UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

JUAN C. PARRA-INTERIAN,

Petitioner-Appellant,

v.

MIKE OBENLAND,

Respondent-Appellee.

No. 19-35497

D.C. No. 3:17-cv-05481-RBL
Western District of Washington,
Tacoma

ORDER

Before: TALLMAN and NGUYEN, Circuit Judges.

The request for a certificate of appealability is denied because appellant has not made a "substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2); *see also Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003).

Any pending motions are denied as moot.

DENIED.

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED

FEB 28 2020

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

JUAN C. PARRA-INTERIAN, Petitioner-Appellant, v. MIKE OBENLAND, Respondent-Appellee.	No. 19-35497 D.C. No. 3:17-cv-05481-RBL Western District of Washington, Tacoma ORDER

Before: SILVERMAN and WATFORD, Circuit Judges.

Appellant's motion for reconsideration (Docket Entry No. 7) is denied. *See* 9th Cir. R. 27-10.

No further filings will be entertained in this closed case.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

JUAN C PARRA-INTERIAN,

Petitioner,

v.

RON HAYNES,

Respondent.

CASE NO. 3:18-CV-05335-RBL-DWC

ORDER TO SHOW CAUSE

Petitioner Juan C. Parra-Interian filed a Declaration and Application to Procced In Forma Pauperis in a Federal Habeas Action and a proposed Petition for Writ of Habeas Corpus pursuant to 28 U.S.C. § 2254 ("Second Petition"). Dkt. 1, 1-1. Having reviewed the Petition, the Court declines to order Respondent to file an answer and directs Petitioner to show cause why this case should not be dismissed.

I. Background

On June 21, 2017, Petitioner filed a separate 28 U.S.C. § 2254 action raising eighteen grounds for relief. *See Parra-Interian v. Gilbert*, 3:17-cv-05481-RBL-DWC ("First Petition"). The Court appointed counsel to represent Petitioner in the First Petition on March 16, 2018. *Id.*

at Dkt. 30. The First Petition is currently ready for the Court's consideration on June 8, 2018. *Id.* at Dkt. 35. Petitioner initiated the Second Petition on April 30, 2018.

II. Discussion

"Generally, a new petition is 'second or successive' if it raises claims that were or could have been adjudicated on their merits in an earlier petition." *Cooper v. Calderon,* 274 F.3d 1270, 1273 (9th Cir.2001). The Antiterrorism and Effective Death Penalty Act ("AEDPA") implemented a gatekeeper function, requiring that successive § 2254 petitions be dismissed unless they meet one of the exceptions outlined in 28 U.S.C. § 2244(b)(2). Even if a petitioner can demonstrate he qualifies for § 2244(b)(2) exception, he must seek authorization from the court of appeals before filing his new petition with the district court. 28 U.S.C. § 2244(b)(3); *see Woods v. Carey*, 525 F.3d 886, 888 (9th Cir. 2008).

However, when the first petition is still pending in the district court, a subsequently filed petition is not a "second or successive petition." *Woods*, 525 F.3d at 890. Rather, where a new *pro se* petition is filed before the adjudication of a prior petition is complete, the new petition should be construed as a motion to amend the pending petition rather than as a successive application. *Id.* at 888, 890. As Petitioner's First Petition is still pending, the Second Petition should be construed as a motion to amend the First Petition.

Under this Court's Local Rules, Petitioner cannot appear or act on his own behalf if he is represented by an attorney of record. Local Rule 83.2(b)(5). In the First Petition, Petitioner is represented by attorney Andrew Kennedy. Therefore, he cannot, *pro se*, file a motion to amend the First Petition.

III. Conclusion

As Petitioner's Second Petition is construed as a motion to amend the First Petition and as Petitioner cannot currently file documents *pro se* regarding the First Petition, he must show cause why Second Petition should not be dismissed for Petitioner's failure to comply with Local Rule 83.2. Petitioner must show cause on or before June 1, 2018.

The Court declines to rule on the Application to Proceed *In Forma Puaperis* until Petitioner responds to this Order.

The Court is directed to file this Order in the above-captioned case and in *Parra-Interian v. Gilbert*, 3:17-cv-05481-RBL-DWC.

Dated this 3rd day of May, 2018.

David W. Christel
United States Magistrate Judge

THE HONORABLE RONALD B. LEIGHTON
THE HONORABLE DAVID W. CHRISTEL

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

JUAN C. PARRA-INTERIAN, Petitioner, vs. JAMES KEY, Respondent.	NO. C17-5481-RBL-DWC PETITIONER'S OBJECTIONS TO MAGISTRATE JUDGE'S REPORT AND RECOMMENDATION

I. Introduction

Juan C. Parra-Interian, by his attorney, Assistant Federal Public Defender Andrew D. Kennedy, objects to the recommendations in the Magistrate Judge's Report and Recommendation, Dkt. 44, that his petition be denied and that he be denied an evidentiary hearing and a certificate of appealability. [1] In support of his argument, Mr. Parra-Interian relies on the reasons set forth below and those articulated in his earlier briefing, including his Petition for Writ of Habeas Corpus, Dkt. 3, and his *pro se* reply thereto, Dkt. 17, and his supplemental reply filed by counsel, Dkt. 37. In his petition, Mr. Parra-Interian identified nineteen distinct grounds for relief as recognized by the magistrate judge. *See* Dkt. 44 at 5-6. The Magistrate Judge recommended dismissing the

[1] Previous caption in this case has listed the respondent as Mike Obenland. However, Mr. Parra-Interian has subsequently been transferred to Airway Heights Corrections Center and the current warden of that facility is James Key. Accordingly, pursuant to the applicable rules governing 2254 proceedings, Mr. Parra-Interian has substituted him as the respondent for these objections.

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petition on all grounds without an evidentiary hearing and recommends denying Mr. Parra-Interian a certificate of appealability through which he may pursue his claim to the Ninth Circuit. Mr. Parra-Interian specifically objects to the magistrate judge's conclusion as to seven of those grounds, identified by the Magistrate Judge as Grounds 1, 2, 5, 6, 8(b), 9, and 12, and to the denial of an evidentiary hearing and the denial of a certificate of appealability. This Court should grant Mr. Parra-Interian's petition particularly as to the seven grounds expanded upon below or at least afford him an evidentiary hearing or a certificate of appealability through which to pursue his claims further.

II. The charges against Mr. Parra-Interian were improperly joined and the Magistrate Judge's conclusion that he was not prejudiced by a misjoinder was in error and should be rejected.

In the first ground for relief in his *pro se* petition, Mr. Parra-Interian outlined how the prejudicial joinder of two sets of charges related to two separate sets of actions, connected only by the fact that they involved the same alleged victim, was improper and violated his Fifth Amendment Right to Due Process. Dkt. 3, at 5, 20-21; Dkt. 37 at 3-6; *see also* Dkt. 9, Exs. 1 and 2. Mr. Parra-Interian highlighted how the solicitation and conspiracy charges tainted the jurors against him with regard to the burglary and rape charges because they could likely have believed that someone who could solicit the murder of a mother and authorize the murder of her child if necessary could be guilty of anything. Dkt. 3 at 5, 21-22. The Magistrate Judge recommends rejecting this argument, reaching several conclusions, each of which was misplaced. First, the Magistrate Judge concluded that there was not disparity between the strength of the evidence supporting the two sets of charges. Dkt. 44 at 12-13. Second, the Magistrate Judge concluded that the defenses to the two sets of charges were not incongruous and, consequently, a risk of confusion did not stem from the improper joinder. Dkt. 44 at 13. Third, the Magistrate Judge rejected Mr. Parra-Interian's argument that the evidence concerning the rape and

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burglary charges was inapplicable to the solicitation and conspiracy charges. Dkt. 44 at 13. Finally, the Magistrate Judge determined that the evidence introduced to support the solicitation and conspiracy charges did not prejudice the jury regarding the rape and burglary charges. Dkt. 44 at 13-15. Mr. Parra-Interian urges this Court to reject each of those conclusions and find that the joinder was, in fact, improper, because the evidence supporting the two sets of charges was disproportionate, was inapplicable across the sets of charges, and did unnecessarily prejudice Mr. Parra-Interian.

Contrary to the Magistrate Judge's conclusion, it is clear that the evidence supporting the rape and burglary charges was far weaker than the evidence supporting the solicitation and conspiracy charges. The Magistrate Judge concluded that "[w]hile the rape and burglary charges include more circumstantial evidence, the evidence was strong." Dkt. 44 at 13. The fact is that the evidence against Mr. Parra-Interian on the rape and burglary charges was highly speculative, required the jury to infer a great deal from the circumstances and, as demonstrated below, required the jurors to make factually impossible findings in order to convict Mr. Parra-Interian. Conversely, on the solicitation and conspiracy counts, the State's evidence included an eyewitness account of Mr. Parra-Interian requesting that the confidential informant commit the crime and Mr. Parra-Interian's own recorded statements. Dkt. 10, Ex. 32 at 23-25. The Magistrate Judge's conclusion that there was not a great disparity between the strength of the evidence on the two counts should be rejected.

Second, although the Magistrate Judge determined that there was no possibility of confusion between the defenses to the two sets of charges, the confusion stemming from the two defense is palpable. Mr. Parra-Interian's defense to the rape and burglary charges was a general denial – that he had not entered or remained in the home with intent to commit a crime and that he never sexually assaulted the alleged victim. His defense to the solicitation and conspiracy charges was one of a mistake and confusion in translation.

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Dkt. 10, Ex. 32 at 19-20. However, the need to present the two defenses simultaneously put the two sets of defense counsel (because Mr. Parra-Interian's defense counsel on the rape and burglary charges was conflicted out of representing him on the conspiracy and solicitation charges) in a position where they had to convince the jury of these two seemingly incongruous theories of defense. The jury would have been confused about why a man who was innocent of rape and burglary was attempting to silence the alleged victim. The confusion arising from the two defenses is readily apparent and this Court should reject the Magistrate Judge's conclusion that it was not.

The Magistrate Judge is also mistaken in concluding that the evidence regarding one set of charges was applicable to the other. The Magistrate reasoned that "the nature of the rape and burglary charges would be introduced in the solicitation and conspiracy charges." Dkt. 44 at 13-14. First, while the basic fact that Mr. Parra-Interian was charged with those counts may have been introduced, the full nature of the conduct was not necessarily admissible. Second, even if the Magistrate Judge's conclusion is assumed to be true, it does not work in the inverse. The evidence regarding the solicitation and conspiracy charges is not applicable to the rape and burglary counts. Thus, the cross-applicability of the evidence should not have justified joinder, particularly where the evidence of conspiracy and solicitation would significantly prejudice Mr. Parra-Interian on the rape and burglary charges, which it clearly did.

Finally, the Magistrate Judge's conclusion that Mr. Parra-Interian was not prejudiced by the joinder of the charges should be rejected as well. Dkt. 44 at 14-15. The Magistrate Judge acknowledges that there was "evidence the jury had an emotional response" to the evidence suggesting that Mr. Parra-Interian was open to the possibility of the victim's daughter being murdered yet the Magistrate Judge concluded that there was no evidence to support the conclusion that the jury would not fairly consider the charges. Dkt. 44 at 14-15. That conclusion is belied by the facts. Ultimately, the jury

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heard about a man who was supposedly attempting to murder a woman and willing to accept the murder of her child as collateral damage. The jury responded physically to that testimony. Dkt. 10, Ex. 38 at 125-35. To introduce evidence of such behavior at a trial for entirely different allegations would be impermissible. It had no probative value on the rape and burglary counts and significantly prejudiced Mr. Parra-Interian. Accordingly, the Magistrate Judge's finding of a lack of prejudice is unsupported and should not be adopted.

Ultimately, the root question regarding whether Mr. Parra-Interian has suffered a constitutional violation sufficient to warrant a writ of habeas corpus is the last one identified by the Magistrate Judge, namely whether he was prejudiced by the misjoinder. As Mr. Parra-Interian demonstrated in his reply, that question should be answered in the affirmative if the misjoinder "had substantial and injurious effect or influence in determining the jury's verdict." *United States v. Lane*, 474 U.S. 438, 449 (1986) (internal quotation omitted). This is the quintessential case in which a misjoinder was so egregious that it deprived the defendant of his Fifth Amendment right to a fair trial. A relatively weak case on rape and burglary was buttressed by inflammatory evidence suggesting that the defendant was willing to kill a child to get out of jail. Due to conflicts, the defendant had to be represented by separate attorneys yet tried together on the separate charges. If the two cases had not been joined, judicial economy may have suffered slightly but Mr. Parra-Interian would have had the benefit of a fair trial at which the jury would have had a meaningful opportunity to consider the relatively weak evidence of rape and burglary without their minds being tainted by disgust at Mr. Parra-Interian as a result of the conspiracy and solicitation arguments. There is a reasonable probability that the outcome of such a trial would have been different. Consequently, Mr. Parra-Interian did suffer prejudice from the misjoinder sufficient to violate his Fifth Amendment rights and the state court's conclusion that he did not was an unreasonable application of clearly

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established federal law. Thus, the Magistrate Judge's recommendation that this claim be denied should be rejected and Mr. Parra-Interian should be granted a writ of habeas corpus.

III. Because the alleged victim was not helpless, there was insufficient evidence to convict Mr. Parra-Interian of second-degree rape and the Magistrate Judge's conclusion that there was sufficient evidence to do so was in error.

Mr. Parra-Interian's second ground for relief from his *pro se* petition concerned the fact that he was convicted despite insufficient evidence to support the charge of second degree rape. Specifically, he argued that, under Washington law, he could only be convicted if the state proved that the victim was helpless at the time the alleged sexual contact occurred. *See* Revised Code of Washington ("RCW") 9A.44.050(1)(b). While the State and state courts in various proceedings have attempted to support such an allegation by claiming that the alleged victim was intoxicated and, at other times, arguing that the victim was asleep, the record contradicts either conclusion. Dkt. 10, Exs. 3 at 9-10, 41 at 20-22. The Magistrate Judge reasons that, viewed in the light most favorable to the prosecution, the evidence supports the conviction because the victim was "not all the way awake" at the time someone began touching her and, ultimately, digitally penetrating her. Dkt. 44 at 17. Accordingly, the Magistrate Judge concluded that there was sufficient evidence that the victim was helpless at the time the assault began and recommended denying Mr. Parra-Interian's petition as to this claim. The Magistrate Judge is correct that Mr. Parra-Interian is only entitled to a writ of habeas corpus if, when viewing the evidence in the light most favorable to the State, no reasonable trier of fact could have found him guilty beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 319 (1979). However, the Magistrate Judge's conclusion is unsupported by Washington law, which dictates that a person cannot be partially asleep and, thus, because the alleged victim unequivocally said she was not asleep at the time the alleged assault began, there was not enough evidence to support a conviction. Consequently, this Court should reject

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the Magistrate Judge's recommendation that the Washington Supreme Court's decision was not an unreasonable application of clearly established federal law and grant Mr. Parra-Interian's petition.

Under Washington law, an alleged victim must incapable of consent by reason of being physically helpless or mentally incapacitated" in order for conduct such as that alleged here to give rise to a conviction for second degree rape. Rev. Code Wash. § 9A.44.050(1)(b). The Magistrate Judge reasons that, taking the evidence in the light most favorable to the State, that requirement is met because the alleged victim was "not fully awake when she felt digital penetration, but she thought it was her fiancé so she was 'okay with it.'" Dkt. 44 at 18 (quoting Dkt. 12, Ex. 34 at 278). The record is clear that she was not asleep when the touching began. Dkt. 10, Ex. 34 at 21. In the Report and Recommendation, however, the Magistrate Judge ignored the case law cited by Mr. Parra-Interian in his reply which indicate that a state between asleep and awake is not cognizable for purposes of the victim being considered helpless under the statute. *See State v. Bucknell*, 144 Wash. App. 524, 526, 529-30 (2008) (finding that a victim who could not move from the chest down but who was capable of talking, answering questions, and perceiving information was not "physically helpless); *State v. Puapuaga*, 54 Wash. App. 857, 861 (1989) (recognizing unconsciousness as a situation in which a victim was physically incapable of resisting but making no reference to a person who is groggy but aware of what was transpiring and capable of responding). The cases cited in the Magistrate Judge's Report and Recommendation focus on the question of whether the victim was awake when the sexual act began. Dkt. 44 at 18 (citing *United States v. Fasthorse*, 639 F.3dfd 1182, 1184 (9th Cir. 2011). However, that is not the issue here. The issue is whether an alleged victim who, by all accounts, is not asleep during any portion of an alleged sexual act is "helpless" in order to be the victim of second degree rape. Under Washington law, she is not. Accordingly, even viewing the evidence in the

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light most favorable to the State, there was insufficient evidence to convict Mr. Parra-Interian of second degree rape. Therefore, this Court should reject the Magistrate Judge's recommendation that this claim be denied and grant Mr. Parra-Interian's petition for writ of habeas corpus.

IV. Because Mr. Parra-Interian was arrived at the home for a party, there was insufficient evidence to convict him of burglary and it was error for the Magistrate Judge to reject that argument.

In the claim from his *pro se* petition identified by the Magistrate Judge as Ground 6, Mr. Parra-Interian demonstrated that, even viewing the evidence in the light most favorable to the State, there was insufficient evidence to convict him of first degree burglary with sexual motivation because he never entered or remained in the home without authorization or with the intent to commit a crime. To support this, he established that the victim had hosted a party earlier that night to which, even if the victim testified that she herself had not invited Mr. Parra-Interian, the evidence demonstrates that he at least believed he was invited, entered the lighted home through an open door, and did not attempt to conceal his presence upon entering. The Magistrate Judge concluded that, "[v]iewing evidence in the light most favorable to the State, a jury could infer Petitioner entered S.A.'s home, uninvited, after all the occupants had gone to sleep," and then "woke an occupant in the home, asked for S.A.'s location, and then raped S.A." Dkt. 44 at 22. Therefore, the Magistrate Judge concluded that sufficient evidence existed for a rational trier of fact to reasonably conclude that he "unlawfully entered S.A.'s home with the intent to rape her, committing burglary in the first degree with sexual motivation." Dkt. 44 at 22. The Magistrate Judge's recommendation is flawed, however, because, regardless of the light in which it is viewed, the evidence does not support the conclusion that Mr. Parra-Interian entered the house unlawfully or the conclusion that he intended to commit rape. As such, the evidence was insufficient to convict Mr. Parra-Interian of burglary in the first degree, the opinion of the Washington Supreme Court was an

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unreasonable application of clearly established federal law, and this Court should reject the Magistrate Judge's recommendation and grant Mr. Parra-Interian's petition for writ of habeas corpus.

Mr. Parra-Interian's conduct did not meet the elements of burglary under Washington law. To be guilty of first degree burglary, Mr. Parra Interian had to enter or remain unlawfully in the victim's house, with intent to commit a crime against a person or property therein and, while in the building, assault the victim. RCW § 9A.52.020. While the Magistrate Judge references the fact that the victim and her fiancé both testified that they personally had not invited Mr. Parra-Interian to their home that night, there is abundant evidence in the record indicating that there indeed was a party in the home that night and several guests had been invited. Dkt. 10, Exs. 33 at 161-63 and 39 at 154. Even if the hosts of the part denied specifically inviting Mr. Parra-Interian to the party, it is clear that someone had done so as he knew there was a party and believed he was welcome, although it turned out he arrived after the party was over. That fact is corroborated by the fact that, before going to the house, Mr. Parra-Interian telephoned the alleged victim and her parents to make it known that he was coming over for the party. Dkt. 10, Ex. 39 at 154-58. Further, once Mr. Parra-Interian arrived at the home, it was only after finding the home with the lights on and the door unlocked that he entered the home, again indicating that he believed the party was still transpiring. Dkt. 10, Ex. 39 at 158. The State never suggested that Mr. Parra-Interian broke in or did anything other than enter a house believing he was arriving for the tail end of a graduation party. Upon entering the home, Mr. Parra-Interian did not attempt to conceal his identity but rather had a conversation with the first person he encountered, asking her to direct him to where he could find the host of the party. Dkt. 10, Exs. 35 at 15-16, 39 at 158-59. Those are not the actions of someone entering a home with intention to commit a serious crime. The record overwhelmingly supports the conclusion that Mr. Parra-Interian entered the house

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with intention to attend the party, not to commit a crime, and that he remained there only for as long as he felt he was welcome there. In addition, given the insufficiency of the evidence to convict Mr. Parra-Interian of second-degree rape, as discussed above, the evidence is also insufficient for a rational factfinder to conclude that Mr. Parra-Interian committed rape while in the house.

To meet the standard for sufficiency of the evidence, as stated above, Mr. Parra-Interian must show that no reasonable trier of fact could have found him guilty and that it was unreasonable for the state court to conclude that a reasonable trier of fact could have done so. *Jackson*, 443 U.S. at 319 (1979); 28 U.S.C. § 2254(d). Ultimately, under any light, the evidence fails to show that any rational trier of fact could conclude that Mr. Parra-Interian, a houseguest intending to attend a party, entered the house with intent to commit a crime, that he entered or remained unlawfully, despite the door being open and the light being on, and that he necessarily committed rape. Even assuming *arguendo* that the evidence was sufficient to convict him of rape, it is not sufficient to convict him of burglary. In relying on "the same evidence that was sufficient to support the rape conviction," to support the burglary conviction, the Washington Court of Appeals necessarily conceded that there was no additional evidence to support the additional elements of burglary. Thus, it was an unreasonable application of the Supreme Court's holding in *Jackson* to conclude that a rational trier of fact, even viewing all evidence in the light most favorable to the prosecution, could have convicted Mr. Parra-Interian of burglary with sexual motivation. Accordingly, the state court's decision was an unreasonable application of clearly established federal law and the Magistrate Judge's recommendation should be rejected.

V. Mr. Parra-Interian received ineffective assistance of counsel when his attorneys failed to investigate and call witnesses to rebut allegations that he was responsible for a fire in the alleged victim's car and the Magistrate Judge's conclusion that he failed to show prejudice was in error.

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As identified by the Magistrate Judge as Ground 5 of his *pro se* petition for writ of habeas corpus, Mr. Parra-Interian alleged that his attorneys rendered deficient performance in failing to investigate or present evidence disproving his involvement in a fire occurring in the alleged victim's car before he allegedly solicited a fellow inmate to murder her. Dkt. 3 at 29-30. He alleged that, in failing to find deficient performance and prejudice stemming from his attorney's failure, the Washington Supreme Court's opinion was an unreasonable application of the Supreme Court's holding in *Strickland v. Washington.* 466 U.S. 668 (1984). The Magistrate Judge recommended denying this claim, concluding that Mr. Parra-Interian failed to demonstrate what evidence would have been discovered through a reasonable investigation and, as such, could not show that he was prejudiced by the failure. Dkt. 44 at 30. Because he was indeed prejudiced by the attorneys' failure to investigate and present evidence rebutting the allegation of his involvement in the fire, Mr. Parra-Interian objects to this conclusion by the Magistrate Judge and asks this Court to grant his petition for a writ of habeas corpus.

Contrary to the Magistrate Judge's position, there was available evidence to be uncovered disproving Mr. Parra-Interian's involvement in the fire and there is a reasonable probability that, had it been investigated and presented, the outcome of the trial would have been different. Accordingly, the finding that Mr. Parra-Interian was not prejudiced was an unreasonable application of the Supreme Court's holding in *Strickland.* Specifically, as Mr. Parra-Interian's attorney Ted Debray commented to the trial court, counsel was in possession of a finding by the fire investigator concluding that the investigation was "inconclusive . . . about what the cause of the fire was, let alone whether it was due to any kind of human agency." Dkt. 10, Ex. 33 at 5-6. Likewise, Mr. Parra-Interian's other attorney, James Morgan, noted that he knew that fire investigators had "concluded that there's no evidence of criminal activity" and "did not

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conduct any further investigation" into the issue. Dkt. 10, Ex. 33 at 9-10. Those statements alone attest to the fact that there were witnesses available who would have been in a position to rebut the State's position that Mr. Parra-Interian had been responsible for the fire, specifically the individuals who conducted the fire investigation. No further indication of what they would have said is necessary as their reports were clear as to their findings. However, counsel needed to undertake the necessary effort to interview and call them as witnesses which counsel was unwilling to do, not because of any tactical reason but because one attorney was "certainly not prepared to litigate all of the details about the nature of the fire, and the origin of the fire" while the other attorney did not want "to run around Longview looking for these witnesses to interview them and subpoena them right in the middle of trial" because it was "simply not fair." Dkt. 10, Ex. 33 at 11, 16-17. Thus, the record is clear that Mr. Parra-Interian was prejudiced by his attorneys' deficient performance and the state court's conclusion that he was not was an unreasonable application of the Supreme Court's holding in *Strickland*. Therefore, Mr. Parra-Interian objects to the Magistrate Judge's recommendation on this issue and urges this Court to reject it and grant the petition for writ of habeas corpus.

VI. Mr. Parra-Interian received ineffective assistance of counsel when his attorneys failed to move to suppress wiretap recordings and it was error for the Magistrate Judge to conclude that he had failed to show prejudice on this ground.

Another way in which Mr. Parra-Interian demonstrated in his *pro se* petition that he received ineffective assistance of counsel was through his attorneys' failure to challenge the wiretap recordings obtained by the state's cooperating witness, a claim which the Magistrate Judge labeled as Ground 8(b). Dkt. 3 at 35-36. Mr. Parra-Interian demonstrated that his attorneys rendered deficient performance in failing to challenge the admission of the wiretap recording which was obtained through a selective presentation

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of information to the granting court and he was prejudiced because, had that wire recording been suppressed, there is more than a reasonable probability that he would not have been convicted of conspiracy or solicitation. Dkt. 3 at 35-36. In rejecting that argument, the Washington state court reached a decision that was an unreasonable application of the Supreme Court's holding in *Strickland*, 466 U.S. at 668. The Magistrate Judge concludes that Mr. Parra-Interian's claim is infirm because he failed to show that the detectives investigating the case were aware that the cooperating witness was attempting to frame Mr. Parra-Interian or that they took any actions to release the cooperating witness from custody. Accordingly, the Magistrate Judge concludes that a hearing under *Franks v. Delaware*, 428 U.S. 154 (1978) would not necessarily have been fruitful and, as such, Mr. Parra-Interian cannot show that he was prejudiced by the failure to request one. Mr. Parra-Interian objects to that conclusion because the record is clear that the cooperating witness was attempting to frame Mr. Parra-Interian and there is at least a reasonable probability that, had a hearing been held, it would have come to light that the detectives were aware of that fact. Therefore, Mr. Parra-Interian was prejudiced and the conclusion that Mr. Parra-Interian did receive ineffective assistance of counsel was an unreasonable application of clearly established federal law. Consequently, this Court should reject the Magistrate Judge's recommendation and grant Mr. Parra-Interian's petition.

Mr. Parra-Interian submitted evidence clearly demonstrating that the cooperating witness was endeavoring to "set Juan up." Dkt. 9, Exs. 24 at 3, 27 at 8-10. Counsel had a duty to investigate that issue and pursue the question including requesting a hearing. While the Magistrate Judge may be correct that the record does not establish that the detectives working on the case knew the cooperating witness's motives, the declarations support a reasonable probability that the detectives indeed knew those motives and the reason those motives are at all ambiguous is because counsel failed to request the

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hearing. Had counsel requested an evidentiary hearing, there is at least a reasonable probability that the trial court would have concluded that the recordings were made as an attempt to frame Mr. Parra-Interian. Therefore, under *Strickland*, Mr. Parra-Interian was prejudiced by his attorney's deficient performance and the state court's conclusion to the contrary is an unreasonable application of that holding. The Magistrate Judge's rejection of that argument should not be adopted and Mr. Parra-Interian should be granted a writ of habeas corpus.

VII. Mr. Parra-Interian's counsel rendered ineffective assistance in several other distinct areas and the Magistrate Judge erroneously discounted them on the ground that he failed to show prejudice.

Beyond the two specific significant manifestations of his counsel's ineffective assistance outlined above, Mr. Parra-Interian also delineated no fewer than thirteen other actions that his attorneys undertook or failed to undertake that fell below an objective standard of reasonableness and which prejudiced him, which the Magistrate Judge classified as eight reasons and identified as Ground 8 to Mr. Parra-Interian's *pro se* petition. Dkt. 3 at 43-46. The Magistrate Judge recommends dismissing these claims on the ground that they are merely conclusory in nature and that Mr. Parra-Interian cannot show that the actions in question were not the result of sound trial strategy or that they prejudiced the outcome of the trial. Dkt. 44 at 34-35. Mr. Parra-Interian objects to that conclusion. Although these individual examples may not be as well-developed as the other instances, they nonetheless rise to the level of ineffective assistance of counsel. Furthermore, their collective effect, especially when viewed in light of the more concrete examples identified above, show that Mr. Parra-Interian was the victim of pervasive ineffective assistance of counsel that tainted the result of his trial. As such, the state court's conclusion that Mr. Parra-Interian did not receive ineffective assistance of counsel was an unreasonable application of clearly established federal law and the Magistrate Judge's conclusion to the contrary should not be adopted.

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Although the Magistrate Judge concludes in the Report and Recommendation that Mr. Parra-Interian's claims are not specific enough, there are enough details to determine that Mr. Parra-Interian has made the requisite showing to warrant the granting of a writ of habeas corpus. Further, As Mr. Parra-Interian demonstrated in his reply, the majority of the claims of deficient performance simply cannot be chalked up to trial strategy. Although the Magistrate Judge concludes that sound trial strategy could have been behind some of the actions (or lack thereof) alleged, such as the failure to obtain a hearing regarding the introduction of evidence related to the fire, or obtain an expert to determine that Mr. Parra-Interian could not have written a note with the alleged victim's address on it, or object to evidence related to the alleged victim's sister, that is not accurate. Neither the State nor the Magistrate Judge have pointed to a single tactical downside to taking any of those actions the defense counsel could have taken. These trial decisions could only have benefited Mr. Parra-Interian in that they would have disproven certain key elements of the prosecution's case, such as that he was responsible for the fire or that he had directed someone to murder the alleged victim. Although the Magistrate Judge concludes that Mr. Parra-Interian has made little more than conclusory allegations to establish prejudice, the fact is that it is clear that there is at least a reasonable probability that, had counsel acted effectively, the outcome of the trial would have been different. Any one of the actions outlined by Mr. Parra-Interian would have chipped away at the prosecution's case against him and, without all of those pieces of evidence, there is a reasonable probability that the outcome of the trial would have been different. *See Turner v. Duncan*, 158 F.3d 449, 457 (9th Cir. 1998) ("When an attorney has made a series of errors that prevents the proper presentation of a defense, it is appropriate to consider the cumulative impact of the errors in assessing prejudice."). But for counsel's deficient performance, there is a reasonable probability that the prosecution would have been left without some of the most critical evidence to its case, such as the wire recording or

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Mr. Parra-Interian or the evidence of the victim's car fire. Consequently, there is a reasonable probability that, had counsel performed adequately, the outcome of the trial would have been different and the Magistrate Judge was in error in concluding that the state court's decision was not an unreasonable application of clearly established federal law. Therefore, this Court should reject the Magistrate Judge's recommendation and grant Mr. Parra-Interian's petition.

VIII. The Magistrate Judge's conclusion that the prosecutor did not engage in misconduct because Mr. Parra-Interian's claims were little more than speculation was in error.

In the claim identified by the Magistrate Judge as Ground 9, Mr. Parra-Interian identified several instances of conduct by the trial prosecutor which, he argued, constituted prosecutorial misconduct and violated his constitutional right to due process. Dkt. 3 at 37-39. These alleged instances of prosecutorial misconduct primarily involved what the prosecutor did and did not reveal about the State's informant, Mr. White, and the prosecution's relationship with him. As Mr. Parra-Interian argued, had the prosecutor been honest about Mr. White, Mr. Parra-Interian would have been aware that Mr. White was attempting to "set up" Mr. Parra-Interian was highly motivated to assist the prosecution. He alleged that the Washington court's holding finding no prosecutorial misconduct was an unreasonable application of the Supreme Court's holding in *Darden v. Wainwright* which allows for relief if prosecutorial misconduct "so infected the trial with unfairness as to make the resulting conviction a violation of due process." 477 U.S. 168, 181 (1986). The Magistrate Judge recommends rejecting this claim, however, concluding that Mr. Parra-Interian failed to provide specific evidence regarding what information was withheld regarding the cooperating witness and that Mr. Parra-Interian's allegations were merely conclusory. Dkt. 44 at 39-40. The Magistrate Judge's conclusion should be rejected because Mr. Parra-Interian's allegations were more than conclusory

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allegations and the misconduct alleged did indeed rise to the level of a denial of due process.

The Magistrate Judge's recommendation should not be followed because it fails to give proper recognition to the significance of the evidence in question and the possibility that, had it been properly framed, that would have affected the outcome of the trial. The crux of Mr. Parra-Interian's defense to the solicitation and conspiracy counts was that the cooperating witness, a white supremacist, sought to set Mr. Parra-Interian up on account of his race and, noting Mr. Parra-Interian's limited English abilities, elicited a statement that would be used at trial to convict Mr. Parra-Interian. As demonstrated with respect to the *Franks* issue, Mr. Parra-Interian did develop evidence that this was the motive at play, through declarations of other inmates. The Magistrate Judge is correct that he did not establish conclusively that the State was aware of those statements at the time of the trial but, as demonstrated above, the lack of evidence on that issue is largely attributable to the deficient performance by his counsel. However, the context makes it much more than likely that the prosecutor was aware of what was transpiring and the allegation of prosecutorial misconduct and the ensuing violation of due process was much more than mere speculation. There is a real probability of a constitutional violation, sufficient to warrant the granting of a writ of habeas corpus. Accordingly, this Court should not adopt this recommendation from the Magistrate Judge and instead grant Mr. Parra-Interian's petition.

IX. If this Court is inclined to dismiss the petition, it should first order an evidentiary hearing through which Mr. Parra-Interian can further develop the facts or a certificate of appelability through which he can pursue his claims further.

If this Court is inclined to adopt the Magistrate Judge's recommendations and rule against Mr. Parra-Interian because the underlying facts are not sufficient to support his arguments, it should first afford him an evidentiary hearing through which he can expand

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the record and further develop those facts. A habeas petitioner is entitled to an evidentiary hearing if the claim relies on, *inter alia*, "a factual predicate that could not have been previously discovered through the exercise of due diligence." 28 U.S.C. § 2254(e)(2). Mr. Parra-Interian exercised appropriate diligence in attempting to develop the facts. *Williams v. Taylor*, 529 U.S. 420, 437 (2000). The Washington Court of Appeals and Washington Supreme Court both denied review of his claims without an evidentiary hearing As demonstrated above and in Mr. Parra-Interian's earlier pleadings, Mr. Parra-Interian believes that the existing record is sufficient to support the granting of a writ on any number of his claims without further factual development but, if this Court believes that it is not, Mr. Parra-Interian requests that it exercise its discretion and hold an evidentiary hearing through which he can call witnesses, including those inmates who overheard Mr. White say he intended to "set Juan up" and relayed such information to detectives. *Schriro v. Landrigan*, 550 U.S. 465, 473-75 (2007).

At a minimum, Mr. Parra-Interian is entitled to a certificate of appealability through which he can present his claim to a reviewing court. In order to receive a certificate of appealability, a petitioner must only show that his claims are "debatable amongst jurists of reason." *Miller-El v. Cockrell*, 537 U.S. 322, 336 (2003). Each of the issues articulated above are, at a minimum, debatable amongst jurists of reason. While this Court should grant the writ, if it elects not to do so, it should at least afford Mr. Parra-Interian the opportunity to pursue his case to a higher court.

X. Conclusion

Juan Parra-Interian's rights were clearly violated throughout his trial in multiple key respects including those outlined these objections and those previously briefed before the Magistrate Judge. The record is unambiguous and the state court's conclusions denying Mr. Parra-Interian's claims were both unreasonable determinations of the facts and an unreasonable application of clearly established federal law. Accordingly,

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Mr. Parra-Interian requests that this Court reject the recommendations of the Magistrate Judge and grant him a writ of habeas corpus or, at a minimum an evidentiary hearing through which he can further develop the facts surrounding his claims or a certificate of appealability through which he can present the issues to the Ninth Circuit.

Dated this 4th day of April, 2019.[2]

Respectfully submitted,

s/ Andrew Kennedy
Assistant Federal Public Defender
Attorney for Juan Parra-Interian

[2] Pursuant to 28 U.S. 636(b)(1) and Fed. R. Civ. P. 72(b), objections must be filed within 14 days of service of the Magistrate Judge's Report and Recommendation. The Magistrate Judge's Report and Recommendation was dated March 20, 2019. However, it was not entered and served upon counsel until March 21, 2019. Counsel contacted the Case Administrator who confirmed that the operative date is the date on which the Report and Recommendation was entered and, therefore, although they are being filed 15 days after the date listed on the Report and Recommendation, these objections should be deemed timely.

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CERTIFICATE OF SERVICE

I hereby certify that on April 4, 2019, I electronically filed the foregoing document with the Clerk of the Court using the CM/ECF system, which will send notification of filing to all registered parties.

s/ Charlotte Ponikvar
Paralegal
Office of the Federal Public Defender

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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

In re the Personal Restraint Petitions of JUAN CARLOS PARRA-INTERIAN, Petitioner.	Nos. 48216-9-II and 48366-6-II (consolidated) ORDER DISMISSING PETITIONS

Juan Parra-Interian relief from personal restraint imposed following his 2012 convictions for second degree rape, first degree burglary, solicitation to commit first degree murder and conspiracy to commit first degree murder.[1] He asserts 17 grounds for relief.

First, he argues that the evidence was insufficient to support the rape conviction. But this argument was rejected in his direct appeal, No. 43432-6-II, and unless he shows that the interests of justice require it, he cannot raise this argument again in this petition. *In re Pers. Restraint of Lord*, 123 Wn.2d 296, 303, 868 P.2d 835 (1994). He makes no such showing.

Second, he argues that the evidence was insufficient to support the burglary conviction. "The test for determining the sufficiency of the evidence is whether, after viewing the evidence in the light most favorable to the State, any rational trier of fact could have found guilt beyond a reasonable doubt." *State v. Salinas*, 119 Wn.2d 192, 201, 829

[1] We issued the mandate of Parra-Interian's direct appeal on February 6, 2015, making his November 9, 2015 and January 25, 2016 petitions timely filed. RCW 10.73.090(1).

P.2d 1068 (1992). The same evidence that was sufficient to support the rape conviction is sufficient to prove the burglary conviction.

Third, he argues that his trial counsel was ineffective for not presenting an expert witness regarding a fire that occurred at the victim's house after he was charged with the rape and burglary. To establish ineffective assistance of counsel, he must demonstrate that his counsel's performance fell below an objective standard of reasonableness and that as a result of that deficient performance, the result of his case probably would have been different. *State v. McFarland*, 127 Wn.2d 322, 335-36, 899 P.2d 1251 (1995); *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). This court presumes strongly that trial counsel's performance was reasonable. *State v. Grier*, 171 Wn.2d 17, 42, 246 P.3d 1260 (2011). Parra-Interian fails to show either deficient performance or resulting prejudice. His counsel's decision not to present such an expert may have been a tactical one that cannot form the basis of a claim of ineffective assistance. *McFarland*, 127 Wn.2d at 336.

Fourth, he argues that the trial court erred in allowing evidence of the fire at the victim's house. This court reviews the admissibility of evidence under ER 404(b) for an abuse of discretion. *State v. Foxhoven*, 161 Wn.2d 168, 174, 163 P.3d 786 (2007). Parra-Interian does not demonstrate that the trial court abused its discretion.

Fifth, he argues that his Sixth Amendment right to confront witnesses was violated when the trial court admitted a recording of a conversation between his wife and Ronald White. But recordings of conversations that convey threats of harm, as this conversation did, are admissible under RCW 9.73.030(2). Parra-Interian also appears to argue that the admission of the recording violated the marital communication privilege, RCW 5.60.060.

But that privilege only extends to communications between spouses and does not apply to a spouse's communication with a third party.

Sixth, he argues that he received ineffective assistance of counsel when his counsel did not request a *Franks*[2] hearing as to the warrant authorizing the body wire worn by White. But such a hearing is only required if a substantial showing is made that a knowingly false statement was used in obtaining the warrant. Other than asserting that White was lying, Parra-Interian makes no such showing.

Seventh, he argues that the State engaged in misconduct by offering White a plea deal for his cooperation in wearing the body wire and by introducing evidence from him. This does not constitute prosecutorial misconduct.

Eighth, he argues that the search warrant was invalid because it was based on White's statements, which he asserts are lies. But the cases he relies upon involve statements by confidential informants. White was a known informant. Parra-Interian does not show that the warrant lacked probable cause.

Ninth, he argues that he was entrapped by White. But he did not argue entrapment at trial. And he initiated the conversations with White, which would have made an entrapment defense unavailable.

Tenth, he argues that in addition to the inactions discussed above, he received ineffective assistance of counsel through failures to object or failures to move for a mistrial. But he does not show either that the failures were deficient performance of that the result of his trial would likely have been different had the failures not occurred.

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[2] *Franks v. Delaware*, 438 U.S. 154, 155-56, 98 S. Ct. 2674, 57 L. Ed. 2d 667 (1978).

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Eleventh, he argues that the trial court erred in admitting the body wire recording because White was acting as an agent of the police and because he was not advised his right to counsel. But he had not been accused in the conspiracy and solicitation cases at the time of the recording, so he was not entitled to counsel then.

Twelfth, he argues that a *Brady*[3] violation occurred. But he does not show any potentially exculpatory evidence that the police withheld from him. His references are to police reports that his counsel had received before trial.

Thirteenth, he argues that his arrest was unlawful because he was detained for three hours without access to counsel, so any evidence seized during the arrest should have been suppressed. But he does not show that the length of his pre-arrest detention violated his constitutional rights.

Fourteenth, he argues that he was subjected to unconstitutional treatment in the Cowlitz County Jail. But because he is no longer in that jail, there is no relief that this court can provide through a personal restraint petition.

Fifteenth, he argues that he was not given proper notice of the seizure of his property. But the forfeiture of the property seized under the warrant is not a form of restraint under RAP 16.4(b) that can be addressed through a personal restraint petition.

Sixteenth, he argues that the proceedings against him were racist because the State used White, who was believed to have ties to a white supremacist group and to have made racist comments, as an informant, and because a prospective juror said her daughter was allegedly raped and killed by a Mexican. But the jury was informed of White's

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[3] *Brady v. Maryland*, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963).

characteristics and could have chosen to find him not credible because of them. And the court excused the potential juror at issue.

Finally, in his consolidated petition, he argues that the forfeiture of the property seized under the warrant was invalid. But as discussed above, that forfeiture is not a form of restraint. And he had an opportunity to appeal from the forfeiture, No. 46709-7-II, which he abandoned.

Parra-Interian fails to demonstrate grounds for relief from restraint. Accordingly, it is hereby

ORDERED that Parra-Interian's petitions are dismissed under RAP 16.11(b). His motion for appointment of counsel is denied.

DATED this 26th day of October, 2016.

A.C.J.

Acting Chief Judge

Cc: Juan C. Parra-Interian
Lacey Lincoln
Cowlitz County Clerk
County Cause Nos. 10-1-00557-6 and 11-1-01263-5