No._____

IN THE SUPREME COURT OF THE UNITED STATES

JERRY R. TIPPETT,

Petitioner,

v.

JOHN MYRICK, Superintendent of TRCI,

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

Oliver W. Loewy
Assistant Federal Public Defender
101 SW Main Street, Suite 1700
Portland, Oregon 97204
(503) 326-2123

Attorney for Petitioner

QUESTIONS PRESENTED

Whether it is at least debatable that in § 2254 habeas proceedings *Martinez v. Ryan* may not be utilized to excuse the default of an ineffective assistance of trial counsel claim when the ineffective assistance would be relied on to assert cause-and-prejudice to excuse the default of a free-standing constitutional claim?

TABLE OF CONTENTS

PAGE

APPENDICES

PAGE

TABLE OF AUTHORITIES

PAGE

CASES

CONSTITUTIONAL PROVISIONS

STATUTES

OPINIONS BELOW

A Magistrate Judge for the United States District Court for the District of Oregon entered Findings and Recommendation. Appendix E (*Tippett v. Myrick*, 2020 WL 7759457 (D. Or. September 30, 2020)). An Article III judge adopted the Findings and Recommendation, denied Mr. Tippett's petition for writ of habeas corpus, and denied a certificate of appealability ("COA"). Appendix D (*Tippett v. Myrick*, 2020 WL 7753687 (D. Or. December 28, 2020)). The District Court entered its Judgment that same day. Appendix C. Mr. Tippett filed a Motion for Certificate of Appealability. Appendix B. On appeal, the United States Court of Appeals for the Ninth Circuit denied a COA. Appendix A. (*Tippett v. Myrick*, 2021 WL 2660257 (9th Cir. April 20, 2021) (Order)).

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 April 20, 2021. Appendix A.

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 or 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

Mr. Tippett stands convicted of First Degree Sodomy, after a bench trial at which the judge determined that Mr. Tippett had engaged in non-consensual oral sex with Michael Malone, the complaining witness.

On direct appeal, the Oregon Court of Appeals affirmed without opinion, and the Oregon Supreme Court denied review. *State v. Tippett*, 351 P.3d 89 (Or. Ct. App. 2015) (table), *review denied*, 351 P.3d 89 (Or. 2015) (table). When Mr. Tippett appealed from the denial of postconviction relief, the Oregon Court of Appeals dismissed his appeal. *Tippett v. Myrick*, Case No. A162889 (Or. Ct. App. July 25, 2017). The Oregon Supreme Court denied Mr. Tippett's petition seeking review. *Tippett v. Myrick*, Case No. S065417 (Or. February 1, 2018).

B. Federal Habeas Proceedings

On August 4, 2016, the District Court docketed Mr. Tippett's *pro se* Petition for Writ of Habeas Corpus Pursuant to 28 U.S.C. § 2254. D. Ct. Dkt. 2. Claim 1 in his Second Amended Petition, the operative petition in the District Court proceedings, asserts that "Mr. Tippett's Conviction Rests On [Complainant-] Mr. Malone's Perjured Testimony, In Violation of Mr. Tippett's Fourteenth Amendment Right to Due Process." D. Ct. Dkt. 67 at 11 (all words capitalized in original). Mr. Tippett argued that the procedural default of Claim 1 should be excused because trial counsel's ineffectiveness caused the default. Acknowledging that he did not present to the state courts his ineffective assistance of trial counsel ("IATC") claim, Mr. Tippett relied on *Martinez v. Ryan*, 566 U.S. 1 (2012), to argue that the procedural default of that IATC claim should be excused because postconviction counsel caused that default. The Magistrate Judge rejected Mr. Tippett's argument, reasoning that that *Martinez* cannot be utilized to excuse the default of an IATC claim when that claim would then be relied on to excuse some other claim. For this reason, the Magistrate Judge declined to reach the merits of Claim 1.

Mr. Tippett filed objections arguing that this Court has not prohibited the application of *Martinez*'s equitable rule that postconviction ineffective assistance of counsel may excuse the procedural default of an IATC claim in cases where that

IATC would then be relied on to excuse some other claim for relief. Mr. Tippett noted that this Court has long held that trial counsel's ineffectiveness may excuse the default of another claim. D.Ct. Dkt. 124 at 6-7 (relying on *Coleman v. Thompson*, 501 U.S. 722 (1991)).

The District Court adopted the Magistrate Judge's Findings and Recommendation, denied Mr. Tippett's motion for an evidentiary hearing, denied the petition, dismissed the action with prejudice, and denied a COA. Appendix D. That same day, December 28, 2020, the District Court entered its Judgment denying the petition, dismissing the action with prejudice, and denying a COA. Appendix C.

In seeking a COA from the Ninth Circuit Court of Appeals, Mr. Tippett urged that reasonable jurists would find it debatable whether the District Court had correctly determined that *Martinez* cannot be utilized to excuse the default of an IATC claim when that ineffective assistance of counsel will then be relied on to excuse the default of some other claim for relief. Appendix B at 7.

REASONS FOR GRANTING THE WRIT

I. THE COURTS OF APPEAL ARE SPLIT ON WHETHER *MARTINEZ* MAY BE APPLIED TO EXCUSE THE DEFAULT OF AN INEFFECTIVE ASSISTANCE OF TRIAL COUNSEL CLAIM WHEN THAT CLAIM WOULD BE RELIED ON TO EXCUSE THE DEFAULT OF ANOTHER CLAIM FOR RELIEF.

In *Edwards v. Carpenter*, 529 U.S. 446 (2000), this Court held that "an ineffective-assistance-of-counsel claim asserted as cause for the procedural default of another claim can itself be procedurally defaulted [and may] *itself* be excused if the prisoner can satisfy the cause-and-prejudice standard with respect to *that* claim." *Id.* at 453. The Circuit Courts of Appeal are split on whether *Martinez* may be applied to excuse the default of an IATC claim when that ineffective assistance will then be relied on to excuse the default of another claim for relief. Whereas the Third and Eighth Circuits apply *Martinez* in that context, the Sixth Circuit—and in the instant case, the Ninth Circuit—has held that it may not be.

In *Preston v. Superintendent Graterford SCI*, 902 F.3d 365, 378 (3d Cir. 2018), the petitioner asserted that trial counsel's ineffectiveness in failing to raise and preserve a Confrontation Clause claim excused procedural default of that claim. *Id.* at 375. However, as the petitioner conceded, his ineffective assistance of trial counsel claim was itself procedurally defaulted. Applying *Martinez*, the Third Circuit held that the petitioner had "overcome the procedural default of his IATC claim under *Martinez*." *Id.* at 376 (emphasis omitted).

In *Deck v. Jennings*, 978 F.3d 578, 582 (8th Cir. 2020), the District Court granted habeas relief because, among other reasons, the lengthy delay between conviction and sentencing proceedings violated the due process guarantee and the prohibition against cruel and unusual punishment. *Id.* at 581. Acknowledging that

the due process and cruel and unusual punishment claims were defaulted because trial counsel had not objected to the long delay, the District Court ruled that postconviction counsel's failure to assert trial counsel's ineffectiveness in failing to object excused the default of that claim. *Id.* at 582. The District Court then relied on *Edwards* and *Martinez* to "conclude[] that the newly excused ineffective-assistance-of-counsel claim provided cause for the default of the underlying Eighth and Fourteenth Amendment claims." *Id.* Far from rejecting this analysis, the Eighth Circuit engaged in extensive *Martinez* analysis to determine postconviction counsel had not been ineffective and that, therefore, reversal was appropriate.

By contrast to the Third and Eighth Circuits, the Sixth Circuit has held that *Martinez* may not be relied on to excuse the default of an ineffective assistance of trial counsel claim where that claim would then be deployed to excuse the default of a further free-standing constitutional claim. *Zagorski v. Mays*, 907 F.3d 901 (6th Cir. 2018). The Sixth Circuit reasoned that allowing *Martinez* to excuse an ineffective assistance of trial counsel claim in that context would render *Martinez* "the exception that swallows [the] rule," that state courts should have "the first opportunity to correct any constitutional violations stemming from their own mistakes." *Zagorski*, 907 F.3d at 905.

Further, in the instant case, the District Court ruled that *Martinez* may not be relied on to excuse the procedural default of an IATC claim whenever the

petitioner intends to rely on the ineffective assistance to argue in favor of excusing another procedurally defaulted claim. The Ninth Circuit ruled that it is *not* at least debatable whether *Martinez v. Ryan* may be utilized to excuse the default of an ineffective assistance of trial counsel claim when that ineffective assistance would then be relied on to assert cause-and-prejudice to excuse the default of a free-standing constitutional claim.

II. THE CIRCUIT SPLIT DEMONSTRATES THAT SOME COURTS OF APPEAL HAVE INFERRED THAT *MARTINEZ* PARTLY OVERRULES *EDWARDS* RATHER THAN RESPECTING THIS COURT'S ESTABLISHED PREROGATIVE.

This Court has long and unwaveringly held that where its precedent "has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the court of Appeals should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions." *Rodriguez de Quijas v. Shearson/American Exp., Inc.*, 490 U.S. 477, 1922-22 (1989). As Justice Kavanaugh last year explained in a concurring opinion, "vertical *stare decisis* is absolute, as it must be in a hierarchical system with 'one supreme Court.' U.S. Const., Art. III, § 1. In other words, the state courts and the other federal courts have a constitutional obligation to follow a precedent of this Court unless and until it is overruled by this Court." *Ramos v. Louisiana*, 140 S.Ct. 1390, 1416 n. 5 (2020).

The Sixth and Ninth Circuits violated this "absolute" rule by inferring that *Martinez* partly overruled *Edwards*. *Martinez* contains no language prohibiting the use of ineffective assistance of postconviction counsel to excuse a defaulted trial counsel ineffectiveness claim where trial counsel ineffectiveness would then be used to excuse a free-standing claim's default. However, the animating principles in *Martinez*—that effective assistance of counsel is fundamental to our justice system and that investigation and an understanding of trial strategy is often needed to craft an ineffective assistance of trial counsel claim—strongly favor allowing ineffective assistance of trial counsel to excuse other claims even when the procedural default of the trial counsel claim itself has been excused. In the instant case, for example, Claim 1 asserts that Mr. Tippett's conviction rests on perjured testimony. That assertion is grounded in investigation neither postconviction nor trial counsel conducted.

III. THE NINTH CIRCUIT'S ERROR IN DETERMINING THAT MR. JACOBS FAILED TO SHOW THAT IT IS DEBATABLE AMONG JURISTS OF REASON THAT HE DID NOT STATE A VALID CLAIM OF THE DENIAL OF A CONSTITUTIONAL RIGHT SHOULD NOT PREVENT THIS COURT FROM REACHING THE QUESTION PRESENTED.

In addition to showing that jurists of reason would find it debatable whether the district court was correct in its procedural ruling—the subject of the Question Presented in this application—a petitioner seeking a COA must show that "jurists of reason would find it debatable whether the petition states a valid claim of the

denial of a constitutional right[.]" *Slack v. McDaniel*, 529 U.S. 473, 484 (2000). To satisfy this requirement, a prisoner need "show . . . only something more than the absence of frivolity or the existence of mere good faith on his or her part." *Miller-El v. Cockrell*, 577 U.S. 322, 337-38 (2003). Here, as demonstrated below, whether Mr. Tippett's first ground for relief (Claim 1) stated a valid claim that his conviction rests on the complainant's perjured testimony in violation of the Fourteenth Amendment right to due process was not "beyond all debate." *Welch v. United States*, 136 S.Ct. 1257, 1264 (2016). Because the Ninth Circuit's valid claim ruling was erroneous, it does not prevent the Court from reaching the Question Presented.

The state's theory at trial was that Mr. Tippett performed oral sex on the complainant, Michael Malone, when the complainant was unconscious and incapable of consent by reason of mental incapacity and physical helplessness. Tr. at 200 (closing argument). While Mr. Malone testified that he had no memory of the events, two of his friends—Kacey Scacco and Randall Zimmerman—testified that they observed Mr. Tippett performing oral sex on Mr. Malone. They also testified, along with law enforcement officers and an Emergency Medical Technician, that Mr. Malone was inebriated at the time.

Mr. Malone is now deceased. However, in the District Court, Mr. Tippett proffered an affidavit from a witness relating that Mr. Malone stated that, contrary

to his trial testimony, he had known Mr. Tippett for months, that he and Mr. Tippett were having consensual sex when Scacco showed up, that he was embarrassed by being found having sex with another man, and that Mr. Tippett had not raped him. D. Ct. Dkt. 62-1 at 2. Mr. Tippett also proffered a recitation of a percipient witness' statement that also contradicted Mr. Malone's testimony. These proffered statements establish that it is at least debatable whether Mr. Tippett's claim that his conviction rests on Mr. Malone's perjured testimony in violation of his Fourteenth Amendment right to due process states a valid claim of the denial of constitutional right.

1. The Trial Evidence.

Malone testified that he was sitting down at his campsite "by the wetlands having a drink" when Mr. Tippett showed up and they started talking. Tr. at 15, 17. Mr. Tippett told Malone that "he came up from Texas." *Id*. at 17. After reiterating that he had never before seen Mr. Tippett (*id.* at 17), Malone testified that his memory of the events was incomplete because after smoking pot supplied by Tippett, he passed out. *Id.* Malone then testified that the last thing he remembered before waking up in the hospital was talking to his friend Gary. *Id.* at 19. Gary was at the campsite when Malone smoked marijuana. *Id.* Continuing to claim that the marijuana impaired him and caused him to pass out, Malone testified that he had no recollection of Mr. Tippett performing oral sex on him.

On cross-examination, Malone explained that Mr. Tippett was already at the campsite when his (Malone's) friend Gary arrived (*id.* at 23), that he had not told the police about Gary because he "didn't think it'd come up" (*id.* at 24), and clarified that he, Mr. Tippett, and Gary smoked marijuana that day. Specifically, Malone and Tippett finished a joint which Tippett was smoking when he arrived. Tr. at 30-1. When Gary stopped by, he (Gary) stayed about 15-25 feet away from Malone and Tippett. *Id.* at 32-33. Tippett walked over to Gary and shared part of another joint with him. *Id.*

Kacey Scacco testified that when she first approached the campsite, she saw a blue tarp covering Tippett and Malone. Tr. at 52-53. She called out, "like I always do, I do, Mikey?" *Id.* at 51. Malone groaned and Tippett "threw" the tarp off so that she could see them from the "waist up." *Id.* at 53. Malone was not awake, so Scacco tried to wake him by "push[ing] on his arm a little bit." Dkt. 102 at 56. Malone responded by groaning. *Id.* Scacco asked Tippett who he was and what he was doing there. When Tippett responded that he was sleeping with his friend, using a word which Ms. Scacco could not recall but believed implied they were partners (*id.* at 54-55), Scacco told him to leave. Tippett declined. Scacco left and returned 30 minutes later with her boyfriend, Randall Zimmerman. *Id.* at 55 & 73. When she arrived the second time, Scacco saw Tippett "[g]iving him oral sex." *Id.* at 61. Neither the tarp nor a blanket was covering Malone and Tippett. *Id*. at

60, 73. Malone's pants were unzipped but not pulled down at all. *Id.* at 65. Zimmerman told Mr. Tippett to leave and chased him from the campsite to the street. *Id.* at 63. Ms. Scacco followed. *Id.* After Mr. Tippett reached and crossed the street, Ms. Scacco returned to Malone, "put his penis back in" and pulled up his pants. *Id.* at 65. She "tried to get him to move; he wouldn't move." *Id.* at 66. The police arrived at about the same time, and Ms. Scacco then went back to the street. *Id.*

Zimmerman testified that when Ms. Scacco and he arrived, a tarp was covering Malone and Tippett. Tr. at 90. When he pulled the tarp off, he saw Tippett performing oral sex on Mr. Malone. Malone's pants were down almost to his knees. Tr. at 84. "Mr. Malone [was] basically asleep. . . . We couldn't wake – we couldn't move him." *Id.* at 81-2.

Scacco and Zimmerman each testified that Malone would remain coherent after drinking large quantities of liquor, thereby corroborating Malone's testimony that he drank some vodka that day but that "it was the pot that passed me out." In particular, Scacco testified that she had known Malone to drink two or three fifths of vodka and remain coherent, and Zimmerman testified that Malone could drink a fifth by himself and still function. Tr. at 70, 87.

Officer Elkins testified that he responded to the campsite, arriving at about 7:20 p.m. *Id.* at 97. He testified that Malone "appeared to be passed out. His eyes

were rolled to the top of his head, almost in the back of his head." *Id.* at 98. "[H]is eyes were open." *Id.* at 99. When Malone did not respond to Officer Elkins' verbal efforts, he "physically shook" Mr. Malone and asked if he was okay. *Id.* at 100. Malone responded, but it "basically was, like, a slur. It was, like, more of a uh-uh-uh of a moan." *Id.* Mr. Malone was transported to the hospital. "[I]t wasn't 'til about 8:15, 8:20ish [that Officer Elkins] was actually able to communicate with Michael Malone." *Id.* at 101. "[H]e was still very hard to talk to at that point. He had a heavy slur to his speech at the point as well, too." *Id.*

Two defense percipient witnesses other than Mr. Tippett also provided testimony relevant to Mr. Malone's mental state, an Emergency Medical Technician ("EMT") who responded to the scene (Lindsay Telek) and a responding officer (Officer Burnum). EMT Telek testified that when she arrived at the scene at about 7:20 p.m., less than five minutes *after* Officer Elkins had arrived on the scene, Malone was oriented as to time and place, that is, he knew what month of the year it was and where he was. *Id.* at 142, 140. Malone would answer Telek's questions, then would "go back to sleep." *Id.* at 140. While Telek "had to speak very forcefully, directly to him, loud, to gain [Mr. Malone's attention]," she did not need to physically shake or otherwise make physical contact with him. *Id.* at 140-41. Officer Burnum testified that when she responded to the scene, Mr. Malone's

"eyes were shut, but he was moving around[.] [H]e was just kind of slow to answer[,] . . . as if he was bothered that we woke him up or, you know." *Id.* at 158.

Mr. Tippett testified that he had first met Malone the day before. Tippett had been walking to a friend's home when some geese crossing the road toward the wetland area drew his attention. Tr. at 162. He followed them into the wetland area and watched them for a while. *Id.* When he turned to leave, he saw Malone sitting nearby. *Id.* at 163. Tippett accepted Malone's invitation to sit down and talk for a while. They talked about the practical challenges Malone faced as a homeless person (e.g., available bathing facilities), as Tippett had lived outside in the past, and they drank some vodka. Tr. 163-64. After, Mr. Tippett continued to his friend's home. The next day, Tippett started to return to his friend's house to wash his dirty laundry. Tr. at 165. On his way, Tippett stopped to check on Malone. Tr. at 166. Malone was there, and they started talking and drinking Malone's vodka from a new 5th-size bottle. Tr. 167-68. They talked about Malone's needs (toiletries and clothes, e.g.), local resources, and Malone's past girlfriend. Tr. 169-70. Malone then said he was lonely, started groping himself, and asked whether Tippett was gay. Tr. at 170. Tippett confirmed that he is gay, Malone continued groping himself, and Tippett asked him whether he wanted to have sex, specifically whether he was "wanting a blowjob[.]" Tr. at 171. Malone said he did, pulled his tarp over them for privacy, unzipped his pants, and had sex with Tippett. Tr. at

172-73. After, Tippett had a little more vodka, Malone finished off the bottle, and they laid down under the blanket and tarp. Tr. at 174.

Sometime later Scacco showed up and asked Tippett who he was and why he was there. Tr. at 175. Tippett replied that he and Malone were "snuggling and drinking vodka." Tr. at 175. Scacco then left without further discussion. Tr. at 176.

About 30 minutes later, Scacco returned with Zimmerman. Tr. at 176. Malone and Tippett were still under the tarp and were not having sex. Tr. at 177. Zimmerman pulled the tarp off them. Tr. at 178. In response to Zimmerman's asking what he was doing and who he was, Tippett identified himself and said that he and Malone had been sleeping. Tr. 181. Zimmerman then attacked Tippett, picking him up and throwing him to the ground. Tr. at 182. Tippett grabbed some of his belongings and left. *Id.*

At no time that day did Mr. Tippett smoke marijuana by himself or with either Malone or anyone else. Tr. at 179-80. Mr. Tippett testified that, contrary to Malone's testimony, no third person showed up when he and Malone were there. Tr. at 179.[1]

[1] Gary was available to testify, but the defense was unaware of him and what he had to offer. Had the defense adequately investigated the case, they would have learned that Gary would have testified that he was at Malone's campsite when a third male was there, that the third male said he was from Texas, and that none of the three smoked marijuana while he was there. Malone testified that Tippett said

Other than Mr. Tippett, the defense called no witness to impeach Mr. Malone's assertion that Mr. Tippett had shared marijuana with him and Gary (Tr. at 18-19), an assertion indirectly supported by Scacco's and Zimmerman's testimony that Malone would remain functional after consuming large quantities of alcohol.

Tippett testified that he initially told the police that he had not had sex with Malone because he was afraid he would be arrested and because he felt humiliated. Tr. at 183-84. Tippett also testified that he knew Malone was under the influence of alcohol; that he himself was under the influence; that, in light of Malone's talking about women, he did not think Malone would have wanted sex were he sober; but that because Malone had said he wanted to have sex, unzipped his pants, and pulled out his penis that he believed Malone had consented. Tr. at 185, 187.

2. The Evidence That Mr. Tippett's Conviction Rests On Perjured Testimony In Violation Of His Right To Due Process.

In the District Court, Mr. Tippett proffered an affidavit from Roy Harrison, a friend of Mr. Malone's, stating that Mr. Malone had told him that he lied at Mr. Tippett's trial. D.Ct. Dkt. 62-1 at 2. The truth was, Malone related, that he had met Tippett before that day, that he and Tippett were having sex when Scacco showed

---

he was from Texas. With Gary's testimony, there would have been no reason to elicit testimony from Mr. Tippett contradicting Malone's testimony that a friend of his dropped by while Tippett was there and that the three of them smoked marijuana.

up, that he was embarrassed "by being caught having sex with a guy," and that Tippett had not raped him. *Id.*

Mr. Tippett also proffered that Gary Schmidt—who, according to Malone, was Malone's friend and present when Malone and Tippett had supposedly smoked marijuana—stated that he would testify in court that he was present at Malone's campsite when Tippett was there, that Tippett never offered marijuana to Gary, and that he (Gary) did not see or smell marijuana. D.Ct. Dkt. 62 at 16.

Schmidt's statements corroborate Malone's hearsay statements. Malone's statements "that Kacey [Scacco] and Randy [Zimmerman] discovered Vodka Mike [aka Malone] and Mr. Tippett having sex[,]" that Zimmerman beat up Tippett after arriving at the scene, that "he was embarrassed by being caught having sex with a guy," and that "Mr. Tippett had not raped him" all necessarily imply that Malone was not, as he had testified, "passed [] out." Dkt. 62-1 at 2; Tr. at 18. Schmidt's statement that there was no marijuana corroborates Malone's statements to Harrison because it contradicts his (Malone's) testimony that, when Scacco and Zimmerman found him having sex with Tippett, he was "passed [] out" due to marijuana he had smoked with Tippett and Schmidt.

Further, Malone told Harrison that he lied for the hope of money from the victim's assistance program. Mr. Tippett proffered documents reflecting Malone's contact with the county victim's assistance program. D.Ct. Dkt. 109-1. These

documents corroborate Malone's statement to Harrison that he perjured himself for hoped-for money by showing that Malone may have been eligible for financial support. Regardless whether Malone ever received payment, he may have believed that he was eligible for and would receive money based on the Victim Assistance Program letter sent to him explaining that "you may be eligible for restitution" and, further, enclosing a form for seeking money from the state Crime Victim Compensation Program. Dkt. 109-1 (letter).

Finally, Malone's statements to Harrison that "Kacey [Scacco] and Randy [Zimmerman] discovered Vodka Mike [aka Malone] and Mr. Tippett having sex[,]" that Zimmerman beat up Tippett after arriving at the scene, that "he was embarrassed by being caught having sex with a guy," and that "Mr. Tippett had not raped him" individually and collectively, undermine the reliability of the Scacco and Zimmerman eyewitness testimony. Malone's being embarrassed at having been "caught having sex with a guy" provided him motive to deceive Scacco and Zimmerman that he was unconscious or unaware. The same is true of Officer Elkins' assessment because Malone knew that Scacco and Malone were nearby.

Jurists of reason would find that Mr. Tippett's proffer to the District Court make it at least debatable whether his petition states a valid claim that his conviction rests on perjured testimony in violation of his right to due process.

CONCLUSION

For these reasons, this Court should grant certiorari to decide whether it is at least debatable that in § 2254 habeas proceedings *Martinez v. Ryan* may not be utilized to excuse the default of an ineffective assistance of trial counsel claim when the ineffective assistance would be relied on to assert cause-and-prejudice to excuse the default of a free-standing constitutional claim.

Respectfully submitted on September 17, 2021.

/s/ Oliver W. Loewy
Oliver W. Loewy
Assistant Federal Public Defender
Attorney for Petitioner

APPENDICES

FILED

APR 20 2021

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

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

JERRY R. TIPPETT, Petitioner-Appellant, v. JOHN MYRICK, Superintendent of TRCI, Respondent-Appellee.	No. 20-36120 D.C. No. 2:16-cv-01584-CL District of Oregon, Pendleton ORDER

Before: GRABER and TALLMAN, 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.

No. 20-36120

UNITED STATE COURT OF APPEALS

FOR THE

NINTH CIRCUIT

JERRY R. TIPPETT,

Petitioner-Appellant,

v.

JOHN MYRICK, Superintendent,
Two Rivers Correctional Institution,

Respondent-Appellee.

Appeal from the United States District Court

for the District of Oregon

MOTION FOR CERTIFICATE OF APPEALABILITY

Oliver W. Loewy
Assistant Federal Public Defender
101 SW Main Street, Suite 1700
Portland, Oregon 97204
(503) 326-2123

Attorney for Petitioner-Appellant

TABLE OF CONTENTS

PAGE

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

JERRY R. TIPPETT, Petitioner-Appellant, v. JOHN MYRICK, Superintendent, Two Rivers Correctional Institution, Respondent-Appellee.	CA No. 20-36120

Jerry R. Tippett (Petitioner), through undersigned counsel and pursuant to Fed. R. App. P. 27 and Ninth Cir. Rule 22-1(d), moves that this Court issue a certificate of appealability on claims 1, 4, 7, and 8 on which he sought habeas relief in the court below. The District Court rejected Mr. Tippett's contention that ineffective assistance of state postconviction counsel may excuse the procedural default of his ineffective assistance of trial counsel claim which, in turn, may excuse the default of claims 1, 4, 7, and 8. *See Martinez v. Ryan*, 566 U.S. 1 (2012) (ineffective assistance of postconviction counsel may excuse default of trial counsel ineffective assistance of counsel). The District Court ruled that *Martinez* cannot be utilized to excuse the default of an ineffective assistance of trial counsel claim if that claim will then be relied on to excuse a free-standing (i.e., *not*

ineffective assistance of counsel) claim. Based on this ruling, the court below determined that Claims 1, 4, 7, and 8 cannot be excused by ineffective assistance of trial counsel in partial reliance on *Martinez*.

STATEMENT OF FACTS AND PROCEDURAL HISTORY

A. The Oregon State Criminal Case

In May 2013, a Clackamas County, Oregon, grand jury returned a three-count indictment based on Mr. Tippett's engaging in oral sex on a single occasion with Michael Malone, the complaining witness. The trial court found Mr. Tippett guilty on Count 1 (First Degree Sodomy), determining that the convictions on the remaining two counts merged with Count 1. D. Ct. Dkt. 11 at State's Exhibit 101 (Judgment).

On direct appeal, the Oregon Court of Appeals affirmed without opinion, and the Oregon Supreme Court denied review. *State v. Tippett*, 351 P.3d 89 (Or. Ct. App. 2015) (table), *review denied*, 351 P.3d 89 (Or. 2015) (table).

Mr. Tippett timely filed in the Umatilla County, Oregon, Circuit Court a petition for post-conviction relief. D. Ct. Dkt. 11 at State's Exhibit 110 (Petition for Post Conviction Relief). The post-conviction court appointed James D. Van Ness to represent Mr. Tippett. Mr. Van Ness filed an affidavit relating his "belief that the original petition cannot be construed to state a ground for relief under ORS

138.510 to 138.680, and cannot be amended to state a ground for relief." D. Ct. Dkt. 11 at State's Exhibit 113. Mr. Van Ness further averred that:

> In addition to the claims presented by Petitioner, I have examined every potential avenue and/or theory which might lead to a claim of ineffective trial counsel or due process violation. I have examined the trial transcript, the appellate transcript, and Petitioner's trial counsel files, and have been unable to find any evidence of ineffective assistance of counsel. I have also found that, under current Oregon law, there is no evidence that Petitioner's due process rights were violated.

D. Ct. Dkt. 11 at State's Exhibit 113 at 2. The Umatilla County Circuit Court dismissed with prejudice Mr. Tippett's petition for post-conviction relief on the ground that it "fail[ed] to state a claim for relief[.]" *Id*., State's Exhibit 116.

Mr. Tippett appealed. The Oregon Court of Appeals dismissed the case because "under ORS 138.525(3), a judgment dismissing a petition for post-conviction relief as meritless—that is, for failure to state a claim—is not appealable." D. Ct. Dkt. 11 at State's Exhibit 124 (*Tippett v. Myrick*, Case No. A162889 (Or. Ct. App. July 25, 2017) ("Order Determining Appealability; Order Dismissing Appeal")). On September 12, 2017, the Oregon Court of Appeals denied Mr. Tippett's petition for reconsideration. D. Ct. Dkt. 11 at State's Exhibit 126 (Order Denying Petition For Reconsideration). The Oregon Supreme Court denied Mr. Tippett's petition seeking review. D. Ct. Dkt. 11 at State's Exhibit 128

(Order Denying Review). The Appellate Judgment was entered March 7, 2018. D. Ct. Dkt. 11 at State's Exhibit 129 at 2.

B. The Federal Habeas Corpus Proceedings In District Court

On August 4, 2016, the District Court docketed Mr. Tippett's pro se Petition for Writ of Habeas Corpus Pursuant to 28 U.S.C. § 2254. D. Ct. Dkt. 2. After briefing addressing Mr. Tippett's claims for relief and his motion for an evidentiary hearing, the Magistrate Judge filed his Findings and Recommendation. D.Ct. Dkt. 110. The Magistrate Judge determined that Mr. Tippett was not entitled to habeas corpus relief on any of his procedurally defaulted free-standing claims because none of those defaults could be excused. Mr. Tippett contended that ineffective assistance of trial counsel should excuse his free-standing claim. Acknowledging that his trial counsel ineffectiveness claim was defaulted, he contended that the default should be excused under *Martinez,* making that ineffectiveness available to excuse the defaulted free-standing claims. The Magistrate Judge, however, determined that *Martinez* cannot be utilized to excuse the default of an ineffective assistance of trial counsel claim when that ineffective assistance of counsel will then be relied on to excuse some other claim. Based on this ruling, the Magistrate Judge determined that the procedural default of Claims 1, 4, 7 (partial), and 8 cannot be excused in partial reliance on *Martinez*.

Mr. Tippett filed objections arguing that nothing in *Martinez* precludes relying on a claim of ineffective assistance of trial counsel, whose procedural default has been excused, to excuse the procedural default of a free-standing claim, and he noted that trial counsel ineffectiveness may excuse the default of another claim. D.Ct. Dkt. 124 at 6-7 (relying on *Coleman v. Thompson*, 501 U.S. 722 (1991)). Mr. Tippett also objected to the Magistrate Judge's determination that his ineffective assistance of trial counsel claims were insubstantial and, therefore, that their procedural default cannot be excused under *Martinez*.

The District Court adopted the Magistrate Judge's Findings and Recommendation, denied Mr. Tippett's motion for an evidentiary hearing, denied the petition, dismissed the action with prejudice, and denied a certificate of appealability. D.Ct. Dkt. 126 (Opinion and Order). That same day, December 28, 2020, the District Court entered its Judgment denying the petition, dismissing the action with prejudice, and denying a certificate of appealability. D.Ct. Dkt. 127.

ARGUMENT

A. THE CERTIFICATE OF APPEALABILITY STANDARD

Where, as here, a district court denies a habeas petition on a procedural ground rather than on the merits of its claims, "a COA should issue when the prisoner shows, at least, [1] that jurists of reason would find it debatable whether the

petition states a valid claim of the denial of a constitutional right and [2] 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). This inquiry "is not coextensive with a merits analysis." *Buck v. Davis*, 137 S.Ct. 759, 773 (2016). Indeed, a prisoner need not "show[] that the appeal will succeed[,] . . . only something more than the absence of frivolity or the existence of mere good faith on his or her part[.]" *Miller-El v. Cockrell*, 537 U.S. 322, 337-38 (2003). "It is consistent with § 2253 that a COA will issue in some instances where there is no certainty of ultimate relief. After all, when a COA is sought, the whole premise is that the prisoner 'has already failed in that endeavor.'" *Miller-El* at 337 (quoting *Barefoot v. Estelle*, 463 U.S. 880, 893 n. 4 (1983)). Further, "a claim can be debatable even though every jurist of reason might agree, after the COA has been granted and the case has received full consideration, that petitioner will not prevail." *Miller-El* at 338. Thus, a COA should issue when "reasonable jurists could debate whether (or, for that matter, agree that) the petition should have been resolved in a different manner." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000). In Mr. Tippett's case, the manner in which the District Court resolved her petition is not "beyond all debate." *Welch v. United States*, 136 S.Ct. 1257, 1264 (2016).

B. WHETHER *MARTINEZ* MAY NOT BE UTILIZED TO EXCUSE THE DEFAULT OF AN INEFFECTIVE ASSISTANCE OF TRIAL CLAIM WHEN THAT CLAIM WILL THEN BE USED TO EXCUSE A FREE-STANDING CONSTITUTIONAL CLAIM IS AT LEAST DEBATABLE AMONG JURISTS OF REASON.

In *Coleman v. Thompson*, 501 U.S. 722 (1991), the Supreme Court held that negligence by postconviction counsel cannot constitute cause to excuse a procedural default. *Id.* at 753. Key to the *Coleman* analysis is that postconviction petitioners have no Sixth Amendment right to counsel. Where a denial of that right causes the default of a claim, the Sixth Amendment requires that "the responsibility for the default be imputed to the State." *Id.* at 754 (quoting *Murray v. Carrier*, 477 U.S. 478, 488 (1986)). Thus, ineffective assistance of trial counsel may excuse the procedural default of a free-standing claim. *Coleman* at 753-54 ("Attorney error that constitutes ineffective assistance of counsel is cause, however."). *See*, *e.g.*, *Dretke v. Haley*, 541 U.S. 386, 394 (2004) (if established, ineffective assistance of trial counsel would "provide cause to excuse the procedural default of his sufficiency of the evidence claim") (citing to *Carrier*, 477 U.S. at 488); *Walker v. Martel*, 709 F.3d 925, 938 (9th Cir. 2013) (ineffective assistance of trial counsel may excuse default of stand-alone shackling claim); *May v. Ryan*, 245 F.Supp.3d 1145 (D. Ariz. 2017) (holding that ineffective assistance of trial counsel excuses the procedural default of petitioner's

constitutional challenge to state statute and jury instruction given pursuant to it), reversed on other grounds, 954 F.3d 1194 (9th Cir. 2020).

By contrast, *Coleman* held, if the default occurs in postconviction proceedings, "where the State has no responsibility to ensure that the petitioner was represented by competent counsel, . . . it is the petitioner who must bear the burden of a failure to follow state procedural rules." *Coleman* at 754. Two decades later, of course, the Supreme Court created a "narrow exception" to *Coleman* by holding that ineffective assistance of postconviction counsel may excuse the default of an ineffective assistance of trial counsel claim. *Martinez*, 566 U.S. at 9.

The *Martinez* exception is narrow because it allows ineffective assistance of postconviction counsel to excuse only one kind of defaulted claim, ineffective assistance of trial counsel, and no other. The Supreme Court reiterated this in *Davila v. Davis*, 137 S.Ct. 2058 (2017), when it rejected an effort to extend the exception to allow ineffective assistance of postconviction counsel to excuse the procedural default of a claim that appellate counsel had been ineffective. There, the Court described the *Martinez* narrow exception as allowing postconviction ineffective assistance of counsel to excuse "a single claim—ineffective assistance of counsel." *Id.* at 2062.

The District Court misread the *Martinez* and *Davila* holding--that ineffective assistance of trial counsel is the only kind of claim which may be excused by ineffective assistance of postconviction counsel—to limit when ineffective assistance of trial counsel may excuse the procedural default of another claim. D.Ct. Dkt. 110 at 10-11. Neither *Martinez* nor *Davila* contains any language prohibiting the use of ineffective assistance of postconviction counsel to excuse a defaulted trial counsel ineffectiveness claim where trial counsel ineffectiveness would then be used to excused a free-standing claim's default. However, the animating principles in *Martinez* and *Davila*—that effective assistance of counsel is fundamental to our justice system and that investigation and an understanding of trial strategy is often needed to craft an ineffective assistance of trial counsel claim—strongly favor allowing ineffective assistance of trial counsel to excuse other claims even when the procedural default of the trial counsel claim itself has been excused. In the instant case, for example, Claim 1 asserts that Mr. Tippett's conviction rests on perjured testimony. That assertion is grounded in investigation neither postconviction nor trial counsel conducted.

It has long been established that ineffective assistance of trial counsel may excuse the procedural default of a claim. *See, supra.* It is at least debatable among jurists of reason whether the district court was correct in ruling that an ineffective

assistance of trial counsel claim, whose default has been excused under *Martinez*, may not excuse the default of a stand-alone claim.

C. THE VALIDITY OF MR. TIPPETT'S CLAIM THAT HIS CONVICTION RESTS ON PERJURED TESTIMONY IS AT LEAST DEBATABLE AMONG JURISTS OF REASON.

The state's theory at trial was that Mr. Tippett performed oral sex on the complainant, Michael Malone, when the complainant was unconscious, incapable of consent by reason of mental incapacity and physical helplessness. Tr. at 200 (closing argument). While Mr. Malone testified that he had no memory of the events, two of his friends—Kacey Scacco and Randall Zimmerman—testified that they observed Mr. Tippett performing oral sex on Mr. Malone. They also testified, along with law enforcement officers and an Emergency Medical Technician, that Mr. Malone was inebriated at the time.

Mr. Malone is now deceased. In federal habeas proceedings, Mr. Tippett proffered a sworn affidavit from one witness as well as a recitation of another witness' statement, both of which contradicted Mr. Malone's testimony and both of which establish that it is at least debatable whether Mr. Tippett's claim that his conviction rests on Mr. Malone's perjured testimony in violation of his Fourteenth Amendment right to due process states a valid claim of the denial of constitutional right.

1. The Trial Evidence.

Malone, the State's first witness, testified that he was sitting down at his campsite "by the wetlands having a drink" when Mr. Tippett showed up and they started talking. *Id.* at 15, 17. Mr. Tippett told Malone that "he came up from Texas." Tr. at 17. After reiterating that he had never before seen Mr. Tippett (*id.* at 17), Malone testified that his memory of the events was incomplete because after smoking pot supplied by Tippett, he passed out. *Id.* Malone then testified that the last thing he remembered before waking up in the hospital was talking to his friend Gary. *Id.* at 19. Gary was at the campsite when Malone smoked marijuana. *Id.* Continuing to claim that the marijuana impaired him and caused him to pass out, Malone testified that he had no recollection of Mr. Tippett performing oral sex on him.

On cross-examination, Malone explained that Mr. Tippett was already at the campsite when his (Malone's) friend Gary arrived (*id.* at 23), that he had not told the police about Gary because he "didn't think it'd come up" (*id.* at 24), and clarified that he, Mr. Tippett, and Gary smoked marijuana that day. Specifically, Malone and Tippett finished a joint which Tippett was smoking when he arrived. Tr. at 30-1. When Gary stopped by, he (Gary) stayed about 15-25 feet away from

Malone and Tippett. *Id.* at 32-33. Tippett walked over to Gary and shared part of another joint with him. *Id.*

Kacey Scacco testified that when she first approached the campsite, she saw a blue tarp covering Tippett and Malone. Tr. at 52-53. She called out, "like I always do, I do, Mikey?" *Id.* at 51. Malone groaned and Tippett "threw" the tarp off so that she could see them from the "waist up." *Id.* at 53. Malone was not awake, so Scacco tried to wake him by "push[ing] on his arm a little bit." Dkt. 102 at 56. Malone responded by groaning. *Id.* Scacco asked Tippett who he was and what he was doing there. When Tippett responded that he was sleeping with his friend, using a word which Ms. Scacco could not recall but believed implied they were partners (*id.* at 54-55), Scacco told him to leave. Tippett declined. Scacco left and returned 30 minutes later with her boyfriend, Randall Zimmerman. *Id.* at 55 & 73. When she arrived the second time, Scacco saw Tippett "[g]iving him oral sex." *Id.* at 61. Neither the tarp nor a blanket was covering Malone and Tippett. *Id*. at 60, 73. Malone's pants were unzipped but not pulled down at all. *Id.* at 65. Zimmerman told Mr. Tippett to leave and chased him from the campsite to the street. *Id.* at 63. Ms. Scacco followed. *Id.* After Mr. Tippett reached and crossed the street, Ms. Scacco returned to Malone, "put his penis back in" and pulled up his pants. *Id.* at 65. She "tried to get him to move; he wouldn't move." *Id.* at 66. The

police arrived at about the same time, and Ms. Scacco then went back to the street. *Id.*

Zimmerman testified that when Ms. Scacco and he arrived, a tarp was covering Malone and Tippett. Tr. at 90. When he pulled the tarp off, he saw Tippett performing oral sex on Mr. Malone. Malone's pants were down almost to his knees. Tr. at 84. "Mr. Malone [was] basically asleep. . . . We couldn't wake – we couldn't move him." *Id.* at 81-2.

Scacco and Zimmerman each testified that Malone would remain coherent after drinking large quantities of liquor, thereby corroborating Malone's testimony that he drank some vodka that day but that "it was the pot that passed me out." In particular, Scacco testified that she had known Malone to drink two or three fifths of vodka and remain coherent, and Zimmerman testified that Malone could drink a fifth by himself and still function. Tr. at 70, 87.

Officer Elkins testified that he responded to the campsite, arriving at about 7:20 p.m. *Id.* at 97. He testified that Malone "appeared to be passed out. His eyes were rolled to the top of his head, almost in the back of his head." *Id.* at 98. "[H]is eyes were open." *Id.* at 99. When Malone did not respond to Officer Elkins' verbal efforts, he "physically shook" Mr. Malone and asked if he was okay. *Id.* at 100. Malone responded, but it "basically was, like, a slur. It was, like, more of a

uh-uh-uh of a moan." *Id.* Mr. Malone was transported to the hospital. "[I]t wasn't 'til about 8:15, 8:20ish [that Officer Elkins] was actually able to communicate with Michael Malone." *Id.* at 101. "[H]e was still very hard to talk to at that point. He had a heavy slur to his speech at the point as well, too." *Id.*

Two defense percipient witnesses other than Mr. Tippett also provided testimony relevant to Mr. Malone's mental state, an Emergency Medical Technician ("EMT") who responded to the scene (Lindsay Telek) and responding officer (Officer Burnum). EMT Telek testified that when she arrived at the scene at about 7:20 p.m., less than five minutes after Officer Elkins had arrived on the scene, Malone was oriented as to time and place, that is, he knew what month of the year it was and where he was. *Id.* at 142, 140. Malone would answer Telek's questions, then would "go back to sleep." *Id.* at 140. While Telek "had to speak very forcefully, directly to him, loud, to gain [Mr. Malone's attention]," she did not need to physically shake or otherwise make physical contact with him. *Id.* at 140-41. Officer Burnum testified that when she responded to the scene, Mr. Malone's "eyes were shut, but he was moving around[.] [H]e was just kind of slow to answer[,] . . . as if he was bothered that we woke him up or, you know." *Id.* at 158.

Mr. Tippett testified that he had first met Malone the day before. Tippett had been walking to a friend's home when some geese crossing the road toward the

wetland area drew his attention. Tr. at 162. He followed them into the wetland area and watched them for a while. *Id.* When he turned to leave, he saw Malone sitting nearby. *Id.* at 163. Tippett accepted Malone's invitation to sit down and talk for a while. They talked about the practical challenges Malone faced as a homeless person (e.g., available bathing facilities), as Tippett had lived outside in the past, and they drank some vodka. Tr. 163-64. After, Mr. Tippett continued to his friend's home. The next day, Tippett started to return to his friend's house to wash his dirty laundry. Tr. at 165. On his way, Tippett stopped to check on Malone. Tr. at 166. Malone was there, and they started talking and drinking Malone's vodka from a new 5th-size bottle. Tr. 167-68. They talked about Malone's needs (toiletries and clothes, e.g.), local resources, and Malone's past girlfriend. Tr. 169-70. Malone then said he was lonely, started groping himself, and asked whether Tippett was gay. Tr. at 170. Tippett confirmed that he is gay, Malone continued groping himself, and Tippett asked him whether he wanted to have sex, specifically whether he was "wanting a blowjob[.]" Tr. at 171. Malone said he did, pulled his tarp over them for privacy, unzipped his pants, and had sex with Tippett. Tr. at 172-73. After, Tippett had a little more vodka, Malone finished off the bottle, and they laid down under the blanket and tarp. Tr. at 174.

Sometime later Scacco showed up and asked Tippett who he was and why he was there. Tr. at 175. Tippett replied that he and Malone were "snuggling and drinking vodka." Tr. at 175. Scacco then left without further discussion. Tr. at 176.

About 30 minutes later, Scacco returned with Zimmerman. Tr. at 176. Malone and Tippett were still under the tarp and were not having sex. Tr. at 177. Zimmerman pulled the tarp off them. Tr. at 178. In response to Zimmerman's asking what he was doing and who he was, Tippett identified himself and said that he and Malone had been sleeping. Tr. 181. Zimmerman then attacked Tippett, picking him up and throwing him to the ground. Tr. at 182. Tippett grabbed some of his belongings and left. *Id.*

At no time that day did Mr. Tippett smoke marijuana by himself or with either Malone or anyone else. Tr. at 179-80. Mr. Tippett testified that, contrary to Malone's testimony, no third person showed up when he and Malone were there. Tr. at 179.[1]

[1] Gary was available to testify, but the defense was unaware of him and what he had to offer. Had the defense adequately investigated the case, they would have learned that Gary would have testified that he was at Malone's campsite when a third male was there, that the third male said he was from Texas, and that none of the three smoked marijuana while he was there. Malone testified that Tippett said he was from Texas. With Gary's testimony, there would have been no reason to elicit testimony from Mr. Tippett contradicting Malone's testimony that a friend of

Other than Mr. Tippett, the defense called no witness to impeach Mr. Malone's assertion that Mr. Tippett had shared marijuana with him and Gary (Tr. at 18-19), an assertion indirectly supported by Scacco's and Zimmerman's testimony.

Tippett testified that he initially told the police that he had not had sex with Malone because he was afraid he'd be arrested and because he felt humiliated. Tr. at 183-84. Tippett also testified that he knew Malone was under the influence of alcohol; that he himself was under the influence; that, in light of Malone's talking about women, that he did not think Malone would have wanted sex were he sober; but that because Malone had said he wanted to have sex, unzipped his pants, and pulled out his penis that he believed Malone had consented. Tr. at 185, 187.

2. The Evidence That Mr. Tippett's Conviction Rests On Perjured Testimony In Violation Of His Right To Due Process.

In the District Court, Mr. Tippett proffered a sworn affidavit from Roy Harrison, a friend of Mr. Malone's, stating that Mr. Malone had told him that he lied at Mr. Tippett's trial. D.Ct. Dkt. 62-1 at 2. The truth was, Malone related, that he had known Tippett for months, that he and Tippett were having sex when

---

his dropped by while Tippett was there and that the three of them smoked marijuana.

Scacco showed up, that he was embarrassed "by being caught having sex with a guy," and that Tippett had not raped him. *Id.*

Mr. Tippett also proffered that Gary Schmidt—who, according to Malone, was Malone's friend and present when Malone and Tippett had supposedly smoked marijuana--stated that he would testify in court that he was present at Malone's campsite when Tippett was there, that Tippett never offered marijuana to Gary, and that he (Gary) did not see or smell marijuana. D.Ct. Dkt. 62 at 16.

Schmidt's statements corroborate Malone's hearsay statements. Malone's statements "that Kacey [Scacco] and Randy [Zimmerman] discovered Vodka Mike [aka Malone] and Mr. Tippett having sex[,]" that Zimmerman beat up Tippett after arriving at the scene, that "he was embarrassed by being caught having sex with a guy," and that "Mr. Tippett had not raped him" all necessarily imply that Malone was not, as he had testified, "passed [] out." Dkt. 62-1 at 2; Tr. at 18. Schmidt's statement that there was no marijuana corroborates Malone's statements because it contradicts his testimony that, when Scacco and Zimmerman found him having sex with Tippett, he (Malone) was "passed [] out" due to marijuana he had smoked with Tippett and Schmidt.

Further, Malone told Harrison that he lied for the hope of money from the victim's assistance program. Mr. Tippett proffered documents reflecting Malone's

contact with the county victim's assistance program. D.Ct. Dkt. 109-1. These documents corroborate Malone's statement to Harrison that he perjured himself for money by showing that Malone may have been eligible for financial support. Regardless whether Malone ever received payment, he may have believed that he was eligible for and would receive money based on the Victim Assistance Program letter sent to him explaining that "you may be eligible for restitution" and, further, enclosing a form for seeking money from the state Crime Victim Compensation Program. Dkt. 109-1 (letter).

Finally, Malone's statements to Harrison that "Kacey [Scacco] and Randy [Zimmerman] discovered Vodka Mike [aka Malone] and Mr. Tippett having sex[,]" that Zimmerman beat up Tippett after arriving at the scene, that "he was embarrassed by being caught having sex with a guy," and that "Mr. Tippett had not raped him" individually and collectively, undermine the reliability of the Scacco and Zimmerman eyewitness testimony. Malone's being embarrassed at having been "caught having sex with a guy" provided him motive to deceive Scacco and Zimmerman that he was unconscious or unaware. The same is true of Officer Elkins' assessment because Malone knew that Scacco and Malone were nearby.

Jurists of reason would find that Mr. Tippett's proffer to the District Court make it at least debatable whether his petition states a valid claim that his conviction rests on perjured testimony in violation of his right to due process.

CONCLUSION

For all these reasons and for all those reasons set out in his briefing before the District Court, Mr. Tippett respectfully asks that the Court grant a certificate of appealability in this case.

Respectfully submitted this 2nd day of February 2021.

/s/ Oliver W. Loewy
Oliver W. Loewy
Assistant Federal Public Defender
Attorney for Petitioner-Appellant

CERTIFICATE OF SERVICE

I hereby certify that on February 2, 2021, I electronically filed the foregoing Petitioner-Appellant's Motion for Certificate of Appealability with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

/s/ Oliver Loewy
Oliver Loewy

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

JERRY R. TIPPETT,

Petitioner,

v.

JOHN MYRICK, Superintendent of TRCI,

Respondent.

Case No. 2:16-cv-1584-CL

JUDGMENT

MCSHANE, Judge:

The Petition (ECF No. 67) is DENIED and this action is DISMISSED, with prejudice. As Petitioner has not made a substantial showing of the denial of a constitutional right, the Court declines to issue a certificate of appealability.

IT IS SO ORDERED.

DATED this 28th day of December, 2020.

/s/ Michael J. McShane
Michael McShane
United States District Judge

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

JERRY R. TIPPETT,

Petitioner,

v.

JOHN MYRICK, Superintendent of TRCI,

Respondent.

Case No. 2:16-cv-1584-CL

ORDER

MCSHANE, Judge:

Magistrate Judge Mark D. Clarke filed a Findings and Recommendation (ECF No. 110), and the matter is now before this court. *See* 28 U.S.C. § 636(b)(1)(B), Fed. R. Civ. P. 72(b). Petitioner filed objections to the Findings and Recommendation. Accordingly, I have reviewed the file of this case *de novo*. *See* 28 U.S.C. § 636(b)(1)(c); *McDonnell Douglas Corp. v. Commodore Bus. Mach., Inc.*, 656 F.2d 1309, 1313 (9th Cir. 1981). I find no error and conclude the report is correct.

Magistrate Judge Clarke's Findings and Recommendation (ECF No. 110) is adopted. Petitioner's Motion for an Evidentiary Hearing (ECF No. 64) is DENIED. The Petition (ECF No. 67) is DENIED and this action is DISMISSED, with prejudice. As Petitioner has not made a

substantial showing of the denial of a constitutional right, the Court declines to issue a certificate of appealability.

IT IS SO ORDERED.

DATED this 28th day of December, 2020.

/s/ Michael J. McShane
Michael McShane
United States District Judge

UNITED STATES DISTRICT COURT

DISTRICT OF OREGON

JERRY R. TIPPETT,

Petitioner,

v.

JOHN MYRICK, Superintendent of TRCI,

Respondent.

Case No. 2:16-cv-01584-CL

FINDINGS AND RECOMMENDATION

CLARKE, Magistrate Judge:

Petitioner brings this petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254 and challenges his conviction for Sodomy in the First Degree. Petitioner alleges that his conviction rests on perjured testimony in violation of his federal due process rights and that his trial and appellate counsel rendered ineffective assistance in violation of his Sixth Amendment right to counsel. Respondent maintains that all but one of petitioner's claims are unexhausted and procedurally defaulted and that the remaining claim does not support habeas relief. For the reasons explained below, I recommend that the Petition be denied and the case dismissed.

BACKGROUND

On May 3, 2013, petitioner was indicted on charges of Sodomy in the First Degree, Sexual Abuse in the First Degree, and Sexual Abuse in the Second Degree. Resp't Ex. 104 at 19-20. The charges arose from petitioner's assault of Michael Malone, a homeless man, while Malone was unconscious. On September 4, 2013, petitioner proceeded to a bench trial after waiving his right to a jury trial.

Several witnesses testified for the State, including Malone, two friends of Malone's who witnessed the assault, and police officers who interacted with Malone and petitioner shortly afterward. *See generally* Resp't Exs. 102-03, Transcript of Proceedings (Tr.). Malone testified that he could not remember the encounter but that he would not have consented to oral sex with petitioner. Tr. 20-21. Petitioner took the stand on his own behalf and testified that Malone had consented to oral sex, and that Malone was conscious and aware at the time. Tr. 170-72.

The trial court found petitioner guilty of all charges. Tr. 211-12. The court imposed a sentence of 100 months on petitioner's conviction for Sodomy in the First Degree and merged the two sexual abuse convictions. Resp't Ex. 101 at 2-4. The court also ordered that petitioner pay the State $1,600 for attorney fees. Resp't Ex. 101 at 3.

After an unsuccessful direct appeal, petitioner filed a petition for post-conviction relief (PCR) and alleged, among other claims, that trial counsel was ineffective in failing to move for acquittal. Resp. Exs. 104-08, 110. PCR counsel subsequently filed an affidavit and averred that he had "examined the trial transcript, the appellate transcript, and Petitioner's trial counsel's files, and have been unable to find any evidence of ineffective assistance of counsel." Resp't' Ex. 113 at 2. At a hearing before the PCR court, respondent moved to dismiss the PCR petition on that basis, and the PCR court granted respondent's motion. Resp't Exs. 114-116, 120-121.

Petitioner appealed, and his appeal was dismissed because the denial of a PCR petition for failure to state a claim is not appealable under state law. Resp't Exs. 122-24.

On August 4, 2016, petitioner filed this federal habeas action under 28 U.S.C. § 2254.

DISCUSSION

In his federal Petition, petitioner alleges one due process claim, five ineffective assistance of trial counsel claims, and two ineffective assistance of appellate counsel claims. *See generally* Sec. Am. Pet. (ECF No. 67). In Claim One, petitioner maintains that his conviction is based on Malone's perjured testimony in violation of his rights to due process. In Claim Two, petitioner claims that his trial counsel was ineffective in failing to investigate and discover two witnesses who would have contradicted Malone's testimony at trial. In Claims Three and Four, petitioner contends that trial counsel was ineffective for failing to move for acquittal on grounds of insufficient evidence and appellate counsel was ineffective for failing to raise this ground on direct appeal. In Claims Five and Six, petitioner claims that trial counsel was ineffective for failing to pursue an affirmative defense and conviction on a lesser-included offense. In Claim Seven, petitioner argues that both trial and appellate counsel were ineffective in failing to challenge the imposition of attorney's fees, and in Claim Eight, petitioner argues that the cumulative error of Claims One through Seven warrants habeas relief.

Respondent argues that all of petitioner's claims are procedurally defaulted, with the exception of Claim Three. With respect to that claim, respondent argues that the state court decision denying it is entitled to deference.

A. Exhaustion and Procedural Default

A state habeas petitioner must exhaust all available state court remedies – either on direct appeal or through collateral proceedings – before a federal court may consider granting habeas

corpus relief. 28 U.S.C. § 2254(b)(1)(A); *see also Baldwin v. Reese*, 541 U.S. 27, 29 (2004). To meet the exhaustion requirement, the petitioner must "fairly present" a federal claim to the State's highest court "in order to give the State the opportunity to pass upon and to correct alleged violations of its prisoners' federal rights." *Duncan v. Henry*, 513 U.S. 364, 365-66 (1995) (per curiam) (quotation marks omitted); *see also Cooper v. Neven*, 641 F.3d 322, 326 (9th Cir. 2011) ("Exhaustion requires the petitioner to 'fairly present' his claims to the highest court of the state."). "A petitioner fully and fairly presents a claim to the state courts if he presents the claim (1) to the correct forum; (2) through the proper vehicle; and (3) by providing the factual and legal basis for the claim." *Scott v. Schriro*, 567 F.3d 573, 582 (9th Cir. 2009) (per curiam) (internal citations omitted).

If a claim was not fairly presented to the state courts and no state remedies remain available for the petitioner to do so, the claim is barred from federal review through procedural default. *See Coleman v. Thompson*, 501 U.S. 722, 732, 735 n.1 (1991); *Sandgathe v. Maass*, 314 F.3d 371, 376 (9th Cir. 2002) ("A procedural default may be *caused* by a failure to exhaust federal claims in state court."). A federal court may consider unexhausted and procedurally barred claims only if the petitioner demonstrates cause for the default and actual prejudice, or if the lack of federal review would result in a "fundamental miscarriage of justice." *Edwards v. Carpenter*, 529 U.S. 446, 451(2000); *Coleman*, 501 U.S. at 750.

In this case, petitioner did not present Claims One, Two, and Four through Eight to the State's highest court on direct or PCR appeal. Resp't Exs. 104, 110. Furthermore, petitioner no longer has an available avenue for exhaustion. Or. Rev. Stat. § 138.071(1); *Id.* § 138.510(3). Therefore, these claims were not fairly presented to the state courts, and they are unexhausted and procedurally barred.

Petitioner does not dispute that these claims are procedurally defaulted. Rather, petitioner argues that his actual innocence and PCR counsel's ineffective assistance excuses the default of his claims. *See Martinez v. Ryan*, 566 U.S. 1 (2012) (allowing the ineffective assistance of post-conviction counsel to serve as cause for the default of an ineffective assistance at trial claim); *Schlup v. Delo*, 513 U.S. 298 (1995) (explaining that a credible claim of actual innocence may excuse a procedurally defaulted claim).

1. Actual Innocence

Under *Schlup*, petitioner may overcome procedural default if he makes the requisite showing of actual innocence. *Schlup,* 513 U.S. at 315-16. In these circumstances, a credible claim of actual innocence is "a gateway through which a habeas petitioner must pass to have his otherwise barred constitutional claim considered on the merits." *Id.* at 315 (citation omitted). "To be credible, such a claim requires petitioner to support his allegations of constitutional error with new reliable evidence – whether it be exculpatory scientific evidence, trustworthy eyewitness accounts, or critical physical evidence – that was not presented at trial." *Id.* at 324. Ultimately, petitioner "must show that it is more likely than not that no reasonable juror would have convicted him in the light of the new evidence." *Id.* at 327.

To support his claim of actual innocence to excuse the default of Claim One, petitioner submits the 2018 affidavit of Roy Harrison. Pet'r Br. Ex. 1 (ECF No. 62-1). Harrison declares that he was a friend of Malone's and also coincidentally shared a jail cell with petitioner in July of 2013. Harrison states that petitioner confided in him about the charges involving Malone, and after Harrison was released from jail that fall, he spoke with Malone. Harrison asserts that Malone told him Scacco and Zimmerman had approached Malone's campsite as he and petitioner were having sex, and Malone stated he "was embarrassed and acting uncomfortable,

stuttered, and tried to cover himself up and get his clothes back on." *Id.* at 2. According to Harrison, even though Malone said that petitioner "had not raped him," Malone admitted that he testified that petitioner had raped him "because he needed money" and was "getting money from a victim's assistance office." *Id.*

Petitioner also relies on the statements of Gary Schmidt, who recalls meeting Malone and another man, presumably petitioner, on the day of Malone's assault. Pet'r Br. at 11. Schmidt apparently stated that he was present for only fifteen minutes and did not smoke marijuana with Malone and petitioner, contrary to Malone's testimony at trial. *Id.* Schmidt's statements are offered solely for purposes of impeachment.

Petitioner requests that this Court conduct an evidentiary hearing to assess the credibility of Harrison and Schmidt. Petitioner contends that if their statements are credited, he can establish that it "is more likely than not that no reasonable juror would have convicted him" in the light of this new evidence. *Schlup*, 513 U.S. at 327. I deny the motion for evidentiary hearing, because the statements of Harrison and Schmidt "speak for themselves" and petitioner fails "to show what more an evidentiary hearing might reveal of material import on his assertion of actual innocence." *See Gandarela v. Johnson*, 286 F.3d 1080, 1087 (9th Cir. 2002).

At trial, petitioner did not dispute that he performed oral sex on Malone. The only question was whether Malone could and actually did consent to the act. The State relied on the theory that Malone was unconscious, not simply intoxicated, and was incapable of consent due to incapacitation. Tr. 200. Thus, the issue is whether it is more likely than not that a reasonable factfinder would have found the evidence insufficient to prove Malone was unconscious and incapable of consent in light of Harrison's and Schmidt's statements. Taken at face value, the statements submitted by petitioner are not reliable evidence to support actual innocence.

First, Schmidt's statements have little if any relevance to petitioner's claim of actual innocence. His statements are offered solely to impeach Malone's testimony about smoking marijuana the day of the assault and show that Malone could not have been incapacitated due to marijuana, as Malone alluded to in his testimony. Tr. 18. Regardless, Schmidt was not a witness to the assault and his statements have no bearing on whether Malone was incapacitated. Given testimony at trial regarding Malone's well-known alcoholism and his drinking on the day in question, whether he smoked marijuana with petitioner and Schmidt is immaterial. Tr. 78, 98, 104. Moreover, Schmidt's statements contradict petitioner's own testimony that he saw no one named Gary that day. Tr. 179.

Second, Harrison's declaration is based on the uncorroborated hearsay statements of Malone made sometime after trial. Malone died in January 2014 and cannot confirm or deny the substance of the statements. Pet'r Br. at 12, n. 5. Uncorroborated hearsay is generally not considered reliable evidence of actual innocence. *See Herrera v. Collins*, 506 U.S. 390, 417 (1993) (stating that affidavits proffered in support of an actual innocence claim were "particularly suspect" because they "consist of hearsay"). Petitioner presents no evidence to corroborate Malone's statements to Harrison. Although a victim's assistance program contacted Malone, no evidence suggests that Malone was eligible for or received financial support from that organization. Pet'r Resp. to Sur-Reply Ex. 1 (ECF No. 109-1). Even if Malone made the statements to Harrison, the testimony at trial reflects that Malone was not a reliable witness or historian. Tr. 20-22, 25-27, 34-35, 100-03, 105-07, 207-09.

Third, Malone's statements to Harrison do not significantly undermine the reliability of eyewitness testimony found credible by the trial court so as to "cast doubt" on petitioner's conviction. *Sistrunk v. Armenakis*, 292 F.3d 669, 673 (9th Cir. 2002) (en banc). Kacey Scacco

testified that she was friends with Malone and often "checked up" on him. Tr. 49-51. On the day in question, she arrived at Malone's campsite and saw him and petitioner lying under a tarp. She testified that Malone "was completely out of it" and responded only with a "groan" when she shook him and tried to speak with him. Tr. 51, 56. She asked petitioner what they were doing, and he responded that he was just sleeping with Malone. Tr. 55. She told petitioner he should leave and that she would return with her boyfriend.

Scacco testified that when she returned with Randy Zimmerman, she saw petitioner performing oral sex on Malone, who was "not conscious" and "laying like a dead fish," with his "arms to the side with his pants open." Tr. 60-61. Scacco testified that Zimmerman started to yell at petitioner, and she told petitioner she was calling the police. Tr. 62. Petitioner picked up his belongings and ran away. Tr. 62-63. Scacco testified that after she and Zimmerman followed petitioner for a short distance, she went back to check on Malone. He had not moved, and Scacco pulled his pants closed with no reaction from him. Tr. 64-65.

Zimmerman testified that Scacco was worried about Malone being with petitioner. Tr. 80. When he and Scacco returned to Malone's campsite, Zimmerman saw petitioner performing oral sex on him. Tr. 81. Zimmerman testified that Malone was "basically asleep" and "not really conscious at all." Tr. 81, 84. Zimmerman testified that he yelled at petitioner and followed him until he flagged down a police officer. Tr. 84.

Scacco's and Zimmerman's testimony was further corroborated by the testimony of Greg Elkins, a police officer who responded to the scene. Elkins testified that when he arrived, Malone "appeared to be passed out. His eyes were rolled to the top of his head, almost in the back of his head." Tr. 98. Malone did not react or respond to verbal commands, and when Elkins shook Malone, he responded with a "slur" or "moan." Tr. 100. The police dispatched the fire

department and medical personnel to assess Malone's condition, and the fire department determined that Malone was "so intoxicated" that medical intervention was warranted. Tr. 100-01. An ambulance eventually took Malone to the local hospital. Tr. 101.

At the hospital, Elkins testified that he had difficulty communicating with Malone, who still had "heavy slur" to his speech. Tr. 101. Elkins would attempt "to start a dialogue with him" about "what's going on or if he knew anything why he was there," and Malone would "fall back asleep for a 5-, 10-minute period, and when he would wake up again, he would look at me and not remember that we were talking." Tr. 101-02. Malone did not know why he was in the hospital, and Elkins testified that he had to repeatedly explain because "five minutes later, he wouldn't remember it at all." Tr. 106. When Elkins explained that police were investigating a report that petitioner had performed oral sex upon him, Malone appeared surprised. Tr. 102-03. Elkins further testified that hospital staff believed Malone was incapable of giving consent to a rape examination, due to his condition and the inability to remember what had been said to him. Tr. 107-08.

The trial court specifically relied on the testimony given by Scacco, Zimmerman, and Elkins when finding petitioner guilty. Tr. 211-12 (the trial court stating that it found the "testimony of Ms. Scacco and Mr. Zimmerman and the testimony of the officers to be credible" and that "that Mr. Malone was mentally incapacitated at the time of the sexual act, and he was essentially passed out and was unresponsive to … Scacco and Mr. Zimmerman, unresponsive to the officers"). Harrison's declaration does not place the credibility of their testimony in question or make it likely that no reasonable factfinder would have found petitioner guilty.

Finally, Malone's purported statements to Harrison contradict petitioner's own testimony at trial. Petitioner testified repeatedly that Scacco and Zimmerman had approached him and

Malone approximately one hour *after* they had engaged in oral sex, and that Scacco and Zimmerman could not have witnessed him performing oral sex on Malone. Tr. 175-78, 188, 194. Petitioner also testified that when they engaged in oral sex, Malone was not as intoxicated as he was thirty minutes to an hour later, when Scacco arrived. Tr. 185. In fact, petitioner confirmed that when Scacco first encountered them, Malone was not responsive and only moaned in response to Scacco's questions. Tr. 195-96. In closing argument, petitioner's counsel likewise argued that the court must look to Malone's condition at the time of the sex act and not "an hour later" when Scacco and Zimmerman found him. Tr. 208. Thus, Malone's hearsay statements suggesting that he was coherent and "embarrassed" when Scacco caught them in a sex act would have contradicted petitioner's own testimony and the premise of his defense at trial.

In sum, based on all of the evidence, petitioner does not establish that it "is more likely than not that no reasonable juror would have convicted him" in light of Harrison's and Schmidt's statements, and he cannot rely on actual innocence to excuse the default of Claim One. *Schlup*, 513 U.S. at 327.

2. The *Martinez* Exception to Procedural Default

Petitioner also argues that all of his defaulted claims should be excused by PCR counsel's ineffectiveness in failing to raise them during petitioner's PCR proceedings. *Martinez*, 566 U.S. at 9, 14 (holding that the ineffective assistance of post-conviction counsel may excuse a defaulted ineffective assistance of trial counsel claim).

As an initial matter, petitioner cannot rely on *Martinez* to excuse the default of his due process and ineffective assistance of appellate counsel claims alleged in Grounds One, Four, Seven, and Eight. The *Martinez* "exception treats ineffective assistance by a prisoner's state postconviction counsel as cause to overcome the default of a single claim – ineffective assistance

of trial counsel – in a single context – where the State effectively requires a defendant to bring that claim in state postconviction proceedings rather than on direct appeal." *See Davila v. Davis*, 137 S. Ct. 2058, 2062-63 (2017). Thus, those clams remain procedurally defaulted and relief should be denied.

For *Martinez* to apply to his remaining defaulted claims, petitioner must show that PCR counsel "was ineffective under the standards of *Strickland v. Washington*" and that his underlying ineffective assistance claims are "substantial" and have "some merit." *Martinez*, 566 U.S. at 14. If petitioner does not raise a substantial claim that trial counsel was ineffective, then petitioner's PCR trial counsel "could not have been ineffective for failing to raise the ineffective assistance of counsel claim in state court." *Sexton v. Cozner*, 679 F.3d 1150, 1161 (9th Cir. 2012). Petitioner does not raise substantial claims of ineffective assistance of trial counsel in Claims Two, Five, Six, or Seven.

Under *Strickland*, a prisoner alleging ineffective assistance of counsel must show that 1) "counsel's performance was deficient," and 2) counsel's "deficient performance prejudiced the defense." *Strickland v. Washington*, 466 U.S. 668, 687 (1984). Judicial review of an attorney's performance is "highly deferential" and carries a "strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." *Id.* at 689 (citation omitted). To establish deficient performance, petitioner "must show that counsel's representations fell below an objective standard of reasonableness." *Id.* at 688. To demonstrate prejudice, petitioner "must 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. "Unless a [petitioner] makes both showings, it cannot be said that the conviction . . . resulted from a breakdown in the adversary process that renders the result unreliable." *Id.*

In Claim Two, petitioner asserts that trial counsel was ineffective in failing to contact Harrison and Schmidt and discover their statements about Malone. However, petitioner fails to explain why a reasonable attorney would have contacted them prior to trial. The conversation between Harrison and Malone took place after trial and would not have been known to trial counsel at that time. Before trial, Harrison apparently told petitioner that Malone would not appear for trial because he could not remain sober. Pet'r Br. Ex. 2 (ECF No. 62-2). A reasonable attorney could have determined that this information did not warrant an interview with Harrison.

Likewise, petitioner fails to explain how trial counsel could have discovered Schmidt's presence on the day of the assault. Apparently, Malone did not mention Schmidt until he testified at trial, and petitioner testified that Schmidt was not present at all that day. Tr. 18-19, 24-26, 107, 179. Regardless, Schmidt's statements would have been cumulative, as trial counsel elicited testimony that contradicted Malone's testimony about smoking marijuana with petitioner and Schmidt. Tr. 204-07.

In Grounds Five and Six, petitioner maintains that trial counsel was ineffective in failing to assert an affirmative defense and pursue the lesser-included offense of Sexual Abuse in the Second Degree, based on petitioner's lack of knowledge about Malone's inability to consent. Petitioner maintains that the evidence showed Malone was intoxicated but not incapacitated, and no reasonable attorney "would have made a tactical decision not to advance the affirmative defense to first degree sodomy" and "not to argue in favor of the lesser included offense of second degree sexual abuse." Pet'r Br. at 17-18.

However, trial counsel elicited testimony and presented argument regarding Malone's degree of intoxication to persuade the trial court that Malone was capable of consenting to oral sex an hour before Scacco and Zimmerman found him. Tr. 210. Given testimony that Malone

was unconscious and non-responsive when Scacco, Zimmerman, and officers arrived at the scene, counsel could have reasonably decided against arguing that petitioner could not have known Malone was incapable of giving consent in that condition. Petitioner's own testimony did not help in this regard. Petitioner testified that, when interviewed by a detective, he commented that he hoped Malone was okay and "still alive" because of Malone's "amount of alcohol intake." Tr. 198.

Moreover, trial counsel requested reconsideration of the court's verdict and argued that the evidence was insufficient to prove Malone was incapacitated and physically helpless, and the court could only find petitioner guilty of Sex Abuse in the Second Degree. Tr. 216-21. Given the evidence at trial, counsel's strategy in focusing on Malone's condition – rather than petitioner's knowledge of Malone's capacity – was not unreasonable. *Strickland*, 466 U.S. at 689-90 (explaining that counsel's reasonable, strategic decisions are entitled to deference).

Finally, in Claim Seven, petitioner argues that trial counsel was ineffective for failing to object to the trial court's imposition of attorney's fees when it made no inquiries into petitioner's ability to pay. *State v. Noyce*, 285 Or. App. 741, 742, 399 P.3d 484 (2017) (per curiam) (holding that it is plain error to impose the costs of defense on a criminal defendant without determining the defendant's ability to pay). Regardless of procedural default, Claim Seven is not cognizable in a habeas action, because it does not challenge the validity of petitioner's conviction or his confinement. *See* 28 U.S.C. § 2254(a) (providing that writ of habeas corpus can be entertained "on the ground that [the petitioner] is in custody in violation of the Constitution or laws or treaties of the United States"). The Ninth Circuit has explained that § 2254 "explicitly requires a nexus between the petitioner's claim and the unlawful nature of the custody." *Bailey v. Hill*, 599 F.3d 976, 980 (9th Cir. 2010) (the imposition of restitution and fines does not establish

jurisdiction under § 2254). Claim Seven does not implicate the unlawfulness of petitioner's custody and is not properly raised in a habeas action.

For all of these reasons, petitioner fails to meet the requirements of *Martinez* to excuse the procedural default of Claims One, Two, Four, Five, and Six, and Claim Seven is not properly raised as a habeas claim. Thus, habeas relief should be denied on these grounds.

B. Exhausted Claim of Ineffective Assistance of Trial Counsel

In Claim Three, petitioner alleges that his trial counsel was ineffective by failing to move for judgment of acquittal when the evidence introduced at trial did not prove beyond a reasonable doubt that Malone was incapacitated and physically helpless. Petitioner raised Claim Three in his PCR petition, and the PCR court found that petitioner failed to state a claim for relief. Respondent maintains that the PCR court's decision was reasonable and is entitled to deference. 28 U.S.C. § 2254(d)(1); *Harrington v. Richter*, 562 U.S. 86, 101 (2011) (on habeas review, a state court decision "must be granted a deference and latitude that are not in operation when the case involves review under the *Strickland* standard itself."). I agree.

Contrary to petitioner's claim, trial counsel twice moved for judgments of acquittal, once after the State rested and again at the conclusion of the trial. Tr. 137-38, 199-200. Although counsel did not raise specific grounds to support his motions, he argued that the evidence was insufficient to submit to a jury. To the extent petitioner argues that counsel should have been more specific with his motions, he fails to show deficient performance or prejudice.

As noted above, the only issue at trial was whether Malone was incapacitated and unable to consent. Thus, counsel necessarily moved for acquittal on grounds that the evidence was insufficient to show that Malone was unconscious or otherwise incapacitated at the time of the sex act, and I find no deficiency.

Further, when assessing motions to acquit based on insufficiency of the evidence, a court must construe the evidence in "the light most favorable to the prosecution" and determine whether "*any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Jackson v. Virginia*, 443 U.S. 307, 319 (1979). A person commits the crime of Sodomy in the First Degree by engaging in oral sex with another person who "is incapable of consent by reason of mental defect, mental incapacitation or physical helplessness." Or. Rev. Stat. § 163.405(1)(d). A person is "mentally incapacitated" if "rendered incapable of appraising or controlling the conduct of the person at the time of the alleged offence." *Id.* § 163.305(3). A person is "physically helpless" if "unconscious" or "physically unable to communicate unwillingness to an act." *Id.* § 163.305(5).

Based on the testimony of Scacco, Zimmerman, and Elkins – along with other testimony elicited at trial – the evidence was more than sufficient to prove beyond a reasonable doubt that Malone was unable to consent due to mental incapacitation and physical helplessness. No prejudice arose from counsel's failure to raise specific grounds in support of his motions.

Accordingly, petitioner's claim of ineffective assistance of trial counsel asserted in Claim Three should be denied.

CONCLUSION

Petitioner's Motion for Evidentiary Hearing (ECF No. 64) is DENIED.

Petitioner's Second Amended Petition for Writ of Habeas Corpus (ECF No. 67) should be DENIED and this case should be DISMISSED 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).

This Findings and Recommendation will be referred to a district judge. Objections, if any, are due within (14) days from service of the Findings and Recommendation. If objections are filed, any response is due fourteen (14) days after being served with a copy of the objections. The parties are advised that the failure to file objections within the specified time may waive the right to appeal the District Court's final order. *Martinez v. Ylst*, 951 F.2d 1153 (9th Cir. 1991).

DATED this 30 day of September, 2020.

MARK D. CLARKE
United States Magistrate Judge