) ("Under the apparent authority doctrine, a search is valid if the government proves that the officers who conducted it reasonably believed that the person from whom they obtained consent had the actual authority to grant that consent." (quoting *United States v. Welch*, 4 F.3d 761, 764 (9th Cir. 1993))).

The denial of Von Hall's petition is AFFIRMED.

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

ERIC THORTON VON HALL, Petitioner-Appellant, v. MARK NOOTH, Respondent-Appellee.	No. 17-35692 D.C. No. 2:15-cv-00469-JE District of Oregon, Pendleton ORDER

Before: FISHER, CLIFTON, and CALLAHAN, Circuit Judges.

The panel has voted to deny the petition for panel rehearing. Judge Callahan has voted to deny the petition for rehearing en banc, and Judges Fisher and Clifton have so recommended. The full court has been advised of the petition for rehearing en banc and no judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35. The petition for panel rehearing and the petition for rehearing en banc are denied.

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

ERIC THORNTON VON HALL,

Petitioner,

v.

MARK NOOTH,

Respondent.

Case No. 2:15-cv-00469-JE

FINDINGS AND RECOMMENDATION

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JELDERKS, Magistrate Judge.

Petitioner brings this habeas corpus case pursuant to 28 U.S.C. § 2254 challenging the legality of his state-court convictions dated July 3, 2008. For the reasons that follow, the Petition for Writ of Habeas Corpus (#1) should be denied.

BACKGROUND

KR, the 17-year-old female victim in this case, met petitioner, who was 36 years of age at the time, at a bus station in Eugene in 2007. The two began a relationship which regularly included petitioner providing KR with methamphetamine and having sexual intercourse with her. Trial Transcript, pp. 373, 380-81. On February 10, 2008, petitioner proposed a sexual encounter involving another teenage female. KR objected and pushed petitioner away from her. Petitioner responded by hitting KR in the face. *Id* at 400.

KR left the apartment, went drinking with some friends, and when she returned, asked petitioner for Tylenol, but he provided her with Seroquel and she "passed out on the bed" with her clothes on. *Id* at 404. When she woke up the following morning, she discovered her "right arm was tied, and my legs were tied down to the end of the bed, spread open. And I had nothing on besides my shirt." *Id* at 406.

Petitioner was in the process of tying KR's left arm when she woke up, and she told petitioner to stop. *Id* at 407. According to KR, petitioner refused, claimed KR "owed him," and he proceeded to rape and sodomize KR, then told her she needed to shower. *Id* at 407-14. KR showered, and told petitioner she was

leaving, at which time he told her she could not leave. "He head butted me, and he grabbed the back of my head and smashed it into the side of the table." *Id* at 414-15. "My nose was cracking. My jaw was cracking." *Id* at 415. Petitioner told KR that if she left, he would kill her family. *Id* at 438

An anonymous caller telephoned the police in Eugene shortly before midnight to report hearing "loud banging noises" coming from the apartment where petitioner was detaining KR. *Id* at 270. Officers Dustin Ballard and Trent Magnuson responded to the call and arrived at the one-bedroom apartment of Gordon Pawpa, a 62-year-old male, who had leased the apartment for at least the previous 15 years. *Id* at 144.

Ballard knocked on the door, Pawpa answered, and Ballard advised him that "some neighbors had called in[.]" *Id* at 29. According to Magnuson, Pawpa "actually invited us in before we even really started talking to him." At that time, Magnuson didn't know "if [Pawpa] was leasing or renting, but the responsible person at the apartment is Gordon Pawpa." *Id* at 55. According to Ballard, Pawpa "said everything was okay" and advised Ballard that there were two other people in the apartment. *Id* at 29. Ballard asked, "could we come inside and just make sure everything - everybody is okay? And he agreed for us to come in." *Id* at 29-30.

The officers initially sat down on the couch with Pawpa, with Ballard asking Pawpa about the source of the noise complaint. Pawpa indicated he had been sleeping, and the disturbance "was probably coming from the other two people that

were in the apartment." *Id* at 55-56. "On that information, [Magnuson] headed back towards the bedroom area, where Mr. Pawpa indicated there [were] two more people back there." *Id* at 56. It was "a real small apartment," and Officer Magnuson "just went around the corner" to the bedroom. *Id* at 56, 31. Ballard stayed in the living room while Magnuson went to look in the bedroom. At that point, Pawpa told Ballard that "he had two people staying with him, and they were in his room, and he had been crashing out on the couch." *Id* at 31.

Officer Ballard acted as the primary officer, and he stayed with Pawpa, "getting his name and his date of birth and all that kind of stuff," while visually inspecting the apartment to determine whether there were any signs of a struggle or any indication of what might have been responsible for the banging noises that prompted the anonymous phone call. *Id* at 30, 55. He could not see any evidence of a dispute.

Magnuson located KR asleep on the bed in the bedroom. Magnuson checked the closet and proceeded to the only bathroom in the apartment where he found petitioner "standing kind of up against [a] wall. It appeared that he was trying to hide, or you know, he didn't want me to see him. He actually kind of startled me." *Id* at 56.

Magnuson brought petitioner out into the living room, where petitioner provided the officers with a false name and produced a birth certificate bearing the false name. Because the name he provided to the officers matched an individual with an outstanding arrest warrant, the officers placed him under arrest.

Magnuson went back to the bedroom where officers, with considerable effort, were able to rouse KR. Officers called a family member of KR's, and another patrolman, Officer Newell, took KR to City Hall where she could be reunited with her family. Officer Newell noticed that KR "had two pretty obvious black eyes" that "appeared to be fresh." *Id* at 90. KR told Newell that petitioner had punched her in the face and "indicated that there may have been some type of sexual assault associated with the assault to her face." *Id* at 90-91.

Newell relayed this information to Ballard, prompting him to ask petitioner "if he would consent to [an] officer searching the [bed]room for any contraband or any other items that may belong to [KR], and he said yeah, but you're going to have to ask [Pawpa] because it's his apartment." *Id* at 39. Officer Magnuson asked Pawpa for permission to search the bedroom, and Pawpa was "very cooperative," advising Magnuson, "you can do whatever you want with the bedroom. Take whatever you need." *Id* at 60. The subsequent search yielded drug paraphernalia, the victim's clothing, and the shoelaces KR claimed petitioner had used to tie her to the bed. *Id* at 62-64.

Based upon the foregoing, the Lane County Grand Jury indicted petitioner on six counts of Delivery of a Controlled Substance to a Minor, six counts of Contributing to the Sexual Delinquency of a Minor, two counts of Rape in the First Degree, three counts of Sodomy in the First Degree, two counts of Sexual Abuse in the First Degree, and one count each of Assault in the Second Degree, Identity Theft, Giving False Information to a

Police Officer, and Unlawful Possession of a Controlled Substance. Respondent's Exhibit 102.

The day before petitioner's trial was to commence, the court held a pretrial conference where the State dismissed one count each of Rape in the First Degree, Sodomy in the First Degree, Sexual Abuse in the First Degree, and Unlawful Possession of a Controlled Substance. Trial Transcript, p. 4. The same day, defense counsel moved to suppress "any and all evidence seized from the residence of the [petitioner] . . . and any and all evidence, observations, statements, or other matters pertaining to, arising from, or constituting knowledge derived from said search." Respondent's Exhibit 124. He maintained that neither petitioner nor anyone else with authority consented to the search of the apartment. The trial court denied the motion to suppress, and made the following findings of fact and conclusions of law pertaining to the officers' initial entry and search:

> Officers Ballard and Magnuson initially responded for a welfare check around 11:16 p.m.
>
> Upon their arrival, they were greeted at the front door by a gentleman identified as Gordon Pawpa. Mr. Pawpa invited the officers into the residence and indicated to the officers that he had been sleeping on the couch, and was unaware of any disturbance taking place. However, he said there were two other occupants in the apartment with him, and that they were in the bedroom of his one-bedroom unit. And he also - when Officer Ballard asked him if they could look around, he said they were welcome, and it was okay by him for them to do that.
>
> * * * * *

> The initial entry into the apartment by officers Ballard and Magnuson [was] justified by the voluntary consent of Mr. Pawpa, who had actual authority and apparent authority.
>
> I find that Mr. Pawpa gave the officers further permission to contact the other occupants in the residence, and that the defendant was contacted in the shared bathroom, not in the bedroom.

Id at 150, 154-55.

Petitioner proceeded to a jury trial where the jury acquitted him of one count of Sexual Abuse in the First Degree and one count of Sodomy in the First Degree. It failed to reach a verdict on one count of Rape in the First Degree and one count of Sodomy in the First Degree, but convicted him of the remaining 16 charges. As a result, the court sentenced petitioner to 236 months in prison.

Petitioner took a direct appeal wherein he argued, through counsel, that the length of his sentence violated the Oregon and U.S. Constitutions.[1] Respondent's Exhibit 103. Counsel did not argue the search and seizure issue. The Oregon Court of Appeals affirmed the trial court's decision without opinion, and the Oregon Supreme Court denied review. *State v. Von Hall*, 235 Or. App. 380, 231 P.3d 1191, *rev. denied*, 349 Or. 57, 240 P.3d 1098 (2010).

Petitioner next filed for post-conviction relief ("PCR") in Malheur County where the PCR court denied relief on his claims. The Oregon Court of Appeals affirmed without opinion, and the Oregon Supreme Court denied review. *Von Hall v. Nooth*, 266 Or.

[1] Petitioner also submitted a *pro se* appellate brief that did not raise the Fourth Amendment issue. Respondent's Exhibit 104.

App. 229, 337 P.3d 204 (2014), *rev. denied*, 336 Or. 690, 344 P.3d 1112 (2015).

Petitioner filed this federal habeas corpus action on March 23, 2015. In his Petition for Writ of Habeas Corpus, petitioner raises 22 grounds for relief. In his only argued claim, petitioner asserts that his appellate attorney was constitutionally ineffective when he omitted the Fourth Amendment search and seizure claim from petitioner's Appellant's Brief on direct review. Respondent asks the court to deny relief on this claim because it lacks merit.

DISCUSSION

I. Standard of Review

An application for a writ of habeas corpus shall not be granted unless adjudication of the claim in state court resulted in a decision that was: (1) "contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States;" or (2) "based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d). A state court's findings of fact are presumed correct, and petitioner bears the burden of rebutting the presumption of correctness by clear and convincing evidence. 28 U.S.C. § 2254(e)(1).

A state court decision is "contrary to . . . clearly established precedent if the state court applies a rule that contradicts the governing law set forth in [the Supreme Court's] cases" or "if the state court confronts a set of facts that are

materially indistinguishable from a decision of [the Supreme] Court and nevertheless arrives at a result different from [that] precedent." *Williams v. Taylor*, 529 U.S. 362, 405-06 (2000). Under the "unreasonable application" clause, a federal habeas court may grant relief "if the state court identifies the correct governing legal principle from [the Supreme Court's] decisions but unreasonably applies that principle to the facts of the prisoner's case." *Id* at 413. The "unreasonable application" clause requires the state court decision to be more than incorrect or erroneous. *Id* at 410. Twenty-eight U.S.C. § 2254(d) "preserves authority to issue the writ in cases where there is no possibility fairminded jurists could disagree that the state court's decision conflicts with [the Supreme] Court's precedents. It goes no farther." *Harrington v. Richter*, 562 U.S. 86, 102 (2011).

II. Unargued Claims

As previously noted, although petitioner raises 22 claims in his Petition, he argues only that he was the victim of ineffective assistance of appellate counsel when his attorney failed to include his Fourth Amendment search and seizure issue in his Appellant's Brief. Petitioner does not argue the merits of his remaining claims, nor does he address any of respondent's arguments as to why relief on these claims should be denied. As such, petitioner has not carried his burden of proof with respect to these unargued claims. *See Silva v. Woodford*, 279 F.3d 825, 835 (9th Cir. 2002) (petitioner bears the burden of proving his claims). Even if petitioner had briefed the merits of these

claims, the court has examined them based upon the existing record and determined that they do not entitle him to relief.

III. Ineffective Assistance of Appellate Counsel

Petitioner asserts that Pawpa did not consent to the search of the bedroom, and even if he did, he lacked authority to grant consent to perform the initial search of the bedroom. He therefore concludes that Magnuson's search beyond the living room was unlawful such that all evidence that subsequently flowed from it was inadmissible at trial. He claims that his direct appellate attorney was constitutionally ineffective for failing to appeal the trial court's ruling on his suppression motion.

Because no Supreme Court precedent is directly on point that corresponds to the facts of this case, the court uses the general two-part test established by the Supreme Court to determine whether petitioner received ineffective assistance of counsel. *Knowles v. Mirzayance*, 556 U.S. 111, 122-23 (2009). First, petitioner must show that his counsel's performance fell below an objective standard of reasonableness. *Strickland v. Washington*, 466 U.S. 668, 686-87 (1984). Due to the difficulties in evaluating counsel's performance, courts must indulge a strong presumption that the conduct falls within the "wide range of reasonable professional assistance." *Id* at 689.

Second, petitioner must show that his counsel's performance prejudiced the defense. The appropriate test for prejudice is whether the petitioner can show "that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id* at 694.

In proving prejudice with respect to the performance of appellate counsel, a petitioner must demonstrate a reasonable probability that but for appellate counsel's failure, "he would have prevailed on his appeal." *Smith v. Robbins*, 528 U.S. 259, 285-286 (2000). He must not only show that the claim had merit, but must also demonstrate that the omitted claim was "clearly stronger than issues that counsel did present." *Id.* When *Strickland's* general standard is combined with the standard of review governing 28 U.S.C. § 2254 habeas corpus cases, the result is a "doubly deferential judicial review." *Mirzayance*, 556 U.S. at 122.

A. Unreasonable Searches and Seizures

The resolution of petitioner's ineffective assistance of appellate counsel claim necessarily relies upon the viability of the suppression motion. Warrantless searches, such as the one that occurred in this case, will not violate the Fourth Amendment's prohibition against unreasonable searches and seizures so long as an individual consents to the search, and that person "possessed common authority over or other sufficient relationship to the premises or effects sought to be inspected." *United States v. Matlock*, 415 U.S. 164, 171 (1974). Common authority is not necessarily determined by a party's ownership interest in the property, but is instead predicated upon "mutual use of the property by persons generally having joint access or control for most purposes, so that it is reasonable to recognize that any of the co-inhabitants has the right to permit inspection in his own right and that the others have assumed the risk that

one of their number might permit the common area to be searched." *Id* at 171 n.7 (1974).

Common authority can be actual, such as where: "(1) a third party had shared use and joint access to or control over a searched area; or (2) the owner of the property to be searched has expressly authorized a third party to give consent to the search." *United States v. Arreguin*, 735 F.3d 1168, 1174 (9th Cir. 2013) (citation and internal quotation marks omitted). However, common authority can also be apparent. "Under the apparent authority doctrine, a search is valid if the government proves that the officers who conducted it reasonably believed that the person from whom they obtained consent had the actual authority to grant that consent." *Id* at 1175 (citation and internal quotation marks omitted).

B. Preservation

As an initial matter, respondent contends that petitioner's trial attorney never argued the issue of Pawpa's apparent authority to consent to a search of the bedroom, thus it was not preserved for appeal and appellate counsel cannot be faulted for not raising it. It is true that trial counsel argued apparent authority only with respect to the second search, Trial Transcript, p. 142, but the trial judge specifically concluded that Pawpa "had actual authority and apparent authority" with respect to the "initial entry into the apartment" by the officers. *Id* at 154. Accordingly, the court finds the issue was sufficiently preserved such that appellate counsel could have properly raised it on appeal.

C. Propriety of Search and Obligation of Appellate Counsel

Appellate counsel filed an affidavit during petitioner's PCR proceedings in which he explained his rationale for not raising the suppression issue. He stated that he "considered this issue and declined to raise it primarily because the trial court determined that petition[er], the victim, and Mr. Pawpa all consented to the search of the bedroom in Mr. Pawpa's house. I also determined that the evidence retrieved from the room had minimal probative value as compared with the victim's and [petitioner's] trial testimony." Respondent's Exhibit 145, p. 2.

The PCR court denied relief on petitioner's claim, providing the following rationale:

> Appellate counsel was not inadequate for not raising the denial of the motion to suppress. Appellate counsel could not argue that the testimony from Pawpa at the trial made the trial court's denial of the motion to suppress error. The trial court based the denial of the motion to suppress in part on the credibility of the officers, and the Court of Appeals was not going to overrule that finding.

Respondent's Exhibit 153, p. 3.

Petitioner asserts that appellate counsel had no tactical basis upon which to omit the Fourth Amendment issue, and that any consent KR and petitioner gave to search came well after Magnuson's initial search such that counsel misunderstood the issue and mistakenly focused on the particulars of the second search of the bedroom. He believes that Officer Magnuson's initial search of the bedroom, when properly viewed in terms of what Magnuson and Ballard knew at that moment, violated the

Fourth Amendment because Magnuson went from sitting on the couch with Ballard to moving to the back bedroom without requesting or obtaining consent from Pawpa or having any indication that anything was amiss. Petitioner reasons that where the PCR court never addressed the issue of consent, its decision involved an unreasonable application of clearly established federal law.

Officer Ballard testified at the suppression motion that when Pawpa answered the door, "I said, well, could we come inside and just make sure everything - everybody is okay? And he agreed for us to come in." Trial Transcript, pp. 29-30. Petitioner states that Officer Ballard's request was a compound one insofar as he asked Pawpa for consent to two different actions: (1) permission to enter the apartment; and (2) permission to make sure everyone was okay. He takes the position that Pawpa only agreed to the first request, not the second. This reading of Ballard's testimony is too technical. Ballard's testimony is most accurately read as asking Pawpa for permission to enter the apartment to make sure everyone was okay. Pawpa's agreement to allow the officers into the apartment, especially where Pawpa had already advised them of the presence of two other people and volunteered that they might be the source of the loud banging sounds, was his consent to their contacting the other two individuals within the apartment to make sure they were safe.

In this regard, Pawpa consented to the entry into the apartment for the officers to personally ascertain whether any of the occupants needed assistance. Such an interpretation is consistent with the record which reveals that the prosecutor

clarified this point during the suppression hearing when he asked Ballard, "When you asked Mr. Pawpa if it was okay for you and Officer Magnuson to come into the residence to make sure everything was okay, was he agreeable to that?" Trial Transcript, p. 30. Ballard responded, "Yes." *Id.* Moreover, the trial court made a finding of fact that Pawpa gave the officers permission to contact the other occupants of the apartment. Trial Transcript, p. 154. Such a finding is entitled to a presumption of correctness absent clear and convincing evidence to the contrary. 28 U.S.C. § 2254(e)(1). In light of the totality of the record, petitioner cannot overcome this finding by clear and convincing evidence.

The record thus establishes that before Magnuson conducted his initial search of the bedroom where he discovered the victim, Pawpa had answered the door, advised Magnuson and Ballard that there were two other individuals in the apartment located in the bedroom, speculated that the loud banging sounds might be associated with his guests, and agreed that the officers could come inside to make sure everyone was okay. It is therefore evident that Pawpa consented to the officers' initial search of the apartment.

Petitioner contends that even if Pawpa purported to consent to a search of the entire apartment, he lacked authority to do so such that any such consent was not valid. He points out that although Pawpa was leasing the apartment, Ballard and Magnuson did not know that at the time of the initial search, and neither of the officers asked Pawpa a single question to determine

whether he had authority over the apartment generally, or the bedroom specifically. Instead, they were confronted with a situation where nothing was visually wrong, and there were indications that Pawpa's living space was confined to the living room.[2] Petitioner therefore posits that the officers could not have reasonably believed that Pawpa, absent further inquiry, had joint use, access, or control over the bedroom.

Respondent counters that Pawpa referred to the apartment's sole bedroom as "his bedroom." *Id* at 31. However, according to Ballard's testimony, Pawpa made this statement only after Magnuson had already gone around the corner to the bedroom. *Id.* As such, Magnuson could not have considered the statement when he initiated his search of the bedroom.

Although Magnuson was not privy to the "his room" comment, at the time Magnuson began his search beyond the living room, Pawpa had already told both officers that he had two other people staying with him,[3] implying that the other two individuals in the apartment were his guests. As previously discussed, Pawpa speculated to both officers that the concerning noises that had prompted the anonymous call for police assistance were coming from the two other individuals in the apartment. *Id* at 55-56.

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[2] Prior to Magnuson's initial search, Pawpa indicated he had been sleeping, and that two other people were staying in the bedroom. Trial Transcript, p. 55-56.

[3] Although petitioner contends Pawpa told only Ballard this fact, and the record supports the inference Pawpa told both officers this fact. Trial Transcript, p. 31 ("he had informed us there was two other people in the back room."). This appears to be what prompted Magnuson to go "just . . . around the corner" of "this very tiny apartment" to the bedroom. *Id* at 31, 112.

Where Pawpa invited the officers in and to contact his guests within the apartment, the officers reasonably believed petitioner had apparent authority to consent to the search of the apartment. Thus, even before petitioner told the officers that the apartment was Pawpa's just prior to the second search, and that any consent to search must come from him, it was evident that Pawpa had control over the apartment, including the bedroom.[4]

Although not obligated to do so, the court has conducted an independent review of the record in this case. It finds that the Fourth Amendment issue was unlikely to prevail on appeal where Pawpa consented to the search of the apartment with apparent authority to do so. Because petitioner has not shown that the PCR court's decision was so erroneous that there is no possibility fairminded jurists would agree with it, that decision was neither contrary to, nor an unreasonable application of, clearly established federal law.

RECOMMENDATION

For the reasons identified above, the Petition for Writ of Habeas Corpus (#1) should be denied and a judgment should be entered dismissing this case with prejudice. The court should decline to issue a Certificate of Appealability on the basis that petitioner has not made a substantial showing of the denial of a constitutional right pursuant to 28 U.S.C. § 2253(c)(2).

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[4] Petitioner states that the officers' state of mind is evidenced by the fact that they asked petitioner for permission to conduct the second search of the bedroom. The court views this as a precautionary measure where they had arrested petitioner, read him his *Miranda* rights, and had reason to believe from interviewing KR that petitioner had committed a crime in the bedroom.

SCHEDULING ORDER

This Findings and Recommendation will be referred to a district judge. Objections, if any, are due within 17 days. If no objections are filed, then the Findings and Recommendation will go under advisement on that date.

If objections are filed, then a response is due within 14 days after being served with a copy of the objections. When the response is due or filed, whichever date is earlier, the Findings and Recommendation will go under advisement.

DATED this 20 day of June, 2017.

John Jelderks
United States Magistrate Judge

No. _____

IN THE SUPREME COURT
OF THE UNITED STATES

ERIC THORTON VON HALL,

Petitioner,

v.

MARK NOOTH,

Respondent.

On Petition For Writ Of Certiorari To
The United States Court Of Appeals
For The Ninth Circuit

CERTIFICATE OF SERVICE AND MAILING

I, Ruben L. Iñiguez, counsel of record and a member of the Bar of this Court, certify that pursuant to Rule 29.3, service has been made of the within PETITION FOR WRIT OF CERTIORARI on counsel for the Respondent by depositing in the United States Post Office, in Portland, Oregon on April 18, 2019, first class postage prepaid, an exact and full copy thereof addressed to:

David B. Thompson
Assistant Attorney General
400 Justice Building
1162 Court Street, NE
Salem, OR 97301-4096

and by depositing in the United States Post Office, in Portland, Oregon on April 18, 2019, first class postage prepaid, an exact and full copy thereof addressed to:

Noel Francisco
Solicitor General of the United States
Room 5616
Department of Justice
950 Pennsylvania Ave., N. W.
Washington, DC 20530-0001

Further, the original and ten (10) copies were mailed to the Honorable Scott S. Harris, Clerk of the United States Supreme Court, by depositing them in a United States Post Office Box, addressed to 1 First Street, N.E., Washington, D.C., 20543, for filing on this 18th day of April, 2019, with first-class postage prepaid.

Dated this 18th day of April, 2019.

Ruben L. Iñiguez
Attorney for Petitioner