No._____

IN THE SUPREME COURT OF THE UNITED STATES

STEPHEN JASON WHITAKER,

Petitioner,

v.

JEFF PREMO, Superintendent,
Oregon State Penitentiary,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Mr. Whitaker claimed in federal habeas proceedings that his guilty plea violated his right to due process because he entered it unaware of relevant statutory maximum penalties. Acknowledging that the claim was procedurally defaulted, he asserted that the procedural default should be excused because ineffective assistance of trial counsel caused it. *Coleman v. Thompson*, 501 U.S. 722, 754 (1991). Correlatively, he argued that the procedural default of the ineffective assistance of trial counsel claim was procedurally defaulted but that it should be excused due to ineffective assistance of postconviction counsel. *Martinez v. Ryan*, 566 U.S. 1 (2012). Relying on a related but, Mr. Whitaker contends, distinct claim, the District Court rejected Mr. Whitaker's assertion that the ineffective assistance of trial counsel claim was exhausted.

The question presented is: Whether a Court of Appeals' denial of a certificate of appealability conflicts with this Court's rulings in *Vasquez v. Hillery*, 474 U.S. 254, 260 (1986), where the district court determined that the state court claim that trial counsel was ineffective in allowing the defendant to enter a guilty plea based on counsel's "misleading information about the law and sentencing and how it applied" exhausted the more specific federal habeas claim that trial counsel was ineffective in failing to advise him of relevant statutory maximum penalties.

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The United States District Court for the District of Oregon denied Mr. Whitaker's petition for writ of habeas corpus in an unpublished opinion and order. App. at 3-11 (*Whitaker v. Premo*, 2019 WL 209885 (D. Or. January 14, 2019) ("Opinion & Order")). That Court also denied a certificate of appealability. App. at 10. On appeal, the United States Court of Appeals for the Ninth Circuit also denied a certificate of appealability as well as a motion to reconsider that denial. App. at 1. (*Whitaker v. Premo*, No. 19-35126 (9th Cir. May 22, 2019).

JURISDICTIONAL STATEMENT

This Court has jurisdiction to review this petition for writ of certiorari under 28 U.S.C. § 1254(1) (2012). The Ninth Circuit filed its order sought to be reviewed on May 22, 2019. App. at 1.

CONSTITUTIONAL AND STATUTORY PROVISIONS

U.S. Const. Amend. VI provides:

> In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defense.

28 U.S.C. § 2253(c)(1) (2012) provides:

> Unless a circuit justice of judge issues a certificate of appealability, an appeal may not be taken to the court of appeals from—
>
> (A) the final order in a habeas corpus proceeding in which the detention complained of arises out of process issued by a State court. . .

28 U.S.C. § 2253(c)(2) (2012) provides:

> A certificate of appealability may issue . . . only if the applicant has made a substantial showing of the denial of a constitutional right.

STATEMENT OF THE CASE

A. State Court Proceedings

In June 2009, a Lane County, Oregon, grand jury returned a six-count indictment against Mr. Whitaker, charging him with two felony counts of first degree manslaughter and several other counts, each carrying a lesser penalty. D.Ct. Dkt. 19-1 at 12-13. Mr. Whitaker later pleade guilty to the two top counts and two misdemeanor counts. D.Ct. Dkt. 19-1 at 16-21. The court sentenced Mr. Whitaker to a total of 200 months imprisonment. *Id.* at 47-48.

Mr. Whitaker did not appeal his conviction and sentence, but he did seek and was denied postconviction relief. The Oregon Court of Appeals affirmed without opinion the denial of postconviction relief, and the Oregon Supreme Court denied review without opinion. *Whitaker v. Premo*, 344 P.3d 1149, *review denied*, 356 P.3d 638 (2015).

B. Federal Habeas Proceedings

In Claim III.C. of his amended petition for writ of habeas corpus, Mr. Whitaker claimed that his guilty plea violated his Fourteenth Amendment right to due process, as he was unaware of the statutory maximum penalty to which he

would have been exposed had he proceeded to trial and been convicted of a lesser included offense of second degree manslaughter on each of the two top first degree manslaughter counts. *See, e.g., McCarthy v. United States,* 394 U.S. 459, 466 (1969) ("because a guilty plea is an admission of the elements of a formal criminal charge, it cannot be truly voluntary unless the defendant possesses an understanding of the law in relation to the facts"). Mr. Whitaker contended that Claim III.C. was procedurally defaulted but that the procedural default should be excused due to trial and postconviction ineffective assistance of counsel. In particular, he asserted that the procedural default of Claim III.C. should be excused because caused by ineffective assistance of trial counsel ("IATC"). *Coleman v. Thompson*, 501 U.S. 722, 754 (1991) ("Where a petitioner defaults a claim as a result of the denial of the right to effective assistance of counsel, the State, which is responsible for the denial as a constitutional matter, must bear the cost of any resulting default and the harm to state interests that federal habeas review entails.") Correlatively, he argued that the IATC claim was procedurally defaulted but that it should be excused due to ineffective assistance of postconviction counsel. *Martinez v. Ryan*, 566 U.S. 1 (2012) (ineffective assistance of postconviction counsel may excused defaulted ineffective assistance of trial counsel claim).

The pertinent IATC claim asserted in postconviction proceedings alleged only that Mr. Whitaker's plea was not "knowingly, willingly and intelligently

made" because "[c]ounsel gave misleading information about the law and sentencing and how it applied." D.Ct. State's Exhibit 109 at 4-5. Counsel never made this claim more specific or otherwise addressed it, thus failed to assert that Mr. Whitaker's plea was involuntary, unknowing, and unintelligent because counsel failed to advise him of the statutory maximum penalty to which he would have been exposed had he been convicted of a lesser included offense of second degree manslaughter on each of the two top first-degree manslaughter counts. Nevertheless, the District Court ruled that postconviction counsel had raised the relevant IATC claim in the postconviction trial-level court, *see* Opinion & Order at 7, but that the claim was defaulted because Mr. Whitaker "did not fairly present any federal claims to the Oregon Supreme Court and therefore procedurally defaulted all of his claims." *Id.* at 4.[1]

Whether the IATC claim was new is critical. If Mr. Whitaker is correct that it was new and, therefore, procedurally defaulted, then he might have established through an expanded record and de novo review that the procedural default of Claim III.C. should have been excused.

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[1] The District Court also ruled that the state postconviction court "specifically addresses the voluntariness issue" in findings of fact and conclusions of law. *Id.* at 8. While it is true that the state court wrote "Plea knowing & voluntary," that determination did not extend to habeas Claim III.C. because, as shown in the text, that habeas claim was not at issue in state postconviction proceedings.

REASONS FOR GRANTING THE WRIT

The Lower Courts Employ Various Inconsistent Interpretations Of *Hillery* In Determining Whether A Claim Is New, As Compared To One Adjudicated In State Postconviction Proceedings.

How to determine whether a federal habeas claim is new, as compared to a related claim adjudicated in state postconviction proceedings, is an important federal question because whether a claim is new drives how a court treats it. It has profound effects on whether the claim may be reviewed on its merits at all and, assuming merits review is available, on what standard of review is employed and what evidence may be considered in deciding the claim. If the claim had been adjudicated in state court, then federal habeas courts must review with deference the state court decision and may not consider any evidence outside the state court record unless certain requirements are satisfied. *Kernan v. Hinojosa*, 136 S.Ct. 1603, 1604 (2016) (AEDPA mandates "deference, rather than *de novo*, review" of merits adjudicated claims unless either § 2254(d)(1) or (d)(2) is satisfied); *Cullen v. Pinholster*, 563 U.S. 170 (2011) (federal habeas court considering the merits of an state court adjudicated claim ordinarily may not consider evidence beyond the state court record). However, if a claim has not been adjudicated in state court, the default may be excused by showing cause and prejudice. Thus, generally, whether a claim is new governs whether a habeas petitioner may be able to present new supporting evidence and whether his claim will be reviewed de novo.

Over two decades ago, the Court held that a habeas claim is new if it "fundamentally alter[s]" the claim as presented to the state courts. *Vasquez v. Hillery*, 474 U.S. 254, 260 (1986). With no subsequent guidance from this Court on how to determine when a claim is fundamentally altered, the lower courts have developed different approaches.

The Fourth Circuit holds that "a petitioner may not support a claim in state court with 'mere conjecture' and subsequently provide the necessary evidentiary support for the claim on federal habeas review." *Gray v. Zook*, 806 F.3d 783, 799 (4th Cir. 2015) (quoting *Winston v. Kelly*, 592 F.3d 535 (4th Cir. 2010)).

Similarly, the Eighth Circuit holds that "merely provid[ing] additional evidentiary support" did not "fundamentally alter" the claim presented in state court. *Rhines v. Young*, 899 F.3d 482, 495 (2018). This could simply be an unremarkable statement that where the "additional evidentiary support" is immaterial, then it does not fundamentally alter the claim. But the *Rhines* opinion did not note that the additional proffered evidence was of a type quintessentially mitigating and that it had not been presented to the state courts. Specifically, habeas counsel presented evidence of childhood exposure to environmental toxins, of brain damage, and of military service and its resulting trauma. *Rhines v. Young*, Case 00-5020-KES (S.D. Western Div.) at Dkt. 282 (motion for leave to amend and exhibits). Each of these factors is classic mitigation, as each may reduce moral

culpability. *See Penry v. Lynaugh*, 492 U.S. 302, 319 (1989) ("defendants who commit criminal acts that are attributable to . . . mental problems[] may be less culpable than defendants who have no such excuse") (internal quotation marks and citation omitted). Thus, in ruling that the claim had been adjudicated in state court, the Eighth Circuit is fairly read to have rejected *in principle* that a claim adjudicated in state court can be fundamentally altered and, therefore, rendered new and unexhausted by alleging or presenting supporting evidence for the first time in federal court.

The Sixth Circuit, too, has rejected *in principle* that new facts presented in federal habeas proceedings in support of a claim adjudicated in state court can render it new and unexhausted. In *Moore v. Mitchell*, 708 F.3d 760 (6th Cir. 2013), the Court of Appeals ruled that petitioner's state court argument that counsel spent insufficient time preparing his expert who, as a result, gave damaging testimony, exhausted his federal court claim based on depositions from trial counsel, a mitigation specialist, and a psychologist. The Sixth Circuit ruled that because the claim had been adjudicated in state court, new supporting evidence could not render it new and unexhausted. *Id.* at 780 ("Thus we are faced with the novel question stemming from *Pinholster*: May a federal habeas court consider additional evidence not before the state courts[?] . . . We hold that it may not." *Id.*

In the case at bar, the Ninth Circuit denied a COA on whether the default of Claim III.C. should be excused. None of the salient facts alleged in his federal habeas proceedings in support of the IATC claim, on which he relied in seeking an order excusing the default of Claim III.C., had been presented in state court. *See also Gonzalez v. Wong*, 667 F.3d 965, 980 (9th Cir. 2011) (determining that habeas claim is not new even though "if the new evidence were considered, [the petitioner] could make a colorable or potentially meritorious Brady claim [on which, in its state court iteration, the petitioner lost]"). Of course, the Ninth Circuit has sometimes adhered to the Court's test set out in *Hillery*. *See Dickens v. Ryan*, 740 F.3d 1302 (2014). Nevertheless, as the instant case and *Wong* illustrate, it does not always do so, and the cases discussed above from other Circuit Courts of Appeal make clear that *Hillery* has been variously interpreted. Lower courts and litigants need further guidance on how to distinguish new claims from related claims adjudicated in state court.

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CONCLUSION

For these reasons, this Court should grant certiorari to resolve how to distinguish new claims from related claim adjudicated in earlier state court proceedings, or, in light of *Hillery*, grant the writ, vacate the judgment, and remand for further proceedings.

Respectfully submitted on August 20, 2019.

Oliver W. Loewy
Assistant Federal Public Defender
Attorney for Petitioner

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

STEPHEN JASON WHITAKER, Petitioner-Appellant, v. JEFF PREMO, Superintendent, Respondent-Appellee.	No. 19-35126 D.C. No. 6:16-cv-00479-HZ District of Oregon, Eugene ORDER

Before: BYBEE and BEA, Circuit Judges.

The request for a certificate of appealability (Docket Entry No. 2) is denied because appellant has not shown that "jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000); *see also* 28 U.S.C. § 2253(c)(2); *Gonzalez v. Thaler*, 565 U.S. 134, 140-41 (2012); *Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003).

Any pending motions are denied as moot.

DENIED.

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

STEPHEN JASON WHITAKER,

Petitioner,

v.

JEFF PREMO,

Respondent.

Case No. 6:16-cv-00479-HZ

OPINION AND ORDER

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HERNANDEZ, District Judge.

Petitioner brings this habeas corpus case pursuant to 28 U.S.C. § 2254 challenging the legality of his state-court convictions for Manslaughter, Reckless Driving, and Driving Under the Influence of Intoxicants. For the reasons that follow, the Amended Petition for Writ of Habeas Corpus (#24) is denied.

BACKGROUND

After spending the day drinking alcohol, Petitioner drove his 1972 Winnebago RV at excessive speeds northbound on I-5 near the Creswell area. Petitioner veered erratically from side to side at speeds of 80 miles per hour despite heavy traffic, changing lanes abruptly. He ultimately struck the freeway median with such force that body of the RV became unmoored from its chassis, flew through the air, and crushed the back seat area of another vehicle traveling in the southbound lanes of I-5. The impact "shredded" the rear left side of the vehicle, killing a six-year-old girl. John Ratliff, Petitioner's friend who was riding with him in the RV, was also killed in the crash.

Petitioner had been operating the RV without a license, and he admitted to consuming a great deal of alcohol and ingesting prescription medications prior to getting behind the wheel. A blood draw at the hospital following the accident showed Petitioner's blood-alcohol content to be .24. Based upon all of these facts, the Lane County Grand Jury indicted Petitioner on two counts of Manslaughter in the First Degree, two counts of Assault in the Third Degree, and one count each of Driving Under

the Influence of Intoxicants and Reckless Driving. Respondent's Exhibit 102.

Petitioner elected to enter a guilty plea to both Manslaughter counts, Driving Under the Influence, and Reckless Driving. In exchange, the State agreed to drop the two counts of Assault. It also agreed that Petitioner could argue for a total Manslaughter sentence of 10 years, and that any sentence from the DUI and Reckless Driving convictions would run concurrently with the sentence imposed for Manslaughter. The trial court subsequently imposed partially concurrent sentences on the Manslaughter convictions resulting in a total prison sentence of 200 months. Respondent's Exhibit 103, pp. 33-34.

Petitioner did not take a direct appeal, but filed for post-conviction relief ("PCR") in Marion County where the PCR court denied relief on his claims. Respondent's Exhibit 134. The Oregon Court of Appeals affirmed the PCR court's decision without opinion, and the Oregon Supreme Court denied review. *Whitaker v. Premo,* 268 Or. App. 854, 344 P.3d 1149, *rev. denied,* 357 Or. 415, 356 P.3d 638 (2015).

Petitioner filed this 28 U.S.C. § 2254 habeas corpus case on March 21, 2016, and amended his Petition on January 20, 2017 to raise various due process and ineffective assistance of counsel claims. Respondent asks the Court to deny relief on the Amended Petition because Petitioner procedurally defaulted all of his claims, and the default is not excused.

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DISCUSSION

A petitioner seeking habeas relief must exhaust his claims by fairly presenting them to the state's highest court, either through a direct appeal or collateral proceedings, before a federal court will consider the merits of habeas corpus claims pursuant to 28 U.S.C. § 2254. *Rose v. Lundy*, 455 U.S. 509, 519 (1982). The exhaustion doctrine is designed "to avoid the unnecessary friction between the federal and state court systems that would result if a lower federal court upset a state court conviction without first giving the state court system an opportunity to correct its own constitutional errors." *Preiser v. Rodriguez*, 411 U.S. 475, 490 (1973).

In this case, Petitioner did not take a direct appeal, thus he did not fairly present any of his claims to Oregon's courts in that fashion. During his PCR proceedings, he presented the Oregon Supreme Court with state-law issues, state procedural issues, and issues that were not properly in his Petition for Review because he had not presented them to the Oregon Court of Appeals. Respondent's Exhibits 138, 140, 141. Petitioner did not fairly present any federal claims to the Oregon Supreme Court and therefore procedurally defaulted all of his claims. Petitioner does not argue otherwise, and instead contends that he has cause to excuse his default. Specifically, he argues that his PCR attorney was ineffective for failing to raise a variety of ineffective assistance of trial counsel claims.

Traditionally, the performance of PCR counsel could not be used to establish cause and prejudice to excuse a procedural

default. *Coleman v. Thompson*, 501 U.S. 722, 753-54 (1991) (only the constitutionally ineffective assistance of counsel constitutes cause); *Pennsylvania v. Finley*, 481 U.S. 551, 556 (1987) (there is no constitutional right to counsel in a PCR proceeding). However, in *Martinez v. Ryan*, 566 U.S. 1, 4 (2012), the Supreme Court found "it . . . necessary to modify the unqualified statement in *Coleman* that an attorney's ignorance or inadvertence in a postconviction proceeding does not qualify as cause to excuse a procedural default." *Id* at 8. It concluded, "Inadequate assistance of counsel at initial-review collateral proceedings may establish cause for a prisoner's procedural default of a claim of ineffective assistance at trial." *Id.*

In order to establish cause to excuse his default pursuant to *Martinez*, Petitioner must show first that his underlying claim of ineffective assistance of trial counsel is substantial insofar as it has "some merit." Next, he must demonstrate that his PCR attorney was ineffective under the standards of *Strickland v. Washington*, 466 U.S. 668 (1984) for failing to raise the claim. "[T]o fulfill this requirement, a petitioner must not only show that PCR counsel performed deficiently, but also that this prejudiced petitioner, i.e., that there was a reasonable probability that, absent the deficient performance, the result of the post-conviction proceedings would have been different." *Runningeagle v. Ryan*, 825 F.3d 970, 982 (9th Cir. 2017) (quotation omitted). Such a finding, of course, would necessarily require the Court to conclude that there is a reasonable

probability that the trial-level ineffective assistance claim would have succeeded had it been raised. *Id.*

Petitioner argues that the element of Manslaughter in the First Degree requiring "extreme indifference to the value of human life" in Oregon is so vague as to violate due process. He believes that PCR counsel should have faulted trial counsel for not raising the issue. However, the record reveals that trial counsel was prepared to make this argument had the case proceeded to trial. Respondent's Exhibit 132, p. 26. As such, the Court cannot conclude that PCR counsel omitted a substantial claim of ineffective assistance of trial counsel.

Petitioner next claims that the trial court violated his right to due process, and trial counsel overlooked these violations, when the trial court failed to: (1) make findings to support consecutive sentences; (2) find a factual basis for his crimes; and (3) ensure that Petitioner was afforded a plea agreement on par with other cases in the State. Petitioner killed two victims, which obviously supported consecutive sentences under Oregon law. *See* ORS 137.123(5)(b). The prosecutor provided a detailed factual basis to support the plea in this case, thus any objection would not have benefitted the defense. Respondent's Exhibit 103, pp. 7-12. While Petitioner believes he has a due process right to be afforded a plea offer equal to defendants convicted of Manslaughter in other Oregon cases, that position is not tenable where "there is no constitutional right to plea bargain." *Weatherford v. Bursey*, 429 U.S. 545, 561 (1977). Accordingly, PCR counsel's performance did not fall below an

objective standard of reasonableness when he declined to include these claims.

Although Petitioner claims that his PCR attorney omitted a claim that Petitioner did not enter a knowing or voluntary plea based upon trial counsel's shortcomings, Petitioner concedes that "each claim or some, broader, related claim does appear in the state post-conviction petition." Sur-reply (#50), p. 6. Although he faults PCR counsel for not providing sufficient argument to support the claims, *Martinez* does not instruct district courts to engage in a separate analysis of whether or how strenuously counsel argued a particular claim. Instead, it speaks only to whether a PCR attorney failed to present a substantial claim of ineffective assistance of trial counsel. *See Martinez*, 566 U.S. at 5, 12 (the proper formulation of the issue is "whether a federal habeas court may excuse a procedural default . . . when the claim was not properly **presented** in state court due to an attorney's errors"); ("To **present** a claim of ineffective assistance at trial in accordance with the State's procedures, then, a prisoner likely needs an effective attorney."); ("A prisoner's inability to **present** a claim of trial error is of particular concern when the claim is one of ineffective assistance of counsel.") (bold added).

In this case, PCR counsel presented Petitioner's claims regarding the voluntariness of his plea to the PCR court, his trial attorney spoke to these issues during a deposition developed for purposes of the PCR proceeding, the PCR court provided Petitioner with a hearing, and the PCR court issued

Findings of Fact and Conclusions of Law that specifically addressed the voluntariness issue. Respondent's Exhibits 132-133, 135 pp. 43-54. Where PCR counsel presented the issue of the knowing and voluntary nature of the plea in the context of an ineffective assistance of counsel claim, *Martinez* does not excuse Petitioner's default.

More generally, it is difficult for Petitioner to demonstrate prejudice as to any of his ineffective assistance of counsel claims in light of the uncontroverted facts of this case as well as his sentencing exposure at trial.[1] Had Petitioner proceeded to trial, the State would have presented evidence that a motorist passing the scene and who happened to be an emergency medical technician "heard a bloodcurdling scream" and saw something he told the grand jury "will forever haunt him." Respondent's Exhibit 103, pp. 9-10. The mother of the dead six-year-old girl was "wailing at the left-rear side of her vehicle" while her husband "was lying on top of her . . . preventing her from going to the left-rear passenger side of the car where their daughter had obviously been sitting." *Id* at 10, 21. As the PCR court correctly advised him, "This was not a case to take to trial. No attorney I can imagine who is competent would have wanted to take this case to trial . . . this was a loser at trial and you were going to be found responsible and the consequences then were going to be bad." Respondent's Exhibit 133, pp. 31-32.

[1] Petitioner estimates his exposure at trial would have been 260 months. Sur-reply (#50), p. 9.

Petitioner's remaining claims include his assertion that he was denied the ability to be present during a specific hearing in his PCR action, but alleged errors in the state PCR process are not addressable as independent grounds for relief through habeas corpus petitions. *Ortiz v. Stewart*, 149 F.3d 923, 939 (1998), *cert. denied* 526 U.S. 1123 (1999); *Franzen v. Brinkman*, 877 F.2d 26 (9th Cir. 1989), *cert. denied*, 493 U.S. 1012 (1989). The Court finds Petitioner's cumulative error claim does not entitle him to relief, and that he has not sustained his burden of proof as to the claims he has not argued. For all of these reasons, habeas corpus relief is not appropriate.

CONCLUSION

For the reasons identified above, the Amended Petition for Writ of Habeas Corpus (#24) is denied. The Court declines 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).

IT IS SO ORDERED.

DATED this 14 day of January, 2019.

Marco Hernández

Marco A. Hernandez
United States District Judge

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

STEPHEN JASON WHITAKER,

Petitioner,

v.

JEFF PREMO,

Respondent.

Case No. 6:16-cv-00479-HZ

JUDGMENT

HERNANDEZ, District Judge.

Based on the Record,

IT IS ORDERED AND ADJUDGED that this Action is DISMISSED, with prejudice. The Court declines 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).

DATED this 14 day of January, 2019.

Marco A. Hernandez
United States District Judge

1 - JUDGMENT

No._____

IN THE SUPREME COURT OF THE UNITED STATES

STEPHEN JASON WHITAKER,

Petitioner,

v.

JEFF PREMO, Superintendent,
Oregon State Penitentiary,

Respondent.

CERTIFICATE OF SERVICE AND MAILING

I, Oliver W. Loewy, appointed to represent Mr. Whitaker under the Criminal Justice Act of 1964, certify that on August 20, 2019, as required by Supreme Court Rule 29, I served a copy of the enclosed Motion to Proceed In Forma Pauperis and Petition for Writ of Certiorari by depositing in the United States Post Office, in Portland, Oregon, first class postage prepaid, a certified, true, exact and full copy thereof addressed to Benjamin Gutman, Solicitor General of Oregon, Oregon Department of Justice, 1162 Court Street NE, Salem, OR 97301-4096.

Further, the original and ten copies were mailed to the Honorable Scott S. Harris, Clerk of the United States Supreme Court, by delivering them to Federal

Express in Portland, Oregon, addressed to 1 First Street, N.E., Washington, D.C. 20543, for filing on August 20, 2019, with delivery fee prepaid.

Additionally, I electronically filed the accompanying Motion for Leave to Proceed In Forma Pauperis and Petition for Writ of Certiorari by using the Supreme Court's Electronic filing system on August 20, 2019.

Dated this 20th day of August 2019.

Oliver W. Loewy
Assistant Federal Public Defender
Attorney for Petitioner