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NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED

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

JEFFERY KINZLE,

Petitioner-Appellant,

v.

ERIC JACKSON,

Respondent-Appellee,

and

STATE OF WASHINGTON; PATRICK R. GLEBE,

Respondents.

No. 20-35747

D.C. No. 2:14-cv-00703-JCC

MEMORANDUM*

Appeal from the United States District Court
for the Western District of Washington
John C. Coughenour, District Judge, Presiding

Argued and Submitted February 7, 2022
Seattle, Washington

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

Before: BYBEE and CHRISTEN, Circuit Judges, and SELNA,** District Judge.

Petitioner Jeffrey Kinzle seeks relief from the district court's denial of his federal habeas petition. Although Kinzle concedes that he was mentally competent to stand trial and engage in plea negotiations through the duration of proceedings, he alleges that his trial counsel was deficient for failing to investigate, discover, and address his mental condition, thereby depriving him of the ability to intelligently consider and accept a plea agreement. The district court granted deference to the last-reasoned state court opinion from the Commissioner of the Washington Supreme Court (Commissioner) under 28 U.S.C. § 2254(d). We have jurisdiction under 28 U.S.C. §§ 1291 and 2253, and we deny the petition.

Under the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), we defer to the state court decision on the merits of any claim unless that decision was "contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States." *Staten v. Davis*, 962 F.3d 487, 494 (9th Cir. 2020) (quoting 28 U.S.C. § 2254(d)(1)). When evaluating a petition under AEDPA deference, we look to the last-reasoned state court decision. *Wilson v. Sellers*, 138 S. Ct. 1188, 1192 (2018);

** The Honorable James V. Selna, United States District Judge for the Central District of California, sitting by designation.

Barker v. Fleming, 423 F.3d 1085, 1091 (9th Cir. 2005). Where "the last reasoned decision adopted or substantially incorporated the reasoning from a previous decision" it is "reasonable for the reviewing court to look at both decisions to fully ascertain the reasoning of the last decision." *Id.* at 1093.

Here, the Commissioner incorporated the reasoning of the Washington Court of Appeals when evaluating Kinzle's IAC claim. The Commissioner recited and applied the appropriate prejudice standard, requiring Kinzle to demonstrate a "reasonable probability" that he would have accepted the plea agreement absent his counsel's allegedly deficient performance. *See Lafler v. Cooper*, 566 U.S. 156, 163–64 (2012). The Commissioner's reasoning—that the relationship between the allegedly deficient performance and Kinzle's decision to reject the plea agreement was "too speculative" to establish a reasonable probability of a different result—was not "unreasonable" in light of the circumstances. Even crediting as relevant Kinzle's declaration that he would have accepted the plea had he been in a better mental state, the record provides ample evidence to the contrary. Throughout proceedings in state court, Kinzle made cogent statements about his decision to reject the plea at issue here and go to trial—as well as about the reasons for his disagreements with his lawyer. Indeed, he accepted a separate plea related to his failure to register as a sex offender. Moreover, as the Commissioner and

Washington Court of Appeals noted, the logical chain necessary to demonstrate prejudice would have required that any investigation by Kinzle's counsel prompt changes to Kinzle's treatment plan sufficient to induce this desired mental state, presumably while simultaneously securing a continuance of proceedings. Neither Kinzle's nor his expert's declaration demonstrates a reasonable probability that an investigation would have resulted in such an outcome. Accordingly, based on the evidence in the record, the Commissioner did not unreasonably apply clearly established federal law.

PETITION DENIED

THE HONORABLE JOHN C. COUGHENOUR

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

JEFFERY M. KINZLE, Petitioner, v. MIKE OBENLAND, Respondent.	CASE NO. C14-0703-JCC ORDER

This matter comes before the Court on Petitioner's objections (Dkt. No. 86) to the report and recommendation of the Honorable Michelle L. Peterson, United States Magistrate Judge (Dkt. No. 78). Having thoroughly considered the parties' briefing and the relevant record, the Court hereby finds oral argument unnecessary and OVERRULES Petitioner's objections, APPROVES and ADOPTS the report and recommendation, DENIES Petitioner's petition for a writ of habeas corpus, and DISMISSES the case with prejudice for the reasons explained herein.

I. BACKGROUND

Judge Peterson's report and recommendation sets forth the underlying facts of this case and the Court will not repeat them here except as relevant. (*See id.* at 1–8.) Petitioner brings this habeas action under 28 U.S.C. § 2254 to challenge his convictions of failing to register as a sex offender (Count I), indecent liberties by forcible compulsion (Count II), and first-degree child molestation (Count III). (*Id.* at 2–3.) Judge Peterson recommends that the Court deny Petitioner's

habeas petition and dismiss the case with prejudice. (*See id.* at 41.)

Petitioner has filed several objections to the report and recommendation. (Dkt. No. 86.) First, Petitioner objects to the report and recommendation's rejection of his claim that his trial counsel was ineffective when she did not investigate his mental state. (*Id.* at 14.) Second, Petitioner objects to the report and recommendation's rejection of his claim that his trial counsel was ineffective when she did not join his motion for new counsel constituted ineffective assistance of counsel. (*Id.* at 17–20.) Third, Petitioner requests a certificate of appealability if the Court accepts Judge Peterson's report and recommendation. (*Id.* at 22.)

II. DISCUSSION

A. Standard of Review

A district court reviews *de novo* those portions of a report and recommendation to which a party objects. *See* 28 U.S.C. § 636(b)(1); Fed. R. Civ. P. 72(b)(3). Objections are required to enable the district court to "focus attention on those issues—factual and legal—that are at the heart of the parties' dispute." *Thomas v. Arn*, 474 U.S. 140, 147 (1985).

State prisoners may collaterally attack their detention in federal court if they are held in violation of the Constitution or the laws and treaties of the United States. 28 U.S.C. § 2254(a). And, under the standards imposed by the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), a federal court may grant a habeas corpus petition with respect to any claim adjudicated on the merits in state court only if the state court's decision (1) "was contrary to, or involved an unreasonable application of, clearly established federal law, as determined by the Supreme Court"; or (2) "was based on an unreasonable determination of the facts in light of the evidence presented in the state court proceedings." 28 U.S.C. § 2254(d). The federal court may find constitutional error only if the state court's conclusion was "more than incorrect or erroneous. The state court's application of clearly established law must be objectively unreasonable." *Lockyer v. Andrade*, 538 U.S. 63, 75 (2005) (internal citations omitted).

A federal court may not overturn state court findings of fact "absent clear and convincing

evidence" that they are "objectively unreasonable." *Miller-El v. Cockrell*, 537 U.S. 322, 340 (2003). The petitioner carries the burden of proof and the court is "limited to the record before the state court that adjudicated the claim[s] on the merits." *Cullen v. Pinholster*, 563 U.S. 170, 181 (2011). This is a "highly deferential standard for evaluating state-court rulings, which demands that state-court decisions be given the benefit of the doubt." *Woodford v. Visciotti*, 537 U.S. 19, 24 (2002) (*per curiam*) (internal citations omitted).

If the federal court finds there was a constitutional error, a habeas petitioner is not entitled to relief unless the error had a "substantial and injurious effect or influence on the" factfinder. *Fry v. Pliler*, 551 U.S. 112, 121 (2007) (extending *Brecht v. Abrahamson*, 507 U.S. 619 (1993), to a federal court's collateral review of a state court criminal judgment on a habeas petition). This has been called the "harmless error" standard. *See Kotteakos v. United States*, 328 U.S. 750 (1946). In applying the harmless error standard, the federal court must determine whether the error substantially influenced the factfinder, rather than placing the burden on the petitioner to show harmful error. *O'Neal v. McAninch*, 513 U.S. 432, 436–37 (1995).

B. Ineffective Assistance of Trial Counsel for Failure to Consider, Investigate, and Evaluate Petitioner's Mental State

Petitioner argues his trial counsel was ineffective because she failed to consider, investigate, and evaluate Petitioner's mental state and therefore failed to ensure that he was being properly medicated while he was awaiting trial. (Dkt. Nos. 60 at 34–36, 78 at 17.) Petitioner alleges that his trial counsel's deficiencies in relation to his mental state deprived him of the ability to understand and intelligently consider a favorable plea offer, which he claims he would have accepted had he benefited from reasonably effective representation. (*See* Dkt. No. 60 at 34–36, 39.)

Judge Peterson rejected this claim after reviewing the state court record and applying AEDPA deference. (Dkt. No. 78 at 17–24.) Petitioner objects to Judge Peterson's conclusion on two grounds: (1) AEDPA deference was inappropriate because the state court decision was

contrary to clearly established federal law, and (2) Judge Peterson only addressed the prejudice prong of *Strickland* and did not address trial counsel's alleged deficiencies, rendering AEDPA deference inappropriate under Ninth Circuit law. (*See* Dkt. No. 86 at 3–4, 14–15.)

1. *Legal Standard*

The Sixth Amendment guarantees a criminal defendant the right to effective assistance of counsel. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). Courts evaluate claims of ineffective assistance of counsel under the two-prong test set forth in *Strickland. See id.* Under that test, a defendant must prove that (1) counsel's performance fell below an objective standard of reasonableness and (2) a reasonable probability exists that, but for counsel's error, the result of the proceedings would have been different. *Id.* at 687–94. To prevail under *Strickland*, a defendant must make both showings. *See id.* at 687.

When considering the first prong of the *Strickland* test, judicial scrutiny is highly deferential. *Id.* at 689. There is a strong presumption that counsel's performance fell within the wide range of "reasonably effective assistance." *Id.* A defendant can overcome that presumption by showing that "counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." *Id.* at 687. "A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." *Id.*

The second prong requires a showing of actual prejudice. Thus, a defendant "must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. "Counsel's deficient performance must have been 'so serious as to deprive the defendant of a fair trial.'" *Avena v. Chappell*, 932 F.3d 1237, 1248 (9th Cir. 2019) (internal citations omitted). A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland*, 466 U.S. at 694. Furthermore, in circumstances where a plea bargain has been offered, "a defendant has the right to effective

assistance of counsel in considering whether to accept it. If that right is denied, prejudice can be shown if loss of the plea opportunity led to a trial resulting in a conviction on more serious charges or the imposition of a more severe sentence." *Lafler v. Cooper*, 566 U.S. 156, 168 (2012).

Finally, while the Supreme Court established the legal principles that govern claims of ineffective assistance of counsel in *Strickland*, it is not the role of a federal habeas court to evaluate whether defense counsel's performance fell below the *Strickland* standard. *See Harrington v. Richter*, 562 U.S. 86, 88 (2011). Rather, when considering an ineffective assistance of counsel claim on federal habeas review, "[t]he pivotal question is whether the state court's application of the *Strickland* standard was unreasonable." *Id.* As the Supreme Court explained in *Harrington*, "[a] state court must be granted a deference and latitude that are not in operation when the case involves review under the *Strickland* standard itself." *Id.*

2. *Objections*

Petitioner makes several arguments against the state court decisions receiving AEDPA deference. First, he argues that deference is inappropriate because the state court decision was contrary to clearly established federal law under *Strickland* and *Lafler*. (*See* Dkt. No. 86 at 2–4, 14.) Petitioner's primary support for this argument comes from the Washington Supreme Court Commissioner's decision denying discretionary review. Specifically, the Commissioner concluded his decision by stating Petitioner did not demonstrate "that he is raising issues of substantial public interest or constitutional issues of sufficient significance to merit this court's review of the Court of Appeals decision." (Dkt. Nos. 67-2 at 350, 86 at 3–4.) Based on that single sentence in the Commissioner's decision, Petitioner claims that the Commissioner applied a standard that was contrary to federal law. (Dkt. Nos. 67-2 at 350, 86 at 3.)

As stated in the report and recommendation, the Commissioner's decision cannot be read without reference to the Court of Appeals' decision. (Dkt. No. 78 at 23.) Notably, the Commissioner's decision makes multiple direct references to the merits of the Court of Appeals'

decision. (*See* Dkt. Nos. 67-2 at 345–50, 78 at 21.) And, as Judge Peterson recognized, the Court of Appeals' decision—which Petitioner does not challenge—expressly adjudicated this issue on the merits under *Strickland* and *Lafler*. (*See* Dkt. No. 78 at 22.) The Commissioner effectively endorsed the Court of Appeals' conclusion in his ruling denying review. (*See* Dkt. Nos. 67-2 at 345–50, 78 at 23.)

Thus, the Court is assured by the Commissioner's report that the Court of Appeals' decision resolved Petitioner's claim on the merits and applied the appropriate constitutional standard, regardless of Petitioner's construction of a single sentence in the Commissioner's decision. (Dkt. No. 67-2 at 345–50). Therefore, the Court agrees with the report and recommendation's application of AEDPA deference to this claim.

Second, Petitioner argues that the report and recommendation improperly focused only on *Strickland*'s prejudice prong when it should have also addressed his trial counsel's alleged deficiency. (*See* Dkt. No. 86 at 14–16.) However, the Court of Appeals did not reach the issue of whether Petitioner's counsel was deficient. (Dkt. Nos. 67-2 at 272, 282, 78 at 22). Instead, the Court of Appeals resolved the claim on the basis that Petitioner had not shown a reasonable probability that he would have accepted the guilty plea offer but for counsel's allegedly deficient advice and representation. (*See id.*) Specifically, the Court of Appeals reasoned that the link between his trial counsel's alleged deficiency and Petitioner's refusal of the plea offer was "speculative and tenuous" and relied on many self-serving assumptions. (*Id.* at 10–11.) In a footnote, the Court of Appeals explicitly stated that "[i]n light of [its] disposition [on the prejudice prong], [it] [would] not consider [Petitioner]'s claim that [his counsel]'s performance was deficient." (Dkt. No. 67-2 at 282.)

The Court therefore need not address Petitioner's trial counsel's alleged deficiencies that Petitioner raises in his habeas petition because the state courts reasonably limited their discussion to whether Petitioner was prejudiced and the Court of Appeals addressed that issue on the merits. (*See* Dkt. Nos. 71 at 3–15, 78 at 22.) Nonetheless, Petitioner repeats the same arguments about

his trial counsel's alleged deficiencies in his objection to the report and recommendation on this ground. (*See* Dkt. No. 86 at 15–16.) He asserts that had his trial counsel investigated his mental health and ordered an evaluation, he would have been treated and reached a mental state in which he would have accepted the plea offer—despite his previously stated desire to make the state prove its case against him. (*Id.*) As Judge Peterson explained, "[w]hile it does appear that the medications Petitioner has been provided since his entry into DOC custody have been beneficial to him, this evidence does nothing to undermine the state courts' conclusion that the causal chain between counsel's alleged deficiencies and Petitioner's rejection of the plea offer is too tenuous to establish actual prejudice." (Dkt. No. 78 at 24.) The Court agrees with the reasoned conclusions of the Court of Appeals and Judge Peterson on this ground.

In sum, the Court of Appeals adjudicated Petitioner's ineffective assistance of counsel claims on the merits and properly received AEDPA deference. Therefore, the Court OVERRULES Petitioner's objections on this ground.

C. Ineffective Assistance of Trial Counsel for Failure to Withdraw as Petitioner's Counsel

Next, Petitioner argues his trial counsel was ineffective when she (1) refused to join in Petitioner's request for new counsel despite acknowledging the relationship was irretrievably broken, (2) followed an office policy of not moving to withdraw, and (3) failed to fully inform the trial judges about the nature and extent of the communication problems between her and Petitioner. (Dkt. No. 78 at 24.)

Petitioner first presented this argument to the state courts in his most recent personal restraint petition. (*See id.*) The Court of Appeals declined to consider the claim because the court had already held on direct appeal of Petitioner's indecent liberties conviction that the trial court did not err in denying Petitioner's motion to substitute counsel. (*Id.* at 24–25.) Subsequently, the Commissioner declined to address the Court of Appeals' rationale when he concluded that Petitioner's claim was time barred under Wash. Rev. Code § 10.73.090 because Petitioner filed

his personal restraint petition more than one year after his indecent liberties conviction became final. (*See* Dkt. No. 67-2 at 348.)

Judge Peterson rejected Petitioner's claim after reviewing the state court record and finding that (1) the Ninth Circuit has upheld the constitutionality of Wash. Rev. Code § 10.73.090, Washington's procedural time bar statute for an ineffective assistance of counsel claim, and (2) Petitioner did not qualify for an equitable exception to the time bar under *Martinez v. Ryan*, 566 U.S. 1 (2012). (*See id.* at 24–28.) Petitioner objects to Judge Peterson's reasoning, arguing again that the Commissioner did not resolve the claim on the merits and that the equitable exception under *Martinez* applies because of Petitioner's trial counsel's deficiencies. (Dkt. No. 86 at 17–18.)

1. *Legal Standard*

If the last state court to decide the issue clearly and expressly states that its judgment rests on a state rule of procedure, the habeas petitioner is barred from asserting the same claim in a later federal habeas proceeding. *Harris v. Reed*, 489 U.S. 255 (1989). When a prisoner defaults on his federal claims in state court pursuant to an independent and adequate state procedural rule, federal habeas review of the claims is barred unless the prisoner can (1) demonstrate cause for the default and actual prejudice as a result of the alleged violation of federal law or (2) demonstrate that the district court's failure to consider the claims will result in a fundamental miscarriage of justice. *Coleman v. Thompson*, 501 U.S. 722, 750 (1991).

For a state procedural rule to be "independent," the state rule must not rest primarily on federal law or be interwoven with federal law. *Coleman*, 501 U.S. at 734–35 (citing *Michigan v. Long*, 463 U.S. 1032, 1040–41 (1983)). A state procedural rule is "adequate" if it was "firmly established" and "regularly followed" at the time of the default. *Beard v. Kindler*, 558 U.S. 53, 60 (2009) (quoting *Lee v. Kemna*, 534 U.S. 362, 375 (2002)). A state procedural rule is not rendered inadequate simply because it is discretionary. *Id.* at 60–61.

In *Martinez*, the Supreme Court announced a limited qualification to the holding in

Coleman v. Thompson, 501 U.S. 722. *See Martinez*, 566 U.S. at 8–9. That qualification provides that a prisoner may be excused for violating a procedural rule if they did not have counsel (or had inadequate counsel) to help them prepare their petition for collateral review. *See id.* at 14. However, *Martinez* also clarifies that, in addition to establishing good cause for the procedural defect, a federal habeas petitioner must demonstrate that "the underlying ineffective-assistance-of-trial-counsel claim is a substantial one, which is to say that the prisoner must demonstrate that the claim has some merit." *Id.* An ineffective assistance of trial counsel claim is "insubstantial" if "it does not have any merit or . . . is wholly without factual support[.]" *Id.* at 16.

2. *Objections*

Here, the Court of Appeals declined to address this ground for relief because it had previously addressed Petitioner's motion to substitute and the Commissioner concluded that the claim was time-barred under Wash. Rev. Code § 10.73.090. (*See* Dkt. Nos. 67-1 at 138–43, 67-2 at 56, 348–349.) Petitioner argues that this claim was not adjudicated on the merits in state court because the claim was dismissed by the Commissioner on procedural grounds. (*See* Dkt. No. 86 at 4.)

Even setting aside the fact that the Court of Appeals did in fact resolve this dispute on the merits, (*see* Dkt. Nos. 67-1 at 143, 67-2 at 56–60), the Commissioner's invocation of Washington's time bar rule constitutes a valid application of a procedural bar. *See Harris*, 498 U.S. at 256 ("[A] procedural default will not bar consideration of a federal claim on habeas review unless the last state court rendering a judgment in the case clearly and expressly states that its judgment rests on a state procedural bar."). And the Ninth Circuit has recognized that Washington's time bar statute applied to this claim provides an independent and adequate state procedural ground to bar federal habeas review. *See Casey v. Moore*, 386 F.3d 896, 920 (9th Cir. 2004); *Shumway v. Payne*, 223 F.3d 982, 989 (9th Cir. 2000).

Additionally, Petitioner's second ineffective assistance of trial counsel claim is not eligible for an equitable exception. *See Martinez*, 566 U.S. at 16. As discussed above,

establishing a claim of ineffective assistance of counsel requires a petitioner to demonstrate that (1) counsel's performance was deficient, and (2) the deficient performance prejudiced the defense. *See Strickland*, 466 U.S. at 687; *supra* Section II.B.1. And under *Martinez*, Petitioner must show that the underlying *Strickland* claim is substantial, which requires "some merit" or factual support. *Martinez*, 566 U.S. at 16. Judge Peterson found that this claim was resolvable solely on the prejudice prong and agreed with the state courts that the connection between Petitioner's trial counsel's alleged deficiencies and Petitioner's refusal to plead guilty was too tenuous to establish actual prejudice. (*See* Dkt. No. 78 at 78.) Petitioner argues that Judge Peterson erred because she did not address whether his trial counsel was actually deficient and that he would have accepted the plea offer if counsel had acted reasonably or if he had been appointed a new attorney. (*See id.* at 16; Dkt. Nos. 78 at 27, 86 at 17.) But both prongs of the *Strickland* test must be satisfied for Petitioner to be entitled to habeas relief; because Petitioner has not sufficiently demonstrated prejudice, the *Strickland* inquiry need not continue. *See In re Crace*, 280 P.3d 1102, 1108 (Wash. 2012) ("We need not consider both prongs of *Strickland* (deficient performance and prejudice) if a petitioner fails on one.").[1]

Thus, Petitioner's second claim of ineffective assistance of counsel is barred from federal habeas review by Wash. Rev. Code § 10.73.090. *See Harris*, 489 U.S. at 256. And Petitioner is not eligible for an equitable exception under *Martinez*. Therefore, the Court OVERRULES Petitioner's objections on this ground.

D. Evidentiary Hearing

Petitioner requests an evidentiary hearing to address the alleged deficiencies in Judge Peterson's report and recommendation. (Dkt. No. 86 at 22.) "In deciding whether to grant an evidentiary hearing, a federal court must consider whether such a hearing could enable an

[1] The Court also notes Petitioner's contemporaneous, contradictory statements in the record that he intended to make the state prove the case against him and that he believed he could "beat" the indecent liberties charge. (*See* Dkt. Nos. 78 at 27–28, 67-1 at 145–46.)

applicant to prove the petition's factual allegations, which, if true, would entitle the applicant to federal habeas relief." *Schriro v. Landrigan*, 550 U.S. 465, 474 (2007). The decision to hold an evidentiary hearing is committed to the court's discretion. *See id.* A hearing is not required if the allegations would not entitle the petitioner to relief under 28 U.S.C. § 2254(d). *Id.* Judge Peterson concluded that an evidentiary hearing is not necessary in this case because Petitioner's claims can be resolved on the existing state court record. (*See* Dkt. No. 78 at 17.) The Court agrees and accordingly DENIES Petitioner's request for an evidentiary hearing.

E. Certificate of Appealability

When issuing a final order denying a petitioner for a writ of habeas corpus, the court must determine if a certificate of appealability should issue. 28 U.S.C. § 2253. To grant a certificate of appealability, the petitioner must make "a substantial showing of the denial of a constitutional right." *Id.* § 2253(c)(2). A petitioner makes such a showing when "reasonable jurists could debate whether . . . the petition should have been resolved in a different manner." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000).

Under this standard, the Court concludes that Petitioner is not entitled to a certificate of appealability with respect to any of the claims asserted in his third amended petition. *See supra* Sections II.B., II.C. Therefore, Court therefore DENIES Petitioner a certificate of appealability.

III. CONCLUSION

The Court has reviewed the balance of the report and recommendation and finds no error. For the foregoing reasons, the Court hereby ORDERS as follows:

1. Petitioner's objections to the report and recommendation (Dkt. No. 86) are OVERRULED;
2. The Court APPROVES and ADOPTS the report and recommendation (Dkt. No. 78);
3. Petitioner's habeas petition (Dkt. No. 60) and this action are DISMISSED with prejudice;
4. Petitioner is DENIED issuance of a certificate of appealability; and

5. The Clerk is DIRECTED to send copies of this order to the parties and to Judge Peterson.

DATED this 21st day of August 2020.

John C. Coughenour
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

JEFFERY M. KINZLE,

Petitioner,

v.

MIKE OBENLAND,

Respondent.

Case No. C14-703-JCC-MLP

REPORT AND RECOMMENDATION

I. INTRODUCTION AND SUMMARY CONCLUSION

Petitioner Jeffery Kinzle is a Washington prisoner who is currently confined at the Monroe Correctional Complex - Washington State Reformatory Unit. He seeks relief under 28 U.S.C. § 2254 from three Snohomish County Superior Court judgments. The operative petition in this action is Petitioner's third amended petition filed on September 25, 2018. (Dkt. # 60.) Respondent has filed an answer to Petitioner's third amended petition (dkt. # 66), Petitioner has filed a response to Respondent's answer (dkt. # 71), and Respondent has filed a reply to Petitioner's response (dkt. # 77). Respondent has also submitted the portions of the state court record he deems relevant to review of the petition. (*See* Dkt. ## 19, 45, 67.) Petitioner has submitted additional portions of the state court record for review, as well as exhibits in support

of his third amended petition. (*See* Dkt. ## 33, 61.)

This Court, having carefully reviewed Petitioner's third amended petition, all briefing of the parties relating to that petition, and the balance of the record, concludes that Petitioner's third amended petition should be denied and this action should be dismissed with prejudice.

II. CHALLENGED JUDGMENTS

Petitioner seeks to challenge three separate judgments of the Snohomish County Superior Court, those filed under cause numbers 11-1-0617-9, 11-1-00709-4, and 11-1-00710-8.

A. Cause No. 11-1-0617-9

In cause number 11-1-0617-9, Petitioner was convicted, following a guilty plea, of one count of failing to register as a sex offender, and was sentenced to 90 days confinement on that charge. (*See* Dkt. # 21, Ex. 28.)

B. Cause No. 11-1-00709-4

In cause number 11-1-00709-4, Petitioner was convicted, following a jury trial, of one count of indecent liberties by forcible compulsion, and was sentenced under RCW 9.94A.507 to an indeterminate sentence with a minimum term of 102 months imprisonment and a maximum term of life. (*See id*., Ex. 10.)

C. Cause No. 11-1-00710-8

In cause number 11-1-00710-8, Petitioner was convicted, following a jury trial, of two counts of first degree child molestation, and was sentenced under RCW 9.94A.507 to an indeterminate sentence with a minimum term of 198 months imprisonment and a maximum term of life. (*See id*., Ex. 29.) One of the two counts of child molestation was reversed on appeal, and the case was remanded to the superior court. *See State v. Kinzle*, 181 Wn. App. 774 (2014). Petitioner was thereafter resentenced on the surviving count to an indeterminate sentence with a

minimum term of 171 months imprisonment and a maximum term of life. (*See* Dkt. # 33, Ex. 31.) Petitioner was ordered to serve this sentence consecutive to the sentence imposed in cause number 11-1-00709-4. (*See id.*)

III. FACTUAL HISTORY

A. Failure to Register as a Sex Offender (Cause No. 11-1-00617-9)

Petitioner, in his guilty plea statement in cause no. 11-1-00617-9, stated the facts underlying his failure to register charge as follows:

> On or about Feb. 4, 2000, in Snohomish Co, WA, I was convicted of a sex offense requiring registration and did, on March 13, 2011, knowingly fail to register with the Snohomish County Sheriff while I was a resident of Snohomish County.

(*Id.*, Ex. 48 at 7.)

B. Indecent Liberties (Cause No. 11-1-00709-4)

The Washington Court of Appeals, on direct appeal of Petitioner's conviction under cause number 11-1-00709-4, summarized the facts relevant to Petitioner's indecent liberties conviction as follows:

> On March 13, 2011, the complaining witness was working alone in a small grocery store when two males, whom she had not seen before, entered the store. At that time, there were no other customers in the store. One of the men, Jeffrey Kinzle, asked her to show him where to find the cans of jalapeño peppers. As she led the men toward the canned food area, Kinzle grabbed her buttocks. She asked Kinzle what was going on, and he responded with laughter. The complaining witness told him to pay for the jalapeños and leave the store. She and Kinzle walked to the cash register.
>
> Shortly afterward, the other man, Nathan Wood, asked the complaining witness to show him where the chipotle peppers were located. As she neared that area of the store, Kinzle grabbed her from behind and took her to the canned food area. He held her around the waist, squeezed her buttocks and breast, pulled on her clothing, kissed her neck, and rubbed his penis against her. As she tried to resist, she ended up face-to-face with Kinzle. She tried to push him away and yelled in Spanish for him to let her go. During the incident, Wood remained in a separate area of the aisle and did not observe what took place. After Wood heard

the complaining witness scream, "like [Kinzle] was attacking her," Wood saw Kinzle run out of the store. The complaining witness ran out of the store and yelled for help. A bystander helped her call the police.

When the police arrived, Wood told them that Kinzle, his roommate, attacked the complaining witness. Wood escorted the police to their apartment. The police questioned Kinzle, arrested him, and transported him to the store. After viewing Kinzle outside the store, the complaining witness said that she was confused and did not know whether he was the person who attacked her.

The State charged Kinzle with indecent liberties by forcible compulsion. Before trial, Kinzle moved to substitute counsel. After two hearings on the matter in July 2011, the court denied the motion.

In August 2011, the State moved to clarify a potential conflict of interest between Kinzle and his attorney. The State received information that Kinzle threatened his attorney and threatened to blow up government buildings and to kill various people, including the president, police officers, and corrections deputies. In its motion, the State cautioned, "The State has also considered that the Defendant may be deliberately manufacturing a situation that would compel replacement of his attorney." Kinzle's attorney expressed confidence in her ability to continue representing him. On October 31, 2011, during motions in limine, the court raised the issue presented in the State's earlier motion. After a colloquy with Kinzle and his attorney, the court decided that Kinzle's attorney would continue to represent him.

Kinzle did not testify at trial. The complaining witness testified through an interpreter. She testified that when Kinzle entered the store, he had brown hair and blue eyes and wore a hat, blue pants, a jacket, brown shoes, and a red or burgundy sweatshirt. He also had "a little bit of a beard." When the police brought Kinzle to the store later that evening, he was clean-shaven. Her testimony included details that she did not reveal to police during earlier interviews. At trial, she stated that Kinzle asked her if she wanted to feel his penis, that his fly was down during the incident, and that she could feel that he had an erection when he rubbed himself against her.

Wood testified that Kinzle did not appear differently when he was arrested than he appeared at the time of the incident. Michael Flavin, Kinzle's other roommate, testified that before police arrived at the apartment, Kinzle shaved and removed his hat and a gray fleece jacket that had dark sleeves and put on a sweatshirt. Brent Vannoy, who was in jail with Kinzle, also testified for the State. He told the court that Kinzle planned to "beat[] his charge" by shaving after the incident and by acting "crazy and stuff for the Court so they thought he was looney and get away with what he did."

> A jury convicted Kinzle as charged. He had an offender score of five, a total standard range of 77-102 months, and a maximum life term. The court sentenced Kinzle to an indeterminate sentence, with a minimum sentence of 102 months confinement and a maximum sentence of life imprisonment. The sentence included 21 conditions of community custody.

(Dkt. # 21, Ex. 16 at 2-5.)

C. First Degree Child Molestation (Cause No. 11-1-00710-8)

The Washington Court of Appeals, on direct appeal of Petitioner's conviction under cause number 11-1-00710-8, summarized the facts relevant to Petitioner's child molestation conviction as follows:

> On March 17, 2011, Kinzle stayed at the apartment of a friend who lived with his girlfriend, ES, and their two daughters, eight-year-old R and four-year-old N. ES returned to the apartment after Kinzle had gone to bed. She found the girls sitting under a small table in her bedroom. The girls were crying. They told their mother that Kinzle "rubbed some stuff" on their private parts. ES found prescription eye cream in the girls' bedroom. The cream had been stored in the bathroom medicine cabinet. ES called the police and then took the girls to the hospital. Paula Newman Skomski, a forensic nurse examiner employed by the hospital, interviewed and examined both girls.
>
> On March 21, 2011, at the request of a police detective, the girls were interviewed by Razi Leptich, a child interview specialist. The interview was recorded. In response to questions, N, the four-year-old, told Leptich that her "dad's friend" "Jeff" put "eye cream" on her "butt" and "pee-pee." Laboratory testing revealed traces of eye cream on R's underwear and on swabs from both girls' perineal areas.
>
> The State charged Kinzle with two counts of first degree child molestation. At a pretrial hearing on September 10, 2012, the court determined that both R and N were competent to testify and ruled that certain out-of-court statements made by each child were admissible under Washington's statutory exception to the hearsay rule, RCW 9A.44.120.
>
> Kinzle's jury trial occurred September 12-14, 2012. At trial, the prosecutor asked the older girl, R, whether any of her dad's friends were in the courtroom. She identified Kinzle. He asked if she remembered the last time she saw Kinzle at her house. When she said it had been a year, the prosecutor asked, "Is there a particular reason that you don't see him anymore?" R testified, "When he was over, he put stuff on a private part." When the prosecutor asked what she

> meant by "stuff" and "private part," R testified, consistent with her previous statements, that Kinzle rubbed "lotion" on her "butt and pee-pee." It is undisputed that Kinzle's right to confront R was not violated and that the State sufficiently proved count 1.

State v. Kinzle, 181 Wn. App. 774, 777-78 (2014).

D. Global Plea Offer

Underlying many of Petitioner's federal habeas claims is a plea offer which encompassed all three of the cases filed against Petitioner in Snohomish County Superior Court, an offer that Petitioner rejected. The Washington Court of Appeals, in Petitioner's most recent personal restraint proceeding, cause number 74670-7-1, summarized the facts pertaining to Petitioner's claims regarding his rejection of the global plea offer as follows:

> Kinzle has a history of mental illness. When he was booked into the Snohomish County Jail (SCJ) in March 2011, he informed jail staff that he was mentally ill and took a number of medications. The jail did not immediately obtain these medications or begin treating Kinzle.
>
> Kinzle was charged with failure to register as a sex offender, indecent liberties, and one count of child molestation. In early April, the Office of Public Defense appointed Cassie Trueblood to represent Kinzle. It appears that Trueblood did not meet with Kinzle for at least two weeks. During this period before their first meeting, Kinzle twice sent kites, or written requests, to the public defender's office asking for a new attorney. App. 37-38. He asserted that Trueblood "refused to do her job." Appendix (App.) 37.
>
> On April 7, the State proposed a plea bargain that encompassed all of the charges. The record contains no evidence concerning Kinzle's response or his discussion with Trueblood about the offer. Kinzle later indicated, however, that he refused the plea against Trueblood's advice.
>
> Near the end of April, Kinzle told jail staff he was experiencing mood swings and asked to resume Lithium treatment.[1] A mental health evaluation was conducted. The mental health professional documented Kinzle's report of rapid

[1] [Court of Appeals' footnote 1] Kinzle also asked the jail staff to obtain his previous mental health records. The jail obtained records from September 2009-January 2010. During that time period, Kinzle's only medication was Dexedrine which reportedly improved his ability to focus.

cycling between mania and depression. She evaluated Kinzle having organized thought processes, reality based thought content, no sensory disturbance, and normal intellectual functioning. Kinzle resumed Lithium treatment on May 1.[2]

In June, the State amended the information to add a second count of child molestation. A short time later, Kinzle pleaded guilty to failure to register. At the end of June, the State proposed a second plea offer. Kinzle rejected the offer against Trueblood's advice.

On June 29 and 30, Kinzle addressed five kites to Trueblood. He asked for copies of discovery as well as laws and legal definitions related to his charges. Kinzle also sent a kite to the director of public defense requesting a new attorney. He asserted that Trueblood was doing more to accommodate the prosecutor than to defend him and alleged that she would not fight for him at trial. Id. Kinzle also alleged that Trueblood refused to pursue all of the investigations he requested.

In July, after negotiation with Trueblood, the State renewed its plea offer. Kinzle indicated that he would accept the offer and a hearing was set. Prior to the hearing, Kinzle addressed seven kites to Trueblood asking her to investigate various defense theories.

At the hearing, Kinzle rejected the plea offer and also moved to substitute counsel. He asserted that Trueblood had been trying to "strong arm" him into accepting a plea deal. App. 56. Kinzle explained that, as he was facing a life sentence, he wanted to fight the charges, not plead to them. He also alleged that Trueblood refused his requests to investigate additional evidence, she had not given him copies of the laws and legal definitions requested, and he did not believe he would get a fair trial with her as his attorney.

Trueblood acknowledged there had been a breakdown in communication, especially in the past week. But she stated that she had done substantial investigation and believed she was competent to handle the case. Trueblood left the decision whether to replace her to the court. The court continued the motion one week to allow Kinzle and Trueblood an opportunity to reestablish communication.

When the hearing resumed, Kinzle stated that he had spoken with Trueblood but he was still opposed to her approach concerning plea offers. The court found that the parties were communicating and Trueblood was investigating all of Kinzle's witnesses. The court denied Kinzle's motion to substitute counsel.

[2] [Court of Appeals' footnote 2] Records indicate, however, that Kinzle did not always receive the medication as prescribed over the next few months.

In August, inmates reported to SCJ corrections officers that Kinzle made threatening statements concerning Trueblood and other targets. When informed of these statements, the prosecutor was concerned that Kinzle's threats could provide Trueblood with a motive to want Kinzle to receive a lengthy sentence and could thus be a conflict of interest. The prosecutor raised his concerns in a motion to clarify the potential conflict of interest. At the hearing on the motion, Trueblood stated that she was prepared for trial, she was not afraid of Kinzle, and she felt confident representing him. The court did not issue a ruling but stated that "Ms. Trueblood believes she can adequately represent [Kinzle], and I've heard nothing to the contrary, and off you go." App. 68.

The court address Kinzle's representation again on October 31, the first day of the indecent liberties trial. During motions in limine, the court inquired about the prior motion concerning a conflict of interest and asked Trueblood to address the issue of representation. Trueblood stated that she was prepared for trial and did not see the need for new counsel. The court then addressed Kinzle:

> **The Court**: Let me just ask you, given that your attorney has represented that she is prepared to represent you today, she's not concerned about whatever you might have communicated at the jail to other people or whatever threats or whatever may have gone on. . . . So we're ready to go. If that meets with your approval.
>
> **Kinzle**: Yes, sir.
>
> **The Court:** O.K. . . . I don't see that there's anything carrying over today that would impact Ms. Trueblood's ability to represent Mr. Kinzle. He's indicated today that he's comfortable having Ms. Trueblood continue to represent him, so I don't perceive a conflict that would require . . . any change of attorney to be addressed at this time. . . .

Kinzle was convicted of indecent liberties. In a separate trial, he was also convicted of two counts of child molestation. We affirmed his indecent liberties conviction in State v. Kinzle, 174 Wn. App. 1073, 2013 WL 1960159 (2013) (Kinzle I). In State v. Kinzle, 181 Wn. App. 774, 326 P.3d 870 (2014) (Kinzle II), we affirmed one count of child molestation, reversed one count, and remanded for correction of improper community custody conditions.

(Dkt. # 67, Ex. 73 at 2-5.)

IV. PROCEDURAL HISTORY

A. State Court Procedural History

Petitioner did not appeal his failure to register conviction, though he did seek direct review of his indecent liberties and first degree child molestation convictions. Petitioner also sought collateral review with respect to all three convictions.

1. Indecent Liberties (Cause No. 11-1-00709-4)

Petitioner appealed his indecent liberties conviction and sentence to the Washington Court of Appeals. (*See* Dkt. # 21, Exs. 11, 12, 13, 14, 15.) On May 13, 2013, the Court of Appeals issued an unpublished opinion affirming Petitioner's conviction, but remanding to the superior court a portion of Petitioner's judgment and sentence which the parties agreed contained improper community custody provisions. (*Id*., Ex. 16.)

Petitioner subsequently sought review in the Washington Supreme Court. (*Id*., Ex. 20.) Petitioner presented the following five issues to the Supreme Court for review: (1) the trial court erred by failing to adequately inquire into the conflict between Petitioner and his attorney; (2) the trial court erred by failing to order a competency hearing; (3) there was insufficient evidence presented at trial to prove the element of forcible compulsion; (4) Petitioner's sentence authorizing lifetime incarceration constitutes cruel and unusual punishment; and, (5) cumulative error deprived Petitioner of a fair trial. (*See id*.) On December 11, 2013, the Supreme Court denied review without comment, and the Court of Appeals issued its mandate terminating direct review on March 21, 2014. (*Id*., Exs. 21, 22.) On October 15, 2014, the trial court amended the conditions of community custody in accordance with the Court of Appeals' remand directive. (Dkt. # 33, Ex. 30.)

On August 12, 2013, while his petition for review was pending in the Washington Supreme Court, Petitioner filed a *pro se* personal restraint petition in the Supreme Court challenging his indecent liberties conviction. (Dkt. # 21, Ex. 23.) Petitioner raised a single ground for relief in his petition, asserting that an actual conflict of interest existed between him and his appointed counsel which deprived him of effective assistance of counsel. (*Id.*) On April 11, 2014, the Commissioner of the Supreme Court issued a ruling dismissing Petitioner's personal restraint petition, concluding that Petitioner's argument regarding an alleged conflict of interest had been considered and rejected on direct appeal. (*Id.*, Ex. 26.) The Supreme Court issued a certificate of finality in that proceeding on June 6, 2014. (*Id.*, Ex. 27.)

2. First-Degree Child Molestation (Cause No. 11-1-00710-8)

Petitioner appealed his first degree child molestation convictions and sentence to the Washington Court of Appeals. (Dkt. # 46, Exs. 53, 54, 55.) On June 16, 2014, the Court of Appeals issued a published opinion affirming Petitioner's conviction on one of the two counts of first degree child molestation, reversing Petitioner's conviction on the second count, and remanding the judgment and sentence for correction of the conditions of community custody. (*Id.*, Ex. 56.)

Petitioner subsequently filed a petition for review in the Washington Supreme Court in which he raised a single ground for review, asserting that the trial court's instructions misinformed the jury of its deliberative role. (*Id.*, Ex. 57.) The Supreme Court denied the petition for review without comment on November 5, 2014, and the Court of Appeals issued its mandate terminating direct review on December 10, 2014. (*Id.*, Exs. 58, 59.) On February 5, 2015, Petitioner was resentenced on the single count of first degree child molestation upheld on appeal to an indeterminate maximum term of life imprisonment, with a minimum term of 171 months.

(*See* Dkt. # 33, Ex. 31.) The second count, which was reversed on appeal, was dismissed. (*See id.*)

On September 13, 2013, while his direct appeal was pending in the Court of Appeals, Petitioner filed a *pro se* personal restraint petition in the Washington Supreme Court challenging his first degree child molestation convictions. (Dkt. # 46, Ex. 60.) Petitioner raised two grounds for relief, asserting that (1) his pre-trial defense counsel had a conflict of interest, and (2) that he was actually innocent of the charges. (*Id.*, Ex. 60 at 2.) The petition was apparently transferred to the Washington Court of Appeals and, on November 20, 2013, the Court of Appeals issued an order staying the personal restraint petition pending issuance of a mandate in Petitioner's direct appeal. (*Id.*, Ex. 61.) On November 20, 2014, the Federal Public Defender appeared on behalf of Petitioner and moved to voluntarily dismiss the personal restraint petition without prejudice. (*Id.*, Exs. 62, 63.) On December 22, 2014, the Court of Appeals granted the motion to dismiss and, on February 20, 2015, the Court of Appeals issued a certificate of finality in that proceeding. (*Id.*, Exs. 64, 65.)

3. Personal Restraint Petition Challenging All Convictions

On February 4, 2016, after a stay had been entered in this proceeding, Petitioner, through counsel, filed a personal restraint petition in the Washington Court of Appeals challenging all three of his convictions. (Dkt. # 67, Ex. 67.) Petitioner raised two grounds for relief, asserting that defense counsel rendered ineffective assistance when she (1) failed to consider, investigate, and evaluate Petitioner's mental state and thereby deprived him of the ability to understand and intelligently consider a favorable plea offer, and (2) refused to join Petitioner's request for new counsel, followed an office policy of not moving to withdraw, and failed to fully inform the

judges in Petitioner's case about the nature and extent of the conflict between her and Petitioner. (*Id*., Ex. 67 at 28, 35.) The petition was referred to a three-judge panel for review. (*Id*., Ex. 72.)

On September 11, 2017, the Court of Appeals issued an unpublished opinion denying the petition. (*Id*., Ex. 73.) The court declined to consider the merits of Petitioner's claim concerning the breakdown in the attorney-client relationship because the claim was considered and rejected on direct appeal. (*Id*., Ex. 73 at 6-9.) With respect to Petitioner's claim that counsel failed to investigate his mental state, the court determined that the link between counsel's alleged deficiency and Petitioner's rejection of the plea offer was "speculative and tenuous" and that he had failed to establish he was prejudiced by counsel's performance. (*Id*., Ex. 73 at 10-11.)

Petitioner thereafter filed a motion for discretionary review in the Washington Supreme Court in which he raised the same issues as were raised in his personal restraint petition. (*Id*., Ex. 74 at 1-2.) On February 14, 2018, the Commissioner of the Supreme Court issued a ruling denying review. (*Id*., Ex. 75.) As to Petitioner's claim concerning the breakdown in his relationship with counsel, the Commissioner held that the claim was untimely because it pertained only to Petitioner's indecent liberties conviction which became final on October 15, 2014, well over a year before Petitioner filed his personal restraint petition in February 2016. (*Id*., Ex. 75 at 4.) With respect to Petitioner's claim that counsel failed to investigate his mental state, the Commissioner agreed with the Court of Appeals that the claim was too speculative to warrant review. (*Id*., Ex. 75 at 5.)

Petitioner moved to modify the Commissioner's ruling, but that motion was denied without comment on May 2, 2018. (*Id*., Exs. 76, 77.) The Court of Appeals issued a mandate in Petitioner's personal restraint proceedings on May 18, 2018. (*Id*., Ex. 78.)

B. Federal Court Procedural History

Petitioner initiated this action on May 12, 2014, with the submission of a *pro se* petition for writ of habeas corpus under 28 U.S.C. § 2254 challenging only his indecent liberties conviction. (*See* Dkt. # 1.) The Court declined to serve Petitioner's original petition because Petitioner failed to name a proper respondent, but Petitioner was granted leave to file an amended petition correcting this deficiency. (Dkt. # 5.) Petitioner filed an amended petition on June 9, 2014, and the Court thereafter ordered the petition served on Respondent. (Dkt. ## 6, 7.) The Court subsequently appointed the Federal Public Defender to represent Petitioner in this action. (Dkt. # 17.)

On August 18, 2014, Respondent filed his answer to Petitioner's amended petition. Petitioner was thereafter granted multiple extensions of time to file a response to Respondent's answer. (*See* Dkt. ## 23, 24, 25, 26, 27, 29.) On March 26, 2015, Petitioner filed a motion to amend his petition, in lieu of a response. (Dkt. # 28.) Petitioner's unopposed motion to amend his petition was granted on April 20, 2015, and his second amended petition was filed. (Dkt. ## 41, 42.) In his second amended petition, Petitioner sought to challenge his convictions in all three of his Snohomish County Superior Court cases (cause numbers 11-1-00617-9, 11-1-00709-4, and 11-1-00710-8). (Dkt. # 42.) Respondent filed an answer to the second amended petition on June 4, 2015. (Dkt. # 44.)

On August 19, 2015, United States Magistrate Judge James Donohue, issued a Report and Recommendation recommending that Petitioner's second amended petition be dismissed as a mixed petition containing both exhausted and unexhausted claims. (Dkt. # 49.) Shortly thereafter, Petitioner filed a motion to stay and abey this action while he returned to state court to litigate his unexhausted claims. (Dkt. # 50.) On November 5, 2015, United States District Judge

John C. Coughenour granted Petitioner's motion to stay and abey. (Dkt. # 52.) The stay was lifted in May 2018 after Petitioner's state court proceedings concluded. (*See* Dkt. ## 55, 56.) Petitioner filed a third amended petition on September 25, 2018 (dkt. # 60), and Respondent filed an answer thereto on February 6, 2019 (dkt. # 66). Petitioner filed a response to Respondent's answer on April 15, 2019 (dkt. # 71), and Respondent, at the Court's direction, filed a reply to Petitioner's response on July 5, 2019 (*see* dkt. ## 76, 77). The briefing is now complete, and this matter is ripe for review.

V. GROUNDS FOR RELIEF

Petitioner identifies five grounds for relief in his third amended habeas petition:

> GROUND ONE: Defense counsel's failure to consider, investigate, and evaluate Mr. Kinzle's mental state was ineffective and prejudiced Mr. Kinzle by depriving him of the ability to understand and intelligently consider a favorable plea offer, an offer he would have accepted. This violated Mr. Kinzle's Sixth Amendment right to effective assistance of counsel.
>
> GROUND TWO: Mr. Kinzle's attorney provided ineffective assistance of counsel and deprived him of his Sixth Amendment right to counsel by (1) Refusing to join in Mr. Kinzle's request for a new lawyer despite acknowledging that the relationship was irreconcilably broken; (2) Following an office policy of not moving to withdraw even if the Rules of Professional Conduct require withdrawal; and (3) Failing to fully inform the judges at subsequent hearings about the nature and extent of the conflict. Mr. Kinzle was prejudiced, because had the court replaced his first attorney, he would have received effective assistance of counsel with respect to his plea offer.
>
> GROUND THREE: Mr. Kinzle's Sixth Amendment right to counsel was violated by the trial court's improper denial of his motion for substitute counsel when he had an irreconcilable conflict with his appointed attorney and Mr. Kinzle was prejudiced.
>
> GROUND FOUR: Mr. Kinzle's Fourteenth Amendment right to due process was violated by the trial court's failure to order a competency hearing where there was a *bona fide* doubt as to Mr. Kinzle's competency to proceed to trial.
>
> GROUND FIVE: Mr. Kinzle was deprived of his Sixth Amendment right to effective assistance of counsel by his lawyer's failure to properly investigate the

> identification procedures in this case, and failing to file a meritorious motion to suppress the victim's in-court identification of the defendant. The in-court identification made by the victim was a critical component of the prosecution's case and thus Mr. Kinzle was prejudiced.

(*See* Dkt. # 60 at 32, 40, 45, 50, 54-55.)

VI. DISCUSSION

Respondent asserts in his answer to Petitioner's third amended petition that Petitioner presented his first four grounds for relief to the Washington Supreme Court and therefore properly exhausted those claims in accordance with 28 U.S.C. § 2254(b). (Dkt. # 66 at 11.) Respondent argues, however, that Petitioner is not entitled to relief with respect to any of those claims. (*See id*. at 16-45.) Respondent further asserts, and Petitioner concedes, that Petitioner did not present his fifth ground for relief to the state courts at any time. (*See id*. at 11.) Respondent argues that that claim is procedurally barred and without merit. (*Id*. at 45-54.)

A. Standard of Review for Exhausted Claims

Federal habeas corpus relief is available only to a person "in custody in violation of the Constitution or laws or treaties of the United States." 28 U.S.C. § 2254(a). A habeas corpus petition may be granted with respect to any claim adjudicated on the merits in state court only if the state court's decision was contrary to, or involved an unreasonable application of, clearly established federal law, as determined by the Supreme Court, or if the decision was based on an unreasonable determination of the facts in light of the evidence presented. 28 U.S.C. § 2254(d).

Under the "contrary to" clause, a federal habeas court may grant the writ only if the state court arrives at a conclusion opposite to that reached by the Supreme Court on a question of law, or if the state court decides a case differently than the Supreme Court has on a set of materially indistinguishable facts. *See Williams v. Taylor*, 529 U.S. 362, 405-06 (2000). Under the

"unreasonable application" clause, a federal habeas court may grant the writ only if the state court identifies the correct governing legal principle from the Supreme Court's decisions, but unreasonably applies that principle to the facts of the prisoner's case. *See id*. at 407-09.

The Supreme Court has made clear that a state court's decision may be overturned only if the application is "objectively unreasonable." *Lockyer v. Andrade*, 538 U.S. 63, 69 (2003). The Supreme Court has also explained that "[a] state court's determination that a claim lacks merit precludes federal habeas relief so long as 'fairminded jurists could disagree' on the correctness of the state court's decision." *Harrington v. Richter*, 562 U.S. 86, 88 (2011) (citing *Yarborough v. Alvarado*, 541 U.S. 652, 664 (2004)).

Clearly established federal law means "the governing legal principle or principles set forth by the Supreme Court at the time the state court render[ed] its decision." *Lockyer*, 538 U.S. at 71-72. "If no Supreme Court precedent creates clearly established federal law relating to the legal issue the habeas petitioner raised in state court, the state court's decision cannot be contrary to or an unreasonable application of clearly established federal law." *Brewer v. Hall*, 378 F.3d 952, 955 (9th Cir. 2004) (citing *Dows v. Wood*, 211 F.3d 480, 485-86 (9th Cir. 2000)).

In considering a habeas petition, this Court's review "is limited to the record that was before the state court that adjudicated the claim on the merits." *Cullen v. Pinholster*, 563 U.S. 170, 181-82 (2011). If a habeas petitioner challenges the determination of a factual issue by a state court, such determination shall be presumed correct, and the applicant has the burden of rebutting the presumption of correctness by clear and convincing evidence. 28 U.S.C. § 2254(e)(1).

B. Evidentiary Hearing

Petitioner requests that he be granted an evidentiary hearing in this matter. (*See* Dkt. # 60 at 61.) Respondent argues that no evidentiary hearing is required. (Dkt. # 66 at 14-15.) The decision to hold a hearing is committed to the Court's discretion. *Schriro v. Landrigan*, 550 U.S. 465 (2007). "[A] federal court must consider whether such a hearing could enable an applicant to prove the petition's factual allegations, which, if true, would entitle the applicant to federal habeas relief." *Landrigan*, 550 U.S. at 474. A hearing is not required if the allegations would not entitle Petitioner to relief under 28 U.S.C. § 2254(d). *Id*. "It follows that if the record refutes the applicant's factual allegations or otherwise precludes habeas relief, a district court is not required to hold an evidentiary hearing." *Id.*; *see also Cullen v. Pinholster*, 131 S. Ct. 1388, 1399 (2011). This Court finds it unnecessary to hold an evidentiary hearing because Petitioner's claims may be resolved on the existing state court record.

C. Analysis

1. Ineffective Assistance of Counsel: Failure to Investigate Mental State

Petitioner asserts in his first ground for federal habeas relief that the attorney appointed to represent him in his failure to register and indecent liberties cases, assistant Snohomish County public defender Cassie Trueblood, provided ineffective assistance when she failed to consider, investigate, and evaluate Petitioner's mental state, and therefore failed to ensure that he was being properly medicated while he was in the Snohomish County Jail awaiting trial. (Dkt. # 60 at 34-36.) Petitioner alleges that counsel's deficiencies in relation to his mental state deprived him of the ability to understand and intelligently consider a favorable plea offer, an offer he claims he would have accepted had he had reasonably effective representation. (*See id*. at 34-36, 39.)

Respondent argues that the state courts reasonably rejected this claim in Petitioner's most recent personal restraint proceedings. (Dkt. # 66 at 16, 24-27.)

The Sixth Amendment guarantees a criminal defendant the right to effective assistance of counsel. *Strickland v. Washington*, 466 U.S. 668 (1984). "The essence of an ineffective-assistance claim is that counsel's unprofessional errors so upset the adversarial balance between defense and prosecution that the trial was rendered unfair and the verdict rendered suspect." *Kimmelman v. Morrison*, 477 U.S. 365, 374 (1986). Claims of ineffective assistance of counsel are evaluated under the two-prong test set forth in *Strickland*. Under *Strickland*, a defendant must prove (1) that counsel's performance was deficient and, (2) that the deficient performance prejudiced the defense. *Strickland*, 466 U.S. at 687.

With respect to the first prong of the *Strickland* test, a petitioner must show that counsel's performance fell below an objective standard of reasonableness. *Id*. at 688. Judicial scrutiny of counsel's performance must be highly deferential. *Id*. at 689. "A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." *Id*. at 689. In order to prevail on an ineffective assistance of counsel claim, a petitioner must overcome the presumption that counsel's challenged actions might be considered sound trial strategy. *Id*.

The second prong of the *Strickland* test requires a showing of actual prejudice related to counsel's performance. In order to establish prejudice, a 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. A reasonable probability is a probability sufficient to undermine

confidence in the outcome." *Id*. at 694. The reviewing court need not address both components of the inquiry if an insufficient showing is made on one component. *Id*. at 697.

In circumstances where a plea bargain has been offered, "a defendant has the right to effective assistance of counsel in considering whether to accept it. If that right is denied, prejudice can be shown if loss of the plea opportunity led to a trial resulting in a conviction on more serious charges or the imposition of a more severe sentence." *Lafler v. Cooper*, 566 U.S. 156, 168 (2012).

While the Supreme Court established in *Strickland* the legal principles that govern claims of ineffective assistance of counsel, it is not the role of the federal habeas court to evaluate whether defense counsel's performance fell below the *Strickland* standard. *Harrington*, 562 U.S. 101. Rather, when considering an ineffective assistance of counsel claim on federal habeas review, "[t]he pivotal question is whether the state court's application of the *Strickland* standard was unreasonable." *Id*. As the Supreme Court explained in *Harrington*, "[a] state court must be granted a deference and latitude that are not in operation when the case involves review under the *Strickland* standard itself." *Id*.

The Washington Court of Appeals, in Petitioner's most recent personal restraint proceedings, rejected Petitioner's claim that counsel was deficient in failing to investigate his mental health. The panel explained its conclusion as follows:

> In this personal restraint petition, Kinzle asserts that Trueblood was deficient in failing to investigate his mental health despite numerous facts that should have alerted her that he was mentally ill. The State contends that this claim simply recasts the issue of whether Kinzle was competent to assist in his own defense. Kinzle disputes that his competency is at issue here. He contends that, regardless of whether he was incompetent, his mental illness was at the root of his problems with counsel and his refusal of the plea offer.

Kinzle's claim here is closely related to the competency issue considered in Kinzle I. In the direct appeal, however, we examined whether the evidence before the trial court indicated that Kinzle was incompetent. Here, the question is whether the facts available to Trueblood created an obligation that she investigate Kinzle's mental health. Because that issue was not addressed on direct appeal, we consider it here.

We first consider whether Kinzle has established prejudice. To obtain relief in a personal restraint petition, a petitioner must show that he was actually prejudiced by each claimed constitutional error. In re Pers. Restraint Petition of Rice, 118 Wn.2d 876, 884, 828 P.2d 1086 (1992). A petitioner shows that he was prejudiced by ineffective assistance of counsel by establishing that, but for counsel's deficient performance, there is a reasonable probability that the result of the trial would have been different. Strickland, 466 U.S. at 687. Where ineffective assistance allegedly causes a defendant to reject a plea offer, a defendant must show a reasonable probability that, but for the ineffective advice of counsel, he would have accepted the plea. Lafler v. Cooper, 566 U.S. 156, 132 S. Ct. 1376, 1385, 182 L. Ed. 2d 398 (2012).

Kinzle asserts that he "would have accepted the original plea offer, had he—with proper medication—been in a mental state to appreciate his legal situation and had communications between his counsel and him not completely broken down." PRP at 34. He relies on his own 2015 declaration, in which he states that his mental illness impeded his ability to understand Trueblood and that if he had "been mentally stable and been able to trust Ms. Trueblood's advice," he would have accepted the offer.[3] App. 14. Kinzle also relies on the declaration of his expert, psychologist Alan Breen, who opined that the initial dose of Lithium prescribed was unlikely to have been optimal and that Kinzle likely continued to have symptoms of mania even after he began treatment. And Kinzle argues that, given the strength of the State's case, any rational defendant would have accepted the plea offer.

The link that Kinzle posits between Trueblood's alleged deficiency and his refusal of the plea offer is speculative and tenuous. His argument assumes that, had Trueblood investigated his mental health, she would have ordered a mental health evaluation. It further assumes that the results of the new evaluation would have been different from those of the mental health evaluation administered on April 26. Kinzle's argument further assumes that, in response to this hypothetical

[3] [Court of Appeals' footnote 4] Kinzle asserts that a petitioner's own statement suffices to establish that he would have accepted the plea offer but for his attorney's deficient performance. He relies on the Sixth Circuit decision underlying Lafler. The case is distinguishable. In Lafler, defense counsel provided erroneous legal information and, based on that information, advised the defendant to reject a plea offer. Cooper v. Lafler, 376 Fed. App'x. 563, 570 (6th Cir. 2010). In a habeas petition following his conviction, the defendant argued that he would have accepted the plea offer but for his attorney's erroneous advice. Id. His trial attorney confirmed the statement and the circumstances lent credence to the claim. Id. at 572.

> evaluation, the SCJ would have modified Kinzle's treatment. Meanwhile, Trueblood would have continued the cases and, at some point, the treatment would have altered Kinzle's mental state to such a degree that he would have accepted Trueblood's advice to accept the plea offer despite his professed desire to make the State prove the case against him. Kinzle points to no case in which a defendant established prejudice through a similarly tenuous connection. He fails to establish a reasonable probability that, but for the alleged deficient representation, he would have accepted the plea. Kinzle fails to establish that he was prejudiced by Trueblood's performance.[4]

(Dkt. # 67, Ex. 73 at 9-11.)

The Washington Supreme Court Commissioner agreed with the Court of Appeals' resolution of this claim, explaining his conclusion as follows:

> Ms. Trueblood's claimed deficiency in investigating and procuring treatment for Mr. Kinzle's mental condition does go to the plea offers and therefore is arguably timely as to all convictions. But I agree with the Court of Appeals that Mr. Kinzle does not show, as he must, that there is a reasonable probability the outcome would have been different in the absence of the deficient performance. *See In re Pers. Restraint of Crace,* 174 Wn.2d 835, 842, 280 P.3d 1102 (2012). This argument hinges on Mr. Kinzle's assertion that, had Ms. Trueblood investigated his condition and procured proper treatment, he would have been in a stable mental state under which he would have accepted the State's plea offer. But this claim is simply too speculative to entitle Mr. Kinzle to relief. I agree with Mr. Kinzle that his own declaration to this point, though self-serving, is relevant. *In re Pers. Restraint of Ruiz-Sanabria*, 184 Wn.2d 632, 641, 362 P.3d 758 (2015). Still, as the Court of Appeals observed, Mr. Kinzle's argument rests on a tenuous chain of causation that would have purportedly resulted in Mr. Kinzle reaching a certain mental state, under which he would have followed Ms. Trueblood's advice to accept the plea offer rather than insist on going to trial. It is one thing for a defendant to plausibly assert that he would have accepted a plea offer had counsel not provided erroneous legal advice on the consequences of going to trial. *See Cooper v. Lafler*, 376 Fed. Appx. 563, 571 (6th Cir. 2010), *vacated*, 566 U.S. 156, 132 S. Ct. 1376, 182 L. Ed. 2d 398 (2012). But how Mr. Kinzle may have judged a plea offer under a different mental state is wholly speculative, despite Mr. Kinzle's assertion. He fails to show that under the circumstances of this case the choice to make the State prove the charges at trial

[4] [Court of Appeals' footnote 5] In light of our disposition, we do not consider Kinzle's claim that Trueblood's performance was deficient. In re Crace, 174 Wn.2d 835, 847, 280 P.3d 1102 (2012). ("We need not consider both prongs of Strickland (deficient performance and prejudice) if a petitioner fails on one.") (quoting Strickland, 466 U.S. at 697).

> was one that a person in a stable mental condition could not have reasonably made.

(*Id*., Ex. 75 at 5.)

Petitioner spends considerable time on arguments relating to counsel's alleged deficiencies in the plea process. (*See* Dkt. # 71 at 3-15.) However, the Court need not address those arguments as the state courts limited their discussion to whether Petitioner was prejudiced by counsel's alleged deficiencies and Petitioner's first ground for relief can be readily resolved on this single prong of the *Strickland* test.

With respect to the issue of prejudice, Petitioner argues that the Washington Supreme Court Commissioner's decision was contrary to the United States Supreme Court's decisions in *Strickland* and *Lafler v. Cooper*, 566 U.S. 156 (2012). (*Id*. at 15-17.) Petitioner focuses his argument on the final sentence of the Commissioner's decision, insisting that he was required to meet a more demanding standard of showing that "the choice to make the state prove the charges at trial was one that a person in a stable mental condition could not have reasonably made," rather than the *Strickland/Lafler* standard of showing that there was a "reasonable probability" he would have accepted the plea had counsel rendered effective assistance. (*See id*.)

However, as Respondent correctly points out, a panel of the Washington Court of Appeals actually adjudicated the merits of Petitioner's ineffective assistance of counsel claim, while the Supreme Court Commissioner simply reviewed the Court of Appeals' decision to determine if discretionary review of the decision was warranted under the Washington Rules of Appellate Procedure. (*See* Dkt. # 67, Ex. 75.) The Commissioner repeatedly referenced the Court of Appeals' decision in his ruling and concluded that discretionary review was not warranted because Petitioner had not shown "that he is raising issues of substantial public interest or

constitutional issues of sufficient significance to merit this court's review of the Court of Appeals decision." (*Id*., Ex. 75 at 6.) The Commissioner's ruling cannot be read without reference to the Court of Appeals' decision.

The Court of Appeals clearly applied the appropriate *Strickland/Lafler* standard in considering whether Petitioner was prejudiced by counsel's alleged deficient conduct and reasonably concluded that he was not. (*See id*., Ex. 73 at 9-11.) The Supreme Court Commissioner effectively endorsed this conclusion in his ruling denying review. (*Id*., Ex. 75 at 5.) While the final sentence of the Commissioner's ruling is admittedly awkward, this Court is not persuaded that it improperly altered the prejudice standard applied to Petitioner's ineffective assistance of counsel claim.

Petitioner also argues that the Commissioner's decision was based on an unreasonable determination of the facts in light of the evidence presented in Petitioner's personal restraint proceedings. (Dkt. # 71 at 17-18.) Petitioner faults the Commissioner for relying solely on Petitioner's declaration in concluding that the causal chain between being properly medicated and rejecting the plea was too tenuous. (*Id*. at 17.) Petitioner maintains that in addition to his declaration stating that he would have pled guilty had he been mentally stable, he provided objective evidence of his decision making before and after his medication issues were properly addressed. (*Id*.) Petitioner cites to the psychiatric intake evaluation performed at the Washington State Penitentiary in August 2014 after he entered Washington Department of Corrections ("DOC") custody (dkt. # 61, Ex. A-33), and a psychiatric progress note entered in September 2018 (dkt. # 75, Ex. A-115), which appear to show improvement in Petitioner's mental stability as his Lithium doses were increased. Petitioner asserts that at the time he executed his

declaration stating he would have pled guilty, he was being properly medicated. (Dkt. # 71 at 18.)

While it does appear that the medications Petitioner has been provided since his entry into DOC custody have been beneficial to him, this evidence does nothing to undermine the state courts' conclusion that the causal chain between counsel's alleged deficiencies and Petitioner's rejection of the plea offer is too tenuous to establish actual prejudice. Though Petitioner is now clearly regretting the fact that he did not accept the plea offer, he has simply not demonstrated that there is a reasonable probability he would have accepted the offer had counsel taken the steps he now believes she should have taken to investigate and evaluate his mental state. The state courts' application of *Strickland* was reasonable and Petitioner's first ground for federal habeas relief should therefore be denied.

2. Ineffective Assistance of Counsel: Failure to Join Motion for New Counsel

Petitioner asserts in his second ground for federal habeas relief that his attorney provided ineffective assistance by (1) refusing to join in Petitioner's request for new counsel despite acknowledging the relationship was irretrievably broken, (2) following an office policy of not moving to withdraw, and (3) failing to fully inform the trial judges about the nature and extent of the communication problems between Petitioner and herself. (*See* Dkt. # 60 at 42.) Respondent argues that this claim, as presented in the third amended petition, is procedurally barred. (Dkt. # 66 at 27.)

The claim asserted by Petitioner in his second ground for relief was first presented to the state courts in Petitioner's most recent personal restraint petition. (*See* Dkt. # 67, Ex. 67 at 35.) The Washington Court of Appeals declined to consider the claim because it had already held on direct appeal of Petitioner's indecent liberties conviction that the trial court did not err in denying

Petitioner's motion to substitute counsel. (*Id*., Ex. 73 at 7-8.) The Washington Supreme Court Commissioner declined to address the Court of Appeals' rationale upon concluding that the claim was time barred under RCW 10.73.090 because Petitioner's personal restraint petition was filed more than one year after his indecent liberties conviction became final in October 2014. (*Id*., Ex. 75 at 4.)

When a prisoner defaults on his federal claims in state court pursuant to an independent and adequate state procedural rule, federal habeas review of the claims is barred unless the prisoner can demonstrate cause for the default and actual prejudice as a result of the alleged violation of federal law, or demonstrate that failure to consider the claims will result in a fundamental miscarriage of justice. *Coleman v. Thompson*, 501 U.S. 722, 750 (1991). If the last state court to decide the issue clearly and expressly states that its judgment rests on a state rule of procedure, the habeas petitioner is barred from asserting the same claim in a later federal habeas proceeding.[5] *Harris v. Reed*, 489 U.S. 255 (1989).

For a state procedural rule to be "independent," the state law ground for decision must not rest primarily on federal law or be interwoven with federal law. *Coleman*, 501 U.S. at 734-35 (citing *Michigan v. Long,* 463 U.S. 1032, 1040–41 (1983)). A state procedural rule is "adequate" if it was "firmly established" and "regularly followed" at the time of the default. *Beard v. Kindler*, 558 U.S. 53, 60 (2009) (quoting *Lee v. Kemna*, 534 U.S. 362, 375 (2002)). A state procedural rule is not rendered inadequate simply because it is discretionary. *Id*. at 60-61. The Ninth Circuit has recognized that the state time bar statute invoked by the Washington Supreme Court to bar the ineffective assistance of counsel claim asserted in Petitioner's second ground for

[5] A petitioner also defaults on a federal habeas claim when he fails to exhaust his state court remedies with respect to that claim and the court to which petitioner would be required to present his claim in order to satisfy the exhaustion requirement would now find the claim to be procedurally barred. *Coleman*, 501 U.S. at 735 n.1.

relief, RCW 10.73.090, provides an independent and adequate state procedural ground to bar federal habeas review. *See Casey v. Moore*, 386 F.3d 896, 920 (9th Cir. 2004); *Shumway v. Payne*, 223 F.3d 982, 989 (9th Cir. 2000).

Petitioner does not challenge the assertion that he procedurally defaulted on his second ground for federal habeas relief. He argues instead that his procedural default should be excused under the rule announced by the United States Supreme Court in *Martinez v. Ryan*, 566 U.S. 1 (2012). (Dkt. # 71 at 20-21.) In *Martinez*, the Supreme Court announced a limited qualification to the holding in *Coleman* that an attorney's ignorance or inadvertence in a post-conviction proceeding does not establish cause which excuses procedural default. *See Martinez*, 566 U.S. at 9. The narrow exception recognized in *Martinez* is that the absence of counsel, or the inadequate assistance of counsel, in an initial-review collateral proceeding may establish cause for a claim of ineffective assistance at trial. *See id*. at 14.

Martinez makes clear that, in addition to establishing cause for the procedural default by demonstrating the absence or inadequate assistance of counsel, a federal habeas petitioner must also demonstrate that "the underlying ineffective-assistance-of-trial-counsel claim is a substantial one, which is to say that the prisoner must demonstrate that the claim has some merit." *Id*. Stated another way, an ineffective assistance of trial counsel claim is "insubstantial" if "it does not have any merit or . . . is wholly without factual support[.]" *Id*. at 16. Because Petitioner did not have counsel in the relevant state court collateral proceedings; *i.e.*, Petitioner's first personal restraint proceeding filed in 2013, the only question this Court need address relative to *Martinez* is whether Petitioner's ineffective assistance of trial counsel claim is substantial.

Petitioner argues that his claim regarding defense counsel's conduct in relation to his request for new counsel is substantial and is supported by an extensive record including

Petitioner's own declaration, the declaration of a mental health expert, and the declaration of a *Strickland* expert. (Dkt. # 71 at 21.) Petitioner asserts that if counsel had acted appropriately and either joined in his request for a new lawyer, or fully informed the various judges who considered his request for new counsel about the nature and extent of the conflict between the two, new counsel would have been appointed. (Dkt. # 60 at 44-46.) Petitioner further asserts that if he had been provided a new attorney, he would have received effective assistance with respect to the plea offer. (*See id*. at 42, 46; Dkt. # 71 at 23-24.)

As explained above, in order to establish a claim of ineffective assistance of counsel, a petitioner must demonstrate (1) that counsel's performance was deficient and, (2) that the deficient performance prejudiced the defense. *Strickland*, 466 U.S. at 687. This claim, like Petitioner's first ground for relief, can be resolved based solely on the prejudice prong of the *Strickland* test.[6] Petitioner speculates that if counsel had withdrawn, or been removed, from his case during pretrial proceedings, he would have been provided a new attorney who would have convinced him to accept the original plea offer or a comparable one.

While Petitioner maintains today, after suffering the consequences of having not accepted a favorable plea offer, that he would have accepted the plea if only counsel had acted reasonably or he had been appointed a new attorney, the Court cannot overlook the fact that at that point in the proceedings Petitioner had indicated a desire to make the state prove the case against him and had expressed his belief that he would be able "beat" the indecent liberties charge. (*See* Dkt. #

[6] It is noteworthy, if not dispositive of this claim, that the Washington Court of Appeals, on direct appeal of Petitioner's indecent liberties conviction, denied Petitioner's claim that the trial court erred when it denied his motion to substitute counsel, and that the Court of Appeals, in Petitioner's most recent personal restraint proceedings, declined to consider the claim of ineffective assistance in relation to Petitioner's efforts to replace his attorney because it had rejected his claim that the attorney-client relationship was irreconcilably broken on direct appeal. (Dkt. # 67, Ex. 73 at 7-8.)

67, Ex. 67, Appen. 56, 57.) Once again, the link between counsel's alleged deficiencies and Petitioner's refusal to plead guilty is too tenuous to effectively establish prejudice.[7] Petitioner's second ground for federal habeas relief should therefore be denied.

3. Denial of Motion for Substitute Counsel

Petitioner asserts in his third ground for federal habeas relief that the trial court violated his right to counsel when it refused to appoint new counsel for Petitioner in light of his irreconcilable conflict with his appointed counsel. (Dkt. #60 at 47-52.) Respondent argues that this claim is without merit. (Dkt. # 66 at 34-40.)

The Sixth Amendment not only guarantees a criminal defendant counsel of reasonable competence, it also guarantees a right to representation free of conflicts. *Wood v. Georgia*, 450 U.S. 261, 272 (1981). The Sixth Amendment does not, however, guarantee an accused a "meaningful attorney-client relationship." *See Morris v. Slappy*, 461, U.S. 1, 13-14 (1983). Thus, not every conflict between an accused and his counsel implicates the Sixth Amendment. *See Schell v. Witek*, 218 F.3d 1017, 1027 (9th Cir. 2000).

The Ninth Circuit has held that a conflict between an accused and his counsel only infringes on the accused's Sixth Amendment rights "where there is a complete breakdown in communication between the attorney and client, and the breakdown prevents effective assistance of counsel." *Stenson v. Lambert*, 504 F.3d 873 (9th Cir. 2007) (citing *Schell*, 218 F.3d at 1026); *accord Daniels v. Woodford*, 428 F.3d 1181, 1197 (9th Cir. 2005) (nature and extent of conflict

[7] Petitioner asserts in his response to Respondent's answer that his first and second grounds for relief are overlapping as to the issue of prejudice, and that counsel's representation with respect to the plea offer and the conflict cumulatively prejudiced him by depriving him of effective assistance of counsel in relation to the plea offers. (Dkt. # 71 at 23.) However, Petitioner has not adequately established prejudice with respect to either his first or second grounds for relief because the link between counsel's alleged deficiencies and his refusal to plead guilty is simply too tenuous. There is no cumulative prejudice because there has not been a showing of any prejudice at all.

must be so great as to "depriv[e] the defendant of representation guaranteed by the Sixth Amendment"). "Disagreements over strategical or tactical decisions do not rise to [the] level of a complete breakdown in communication." *Stenson* 504 F.3d at 886 (citing *Schell*, 218 F.3d at 1026).

The Ninth Circuit has identified three factors a court should consider in determining whether an irreconcilable conflict existed: (1) the extent of the conflict; (2) whether the trial judge made an appropriate inquiry into the extent of the conflict; and (3) the timeliness of the motion to substitute counsel. *Stenson*, 504 F.3d at 886; *Daniels*, 428 F.3d at 1197.

The Washington Court of Appeals, on direct appeal of Petitioner's indecent liberties conviction, rejected Petitioner's claim that the trial court erred in rejecting his request for substitute counsel. The Court explained its conclusion as follows:

> Kinzle first claims that the trial court denied him effective assistance of counsel when it denied his motion for new counsel. He asserts that he and his attorney had "an ongoing, intractable conflict" that "amounted to a total breakdown in communications." He argues that "instead of inquiring into that conflict," the court improperly focused its inquiry on trial counsel's competence. The State counters that Kinzle's concerns "related primarily to tactics, strategy and his lost confidence in his attorney."
>
> We review for abuse of discretion a trial court's decision to deny a motion to substitute counsel. If the attorney-client relationship "completely collapses, the refusal to substitute new counsel violates the defendant's Sixth Amendment right to effective assistance of counsel." A defendant "must show good cause" before the trial court will allow a substitution of counsel, "such as a conflict of interest, an irreconcilable conflict, or a complete breakdown in communication between the attorney and the defendant."
>
> A defendant is not entitled to a particular lawyer with whom he thinks he can have a meaningful attorney-client relationship. A general loss of confidence or trust alone is insufficient to substitute new counsel. The attorney and the defendant must be "so at odds as to prevent presentation of an adequate defense." To determine whether the trial court properly denied Kinzle's motion to substitute counsel, we consider (1) the nature and extent of the alleged conflict, (2) the

adequacy of the court's inquiry, and (3) the timeliness of the motion. We hold that the trial court did not abuse its discretion when it denied Kinzle's motion.

Regarding the first factor, we analyze both (1) the nature and extent of the breakdown in communication between the attorney and the client and (2) the breakdown's effect on the representation that the client actually received. Kinzle fails to show that any alleged breakdown in communications satisfies the first factor.

Kinzle addressed the trial court during two hearings on the motion. He stated his belief that he would not receive "fair representation." He asserted, "I've asked her to obtain various bits of evidence, having swabs retested on our own, speaking with several people, things that would be of value to my case. I've been told on several of them that either she doesn't have time or it wouldn't be worth it in trial." Furthermore, he explained, "And in regards to the communication, I've never refused to speak with her. I—we have had a lot of communication problems and I will be the first to say I—there's times where I get angry . . . I give up on talking right now." Although Kinzle told the court that his attorney acted in "an almost strong-arm manner" to convince him to accept a plea deal, the court noted that he did not accept a plea offer. Kinzle also physically threatened his attorney and told the court that he believed "she works for the same fucking people that are trying to give me life [in prison]."

After the court granted a continuance for Kinzle and his attorney to "work this out," Kinzle told the court that he had spoken with his attorney. When the trial court denied the motion to substitute counsel, it noted that Kinzle's attorney was investigating all of his witnesses in the matter and that she and Kinzle were able to communicate at that point. The court explained, "There may be some differences getting ready for trial tactics and whatnot, but that's not a reason to switch horses in midstream." Later, at a hearing on the State's motion to clarify a potential conflict of interest, the court determined that it "simply would treat any threats made as a product of somebody being upset at the moment" and that no evidence suggested that Kinzle's attorney would be unable to adequately represent him. Moreover, the court noted, "He's indicated today that he's comfortable having Ms. Trueblood continue to represent him."

Counsel has wide latitude to control trial strategy and tactics. "Counsel is not, at the risk of being charged with incompetence, obliged to raise every conceivable point, however frivolous, damaging or inconsequential it may appear at the time, or to argue every point to the court and jury which in retrospect may seem important to the defendant." Posttrial scrutiny of an attorney's trial tactics would cause the attorney to "lose the very freedom of action so essential to a skillful representation of the accused."

> Kinzle told the court that he would only temporarily refuse to communicate with his attorney when he would become angry. He did not accept a plea deal, and nothing in the record indicates any communication problems during trial. His remaining arguments that he offered to support his motion pertained merely to his attorney's unwillingness to offer all of the evidence that he desired. When the court addressed the State's concern about the alleged threats, it determined that the threats were likely due to Kinzle's anger at the moment and that he did not object at that time to having his attorney continue to represent him. For these reasons, the nature and extent of the alleged conflict weighs against finding an abuse of discretion.
>
> The second factor, the adequacy of the trial court's inquiry, appears sufficient. At two separate hearings, the court allowed Kinzle to state his concerns and allowed both his attorney and the prosecutor to respond. Despite Kinzle's assertion that the court did not address his concerns meaningfully, the court explained clearly that his lack of cooperation with his attorney was not a sufficient basis to fire her and that he had to show good cause. Kinzle's attorney told the court that she had "done substantial investigation," that she thought she was "more than competent to handle this case," and that at that point she "ha[d] done everything that is required." Because the court allowed Kinzle to express his concerns fully, inquired into them appropriately, and properly concluded that his attorney was investigating the case adequately, Kinzle fails to show that the court's inquiry was insufficient.
>
> Finally, we consider the third factor, the motion's timeliness. Kinzle's motion was timely. To assess the timeliness of a motion to substitute counsel, we balance the "resulting inconvenience and delay against the defendant's important constitutional right to counsel of his choice." Because Kinzle moved over three months before trial, the court had adequate time to investigate the matter and to appoint new counsel, if necessary.
>
> Having reviewed the three relevant factors, we conclude that the trial court did not err when it denied Kinzle's request for substitute counsel.

(Dkt. # 19, Ex. 16 at 5-10 (footnotes omitted).)

The Court of Appeals' decision addressing and rejecting Petitioner's Sixth Amendment claim is entitled to deference under 28 U.S.C. § 2254(d). As Respondent correctly notes, the United States Supreme Court's holdings on Sixth Amendment conflicts of interest have been limited to cases involving actual conflicts based on multiple concurrent representation of criminal defendants. *See Mickens v. Taylor*, 535 U.S. 162, 175 (2002); *Cuyler v. Sullivan*, 446

U.S. 335, 348 (1980). In *Mickens*, the Court made clear that any extension of its Sixth Amendment conflict jurisprudence beyond this context remained an open question. *Id*. at 176. Petitioner's conflict claim does not fall within the scope of the Supreme Court's Sixth Amendment jurisprudence and the state courts' decision with respect to that claim therefore cannot be deemed contrary to any clearly established federal law. *Brewer*, 378 F.3d at 955.

The Ninth Circuit's jurisprudence in this area, as detailed above, is more expansive in that it is not confined to claims alleging an actual conflict of interest but incorporates as well Sixth Amendment claims alleging an irreconcilable conflict amounting to the constructive deprivation of counsel. The Washington Court of Appeals' decision with respect to Petitioner's Sixth Amendment claim was consistent with that body of jurisprudence, and the Court reasonably rejected the claim as nothing in the record supports Petitioner's contention that there was such a substantial conflict between himself and Ms. Trueblood that he was effectively denied his Sixth Amendment right to counsel. For these reasons, Petitioner's third ground for federal habeas relief should be denied.

4. Competency

Petitioner asserts in his fourth ground for federal habeas relief that the trial court violated his due process rights when it failed to order a competency hearing. (Dkt. # 60 at 52.) Petitioner argues that defense counsel knew Petitioner had mental health issues and the trial court should have developed a *bona fide* doubt about his competency when he threatened to blow up the Courthouse and kill his attorney. (*Id*.) Respondent argues that there was no substantial doubt concerning Petitioner's competency to stand trial and therefore no requirement that the trial court order a competency hearing. (Dkt. # 66 at 40.)

It is well established that a criminal defendant cannot be tried unless he is competent. *Moran v. Godinez*, 509 U.S. 389, 396 (1993) (citing *Pate v. Robinson*, 383 U.S. 375, 378 (1966)). The Supreme Court has held that the standard for determining competence to stand trial is "whether the defendant has 'sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding' and has 'a rational as well as factual understanding of the proceedings against him.'" *Godinez*, 509 U.S. at 396 (quoting *Dusky v. United States*, 362 U.S. 402 (1960)). If a defendant is incompetent, due process requires suspension of the criminal trial until such time as his competency is restored. *Medina v. California*, 505 U.S. 437, 448 (1992).

The Supreme Court has made clear that a state's "failure to observe procedures adequate to protect a defendant's right not to be tried or convicted while incompetent to stand trial deprives him of his due process right to a fair trial." *Drope v. Missouri*, 420 U.S. 162, 172 (1975). A state trial judge must conduct a competency hearing whenever the evidence before him raises a *bona fide* doubt about the defendant's competence to stand trial. *Williams v. Woodford*, 384 F.3d 567, 603-04 (9th Cir. 2004); *Odle v. Woodford*, 238 F.3d 1084, 1087 (9th Cir. 2001). In determining whether there is a *bona fide* or substantial doubt regarding competency, a trial court must "evaluate all of the evidence," and a reviewing court must consider "whether a reasonable judge . . . should have experienced doubt with respect to competency to stand trial." *de Kaplany v. Enomoto,* 540 F.2d 975, 983 (9th Cir. 1976).

A state court's finding that the evidence before the trial court did not require a competency hearing is a finding of fact which is entitled to a presumption of correctness. *Torres v. Prunty,* 223 F.3d 1103, 1105 (9th Cir. 2000) (citing *Maggio v. Fulford,* 462 U.S. 111, 117

(1983)). On federal habeas review the burden is on the petitioner to rebut this presumption of correctness by clear and convincing evidence. 28 U.S.C. § 2254(e)(1).

The Washington Court of Appeals, on direct appeal of Petitioner's indecent liberties conviction, rejected Petitioner's claim that the trial court erred in failing to order a competency hearing. The Court explained its conclusion as follows:

> Kinzle also contends that the trial court should have conducted a competency hearing because "the judge had substantial evidence before trial of Mr. Kinzle's questionable competency." He points to his statement during the hearing on the motion to substitute counsel that he had a "past mental health history." He also highlights the prosecutor's statement during the hearing on the State's motion to clarify a potential conflict that Kinzle, while speaking to other inmates, made a series of threats to blow up government buildings and to kill various people.
>
> We review for abuse of discretion a trial court's threshold determination about the existence of any reason to doubt a defendant's competence to stand trial. Under RCW 10.77.050, an incompetent person may not be tried, convicted, or sentenced for committing an offense so long as the incapacity continues. Under RCW 10.77.010(15), "incompetency" means that a person "lacks the capacity to understand the nature of the proceedings against him or her or to assist in his or her own defense as a result of mental disease or defect." When a reason exists to doubt the defendant's competence,
>
> > the court on its own motion or on the motion of any party shall either appoint or request the secretary [of the department of social and health services] to designate at least two qualified experts or professional persons, one of whom shall be approved by the prosecuting attorney, to examine and report upon the mental condition of the defendant.
>
> These procedures are mandatory. If the court fails to follow the procedures to protect an accused's right not to be tried while incompetent, it denies the accused his due process rights.
>
> A trial court generally maintains discretion in assessing whether or not to order a competency examination. In making such a determination, the court may consider such factors as the defendant's appearance, demeanor, conduct, personal and family history, past behavior, medical and psychiatric reports, and counsel's statements. It should give "considerable weight" to the defense attorney's opinion regarding a client's competence and ability to assist in his defense. "Washington

> cases have taken the position that a trial court does not abuse its discretion if competency issues are raised."
>
> We hold that the trial court did not abuse its discretion when it did not order a competency examination. At sentencing, the court recognized that Kinzle suffered from mental health issues. But no evidence suggests that, during trial, Kinzle was unable to understand the nature of the proceedings or to assist in his own defense. In fact, when Kinzle addressed the court, the opposite appeared to be true. Additionally, during trial, Brent Vannoy testified that while he and Kinzle were in jail together, Kinzle sought to act "crazy and stuff" to "beat[] his charge." Despite Kinzle's argument that this testimony occurred "after the judge had significant reason to doubt Mr. Kinzle's competency," the alleged threats did not provide a sufficient factual basis to conclude that Kinzle was incompetent. Moreover, Kinzle's attorney did not file a motion for an examination or otherwise indicate that Kinzle was incompetent, although she had many opportunities to confer with Kinzle before trial and to assess his competence.

(Dkt. # 19, Ex. 16 at 10-13.)

Petitioner fails to rebut the presumption of correctness that attaches to the Court of Appeals' conclusion that the evidence before the trial court did not require a competency hearing. Petitioner suggests that his refusal to be transported to court for a hearing in April 2011, his reference to past mental health issues at a hearing in July 2011, and his threats in August 2011 to bomb the courthouse and to kill various people including law enforcement, government officials, his lawyer, and the family of his victims, should have caused the court to inquire into his mental health history and to order a competency hearing. (Dkt. # 60 at 52-54.)

However, when these events are viewed in the context of the proceedings as a whole, it cannot reasonably be concluded that the events, either individually or cumulatively, should have given rise to concerns regarding Petitioner's competence. An inmate's refusal to be transported to court is not so unusual as to give rise to legitimate concerns regarding competence. As to Petitioner's reference to his "past mental health history," it is noteworthy that this brief reference was made in a hearing on Petitioner's motion for appointment of new counsel during which he

clearly and coherently conveyed his concerns regarding his appointed counsel to the court and, in so doing, demonstrated a reasonable understanding of the nature and consequences of the proceedings against him, and an ability to assist in his own defense. (*See* Dkt. # 19, Ex. 1 at 2-12.) Petitioner's subsequent threats were made in the presence of jail inmates shortly after his requests for a new attorney were denied, (*id*., Ex. 8 at 1-2), and do not appear to have been reflective of Petitioner's behavior in court.

The Washington Court of Appeals reasonably concluded that the evidence was insufficient to raise a bona fide doubt as to Petitioner's competency. Petitioner's fourth ground for federal habeas relief should therefore be denied.

5. Ineffective Assistance of Counsel: Failure to File Motion to Suppress Victim's In-Court Identification

Petitioner asserts in his fifth ground for federal habeas relief that counsel in his indecent liberties case provided ineffective assistance when she failed to properly investigate the identification procedures employed in that case and failed to file a meritorious motion to suppress the victim's in-court identification. (Dkt. # 60 at 55.) Petitioner claims that the in-court identification was a critical component of the prosecution's case and that he was therefore prejudiced by its admission. (*See id*.) Petitioner concedes that he did not present this claim to the state courts, but maintains this was because he was not provided counsel in his initial-review collateral proceeding. (*Id*.) Respondent argues that the claim is procedurally barred and without merit. (Dkt. # 66 at 45-54.)

A state prisoner is required to exhaust all available state court remedies before seeking a federal writ of habeas corpus. 28 U.S.C. § 2254(b)(1). The exhaustion requirement is a matter of comity, intended to afford the state courts "an initial opportunity to pass upon and correct alleged

violations of its prisoners' federal rights." *Picard v. Connor*, 404 U.S. 270, 275 (1971) (internal quotation marks and citations omitted). In order to provide the state courts with the requisite "opportunity" to consider his federal claims, a prisoner must "fairly present" his claims to each appropriate state court for review, including a state supreme court with powers of discretionary review. *Baldwin v. Reese*, 541 U.S. 27, 29 (2004) (citing *Duncan v. Henry*, 513 U.S. 364, 365 (1995), and *O'Sullivan v. Boerckel*, 526 U.S. 838, 845 (1999)).

The exhaustion requirement, however, only applies when there are state remedies available at the time of the federal petition. *Engle v. Isaac*, 456 U.S. 107, 125 n.28 (1982). When a federal habeas petitioner "fail[s] to present his claims in state court and can no longer raise them through any state procedure, state remedies are no longer available, and are thus exhausted." *Franklin v. Johnson*, 290 F.3d 1223, 1231 (9th Cir. 2002). The parties agree that Petitioner's fifth ground for relief is now technically exhausted, but procedurally defaulted, because there are no longer any state remedies available to him. *Coleman*, 501 U.S. at 735 n.1.

Petitioner once again argues, as he did in relation to his second ground for relief, that he is entitled to application of the *Martinez* rule to excuse his procedural default. As explained above, in order to establish cause for a procedural default under *Martinez*, a federal habeas petitioner must demonstrate that there was an absence of counsel, or the inadequate assistance of counsel, in an initial-review collateral proceeding, and that the underlying ineffective assistance of trial counsel claim is a substantial one. *Martinez*, 566 U.S. at 14. As noted above, this claim pertains to Petitioner's indecent liberties conviction and the record makes clear that Petitioner did not have counsel in the relevant state court proceeding; *i.e.*, Petitioner's first personal restraint proceeding filed in 2013. Thus, this Court need only address the question of whether Petitioner's ineffective assistance of counsel claim is substantial. As explained above, an

ineffective assistance of trial counsel claim is substantial if the claim has some merit. Petitioner maintains that his identification claim is substantial. (Dkt. # 71 at 27.) Respondent disagrees. (Dkt. # 77.)

Petitioner argues that his trial counsel was deficient for failing to move to suppress the victim's in-court identification on Sixth Amendment grounds because that identification was a product of a "state-orchestrated show-up" that occurred during an earlier hearing on the victim's request for a civil protection order in which Petitioner was not represented by counsel. (*See* Dkt. # 60 at 55-56.) Petitioner further argues that defense counsel should have moved to suppress the identification on due process grounds as well because the state employed two one-to-one confrontations prior to trial, the second of which was suggestive and unnecessary. (*Id*. at 59.) Petitioner maintains that without the victim's in-court identification, he would not have been convicted. (*Id*.)

Once again, in order to prevail on a claim of ineffective assistance of counsel, a petitioner must demonstrate (1) that counsel's performance was deficient and, (2) that the deficient performance prejudiced the defense. *Strickland*, 466 U.S. at 687. As with Petitioner's first two ineffective assistance of counsel claims, this Court need not address the first prong of the *Strickland* standard because Petitioner makes no credible showing that he was prejudiced by the failure of counsel to seek to suppress the victim's in-court identification.[8]

As explained previously, in order to establish prejudice under the *Strickland* standard, a 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. A reasonable probability is a

[8] The reviewing court need not address both components of the inquiry if an insufficient showing is made on one component. *Strickland*, 466 U.S. at 697.

probability sufficient to undermine confidence in the outcome." *Strickland*, 466 U.S. at 694. There is no reasonable probability that had counsel successfully moved for suppression of the in-court identification, the outcome of Petitioner's trial on the indecent liberties charge would have been different.

The record confirms that identification was an issue during Petitioner's trial and that the victim identified Petitioner in court as the man who had attacked her, even though she was unable to identify him as her attacker when police brought him back to the scene of attack on the day it occurred. (*See* Dkt. # 19, Ex. 5 at 43-44.) However, the suggestion that Petitioner would not have been convicted if the victim's in-court identification had been suppressed is not supported by the record. In addition to the victim's testimony, the state presented the testimony of Nathan Wood, a friend of Petitioner's who accompanied Petitioner into the store where the attack occurred. Mr. Wood testified that he was present during the attack and he positively identified Petitioner as the attacker. (Dkt. # 19, Ex. 5 at 106-08, 111-12.)

The state also presented the testimony of Michael Flavin who shared a residence with both Petitioner and Mr. Wood. Mr. Flavin testified that Petitioner and Mr. Wood left together to go to the store and that Petitioner returned alone about 45 minutes later in a "frantic" state. (*Id*., Ex. 6 at 8-9.) Mr. Flavin further testified that Petitioner took off the hat and coat he had worn to the store and immediately went into the bathroom and shaved his face.[9] (*Id*., Ex. 6 at 9-11.) Finally, the state presented the testimony of a jail inmate who had been confined at the Snohomish County Jail at the same time as Petitioner. This inmate, Brent Vannoy, testified that

[9] The victim testified that when police brought Petitioner to the store for a show up, she told them that she was confused, and that the person they had brought to the store looked different from the person who had attacked her because the man was not wearing the hat or jacket the attacker had worn, and he was clean shaven whereas her attacker had had some facial hair. (Dkt. # 19, Ex. 5 at 42.)

Petitioner repeatedly told him he believed he would not be convicted because he had shaved. (*Id*., Ex. 6 at 21-22.)

The testimony presented at trial also made clear that at the time of the attack, there were only three individuals in the store: the victim, Petitioner, and Mr. Wood. (*Id*., Ex. 5 at 19-20, 100.) The victim made clear that the two men did not look similar, and she provided descriptions of both. (*See id*., Ex. 5 at 21-22.) The individual whom she described as her attacker, matched the description of Petitioner, not Mr. Wood. (*See id*., Ex. 5 at 21-22, 31.) In addition, the testimony made clear that it was Petitioner who ran out of the store after the attack, while Mr. Wood stayed at the store until police arrived. (*Id*., Ex. 5 at 39-41, 108-110.)

The evidence presented at trial, when viewed in its totality, confirms Respondent's assertion that the victim's in-court identification played a relatively minor role in the state's case (*see* dkt. # 77 at 7), and it certainly does not support Petitioner's proposition that if the in-court identification had been suppressed he would not have been convicted. This Court concludes that there is no arguable merit to Petitioner's ineffective assistance of counsel claim arising out of counsel's failure to move to suppress the victim's in-court identification and, thus, Petitioner's fifth ground for federal habeas relief should be denied.

CERTIFICATE OF APPEALABILITY

A petitioner seeking post-conviction relief under § 2254 may appeal a district court's dismissal of his federal habeas petition only after obtaining a certificate of appealability (COA) from a district or circuit judge. A certificate of appealability may issue only where a petitioner has made "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(3). A petitioner satisfies this standard "by demonstrating that jurists of reason could disagree with the district court's resolution of his constitutional claims or that jurists could

conclude the issues presented are adequate to deserve encouragement to proceed further." *Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003). Under this standard, this Court concludes that Petitioner is not entitled to a certificate of appealability with respect to any of the claims asserted in his third amended petition.

CONCLUSION

For the reasons set forth above, this Court recommends that Petitioner's third amended petition for writ of habeas corpus be denied and that this action be dismissed with prejudice. This Court further recommends that a certificate of appealability be denied. A proposed order accompanies this Report and Recommendation.

Objections to this Report and Recommendation, if any, should be filed with the Clerk and served upon all parties to this suit by no later than **October 24, 2019**. Failure to file objections within the specified time may affect the right to appeal. Objections should be noted for consideration on the District Judge's motion calendar **fourteen (14)** days after they are served and filed. Responses to objections, if any, shall be filed no later than **fourteen (14)** days after service and filing of objections. If no timely objections are filed, the matter will be ready for consideration by the District Judge on the date that objections were due.

DATED this 9th day of October, 2019.

MICHELLE L. PETERSON
United States Magistrate Judge