

FILED
Court of Appeals
Division II
State of Washington
11/12/2019 9:00 AM

NO. 53400-2-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON, Respondent

v.

JASON ROBERT STOMPS, Petitioner

FROM THE SUPERIOR COURT FOR CLARK COUNTY
CLARK COUNTY SUPERIOR COURT CAUSE NO.14-1-00772-8

RESPONSE TO PERSONAL RESTRAINT PETITION

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IDENTITY OF RESPONDENT AND AUTHORITY FOR RESTRAINT

The State of Washington is the Respondent in this matter. The defendant is restrained by the judgment and sentence entered by the Clark County Superior Court on April 29, 2015, under cause number 14-1-00772-8.

ISSUES FOR REVIEW

Is defendant's personal restraint petition (PRP) time barred?

Does defendant's PRP raise issues that were previously raised and decided on the merits?

STATEMENT OF THE CASE

A. PROCEDURAL HISTORY

Following a jury trial in 2015, Stomps was found guilty of Burglary in the First Degree, three counts of Kidnapping in the Second Degree, and three counts of Assault in the Second Degree. CP 79-85, 93. Each count for which Stomps was convicted also contained a firearm enhancement. CP 85-93.

At sentencing, the State requested that the trial court merge the assault convictions into the kidnapping convictions *and* impose an exceptional sentence downward on the remaining convictions. CP 95; RP

443-48. The State’s recommendation was based on the mitigating circumstance that the “operation of the multiple offense policy of RCW 9.94A.589 results in a presumptive sentence that is clearly excessive in light of the purposes of this chapter.” RCW 9.94A.535(1)(g); RP 446-47. The trial court followed the State’s recommendation and sentenced Stomps to an exceptional sentence downwards of 180 months, which was accomplished by imposing 12 months on each substantive count¹ to run concurrently and 168 months of firearm enhancements. CP 95-96, 107-09; RP 468-476.

Stomps filed a direct appeal challenging the sufficiency of the evidence that supported his convictions. *State v. Stomps*, 195 Wn.App. 1007, 2016 WL 3965175 (2016).² This Court affirmed, holding that “[s]ufficient evidence exists to support all of Stomps’ convictions.” *Id.* at 4. Stomps’ petition for review was denied on February 8, 2017 and this Court issued its mandate on February 13, 2017. *State v. Stomps*, 187 Wn.2d 1010, 388 P.3d 480 (2017); Appendix B – Mandate.

On May 8, 2018, Stomps filed a petition for a writ of habeas corpus in the Western District of Washington. *Stomps v. Obenland*, 2018

¹ The standard range on the burglary count was 57 to 75 months and 41 to 54 months on the kidnapping counts. CP 95.

² Attached as Appendix A.

WL 6069792 at 2.³ Stomps again argued that his convictions were based on insufficient evidence, and he additionally argued that he received the ineffective assistance of counsel at trial and that he was actually innocent of his convictions. *Id.* at 1. On October 29, 2018, United States Magistrate Judge J. Richard Creatura filed his Report and Recommendation that found that Stomps (1) “failed to exhaust his state court remedies as to his second and third habeas grounds,” i.e., ineffective assistance and actual innocence; (2) “procedurally defaulted” on the same since he was then time barred from filing a State PRP based on those grounds; (3) “failed to establish cause and prejudice” to excuse his procedural defaults; (4) did not “provide[] any evidence indicating he is factually innocent”; and (5) that this Court “did not unreasonably apply clearly established federal law when it concluded the evidence was sufficient” to support Stomps’ convictions. *Id.* at 3-10. On November 20, 2018, United States District Judge Ronald B. Leighton adopted the magistrate judge’s Report and Recommendation in whole and denied Stomps’ habeas petition. *Stomps v. Obenland*, 2018 WL 6067203.⁴ Stomps’ request for a certificate of appealability of that decision was denied by the Ninth Circuit Court of Appeals on April 25, 2019. Appendix E – Denial of Certificate of Appealability.

³ Attached as Appendix C.

⁴ Attached as Appendix D.

On April 22, 2019, over two years after the mandate issued, Stomps filed the instant petition. In this petition, Stomps attempts to reargue that insufficient evidence supports his convictions and claims that his petition is not time barred due to “newly discovered evidence” and “a significant change in the law.” PRP at 9. Stomps also claims equitable tolling applies, that he is actually and factually innocent, and that he received the ineffective assistance of trial counsel. PRP at 9. As argued below, these claims fail—Stomps’ PRP is time barred—because he raises an issue raised and rejected on direct appeal, there is no newly discovered evidence, there has been no significant change in the law, and he is not innocent.

B. SUBSTANTIVE FACTS

This Court stated the facts of Stomps’ case as follows:

Stomps worked as a bail bond recovery agent. One evening, Stomps went to the home of Annette and Bill Waleske looking for Courtney Barnes. Barnes was free on bail, and his girlfriend, Sinan Hang, guaranteed the bail bond. Hang listed the Waleskes’ address as her address. Hang was friends with Annette and had used the Waleskes’ address in the past, but she did not have permission to use it on the bail bond application. Barnes listed a separate address. When Barnes failed to appear for a court hearing, the bail bond company contracted with Stomps to locate him.

When Stomps arrived at the Waleskes’ residence, Annette and Bill were out, but their daughter, Tayler Waleske; son, Quincey Waleske; and daughter's boyfriend, Nathan

Panosh, were at the home. Tayler and Nathan were watching a movie when they heard pounding on the door. They walked towards the door and heard Stomps yell, "I'm looking for Courtney Barnes. Open up your door, or I'll kick your fucking door down." Tayler did not know anyone by the name of Courtney Barnes. Tayler was frightened by Stomps, and yelled out, "We don't know Courtney. You need to leave." The pounding and yelling continued. Tayler and Nathan went upstairs to get Quincey. Tayler then called 911.

While Tayler was on the phone with the 911 operator, Stomps broke down the front door with a railroad tie driver, which is similar to a sledgehammer. Once inside, he ordered everyone downstairs. Even though he recognized that the three individuals were not the fugitive he was looking for and that Barnes was not in the house, Stomps pointed his gun at them and ordered Quincey, who had just gotten out of the shower and had only a towel wrapped around him, to handcuff himself to Nathan and then ordered all three to get on the floor. Stomps then identified himself as a bail bond recovery agent. The parties dispute whether this was the first time Stomp identified himself. Nathan then repeatedly asked for the key to unlock the handcuffs, but Stomps refused.

Police arrived at the residence and detained Stomps. The State ultimately charged Stomps with first degree burglary, three counts of first degree kidnapping, and three counts of second degree assault; each charge included a special allegation that he was armed with a firearm.

During trial, Stomps admitted he did not first check the address listed for Barnes before going to the address listed for Barnes' girlfriend. Also during trial, Nathan testified that he did not feel free to leave when Stomps handcuffed him and pointed a gun at him. Quincey testified, "I was intimidated. I didn't want—I felt like my life was in danger." He further testified he did not feel free to leave because he was wrapped in a towel and being held at gunpoint. Tayler also testified that she did not feel free to

leave because she “had a gun pointed at [her]” and was afraid she “was going to get shot.” The 911 recording was also admitted where Tayler tells the operator they were scared.

Stomps, 2016 WL 3965175 at 1 (internal citations omitted).

RAP 16.9 STATEMENT

RAP 16.9 (a) says the Respondent “should also identify in the response all material disputed questions of fact.” The State hereby declares that if any fact averred by the defendant would in any way dispute, refute, rebut, negate, undermine, or undercut any fact in the record or verdict of the jury, it is a disputed question of fact. Unless the State *specifically disavows* a fact adduced at trial, the State should be viewed as adhering to the settled record in total and to the extent anything said or averred by the defendant would stand in contrast with any fact from the record, the State disagrees with and disputes that fact. This includes any “opinion,” be it by expert or lay person, which purports to dispute, refute, rebut, negate, undermine, or undercut any fact adduced at trial or any verdict rendered by the jury. If the fact in question is germane to this Court’s consideration of the personal restraint petition such that the petition cannot be decided without settling the matter, this Court is then required by RAP 16.11 to remand this matter to the Superior Court for a reference hearing, wherein a proper trier of fact can settle the dispute. An

appellate court is not a trier of fact and cannot settle factual disagreements. See e.g. *State v. Rafay*, 168 Wn.App. 734, 285 P.3d 83 (2012), *State v. Macon*, 128 Wn.2d 784, 911 P.2d 1004 (1996). A party is not required to specifically request a reference hearing to trigger the appellate Court's duty to hold one in the event this Court determines there is a disputed fact that must be settled.

ARGUMENT

A personal restraint petition is not a substitute for a direct appeal. *In re Hagler*, 97 Wn.2d 818, 650 P.2d 1103 (1982). A personal restraint petitioner must prove either a constitutional error that caused actual and substantial prejudice or a nonconstitutional error that caused a complete miscarriage of justice. *In re Coats*, 173 Wn.2d 123, 267 P.3d 324 (2011); *In re Cook*, 114 Wn.2d 802, 792 P.2d 506 (1990). In fact, “[i]f the petitioner fails to make the threshold, prima facie showing of actual and substantial prejudice, [reviewing courts] must dismiss [the] PRP.” *In re Meippen*, 193 Wn.2d 310, 315-16, 440 P.3d 978 (2019) (citations omitted). The burden of showing actual and substantial prejudice means that a petitioner must do more than show that “that the errors at his trial created a possibility of prejudice, but that the outcome would more likely

than not have been different had the alleged error not occurred.” *Id.*

(internal quotations omitted).

Thus, in evaluating the merits of a personal restraint petition, the Court may: (1) dismiss the petition if the petitioner fails to make a prima facie showing of constitutional or nonconstitutional error or of actual and substantial prejudice; (2) remand for a full hearing if the petitioner makes a prima facie showing but the merits of the contentions cannot be determined solely from the record; or (3) grant the personal restraint petition without further hearing if the petitioner has proven actual prejudice or a miscarriage of justice. *Id.*; *Cook*, 114 Wn.2d at 810-11; *In re Pers. Restraint of Hews*, 99 Wn.2d 80, 88, 660 P.2d 263 (1983).

But before a court can consider a petition’s merit, it must determine whether the petition was timely and properly filed. Where a judgment and sentence is valid on its face, a personal restraint petition must be filed no later than one year after the judgment becomes final. RCW 10.73.090(1). If the petition is filed after the one year period, this Court must dismiss the petition unless the defendant can show that his claims for relief fall solely within one of the exceptions to the time bar listed in RCW 10.73.100. These exceptions are: (1) newly discovered evidence; (2) the statute that the defendant was convicted of violating was unconstitutional; (3) the conviction was barred by double jeopardy (4) the

defendant pled not guilty and the evidence introduced at trial was insufficient to support the conviction; (5) the sentence imposed was in excess of the court's jurisdiction; or (6) there has been a significant change in the law. RCW 10.73.100. Importantly, however, "[w]here one or more of the grounds asserted for relief fall within the exceptions in RCW 10.73.100 and one or more do not, then the petition is 'mixed petition'" that is subject to the time bar and cannot be considered. *In re Turay*, 150 Wn.2d 71, 85-86, 74 P.3d 1194 (2003) (citing *In re Hankerson*, 149 Wn.2d 697, 702-03, 72 P.3d 703 (2003)). As our Supreme Court has instructed, courts "will not advise as to which claims are time barred and which are not, nor will the court decide claims under RCW 10.73.100 that are not time barred." *Id.* at 86.

I. Stomps' petition is time barred

a. Stomps has not presented newly discovered evidence

Stomps claims that he can defeat the one-year time bar under the "newly discovered evidence" exception. PRP at 10-12. Stomps' "newly discovered evidence" consists of what he believes his one-time co-defendant would have testified to had he been called as a witness at trial, which is based on a transcript of a police interview that occurred in 2014, and a declaration from an expert about "a BRA's [(Bail recovery agent)] job" authored on March 6, 2019. PRP at 11, 15-16, 70-94 (Exhibit 3), 121-

134 (Exhibit 7); CP 1-4. Because neither of these items constitute “newly discovered evidence” Stomps’ PRP is time barred and must be dismissed in total.

First, under RCW 10.73.100(1), the newly discovered evidence exception to the time-bar is only applicable “if the defendant acted with reasonable diligence in discovering the evidence *and* in filing the petition.” RCW 10.73.100(1) (emphasis added). Second, the petitioner must show:

that the evidence (1) will probably change the result of the trial; (2) was discovered since the trial; (3) could not have been discovered before trial by the exercise of due diligence; (4) is material; *and* (5) is not merely cumulative or impeaching.

In re Lord, 123 Wn.2d 296, 319-320, 868 P.2d 835 (1994)

(emphasis in original) (citing *State v. Williams*, 96 Wn.2d 215, 223, 634 P.2d 868 (1981)). Furthermore, factor four requires not just materiality, but also admissibility. *In re Faircloth*, 177 Wn.App. 161, 166, 311 P.3d 47 (2013); *In re Rice*, 118 Wn.2d 876, 886, 828 P.2d 1086 (1992). If any of these factors is missing, the petitioner is not entitled to relief. *Williams*, 96 Wn.2d at 223.

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1. *Co-defendant, bail recovery agent David Smith*

Here, the fact that his fellow bail recovery agent, and one-time co-defendant, was present during the incident in question, observed the incident, and made statements to police plainly cannot be considered evidence that “was discovered since the trial” and that “could not have been discovered before trial by the exercise of due diligence.” Stomps’ own exhibits attached to his PRP show that this information—of which he would have had personal knowledge of anyway—was provided to him in discovery as the transcript and police report are both Bate Stamped. PRP 70-98. Stomps provides no argument as to how this evidence was someone unknown and undiscovered by him prior to trial.

Instead, Stomps argues that he excused from complying with the “newly discovered evidence” test where “trial counsel discovered the evidence and failed to use it, like is here, then the defendant’s lack of control over trial strategy means he should not be penalized for his trial counsel’s incompetence.” PRP at 11.⁵ He cites no legal authority for his argument. “Where no authorities are cited in support of a proposition, the

⁵ In order to raise a claim of ineffective assistance of counsel after the one year period, the ineffective assistance claim itself must fall within one of RCW 10.73.100’s exceptions. *In re Adams*, 178 Wn.2d 417, 422-27, 309 P.3d 451 (2013); *In re Sorenson*, 200 Wn.App. 692, 700-01, 403 P.3d 109 (2017). That is, a claim of ineffective assistance of counsel is not, by itself, an exception to the time bar. *Adams*, 178 Wn.2d at 422-27; *Sorenson*, 200 Wn.App. at 700-01.

court is not required to search out authorities, but may assume that counsel, after diligent search, has found none.” *State v. Young*, 89 Wn.2d 613, 625, 574 P.2d 1171 (1978) (quoting *DeHeer v. Seattle Post-Intelligencer*, 60 Wn.2d 122, 126, 372 P.2d 193 (1962)); *State v. Dow*, 162 Wn.App. 324, 331, 253 P.3d 476 (2011). Accordingly, this Court need not consider Stomps’ claims that are unsupported by citation to authority. *State v. Lord*, 117 Wn.2d 829, 853, 822 P.2d 177 (1991).

Moreover, to the extent that our courts have examined such an argument it did not fare well. *In re Yates*, 183 Wn.2d 572, 576, 353 P.3d 1283 (2015). In noting that “newly discovered evidence” has not been so broadly interpreted to include “evidence relating to the ineffectiveness of trial counsel” our Supreme Court remarked that:

But even if we were to adopt such a broad interpretation, there is no newly discovered evidence involved in Yates’s claim. *The only thing “new” here is that Yates’s new attorney has a new idea for a claim.* That is not newly discovered evidence. Furthermore, Yates failed to address the five requirements that a petitioner must show in order for newly discovered evidence to constitute grounds for relief in a personal restraint petition, *such as the requirement that the evidence could not have been discovered earlier by the exercise of due diligence.* We find his argument regarding “newly discovered evidence” to be meritless.

Id. at 576 (emphasis added) (internal citation omitted); *see also In re Martin*, 6 Wn.App.2d 1024, 2018 WL 6179309, 2 (2018)⁶ (rejecting a joined “newly discovered evidence” and ineffective assistance of counsel claim in an attempt to defeat the time bar); *but see* 2018 WL 6179309 at 3 (Worswick, J., concurring) (noting that “it is conceivable that a personal restraint petitioner could successfully argue that evidence of his attorney’s ineffective assistance could not have been discovered by the exercise of due diligence” but concluding that petitioner had failed to do so). This Court should find that Smith, and his statements, cannot constitute “newly discovered evidence” and that Stomps’ PRP is time barred.

2. *Professor Brian Johnson’s 2019 Declaration*

A declaration written in 2019 that Stomps characterizes as “expert testimony about a BRA’s job” cannot constitute “newly discovered evidence.” For one, Stomps cannot—and does not attempt to—show that Professor Johnson’s opinion would be admissible in a trial proceeding under ER 702. For example, Professor Johnson’s declaration contains legal opinions as to the meaning of the relevant statute, declares that “Stomps acted as reasonable bail recovery agent,” and that his “force-related activities were appropriate.” PRP at 126-27, 134. Stomps does not

⁶ This Court’s opinion in *Martin* is unpublished. Pursuant to GR 14.1 this opinion “may be accorded such persuasive value as the court deems appropriate.”

advance an argument that he could properly present these opinions to a jury. *See* PRP.

Furthermore, Stomps' crimes occurred back in March of 2014. And while he blames trial counsel, he cannot show why it would take him 5 years since the time of the crime to get a declaration from an expert and file the instant PRP—especially since the expert is not opining on a new scientific method or testing procedure. The opinion would have been just as available to Stomps in 2014 as it is today. Consequently, Stomps fails to show that the evidence “could not have been discovered before trial by the exercise of due diligence.” *Williams*, 96 Wn.2d at 223.

Nor is Professor Johnson's declaration material, i.e., the introduction of his opinion would not probably change the result at a new trial. *State v. Mullen*, 171 Wn.2d 881, 905-06, 259 P.3d 158 (2011). The jury was well situated to determine whether Stomps acted reasonably and the evidence overwhelmingly established he did not when he forced entry into the victims' home, handcuffed them, and drew and pointed his firearm at them. Thus, Stomps has failed to meet his burden to show that he has newly discovered evidence which entitles him to relief or defeats the time bar. His PRP must be dismissed as untimely.

- b. Stomps has not shown that there has been a significant change in the law

Pursuant to RCW 10.73.100(6) a defendant can defeat the time bar if (1) “[t]here has been a significant change in the law” that is (2) “material to the conviction” and (3) “sufficient reasons exist to require retroactive application” of the new rule. *In re Haghghi*, 178 Wn.2d 435, 445, 309 P.3d 459 (2013). A significant change in the law occurs “where an intervening opinion has effectively overturned a prior appellate decision that was originally determinative of a material issue.” *In re Tsai*, 183 Wn.2d 91, 104, 351 P.3d 138 (2015) (quoting *In re Greening*, 141 Wn.2d 687, 697, 9 P.3d 206 (2000)). On the contrary, an “intervening appellate decision that settles a point of law without overturning prior precedent or simply applies settled law to new facts does not constitute a significant change in the law.” *In re Light-Roth*, 191 Wn.2d 328, 333-34, 422 P.3d 444 (2018) (citations and internal quotation omitted).

Moreover, a “significant change in the law requires that the *law*, not counsels’ understanding of the law on an unsettled question, has changed.” *In re Flippo*, 187 Wn.2d 106, 113, 385 P.3d 128 (2016) (emphasis added) (citing *State v. Miller*, 185 Wn.2d 111, 116, 371 P.3d 528 (2016)). Accordingly, a significant change in the law “is likely to have occurred if the defendant was *unable* to argue the issue in question before

publication of the intervening decision.” *Light-Roth*, 191 Wn.2d at 334 (emphasis added) (citation omitted).

Here, Stomps argues that *Applegate v. Lucky Bail Bonds, Inc.*, 197 Wn.App. 153, 387 P.3d 1128 (2016) constitutes a significant change in the law allowing him to defeat the time bar. PRP at 26-28. *Applegate*, Stomps contends, “critically modifies *Portnoy* by defining the legal stand for entry into property of third parties” and rejects “the limited holding in *Portnoy*.” PRP at 28; *State v. Portnoy*, 43 Wn.App. 455, 718 P.2d 805 (1986). Regardless of what that means, however, *Applegate* does not purport to criticize *Portnoy* or overturn it, let alone “effectively overturn[] a prior appellate decision that was originally determinative of a material issue.” Compare *Applegate*, 197 Wn.App. at 163-64, with *Portnoy*, 43 Wn.App. at 465-66; *Tsai*, 183 Wn.2d at 104. *Applegate*’s holding is simply that the trial instructions given to the jury “did not misstate the law.” 197 Wn.App. at 163, 166.

And even assuming *Applegate* clarified or modified prior appellate court holdings by making clear that bondsmen “have a privilege to enter the private dwelling of a third party” when he or she reasonably believes “the principle” to be inside; such a holding would “settle[] a point of law without overturning prior precedent or simply appl[y] settled law to new facts” and would not constitute a significant change in the law. 197

Wn.App. at 156-57; *Light-Roth*, 191 Wn.2d at 333-34. In fact, the jury instructions specifically allowed Stomps to argue that he was entitled to enter the victims' home if he had "reasonable cause" to believe the principle was inside the home, and the State spent a significant amount of time in closing arguing that he did not. RP 394-99, 401-02, 417-18; CP 64. Because Stomps was *able* to "argue the issue in question before publication of the intervening decision [(Applegate)]," *Applegate* does not constitute a significant change in the law. *Light-Roth*, 191 Wn.2d at 334. As a result, Stomps' PRP is time barred and should be dismissed.

II. Stomps' petition raises issues that were raised and rejected on direct appeal

Generally, a "collateral attack . . . on a criminal conviction and sentence should not simply be a reiteration of issues finally resolved at trial and direct review, but rather should raise new points of fact and law that were not or could not have been raised in the principal action, to the prejudice of the defendant." *In re Gentry*, 137 Wn.2d 378, 388-89, 972 P.2d 1250 (1999). The petitioner in a personal restraint petition is prohibited from renewing an issue that was raised and rejected on direct appeal unless the interests of justice require relitigation of that issue. *In re Lord*, 123 Wn.2d at 303. This burden—that the interests of justice require relitigation of an issue—can be met by showing an intervening change in

the law “or some other justification for having failed to raise a crucial point or argument in the prior application.” *Gentry*, 137 Wn.2d at 388.

An issue is raised and rejected on direct appeal when the petitioner previously raised the same issue on direct appeal and the issue was determined on the merits and adversely to the petitioner. *In re Taylor*, 105 Wn.2d 683, 686-89, 717 P.2d 755 (1986). A “new” issue is not created merely by supporting a previous ground for relief with different factual allegations or with different legal arguments. *In re Jeffries*, 114 Wn.2d 485, 789 P.2d 731 (1990). That is, arguments or grounds are presented to an appellate court, if, assuming merit, they provided “a sufficient legal basis for granting relief,” but “identical grounds may often be proved by different factual allegations” and “identical grounds may often be supported by different legal arguments.” *Sanders v. U.S.*, 373 U.S. 1, 16, 83 S.Ct. 1068, 10 L.Ed.2d 148 (1963).

Essentially, a defendant may not retitile the same issue as something else in order to avoid the bar on relitigation. *See In re Stenson*, 142 Wn.2d 710, 16 P.3d 1 (2001). More specifically, “[a] defendant may not recast the same issue as an ineffective assistance claim; simply recasting an argument in that manner does not create a new ground for relief or constitute good cause for reconsidering the previously rejected claim.” *Id.* at 720. That said, if “doubts arise in particular cases as to

whether two grounds are different or the same, they should be resolved in favor of the applicant.” *Taylor*, 105 Wn.2d at 688.

Here, Stomps renews his insufficient evidence claim that was raised and rejected on direct appeal. PRP at 16-26; *Stomps*, 2016 WL 3965175 at 2-4; *Lord*, 123 Wn.2d at 303. That he has attempted to interject an ineffective assistance claim into the equation does not create a new ground for relief or change the fact that this Court found that sufficient evidence supported each of his convictions as part of his direct appeal. *Stenson*, 142 Wn.2d at 720; PRP 12-16. Stomps has also failed to carry his burden to show that the interests of justice require relitigation of his insufficient evidence claim. *Gentry*, 137 Wn.2d at 388. Thus, this Court should dismiss his petition.

III. Stomps is not innocent and equitable tolling does not apply to his petition.

Equitable tolling “permits a court to allow an action to proceed when justice requires it, even though a statutory time period has elapsed.” *In re Bonds*, 165 Wn.2d 135, 141, 196 P.3d 672 (2008). A petitioner who seeks to benefit from the equitable tolling doctrine must demonstrate that the petition was untimely due to bad faith, deception, or false assurances. *Id.* at 141-42, 144. In any context, the doctrine of equitable tolling is a narrow doctrine to be used only sparingly and not applicable more

generally to “garden variety” claims. *In re Haghghi*, 178 Wn.2d at 447-48.

Stomps cannot and does not show that equitable tolling applies to his petition. PRP at 28-41. He alleges no bad faith, deception, false assurances or other outside forces that would excuse the late filing of his PRP. PRP at 28-41. Instead, he argues that his “innocence” is sufficient to establish equitable tolling. PRP at 28-41. But his innocence claim, whether as a gateway claim or of “actual innocence,” is substantively nothing more than a rehash of his insufficient evidence claim. *See Stomps*, 2018 WL 6069792 at 6 (noting that “petitioner has not denied that he did in fact engage in the conduct for which he was convicted,” but instead made an “argument of legal insufficiency”). Stomps admits all of the facts that led to his convictions—quibbling with them only at the margins—but argues that he is innocent because he “had a reasonable suspicion that Barnes [(the principal)] was in the house and that he used the same reasonable force as other BRAs . . . when entering a dwelling. . . .” PRP at 40. Again, this is not a claim of factual innocence based on new *facts*; it is an attempt to relitigate the legal sufficiency of the evidence. As a result, his claim of innocence fails and he fails to show that his PRP is entitled to equitable tolling. Stomps’ PRP should be dismissed.

CONCLUSION

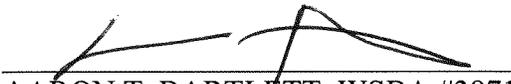
Based on the above arguments the defendant's personal restraint petition should be dismissed.

DATED this 8th day of November, 2019.

Respectfully submitted:

ANTHONY F. GOLIK
Prosecuting Attorney
Clark County, Washington

By:


AARON T. BARTLETT, WSBA #39710
Deputy Prosecuting Attorney
OID# 91127

APPENDICES

APPENDIX	BATES
Appendix A – <i>State v. Stomps</i> , 195 Wn.App. 1007, 2016 WL 3965175 (2016)	001-004
Appendix B – Mandate	005
Appendix C - <i>Stomps v. Obenland</i> , 2018 WL 6069792	006-015
Appendix D - <i>Stomps v. Obenland</i> , 2018 WL 6067203	016
Appendix E – Denial of Certificate of Appealability	017

APPENDIX A

195 Wash.App. 1007

NOTE: UNPUBLISHED OPINION, SEE WA R GEN GR 14.1

Court of Appeals of Washington,
Division 2.

STATE of Washington, Respondent,
v.
Jason Robert STOMPS, Appellant.

No. 47546-4-II

|
July 19, 2016

Appeal from Clark Superior Court, 14-1-00772-8, Honorable Derek Vanderwood, Judge.

Attorneys and Law Firms

Thomas Edward Doyle, Attorney at Law, Hansville, WA, for Appellant.

Rachael Rogers Probstfeld, Clark County Prosecuting Attorney's Office Vancouver, WA, for Respondent.

UNPUBLISHED OPINION

LEE, J.

***1** Jason Robert Stomps appeals his first degree burglary, three counts of second degree kidnapping, and three counts of second degree assault convictions. He argues sufficient evidence does not exist to support his convictions. We disagree and affirm.

FACTS

Stomps worked as a bail bond recovery agent. One evening, Stomps went to the home of Annette and Bill Waleske looking for Courtney Barnes. Barnes was free on bail, and his girlfriend, Sinan Hang, guaranteed the bail bond. Hang listed the Waleskes' address as her address. Hang was friends with Annette¹ and had used the Waleskes' address in the past, but she did not have permission to use it on the bail bond application. Barnes listed a separate address. When Barnes failed to appear for a court hearing, the bail bond company contracted with Stomps to locate him.

¹ Since several of the individuals have the same last name, we respectfully use first names for clarity.

When Stomps arrived at the Waleskes' residence, Annette and Bill were out, but their daughter, Tayler Waleske; son, Quincey Waleske; and daughter's boyfriend, Nathan Panosh, were at the home. Tayler and Nathan were watching a movie when they heard pounding on the door. They walked towards the door and heard Stomps yell, "I'm looking for Courtney Barnes. Open up your door, or I'll kick your fucking door down." Report of Proceedings (RP) at 114. Tayler did not know anyone by the name of Courtney Barnes. Tayler was frightened by Stomps, and yelled out, "We don't know Courtney. You need to leave." RP at 115. The pounding and yelling continued. Tayler and Nathan went upstairs to get Quincey. Tayler then called 911.

While Tayler was on the phone with the 911 operator, Stomps broke down the front door with a railroad tie driver, which is similar to a sledgehammer. Once inside, he ordered everyone downstairs. Even though he recognized that the three individuals

were not the fugitive he was looking for and that Barnes was not in the house, Stomps pointed his gun at them and ordered Quincey, who had just gotten out of the shower and had only a towel wrapped around him, to handcuff himself to Nathan and then ordered all three to get on the floor. Stomps then identified himself as a bail bond recovery agent. The parties dispute whether this was the first time Stomps identified himself. Nathan then repeatedly asked for the key to unlock the handcuffs, but Stomps refused.

Police arrived at the residence and detained Stomps. The State ultimately charged Stomps with first degree burglary, three counts of first degree kidnapping, and three counts of second degree assault; each charge included a special allegation that he was armed with a firearm.

During trial, Stomps admitted he did not first check the address listed for Barnes before going to the address listed for Barnes' girlfriend. Also during trial, Nathan testified that he did not feel free to leave when Stomps handcuffed him and pointed a gun at him. Quincey testified, "I was intimidated. I didn't want—I felt like my life was in danger." RP at 91. He further testified he did not feel free to leave because he was wrapped in a towel and being held at gunpoint. Tayler also testified that she did not feel free to leave because she "had a gun pointed at [her]" and was afraid she "was going to get shot." RP at 128-29. The 911 recording was also admitted where Tayler tells the operator they were scared.

*2 A jury found Stomps guilty as charged. Stomps appeals.

ANALYSIS

Stomps contends he was denied due process because sufficient evidence does not exist to support his convictions. We disagree.

A. LEGAL PRINCIPLES

Evidence is sufficient if, when viewed in the light most favorable to the State, it permits a rational trier of fact to find the essential elements of the crime beyond a reasonable doubt. *State v. Tilton*, 149 Wn.2d 775, 786, 72 P.3d 735 (2003). Courts must draw all reasonable inferences from the evidence in favor of the State and interpret the evidence most strongly against the defendant. *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). Circumstantial evidence receives the same weight as direct evidence. *State v. Thomas*, 150 Wn.2d 821, 874, 83 P.3d 970 (2004). Appellate courts defer to the fact finder on the resolution of conflicting testimony, credibility determinations, and the persuasiveness of the evidence. *Id.* at 874-75.

The purpose of the sufficiency inquiry is to " 'ensure that the trial court fact finder 'rationally appl[ied]' the constitutional standard required by the due process clause of the Fourteenth Amendment, which allows for conviction of a criminal offense only upon proof beyond a reasonable doubt.' " *State v. Berg*, 181 Wn.2d 857, 867, 337 P.3d 310 (2014) (alteration in original) (quoting *State v. Rattana Keo Phuong*, 174 Wn. App. 494, 502, 299 P.3d 37 (2013), review denied, 182 Wn.2d 1022 (2015)). Our review is de novo. *Berg*, 181 Wn.2d at 867.

B. FIRST DEGREE BURGLARY

For the first degree burglary charge, the State had to prove beyond a reasonable doubt that Stomps entered or remained unlawfully in the Waleskes' home with the intent to commit a crime against a person or property therein, while armed with a deadly weapon. RCW 9A.52.020(1)(a). Stomps contends the State failed to prove he intended to commit a crime when he entered the home since he was acting in his capacity as a bail bond recovery agent.

Viewing the facts in the light most favorable to the State, Stomps broke down the Waleskes' front door with a railroad tie driver at an address given for the bond co-signor, not Barnes. And he broke down the door even after being told Barnes was not in the home and that he needed to leave. While pointing a gun at the three individuals he knew were not Barnes, Stomps handcuffed

two of the teenagers and forced all three to stay downstairs. Stomps did this even after he had been told that Barnes was not in the house.²

² Under the “Rule of Taylor,” a bail bond recovery agent may pursue a fugitive “ ‘into another State; may arrest him on the Sabbath; and, if necessary, may break and enter his house for that purpose. The seizure is ... likened to the re-arrest by the sheriff of an escaping prisoner.’ ” *Johnson v. County of Kittitas*, 103 Wn. App. 212, 217-18, 11 P.3d 862 (2000) (quoting *Taylor v. Taintor*, 83 U.S. 366, 371, 21 L. Ed. 287, 16 Wall. 366 (1872)). However, a recovery agent may not “sweep from his path all third parties who he thinks are blocking his search for his client, without liability to the criminal law.” *State v. Portnoy*, 43 Wn. App. 455, 466, 718 P.2d 805 (1986). Since Stomps entered the home of an address given by the bond's co-signer and not the address of the fugitive, since he was told by the individuals inside the home that they did not know the individual he was looking for, and since he still proceeded to forcefully enter the home without permission, Stomps does not have immunity from Washington criminal laws under *Portnoy*.

*3 “In any prosecution for burglary, any person who enters or remains unlawfully in a building may be inferred to have acted with intent to commit a crime against a person or property therein, unless such entering or remaining shall be explained by evidence satisfactory to the trier of fact to have been made without such criminal intent.” RCW 9A.52.040. In this case, a rational trier of fact could find that Stomps unlawfully entered the Waleskes' home. Given the circumstances of the break in and the actions that transpired thereafter, a rational trier of fact can infer he intended to commit a crime. We defer to the trier of fact on any conflicting testimony as to Stomps' intent. *Thomas*, 150 Wn.2d at 874.

Given the evidence, a rational trier of fact could find the essential elements of first degree burglary beyond a reasonable doubt. Thus, sufficient evidence exists to support Stomps' first degree burglary conviction.

C. SECOND DEGREE KIDNAPPING

Stomps next contends sufficient evidence does not support his three second degree kidnapping convictions. Specifically, Stomps argues that there was insufficient evidence to show Stomps intentionally abducted the three individuals. We disagree.

“A person is guilty of kidnapping in the second degree if he or she intentionally abducts another person under circumstances not amounting to kidnapping in the first degree.” RCW 9A.40.030(1). “ ‘Abduct’ means to restrain a person by either (a) secreting or holding him or her in a place where he or she is not likely to be found, or (b) using or threatening to use deadly force.” Former RCW 9A.40.010(1) (2011).³

³ Our legislature amended an unrelated subsection of RCW 9A.40.010 in 2014 that does not apply to this appeal.

Here, Stomps ordered everyone downstairs after he broke the door down and entered the home. Even though he recognized that none of the three teenagers were Barnes, Stomps pointed his gun at them and ordered Quincey, who had just gotten out of the shower and had only a towel wrapped around him, to handcuff himself to Nathan and then ordered both men and Tayler to get on the floor. Nathan repeatedly asked for the key to unlock the handcuffs, but Stomps refused. Nathan testified that he did not feel free to leave when Stomps handcuffed him and pointed a gun at him. Quincey testified, “I was intimidated. I didn't want—I felt like my life was in danger.” RP at 91. He further testified he did not feel free to leave because he was wrapped in a towel and being held at gunpoint. Tayler also testified that she did not feel free to leave because she “had a gun pointed at [her]” and was afraid she “was going to get shot.” RP at 128-29. The 911 recording was also admitted where Tayler tells the operator they were scared.

Viewing these facts in the light most favorable to the State and deferring to the trier of fact on any conflicting testimony as to Stomps' intent, we hold a rational trier of fact could find the essential elements of second degree kidnapping beyond a reasonable doubt for each of the three victims. Thus, sufficient evidence exists to support Stomps' three second degree kidnapping convictions.

D. SECOND DEGREE ASSAULT

Lastly, Stomps contends sufficient evidence does not support his three second degree assault convictions. Specifically, Stomps argues that there is insufficient evidence to support his intent to create apprehension and fear of bodily injury. Again, we disagree.

"A person is guilty of second degree assault if he or she, under circumstances not amounting to assault in the first degree, ... [a]ssaults another with a deadly weapon." RCW 9A.36.021(1)(c). Assault includes "putting another in apprehension of harm." *State v. Elmi*, 166 Wn.2d 209, 215, 207 P.3d 439 (2009).

*4 Here, Stomps broke down the front door after yelling and pounding on the door, telling the occupants to "[o]pen up your door, or I'll kick your fucking door down." RP at 114. Stomps then ordered Tayler, Quincey, and Nathan downstairs. Even though he recognized the three individuals were not Barnes, Stomps pointed his gun at them, ordered Quincey and Nathan to handcuff themselves together, and then ordered all three to get on the floor. During trial, Quincey testified he felt his life was in danger; Tayler testified she felt she was going to die; and on the 911 tape, Tayler reported to the 911 operator that they were all scared.

Viewing the evidence in the light most favorable to the State, we hold a rational trier of fact could find the essential elements of second degree assault beyond a reasonable doubt. Thus, sufficient evidence exists to support Stomps' three second degree assault convictions.

Sufficient evidence exists to support all of Stomps' convictions. Therefore, we affirm.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record in accordance with RCW 2.06.040, it is so ordered.

We concur:

Melnick, J.

Sutton, J.

All Citations

Not Reported in P.3d, 195 Wash.App. 1007, 2016 WL 3965175

APPENDIX B

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON,
Respondent,

v.

JASON R. STOMPS,
Appellant.

No. 47546-4-II

MANDATE

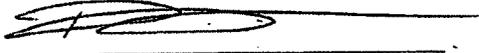
Clark County Cause No.
14-1-00772-8

The State of Washington to: The Superior Court of the State of Washington
in and for Clark County

This is to certify that the opinion of the Court of Appeals of the State of Washington, Division II, filed on July 19, 2016 became the decision terminating review of this court of the above entitled case on February 8, 2017. Accordingly, this cause is mandated to the Superior Court from which the appeal was taken for further proceedings in accordance with the attached true copy of the opinion.

IN TESTIMONY WHEREOF, I have hereunto set
my hand and affixed the seal of said Court at
Tacoma, this 13th day of February, 2017.




Derek M. Byrne
Clerk of the Court of Appeals,
State of Washington, Div. II

cc: Hon. Derek Vanderwood
Thomas Edward Doyle
Rachael Rogers Probstfeld

APPENDIX C

2018 WL 6069792

Only the Westlaw citation is currently available.
United States District Court, W.D. Washington,
at Tacoma.

Jason STOMPS, Petitioner,

v.

Michael OBENLAND, Respondent.

CASE NO. 3:18-cv-05365-RBL-JRC

|
Signed 10/26/2018

|
Filed 10/29/2018

Attorneys and Law Firms

Michael C. Kahrs, Seattle, WA, for Petitioner.

John Joseph Samson, Attorney General's Office, Olympia, WA, for Respondent.

REPORT AND RECOMMENDATION

NOTED FOR: November 16, 2018

J. Richard Creatura, United States Magistrate Judge

***1** The District Court has referred this petition for a writ of habeas corpus to United States Magistrate Judge J. Richard Creatura. The Court's authority for the referral is 28 U.S.C. § 636(b)(1)(A) and (B), and local Magistrate Judge Rules MJR3 and MJR4. Petitioner Jason Stomps, represented by counsel, filed the petition pursuant to 28 U.S.C. § 2254.

Petitioner argues he was convicted on insufficient evidence, that he received ineffective assistance of counsel at trial, and that he is actually innocent of the charges for which he was convicted. However, the Washington Court of Appeals did not unreasonably apply clearly established federal law when it determined petitioner's convictions were predicated on sufficient evidence. In addition, petitioner's second and third grounds are unexhausted and procedurally defaulted, and he has not demonstrated the cause and prejudice or actual innocence to overcome the procedural default. Therefore, the Court recommends that petitioner's habeas petition be denied.

PETITIONER'S CLAIMS IN THIS HABEAS PETITION

- 1) Petitioner's due process rights were violated because he was convicted based on insufficient evidence.
- 2) Petitioner's Sixth Amendment rights were violated when he received ineffective assistance of counsel at trial.
- 3) Petitioner is actually innocent of his convictions.

BASIS FOR CUSTODY AND FACTS

Petitioner was convicted of one count of burglary in the first degree, three counts of kidnapping in the second degree, and three counts of assault in the second degree. Dkt. 9, Ex. 1. He was sentenced to 180 months imprisonment and is currently incarcerated in the Monroe Correctional Center.

On direct appeal, the Washington Court of Appeals stated the facts of petitioner's case as follows:

Stomps worked as a bail bond recovery agent. One evening, Stomps went to the home of Annette and Bill Waleske looking for Courtney Barnes. Barnes was free on bail, and his girlfriend, Sinan Hang, guaranteed the bail bond. Hang listed the Waleskes' address as her address. Hang was friends with Annette [footnote omitted] and had used the Waleskes' address in the past, but she did not have permission to use it on the bail bond application. Barnes listed a separate address. When Barnes failed to appear for a court hearing, the bail bond company contracted with Stomps to locate him.

When Stomps arrived at the Waleskes' residence, Annette and Bill were out, but their daughter, Tayler Waleske; son, Quincey Waleske; and daughter's boyfriend, Nathan Panosh, were at the home. Tayler and Nathan were watching a movie when they heard pounding on the door. They walked towards the door and heard Stomps yell, "I'm looking for Courtney Barnes. Open up your door, or I'll kick your fucking door down." Tayler did not know anyone by the name of Courtney Barnes. Tayler was frightened by Stomps, and yelled out, "We don't know Courtney. You need to leave." The pounding and yelling continued. Tayler and Nathan went upstairs to get Quincey. Tayler then called 911.

*2 While Tayler was on the phone with the 911 operator, Stomps broke down the front door with a railroad tie driver, which is similar to a sledgehammer. Once inside, he ordered everyone downstairs. Even though he recognized that the three individuals were not the fugitive he was looking for and that Barnes was not in the house, Stomps pointed his gun at them and ordered Quincey, who had just gotten out of the shower and had only a towel wrapped around him, to handcuff himself to Nathan and then ordered all three to get on the floor. Stomps then identified himself as a bail bond recovery agent. The parties dispute whether this was the first time Stomp identified himself. Nathan then repeatedly asked for the key to unlock the handcuffs, but Stomps refused.

Police arrived at the residence and detained Stomps. The State ultimately charged Stomps with first degree burglary, three counts of first degree kidnapping, and three counts of second degree assault; each charge included a special allegation that he was armed with a firearm.

During trial, Stomps admitted he did not first check the address listed for Barnes before going to the address listed for Barnes' girlfriend. Also during trial, Nathan testified that he did not feel free to leave when Stomps handcuffed him and pointed a gun at him. Quincey testified, "I was intimidated. I didn't want—I felt like my life was in danger." He further testified he did not feel free to leave because he was wrapped in a towel and being held at gunpoint. Tayler also testified that she did not feel free to leave because she "had a gun pointed at [her]" and was afraid she "was going to get shot." The 911 recording was also admitted where Tayler tells the operator they were scared.

A jury found Stomps guilty as charged.

Dkt. 9, Ex. 2 at pp. 1-3; *State v. Stomps*, 2016 WL 3965175, at *1-*2 (July 19, 2016) (citations to record omitted).

PROCEDURAL HISTORY

Petitioner appealed his convictions to the Washington Court of Appeals, raising the sole ground that there was insufficient evidence to convict him. Dkt. 9, Ex. 4. The Court of Appeals rejected petitioner's argument and affirmed his convictions. *Id.*, Ex. 2. Petitioner then filed a motion for reconsideration, which the Washington Supreme Court treated as a petition for review.

Id., Exs. 7, 8. Petitioner again alleged he was convicted based on insufficient evidence, and also argued for the first time that he received ineffective assistance of counsel, that he had a lawful right to carry firearms, and that his sentences should have run concurrently. *Id.*, Exs. 7, 9. The Washington Supreme Court denied review on February 8, 2017. *Id.*, Ex. 10. The Washington Court of Appeals issued its mandate on February 13, 2017. *Id.*, Ex. 11.

Petitioner declined to file a personal restraint petition (“PRP”) in the Washington Courts. *See* Dkt. 9. Instead, he filed his petition for a writ of habeas corpus on May 8, 2018. Dkt. 1.

STANDARD OF REVIEW

Under the Anti-Terrorism and Effective Death Penalty Act (“AEDPA”), 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).

A federal court may grant a habeas petition under two circumstances. First, a federal habeas court may grant the writ 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 (2000). Second, a federal habeas court may grant the writ 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. *Id.* 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). AEDPA requires federal habeas courts to presume the correctness of state courts’ factual findings unless applicants rebut this presumption with “clear and convincing evidence.” 28 U.S.C. § 2254(e)(1). In addition, review of state court decisions under 28 U.S.C. § 2254(d)(1) 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).

EVIDENTIARY HEARING

*3 The decision to hold a hearing is committed to the Court’s discretion. *Schiro v. Landrigan*, 550 U.S. 465, 473 (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. In determining whether relief is available under 28 U.S.C. § 2254(d)(1), the Court’s review is limited to the record before the state court. *Cullen*, 131 S.Ct. at 1388. A hearing is not required if the allegations would not entitle petitioner to relief under 28 U.S.C. § 2254(d). *Landrigan*, 550 U.S. at 474. “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*, 563 U.S. 170 (2011).

Here, petitioner’s claims rely on established rules of constitutional law. There are no factual issues that could not have been previously discovered by due diligence. Finally, the facts underlying petitioner’s claims are sufficient to establish that a rational fact finder would have found him guilty of the crime. Therefore, the Court concludes that an evidentiary hearing is not necessary to decide this case and petitioner’s claims may be resolved on the existing state record.

DISCUSSION

I. Unexhausted Grounds

Respondent argues petitioner's second and third grounds are unexhausted and procedurally defaulted. Dkt. 4. Petitioner agrees that they are unexhausted and procedurally defaulted, but believes he can show cause and prejudice to allow the Court to nonetheless examine his unexhausted grounds. Dkt. 10.

A. Exhaustion of State Court Remedies

A state prisoner seeking habeas corpus relief in federal court must exhaust available state relief prior to filing a petition in federal court. *See* 28 U.S.C. § 2254. Claims for relief that have not been exhausted in state court are not cognizable in a federal habeas corpus petition. *James v. Borg*, 24 F.3d 20, 24 (9th Cir. 1994). A petitioner must properly raise a habeas claim at every level of the state courts' review. *See Ortberg v. Moody*, 961 F.2d 135, 138 (9th Cir. 1992). “[S]tate prisoners must give the state courts one full opportunity to resolve any constitutional issues by invoking one complete round of the State’s established appellate review process.” *O’Sullivan v. Boerckel*, 526 U.S. 838, 845 (1999); *see also Rose v. Lundy*, 455 U.S. 509, 518-19 (1982). A complete round of the state’s established review process includes presentation of a petitioner’s claims to the state’s highest court. *James*, 24 F.3d at 24.

“Fair presentation” requires that the prisoner alert the state courts to the fact that he is asserting claims under the United States Constitution. *Duncan v. Henry*, 513 U.S. 364, 365 (1995). However, “to be fairly presented in the state courts, a claim must have been raised throughout the state appeals process, not just at the tail end in a prayer for discretionary review.” *Casey v. Moore*, 386 F.3d 896, 916 (9th Cir. 2004).

Here, petitioner properly raised his challenge to the sufficiency of the evidence both to the Washington Court of Appeals and the Washington Supreme Court, and so that ground is properly exhausted. Dkt. 9, Exs. 3, 7. However, petitioner raised his ineffective assistance of counsel ground for the first time in the motion for reconsideration that the Washington Supreme Court treated as a petition for review. *Id.*, Ex. 7. He did not raise that ground with the Washington Court of Appeals. Thus, petitioner has failed to raise that argument throughout the state appeals process – instead he has raised it at the tail end of the process in a motion for discretionary review, and thus has not fairly presented it to the state courts. *See Casey*, 386 F.3d at 916. Similarly, he did not raise his actual innocence argument at all throughout the state appeals process. *See* Dkt. 9, Exs. 3, 7. Therefore, plaintiff has failed to exhaust his state court remedies as to his second and third habeas grounds.

B. Procedural Default

*4 Procedural default is distinct from exhaustion in the habeas context. *Franklin v. Johnson*, 290 F.3d 1223, 1230 (9th Cir. 2002). The procedural default rule bars consideration of a federal claim when it is clear the state court has been presented with the federal claim but declined to reach the issue for procedural reasons or it is clear the state court would hold the claim procedurally barred. *Id.* at 1230-31 (citations omitted). If a state procedural rule would now preclude the petitioner from raising his claim at the state level, the claim is considered “procedurally defaulted” and the federal courts are barred from reviewing the petition on the merits. *Coleman v. Thompson*, 501 U.S. 722, 731-32 (1991); *O’Sullivan*, 526 U.S. at 845.

Washington law provides that a state petition for a collateral attack on a judgment and sentence in a criminal case must be filed within one year after the judgment becomes final. RCW 10.73.090(1). Petitioner’s judgment became final when the Washington State Court of Appeals issued its mandate on February 13, 2017. Dkt. 9, Ex. 11. Petitioner thus had until February 13, 2018 to file a PRP and provide the state courts with the opportunity to review his second and third grounds. However, petitioner failed to file any PRP at all. Thus, petitioner has failed to provide the state courts with one full opportunity to review his second and third grounds, and Washington law now bars petitioner from filing a PRP raising those two grounds. Therefore, petitioner’s second and third grounds are unexhausted and procedurally defaulted, and the Court may not consider them unless petitioner can show cause and prejudice, or can show he is actually innocent of his convictions.

C. Cause and Prejudice

The Court may only review a petitioner's procedurally defaulted grounds if he can show: (1) cause for default in state court and actual prejudice from the alleged error; or (2) that federal review is required to prevent a miscarriage of justice. *Coleman*, 501 U.S. at 748. To show cause, petitioner must demonstrate that some external factor outside petitioner's control prevented petitioner from properly exhausting his state court remedies. *Id.* at 753. "The fact that [a petitioner] did not present an available claim or that he chose to pursue other claims does not establish cause." *Martinez Villareal v. Lewis*, 80 F.3d 1301, 1306 (9th Cir. 1996) (citing *Murray v. Carrier*, 477 U.S. 478, 486 (1986)). These external factors could include interference by state actors that forced petitioner to miss a state procedural deadline, or a showing that the factual or legal basis for a claim was not reasonably available. *Carrier*, 477 U.S. at 488.

The Supreme Court has recognized an exception to the requirement of showing cause to overcome default: "Inadequate assistance of counsel at initial-review collateral proceedings [i.e., the first level of a state collateral attack] may establish cause for a prisoner's procedural default of a claim of ineffective assistance at trial." *Martinez v. Ryan*, 566 U.S. 1, 9 (2012). "That exception treats ineffective assistance by a prisoner's state postconviction counsel as cause to overcome the default of a single claim – ineffective assistance of trial counsel – in a single context – where the State effectively requires a defendant to bring that claim in state postconviction proceedings rather than on direct appeal." *Davila v. Davis*, 137 S. Ct. 1058, 2062-63 (2017). District Courts have also held that failure of a pro se litigant to file his or her own collateral attack at all will mitigate a showing of cause based on ineffective assistance of counsel. See *Braxton v. State of Arizona*, 2015 WL 5116765, at *6 n.5 (D. Ariz. June 4, 2015), *report and recommendation adopted*, 2015 WL 5093478 (failure to file a state collateral attack, even without an attorney, means a prisoner "cannot rely on *Martinez* to establish cause for his failure to present his ineffective assistance of trial counsel claim to the state courts"); *Castillo v. Ryan*, 2013 WL 3282547, at *5 (D. Ariz. June 28, 2013) (finding the same).

*5 Petitioner argues that the Court may consider his second ground because "[c]ause is his actual innocence and the prejudice is the ineffective assistance of counsel set forth in Ground Two." Dkt. 1, p. 10. Read liberally, petitioner may be attempting to invoke *Martinez* to allow the Court to consider a procedurally defaulted ineffective assistance claim. As a preliminary matter, *Martinez* applies only to claims for ineffective assistance of counsel. *Davila v. Davis*, 137 S. Ct. 1058, 2062-63. Thus, petitioner's argument has no application to his actual innocence claim. Further, petitioner has completely failed to file a state PRP. See Dkt. 9. Because petitioner himself failed to file any state collateral attack, *Martinez* does not allow the Court to review his procedurally defaulted claims. See, e.g., *Anderson v. Koster*, 2012 WL 1898781, at *9 (W.D. Mo. May 23, 2012) ("However, *Martinez* is inapposite because, here, petitioner himself is at fault for not filing a pro se [state collateral attack] in the first place"). Therefore, the Court cannot use petitioner's ineffective assistance of counsel claim as an excuse to consider petitioner's procedurally defaulted ineffective assistance claim.

Further, petitioner has not otherwise explained the cause and prejudice that excuses his default. As noted above, petitioner's habeas petition indicates his alleged cause is that he is "actually innocent." Dkt. 1, p. 10. As will be discussed in section II(D) *infra*, a claim of actual innocence may allow a court sitting in habeas to consider a defaulted claim. However, a showing of actual innocence is not a showing of cause and prejudice, but rather a different method to allow a Court to consider an otherwise procedurally defaulted claim. See, e.g., *Wood v. Hall*, 130 F.3d 373, 378-79 (9th Cir. 1997) (making a determination as to whether actual innocence will excuse default *after* making a determination plaintiff had not shown cause and prejudice). Petitioner has provided no other explanation as to why he failed to raise his ineffective assistance of counsel or actual innocence claims with the state courts. As such, petitioner has failed to establish cause and prejudice, and thus has not excused the procedural default as to his ineffective assistance or actual innocence grounds.

D. Actual Innocence

The Court can consider a defaulted claim in an extraordinary circumstance where an error resulted in the conviction of one who is actually innocent. *Murray v. Carrier*, 477 U.S. 478, 496 (1986); *Wood*, 130 F.3d at 379. Under *Schlup v. Delo*, 513 U.S. 298, 314-15 (1995), a petitioner must produce sufficient proof of his actual innocence to bring him "within the narrow class of cases ... implicating a fundamental miscarriage of justice." (quotations omitted). A petitioner must support his claim of actual innocence "with new reliable evidence – whether it be exculpatory scientific evidence, trustworthy eyewitness accounts, or critical physical evidence – that was not presented at trial." *Id.* at 324. A petitioner must "show that it is more likely than not that

no reasonable juror would have convicted him in light of the new evidence.” *Id.* at 327. Actual innocence in this context “means *factual* innocence, not mere *legal* insufficiency.” *Bousley v. United States*, 523 U.S. 614, 623–24 (1998) (emphasis added).

As the Supreme Court has noted, “tenable actual-innocence pleas are rare: ‘[A] petitioner does not meet the threshold requirement unless he persuades the district court that, in light of the new evidence, no juror, acting reasonably, would have voted to find him guilty beyond a reasonable doubt.’ ” *McQuiggin v. Perkins*, 569 U.S. 383, 386 (2013) (quoting *Schlup*, 513 U.S. at 324). The Court’s purpose is not to determine whether the petitioner is innocent, “ ‘but rather to assess the likely impact of the evidence on reasonable jurors.’ ” *Stewart v. Cate*, 757 F.3d 929, 938 (9th Cir. 2014) (quoting *House v. Bell*, 547 U.S. 518, 538 (2006)). However, this standard is extremely high and “should open only when a petition presents ‘evidence of innocence so strong that a court cannot have confidence in the outcome of the trial unless the court is also satisfied that the trial was free of nonharmless constitutional error.’ ” *McQuiggin*, 569 U.S. at 401 (quoting *Schlup*, 513 U.S. at 316). Thus, “ ‘in virtually every case, the allegation of actual innocence has been summarily rejected.’ ” *Calderon v. Thompson*, 523 U.S. 538, 559 (1998) (quoting *Schlup*, 513 U.S. at 324).

*6 Here, plaintiff has not shown that he is actually innocent of the crimes for which he was convicted. First, he has not provided any additional evidence to support his factual innocence. Rather, petitioner has argued that, “[i]f the jury had been presented with the proper evidence and jury instructions, [petitioner] would be walking free.” Dkt. 10, p. 26. He clarifies that, had petitioner’s trial counsel been effective, it would have “enable[d] the jury to render the proper decision.” *Id.* at p. 27. However, petitioner has not denied that he did in fact engage in the conduct for which he was convicted – he merely argues the legal instructions given to the jury were inappropriate because they failed to include an instruction indicating petitioner had state law immunity as a bail bondsman. This is an argument of legal insufficiency -- not new evidence showing factual innocence. *See, e.g., Blue v. Glebe*, 2015 WL 3618537, at *2 (W.D. Wash. June 9, 2015) (finding that an argument that the evidence at trial was not enough for the jury to find guilt was a legal argument, not new evidence of factual innocence); *Dudgeon v. Richards*, 2010 WL 417419, at *18 (W.D. Wash. Jan. 29, 2010) (finding that an argument that evidence presented at trial was false is not new evidence demonstrating factual innocence). As such, petitioner has not provided new evidence to demonstrate his factual innocence and thus has not excused his procedural default.

Further, petitioner’s argument that his actions do not constitute burglary, assault, or kidnapping have already been determined by the Washington Court of Appeals. Petitioner argues that the “jury instructions contained absolutely no instructions on when Bail Bond Recover[y] Agents may enter onto the property of a third party in the performance of their duties.” Dkt. 1, p. 6. The Court takes this to imply that petitioner challenges his conviction in part because the trial Court improperly failed to instruct the jury that petitioner may have immunity. However, the Washington Court of Appeals has already determined that petitioner does not enjoy any immunity or privilege under Washington law that would have insulated him from criminal liability. Dkt. 9, Ex. 2 at p. 4 n.2; *Stomps*, 2016 WL 3965175, at *2 n.2 (“Since Stomps entered the home of an address given by the bond’s co-signer and not the address of the fugitive, since he was told by the individuals inside the home that they did not know the individual he was looking for, and since he still proceeded to forcefully enter the home without permission, Stomps does not have immunity from Washington criminal laws under *Portnoy*”). “[A] state court’s interpretation of state law, including one announced on direct appeal of the challenged conviction, binds a federal court sitting in habeas corpus.” *Bradshaw v. Richey*, 546 U.S. 74, 76 (2005). Thus, because the Washington Court of Appeals has already determined petitioner is not entitled to immunity, the Court must adopt that determination. Therefore, petitioner has not provided any evidence indicating he is factually innocent.

E. Conclusion

Petitioner’s second and third grounds are unexhausted and procedurally defaulted. Further, petitioner has not shown cause and prejudice to excuse his default, nor has he shown that he is actually innocent so as to allow the Court to consider his unexhausted and procedurally defaulted claims. Thus, the Court may not make a determination as to petitioner’s second and third grounds. Therefore, the Court recommends petitioner’s habeas petition be denied as to those grounds.

II. Substantive Actual Innocence

Respondent also argues petitioner's substantive actual innocence ground is not cognizable in a habeas petition. Dkt. 4, p. 21. Because the Court has already found petitioner's actual innocence claim is unexhausted and procedurally defaulted, and because the Court has found that petitioner cannot excuse the procedural default, the Court need not address the substantive actual innocence on its merits and declines to do so here.

III. Sufficiency of the Evidence

Respondent has conceded that petitioner properly exhausted his first ground arguing he was convicted based on insufficient evidence. Dkt. 4, p. 4. The Constitution forbids the criminal conviction of any person except upon proof of guilt beyond a reasonable doubt. *In re Winship*, 397 U.S. 358 (1970). When evaluating a claim of insufficiency of the evidence to support a conviction, the reviewing court must decide "whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Jackson v. Virginia*, 443 U.S. 307, 319 (1979). "*Jackson* leaves juries broad discretion in deciding what inferences to draw from the evidence presented at trial, requiring only that jurors 'draw reasonable inferences from basic facts to ultimate facts.'" *Coleman v. Johnson*, 132 S.Ct. 2060, 2064 (2012) (quoting *Jackson*, 443 U.S. at 419). The constitutional sufficiency of evidence review is sharply limited. *Wright*, 505 U.S. at 296. The finder of fact is entitled to believe the State's evidence and disbelieve the defense's evidence. *Id.* In addition, "[a]n additional layer of deference is added to this standard of review by 28 U.S.C. § 2254(d), which obliges the petitioner ... to demonstrate that the state court's adjudication entailed an unreasonable application of the *Jackson* standard." *Emery v. Clark*, 604 F.3d 1102, 1111 n.7 (9th Cir. 2010) (citing *Juan H. v. Allen*, 408 F.3d 1262, 1274 (9th Cir. 2005)).

*7 In affirming petitioner's conviction, the Washington Court of Appeals stated:

[] First Degree Burglary

For the first degree burglary charge, the State had to prove beyond a reasonable doubt that Stomps entered or remained unlawfully in the Waleskes' home with the intent to commit a crime against a person or property therein, while armed with a deadly weapon. RCW 9A.52.020(1)(a). Stomps contends the State failed to prove he intended to commit a crime when he entered the home since he was acting in his capacity as a bail bond recovery agent.

Viewing the facts in the light most favorable to the State, Stomps broke down the Waleskes' front door with a railroad tie driver at an address given for the bond co-signor, not Barnes. And he broke down the door even after being told Barnes was not in the home and that he needed to leave. While pointing a gun at the three individuals he knew were not Barnes, Stomps handcuffed two of the teenagers and forced all three to stay downstairs. Stomps did this even after he had been told that Barnes was not in the house.¹

"In any prosecution for burglary, any person who enters or remains unlawfully in a building may be inferred to have acted with intent to commit a crime against a person or property therein, unless such entering or remaining shall be explained by evidence satisfactory to the trier of fact to have been made without such criminal intent." RCW 9A.52.040. In this case, a rational trier of fact could find that Stomps unlawfully entered the Waleskes' home. Given the circumstances of the break in and the actions that transpired thereafter, a rational trier of fact can infer he intended to commit a crime. We defer to the trier of fact on any conflicting testimony as to Stomps' intent. *Thomas*, 150 Wn.2d at 874.

Given the evidence, a rational trier of fact could find the essential elements of first degree burglary beyond a reasonable doubt. Thus, sufficient evidence exists to support Stomps' first degree burglary conviction.

[] Second Degree Kidnapping

Stomps next contends sufficient evidence does not support his three second degree kidnapping convictions. Specifically, Stomps argues that there was insufficient evidence to show Stomps intentionally abducted the three individuals. We disagree. "A person is guilty of kidnapping in the second degree if he or she intentionally abducts another person under circumstances not amounting to kidnapping in the first degree." RCW 9A.40.030(1). " 'Abduct' means to restrain a person by either (a)

secretoring or holding him or her in a place where he or she is not likely to be found, or (b) using or threatening to use deadly force.” Former RCW 9A.40.010(1) (2011). [footnote omitted]

Here, Stomps ordered everyone downstairs after he broke the door down and entered the home. Even though he recognized that none of the three teenagers were Barnes, Stomps pointed his gun at them and ordered Quincey, who had just gotten out of the shower and had only a towel wrapped around him, to handcuff himself to Nathan and then ordered both men and Tayler to get on the floor. Nathan repeatedly asked for the key to unlock the handcuffs, but Stomps refused. Nathan testified that he did not feel free to leave when Stomps handcuffed him and pointed a gun at him. Quincey testified, “I was intimidated. I didn’t want—I felt like my life was in danger.” He further testified he did not feel free to leave because he was wrapped in a towel and being held at gunpoint. Tayler also testified that she did not feel free to leave because she “had a gun pointed at [her]” and was afraid she “was going to get shot.” The 911 recording was also admitted where Tayler tells the operator they were scared.

*8 Viewing these facts in the light most favorable to the State and deferring to the trier of fact on any conflicting testimony as to Stomps’ intent, we hold a rational trier of fact could find the essential elements of second degree kidnapping beyond a reasonable doubt for each of the three victims. Thus, sufficient evidence exists to support Stomps’ three second degree kidnapping convictions.

[] Second Degree Assault

Lastly, Stomps contends sufficient evidence does not support his three second degree assault convictions. Specifically, Stomps argues that there is insufficient evidence to support his intent to create apprehension and fear of bodily injury. Again, we disagree.

“A person is guilty of second degree assault if he or she, under circumstances not amounting to assault in the first degree, ... [a]ssaults another with a deadly weapon.” RCW 9A.36.021(1)(c). Assault includes “putting another in apprehension of harm.” *State v. Elmi*, 166 Wn.2d 209, 215, 207 P.3d 439 (2009).

Here, Stomps broke down the front door after yelling and pounding on the door, telling the occupants to “[o]pen up your door, or I’ll kick your fucking door down.” Stomps then ordered Tayler, Quincey, and Nathan downstairs. Even though he recognized the three individuals were not Barnes, Stomps pointed his gun at them, ordered Quincey and Nathan to handcuff themselves together, and then ordered all three to get on the floor. During trial, Quincey testified he felt his life was in danger; Tayler testified she felt she was going to die; and on the 911 tape, Tayler reported to the 911 operator that they were all scared.

Viewing the evidence in the light most favorable to the State, we hold a rational trier of fact could find the essential elements of second degree assault beyond a reasonable doubt. Thus, sufficient evidence exi[sts] to support Stomps’ three second degree assault convictions.

Sufficient evidence exists to support all of Stomps’ convictions. Therefore, we affirm.

Dkt. 9, Ex. 2 at pp. 4-7; *Stomps*, 2016 WL 3965175, at *2-*4 (citations to record omitted).

¹ Under the “Rule of Taylor,” a bail bond recovery agent may pursue a fugitive “ ‘into another State; may arrest him on the Sabbath; and, if necessary, may break and enter his house for that purpose. The seizure is ... likened to the re-arrest by the sheriff of an escaping prisoner.’ ” *Johnson v. County of Kittitas*, 103 Wn. App. 212, 217-18, 11 P.3d 862 (2000) (quoting *Taylor v. Taintor*, 83 U.S. 366, 371, 21 L.Ed. 287, 16 Wall. 366 (1872)). However, a recovery agent may not “sweep from his path all third parties who he thinks are blocking his search for his client, without liability to the criminal law.” *State v. Portnoy*, 43 Wn. App. 455, 466, 718 P.2d 805 (1986). Since Stomps entered the home of an address given by the bond’s co-signer and not the address of the fugitive, since he was told by the individuals inside the home that they did not know the individual he was looking for, and since he still proceeded to forcefully enter the home without permission, Stomps does not have immunity from Washington criminal laws under *Portnoy*. [footnote by Court of Appeals]

Here, the Court of Appeals did not unreasonably apply clearly established federal law when it found petitioner was convicted on sufficient evidence. Non-party Taylor Waleske testified that she, non-party Quincey Waleske, and non-party Nathan Panosh

were at her parents' residence when they heard pounding on the front door. Dk. 9, Ex. 12 at pp. 112-13. She testified that petitioner was pounding on the front door to the residence and yelling. *Id.* at pp. 113-14. She testified that petitioner yelled "I'm looking for Courtney Barnes. Open up your door, or I'll kick your fucking door down." *Id.* at p. 114. Non-party Taylor also testified that petitioner broke the door down and began holding non-party Taylor, non-party Quincey, and non-party Nathan at gun point. *Id.* at pp. 127-28. She testified that she told petitioner she did not know the person petitioner was looking for, and further testified that she did not provide petitioner permission to enter the residence. *Id.* at p. 129. Non-party Taylor finally testified that she did not feel free to leave when petitioner was pointing the gun at her, and felt afraid she "was going to get shot." *Id.* at pp. 128-29.

*9 In addition, non-party Quincey testified that, as petitioner was banging on the door, he told petitioner he did not know who petitioner was looking for and that petitioner had to leave. Dkt. 9, Ex. 12 at p. 83. He corroborated non-party Taylor's testimony that petitioner threatened to kick the front door down, and testified petitioner did, in fact, knock the front door down. *Id.* at p. 85. Non-party Quincey also testified that petitioner did not identify himself as a bail bondsman or a bail agent. *Id.* at p. 87. He stated that petitioner knocked the door down, held him and the other two victims at gunpoint, and ordered non-party Quincey and non-party Nathan to handcuff themselves together. *Id.* at p. 94. Non-party Quincey further testified that he was wearing nothing but a towel at this time. *Id.* at p. 93. Finally, he also testified that he did not feel free to leave when petitioner was pointing the gun at him and that he felt afraid for his life. *Id.* at p. 91.

Finally, non-party Nathan also corroborated the testimony that petitioner threatened to break the door down, and did in fact do so. Dkt. 9, Ex. 12 at pp. 102, 104. He also testified that petitioner failed to identify himself as a bondsman or a bonds agent. *Id.* at pp. 101-102. He further testified that petitioner held him and the other two victims at gunpoint and ordered non-party Nathan and non-party Quincey to handcuff themselves together. *Id.* at p. 107. Finally, a recording of a 911 call placed by non-party Taylor during the incident corroborates the victims' testimony. *Id.* at pp. 115-26.

Here, a reasonable finder of fact could conclude that petitioner was guilty of burglary, kidnapping, and assault. The testimony of three witnesses and the 911 recording show petitioner broke into the victims' residence, held the three victims at gunpoint, and forced two of the victims to handcuff themselves together. Viewing the evidence in the light most favorable to the prosecution, the Court finds that a reasonable juror could conclude this was the unlawful entry of a home with the intent to commit a crime in violation of RCW 9A.52.020, Washington's burglary statute. Thus the Washington Court of Appeals did not unreasonably apply clearly established federal law when it concluded the evidence was sufficient for a conviction of burglary. Similarly, the evidence demonstrates petitioner restrained all three victims with his use of a gun, and restrained non-party Quincey and non-party Panosh when he forced them to handcuff themselves to each other. Again, with the evidence read in the light most favorable to the prosecution, a reasonable juror could find that petitioner intentionally restrained the victims with the use of deadly force in violation of RCW 9A.40.030, Washington's kidnapping statute. Again, the Washington Court of Appeals did not unreasonably apply clearly established federal law when it came to that conclusion. Finally, the evidence shows petitioner held the three victims at gun point and they felt that they were not free to leave. The Court again finds, with the evidence read in the light most favorable to the prosecution, a reasonable juror could conclude those actions constituted putting another in apprehension of harm using a deadly weapon in violation of RCW 9A.36.021, Washington's assault statute. Again, the Washington Court of Appeals did not unreasonably apply clearly established federal law when it came to that conclusion.

Petitioner argues he was convicted on insufficient evidence because he was a bail bondsman who had the right to use reasonable force to affect an arrest. Dkt. 1, p. 5. However, the Washington Court of Appeals has already determined that petitioner does not enjoy any immunity or privilege under Washington law that would have insulated him from criminal liability in this context, holding:

Since Stomps entered the home of an address given by the bond's co-signer and not the address of the fugitive, since he was told by the individuals inside the home that they did not know the individual he

was looking for, and since he still proceeded to forcefully enter the home without permission, Stomps does not have immunity from Washington criminal laws under *Portnoy*.

*10 Dkt. 9, Ex. 2 at p. 4 n.2; *Stomps*, 2016 WL 3965175, at *2 n.2.

“[A] state court’s interpretation of state law, including one announced on direct appeal of the challenged conviction, binds a federal court sitting in habeas corpus.” *Bradshaw v. Richey*, 546 U.S. 74, 76 (2005). Thus, the Court must adopt the Washington Court of Appeals finding that, under Washington law, petitioner was not entitled to use reasonable force under the circumstances. Accordingly, the Court finds petitioner did not have any privilege or immunity to insulate him from a Washington criminal charge, and his claim that he was improperly convicted because he did have immunity is meritless.

Thus, the Washington Court of Appeals did not unreasonably apply clearly established federal law when it determined petitioner was convicted on sufficient evidence. Therefore, the Court recommends petitioner’s habeas petition be denied as to this ground.

CERTIFICATE OF APPEALABILITY

Petitioner seeking post-conviction relief under 28 U.S.C. § 2254 may appeal a district court’s dismissal of the federal habeas petition only after obtaining a certificate of appealability (COA) from a district or circuit judge. A certificate of appealability may issue only if petitioner has made “a substantial showing of the denial of a constitutional right.” *See* 28 U.S.C. § 2253(c)(2). 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) (*citing Slack v. McDaniel*, 529 U.S. 473, 484 (2000)). Pursuant to this standard, this Court concludes that petitioner is not entitled to a certificate of appealability with respect to this petition.

CONCLUSION

For the reasons stated above, the Court recommends petitioner’s habeas petition be denied.

Pursuant to 28 U.S.C. § 636(b)(1) and Fed. R. Civ. P. 72(b), the parties shall have fourteen (14) days from service of this Report to file written objections. *See also* Fed. R. Civ. P. 6. Failure to file objections will result in a waiver of those objections for purposes of *de novo* review by the district judge, *see* 28 U.S.C. § 636(b)(1)(C), and can result in a result in a waiver of those objections for purposes of appeal. *See Thomas v. Arn*, 474 U.S. 140 (1985); *Miranda v. Anchondo*, 684 F.3d 844, 848 (9th Cir. 2012) (citations omitted). Accommodating the time limit imposed by Fed. R. Civ. P. 72(b), the clerk is directed to set the matter for consideration on November 16, 2018, as noted in the caption.

All Citations

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APPENDIX D

2018 WL 6067203

Only the Westlaw citation is currently available.
United States District Court, W.D. Washington,
at Tacoma.

Jason STOMPS, Petitioner,
v.
Michael OBENLAND, Respondent.

CASE NO. 3:18-cv-05365 RBL-JRC

|
Signed 11/20/2018

Attorneys and Law Firms

Michael C. Kahrs, Seattle, WA, for Petitioner.

John Joseph Samson, Attorney General's Office, Olympia, WA, for Respondent.

ORDER ADOPTING REPORT AND RECOMMENDATION

Ronald B. Leighton, United States District Judge

*1 THIS MATTER is before the Court the Report and Recommendation of Magistrate Judge J. Richard Creatura [Dkt. # 15], Petitioner Stomps' Objections [Dkt. # 16], and the underlying record.

- (1) The Report and Recommendation is **ADOPTED**.
- (2) Stomps' habeas petition under 28 U.S.C. § 2254 is **DENIED**.
- (3) Stomps' Motion to Amend his Writ (to voluntarily dismiss his two actual innocence claims) [Dkt. # 17] is **DENIED** as futile. Such an amendment would leave only his sufficiency of the evidence argument, which the Court has rejected.
- (4) The Court will **NOT** issue a Certificate of Appealability under 28 U.S.C. § 2253(c)(2), for the reasons articulated in the Report and Recommendation.

IT IS SO ORDERED.

All Citations

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APPENDIX E

2019 WL 2517162

Only the Westlaw citation is currently available.
United States Court of Appeals, Ninth Circuit.

Jason STOMPS, Petitioner-Appellant,
v.
Mike OBENLAND, Respondent-Appellee.

No. 18-36054

|
FILED APRIL 25, 2019

Attorneys and Law Firms

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John Joseph Samson, Assistant Attorney General, AGWA—Office of the Washington Attorney General, Olympia, WA, for Respondent-Appellee.

D.C. No. 3:18-cv-05365-RBL, Western District of Washington, Tacoma

Before: O'SCANNLAIN and GOULD, Circuit Judges.

ORDER

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

Any pending motions are denied as moot.

DENIED.

All Citations

Not Reported in Fed. Rptr., 2019 WL 2517162

CLARK COUNTY PROSECUTING ATTORNEY

November 12, 2019 - 9:00 AM

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