
No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

ROBERT MICHAEL MCHALE,

Petitioner,

v.

MARK NOOTH,

Respondent.

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

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FILED

NOV 28 2017

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

ROBERT MICHAEL MCHALE,

Petitioner-Appellant,

v.

MARK NOOTH,

Respondent-Appellee.

No. 17-35807

D.C. No. 2:15-cv-01513-PK
District of Oregon,
Pendleton

ORDER

Before: LEAVY and TALLMAN, Circuit Judges.

The request for a certificate of appealability is denied because appellant has not shown that “jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling.”

Slack v. McDaniel, 529 U.S. 473, 484 (2000); *see also* 28 U.S.C. § 2253(c)(2);

Gonzalez v. Thaler, 565 U.S. 134, 140-41 (2012).

Any pending motions are denied as moot.

DENIED.

**Thomas J. Hester, OSB #93184
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**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON**

ROBERT MICHAEL McHALE,

Case No.: 2:15-cv-01513-PK

Petitioner,

NOTICE OF APPEAL

v.

**MARK NOOTH, Superintendent, Snake
River Correctional Institution,**

Respondent

Notice is hereby given that the Petitioner, Robert Michael McHale, hereby appeals to the United States Court of Appeals for the Ninth Circuit from the Judgment entered on September 8, 2017, by the Honorable Marco A. Hernandez.

Respectfully submitted on October 5, 2017.

/s/ Thomas J. Hester
Thomas J. Hester
Assistant Federal Public Defender

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

ROBERT MICHAEL McHALE,

No. 2:15-cv-01513-PK

Petitioner,

v.

MARK NOOTH, Superintendent, Snake
River Correctional Institution,

ORDER

Respondent.

HERNANDEZ, District Judge:

Magistrate Judge Papak issued a Findings & Recommendation (#50) on July 10, 2017, in which he recommends the Court deny Petitioner's Petition for Writ of Habeas Corpus. Petitioner has timely filed objections to the Findings & Recommendation. The matter is now before me pursuant to 28 U.S.C. § 636(b)(1) and Federal Rule of Civil Procedure 72(b).

When any party objects to any portion of the Magistrate Judge's Findings & Recommendation, the district court must make a *de novo* determination of that portion of the Magistrate Judge's report. 28 U.S.C. § 636(b)(1); *Dawson v. Marshall*, 561 F.3d 930, 932 (9th

Cir. 2009); *United States v. Reyna-Tapia*, 328 F.3d 1114, 1121 (9th Cir. 2003) (en banc).

I have carefully considered Petitioner's objections and conclude there is no basis to modify the Findings & Recommendation. I have also reviewed the pertinent portions of the record *de novo* and find no other errors in the Magistrate Judge's Findings & Recommendation.

CONCLUSION

The Court ADOPTS Magistrate Judge Papak's Findings & Recommendation [50], and therefore, Petitioner's Petition for Habeas Corpus [2] is denied.

IT IS SO ORDERED.

DATED this 7 day of September, 2017.


MARCO A. HERNANDEZ
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

ROBERT MICHAEL McHALE,

Petitioner,

v.

MARK NOOTH,

Respondent.

Case No. 2:15-CV-01513-PK

FINDINGS AND RECOMMENDATION

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PAPAK, Magistrate Judge.

Petitioner is currently in the custody of the Oregon Department of Corrections. He brings this habeas corpus proceeding pursuant to 28 U.S.C. § 2254. For the reasons set forth below, Petitioner's Petition for Writ of Habeas Corpus (ECF No. 2) should be DENIED, and Judgment should be entered dismissing this action with prejudice.

BACKGROUND

On December 4, 2006, a Lincoln County jury convicted Petitioner of two counts of Rape in the First Degree, one count of Unlawful Sexual Penetration in the First Degree, and seven counts of Sodomy in the First Degree. The court imposed concurrent and consecutive sentences, totaling 600 months of imprisonment. Resp't Ex. 101 (ECF No. 27). Petitioner directly appealed his convictions, alleging the following errors:

FIRST ASSIGNMENT OF ERROR: In case number 052131 (A134410), the sentencing court erred by ordering defendant to serve the sentences imposed on Counts through 7 consecutively to the sentences imposed on Counts 1 through 4, in violation of defendant's Sixth Amendment jury trial right.

SECOND ASSIGNMENT OF ERROR: In case number 052131 (A134410), sentencing court erred by ordering defendant to serve the sentences imposed on Counts 8 and 9 consecutively to the sentences imposed on Counts 1 through 4 and Counts 5 through 7, in violation of defendant's Sixth Amendment jury trial right.

THIRD ASSIGNMENT OF ERROR: In case number 053631 (A134411), the sentencing court erred by ordering defendant to serve the sentence imposed on Count 3 consecutively to the sentences imposed [on] Counts 1 and 2 and Counts 7 through 12, in violation of defendant's Sixth Amendment jury trial right.

FOURTH ASSIGNMENT OF ERROR: In case number 053631 (A134411), the sentencing court erred by ordering defendant to serve the sentence imposed on Count 6 consecutively to the sentences imposed on Count 1 and 3 and Count 3, in violation of defendant's Sixth Amendment jury trial right.

FIFTH ASSIGNMENT OF ERROR: In case number 052131 (A134410), the sentencing court erred by ordering defendant to serve the sentences imposed on

Counts 5 through 7 consecutively to the sentences imposed on Counts 1 through 4, in violation of ORS 137.123.

SIXTH ASSIGNMENT OF ERROR: In case number 052131 (A134410), the sentencing court erred by ordering defendant to serve the sentences imposed on Counts 8 and 9 consecutively to the sentences imposed on Counts 1 through 4 and Counts 5 through 7, in violation of ORS 137.123.

SEVENTH ASSIGNMENT OF ERROR: In case number 053631 (A134411), the sentencing court erred by ordering defendant to serve the sentence imposed on Count 3 consecutively to the sentences imposed Counts 1 and 2 and Counts 7 through 12, in violation of ORS 137.123.

EIGHT ASSIGNMENT OF ERROR: In case number 053631 (A134411), the sentencing court erred by ordering defendant to serve the sentence imposed on Count 6 consecutively to the sentences imposed on Count 1 and 2 and Count 3, in violation of ORS 137.123.

Resp't Ex's 103. The Oregon Court of Appeals affirmed without opinion. *State v. McHale*, 229 Or. App. 237 (2009). On appeal to the Oregon Supreme Court, Petitioner presented the following questions for the court's review:

QUESTIONS PRESENTED: The court ordered defendant to serve multiple consecutive sentences based on "substantial and compelling reasons of its own creation.

ORS 137.123 identifies several factual bases that support the imposition of consecutive sentences. This petition for review raises these questions:

- (1) Did the sentencing court err by imposing consecutive sentences for reasons other than those contemplated by ORS 137.123?
- (2) Assuming that (1) is answered in the affirmative, does that error constitute an "error of law apparent on the face of the record?"
- (3) Assuming (1) is answered in the affirmative, will this court exercise its discretion to address and correct the error?

Resp't Ex. 105. The Oregon Supreme Court denied review. *State v. McHale*, 347 Or. 290 (2009).

Petitioner then sought state post-conviction relief ("PCR"), in which he alleged the following: (1) "Ineffective Assistance of Trial Counsel by Cumulative Errors," (2) "Prosecutorial Misconduct Prejudice Claim," (3) "Trial Court Abuse of Discretion in Insufficiency of Evidence Claim," (4) "Ineffective Assistance of Appellate Counsel by Cumulative Errors," (5) "Appellate Court's Neglect of Discretion in Insufficiency of Evidence Claim," and, (6) "Supreme Courts Neglect of Discretion in Insufficiency of Evidence Claim." Resp't Ex. 108. Following an evidentiary hearing, the PCR court denied relief. *McHale v. Nooth*, Malheur County Circuit Case No. 10078216P. On appeal to the Oregon Court of Appeals, Petitioner assigned the following errors to the PCR court's ruling:

FIRST ASSIGNMENT OF ERROR: The post-conviction court abused its discretion in denying petitioner's February 14, 2012, motion for continuance.

SECOND ASSIGNMENT OF ERROR: The post-conviction court abused its discretion in denying petitioner's March 13, 2012, request for continuance.

THIRD ASSIGNMENT OF ERROR: The post-conviction court erred in denying petitioner's motion for access to grand jury records.

Resp't Ex. 243. The Oregon Court of Appeals affirmed without opinion, and the Oregon Supreme Court denied review. *McHale v. Nooth*, 270 Or. App. 599, *rev. den.* 357 Or. 415 (2015).

On August 11, 2015, Petitioner filed, *Pro Se*, his Petition for Writ of Habeas Corpus, raising the following grounds for relief:

- G1) Claims of actual/factual innocence, and accumulated errors
- G2) insufficient evidence to validate/sustain a conviction,
- G3) malicious/prejudicial prosecution, unvalidated accusations without demonstrative evidence to vouch for witness testimony
- G4) constitutionally illegal/wrongful incarceration, stemming from these violations
- G5) contaminated evidence rendered unusable/ unreliable,

- G6) medical confirmations of deceitful testimony by all state/court participants, accuser/declarants, & expert/professional witness's,
- G7) abuse/neglect by circuit, appeal, & supreme state/courts failure to adjudicate proceedings by appropriately balancing constitutional due process and equal protection per national and sovereign mitigation/arbitration standards established by the populace to protect themselves from false allegations and erroneous convictions premised on those perjurious confabulations, and the prejudice incurred by these discrepancies individually and/or the accumulation of them in toto, have not been addressed by the state/court and petitioner prays rectificative relief from this court

[ac] cumulative error [s]

All of these significant factors have been ignored by all of the state/court entities up to the present. I am imploring that this court encourages the state/courts to validate the merits of my issues and/or confirm the verity of the claims presented and rectify these discrepancies in my favor by exercising your discretions or intercede on my behalf by affording me a favorable resolution with summary judgment and/or any other procedures available for release.

Pet. (ECF 2) at 7.

On September 14, 2015, this Court granted Petitioner's motion for appointment of counsel, and subsequently granted several motions by counsel for extension of time to file a supporting brief. Notably, counsel did not move for leave to file an Amended Petition for Habeas Corpus Relief.

Respondent argues all seven of the grounds for relief in the Petition should be denied because none alleges federal constitutional claims, and because they are procedurally defaulted. In his supporting brief, Petitioner urges this Court to forgive any procedural default under the *Martinez* Exception, arguing that both trial counsel and post-conviction counsel were ineffective. *Martinez v. Ryan*, 566 U.S. 1 (2012). Alternatively, Petitioner asks this Court to conduct an evidentiary hearing to allow him to demonstrate "cause" for any procedural default. Petitioner does not address Respondent's arguments that his Petition fails to raise a federal claim for relief.

DISCUSSION

I. The Petition Does Not Allege Federal Habeas Claims

Under 28 U.S.C. § 2254(a), federal courts may entertain applications for writs of habeas corpus by a state prisoner “only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.” *See Estelle v. McGuire*, 502 U.S. 62, 67 (1991) (holding that federal courts are limited, on habeas review, to deciding whether a conviction violated the Constitution, laws, or treaties of the United States); *see also Green v. Henry*, 302 F.3d 1067, 1070 n.3 (9th Cir. 2002) (claims not in the petition need not be considered). Rule 2(c) of the Rules Governing claims filed pursuant to 28 U.S.C. § 2254 provides, *inter alia*, that a Petition for Writ of Habeas Corpus must: (1) specify all the grounds for relief available to the petitioner; and, (2) state the facts supporting each ground.

The claims in Petitioner’s Habeas Petition do not allege that he is in custody in violation of the federal Constitution, or any other body of federal law. Although his supporting brief does argue ineffective assistance of counsel in violation of the Sixth Amendment, this claim is not properly before the Court because a traverse is not the proper pleading to raise additional grounds for relief. *Cacoperdo v. Demosthenes*, 37 F.3d 504, 507 (9th Cir. 1994) (finding claims not raised in the petition are not cognizable on appeal). Moreover, even construing his Petition liberally, this Court is satisfied that Petitioner is not entitled to relief on any of the claims in his Petition because, as discussed below, he did not fairly present them in state court.

II. Petitioner’s Claims Are Procedurally Defaulted

Generally, a state prisoner must exhaust all available state court remedies either on direct appeal or through collateral proceedings before a federal court may consider granting habeas corpus relief. 28 U.S.C. § 2254(b)(1). A state prisoner satisfies the exhaustion requirement by

“fairly presenting” his federal claim(s) to the appropriate state courts at all appropriate stages afforded under state law, thereby affording the state court “the opportunity to pass upon and correct alleged violations of its prisoners’ federal rights.” *Duncan v. Henry*, 513 U.S. 364, 365 (1995); *Castille v. Peoples*, 489 U.S. 346, 351 (1989); *Baldwin v. Reese*, 541 U.S. 27, 29 (2004).

Before the state court, a state prisoner must “include reference to a specific federal constitutional guarantee, as well as a statement of facts that entitle [him] to relief.” *Baldwin*, 541 U.S. at 32; *see also Castillo v. McFadden*, 399 F.3d 993, 1000 (9th Cir. 2005) (“To exhaust his claim, [a petitioner] must have presented his federal, constitutional issue before the [state appellate courts] within the four corners of his appellate briefing.”). If a state prisoner procedurally defaults his available state remedies, habeas relief is precluded absent a showing of cause and prejudice, or that the failure to consider the defaulted claims will result in a fundamental miscarriage of justice. *Coleman v. Thompson*, 501 U.S. 722, 750 (1991).

In the case at bar, with each successive appeal Petitioner raised different grounds for relief. On direct appeal, Petitioner challenged the trial court’s imposition of consecutive sentences under state law. Although he did allege to the Oregon Court of Appeals that consecutive sentences violated his “Sixth Amendment jury trial right,” on appeal to the Oregon Supreme Court Petitioner dropped all reference to the Sixth Amendment, claiming simply that the trial court erred by imposing consecutive sentences in contravention of state law. In the PCR petition, Petitioner raised claims (detailed above) ranging from ineffective assistance of trial and appellate counsel to trial and appellate court abuse of discretion. When the PCR court denied relief on these claims, Petitioner requested relief from the Oregon Court of Appeals on the grounds that the PCR court committed procedural errors in not granting a continuance or access to grand jury records. Now, Petitioner claims he is entitled to habeas corpus relief because he is

actually innocent, he was maliciously prosecuted, his conviction rests upon insufficient evidence, the evidence was contaminated, the witnesses against him were not credible, and the courts have erred in numerous ways. Because these claims were not fairly presented to the appropriate state courts, at all appropriate stages, they are procedurally defaulted.

In his supporting brief Petitioner argues any procedurally defaulted claims should be excused under the *Martinez* exception. However, only a claim of ineffective assistance at trial may be excused under a meritorious *Martinez* exception analysis. *See Martinez v. Ryan*, 566 U.S. 1, 9 (2012) (holding that inadequate assistance of counsel at initial-review collateral proceedings may establish cause for a prisoner's procedural default of a claim of ineffective assistance at trial); *see also Davila v. Davis*, --- S. Ct. ---, 2017 WL 2722418 (June 26, 2017) (declining to extend *Martinez* beyond its narrow exception). Since Petitioner does not allege ineffective assistance of trial counsel here, he cannot show cause and prejudice to excuse his procedural default under the *Martinez* exception.

III. Petitioner Is Not Entitled To An Evidentiary Hearing

Alternatively, Petitioner asks this Court to conduct an evidentiary hearing to allow him to demonstrate “cause” for any procedural default. Pet’r’s Br. in Supp. at 14. This Court finds the written record—containing the entire transcript of Petitioner’s trial proceedings, as well as 154 post-conviction exhibits—is sufficient to conclude that Petitioner had ample opportunity to develop the facts underlying his ineffective assistance of trial counsel claim, and he failed to do so. *See Griffin v. Johnson*, 350 F.3d 956, 966 (9th Cir. 2003) (finding no need for evidentiary hearing because it would not produce evidence more reliable or probative than the testimony and affidavits already presented). Accordingly, Petitioner’s request for an evidentiary hearing should be denied.

RECOMMENDATION

Based on the foregoing, Petitioner's Petition for Writ of Habeas Corpus (ECF No. 2) should be DENIED, and judgment should enter DISMISSING this case with prejudice.

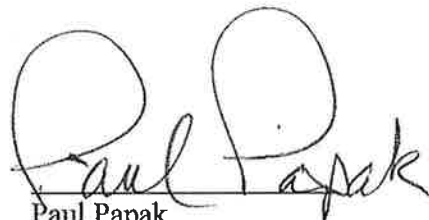
SCHEDULING ORDER

The Findings and Recommendations will be referred to a district judge. Objections, if any, are due fourteen (14) days from service of the Findings and Recommendation. If no objections are filed, then the Findings and Recommendation will go under advisement on that date. If objections are filed, then a response is due fourteen (14) days after being served with a copy of the objections. When the response is due or filed, whichever date is earlier, the Findings and Recommendation will go under advisement.

NOTICE

A party's failure to timely file objections to any of these findings will be considered a waiver of that party's right to *de novo* consideration of the factual issues addressed herein and will constitute a waiver of the party's right to review of the findings of fact in any order or judgment entered by a district judge. These Findings and Recommendation are not immediately appealable to the Ninth Circuit Court of Appeals. Any notice of appeal pursuant to Rule 4(a)(1) of the Federal Rules of Appellate Procedure should not be filed until entry of judgment. In addition, the district judge should certify that Petitioner has not made a substantial showing of the denial of a constitutional right pursuant to 28 U.S.C. § 2253(c)(2). This case is not appropriate for appellate review.

DATED this 10th day of July, 2017.


Paul Papak
United States Magistrate Judge