

1 The Court mostly agrees with the R&R’s reasoning¹ but, as explained below, departs in
2 part from Judge Christel’s ruling on Ms. Tricomo’s first ground for relief—namely that she
3 “received ineffective assistance of counsel in violation of the right to counsel protected by the
4 Sixth and Fourteenth Amendments” because her sentencing lawyer “did not hire the proper
5 expert to evaluate the effect of the prescribed medication, Paxil,” on Ms. Tricomo’s behavior.
6 (Dkt. No. 1 at 5.)

7 II BACKGROUND

8 The procedural and factual background of this case has been discussed at length in Judge
9 Christel’s prior R&Rs (Dkt. Nos. 24, 39) and the Court incorporates these by reference.
10 Nonetheless, the Court briefly recounts the procedural history of the latest R&R.

11 On April 8, 2022, Judge Christel issued the First R&R, which recommended denying the
12 second and third grounds of Ms. Tricomo’s Petition² but ordering an evidentiary hearing as to
13 the first ground (ineffective assistance of counsel (“IAC”)). (Dkt. No. 24 at 38.) While the R&R
14 was pending before this Court, the Supreme Court issued *Shinn v. Ramirez*, 142 S. Ct. 1718
15 (2022), which dramatically narrowed the scope of relief afforded to parties seeking federal
16 habeas relief on the basis of IAC claims. In light of *Shinn*, the Court declined to adopt Judge
17 Christel’s First R&R and referred the matter back to Judge Christel for further review. (Dkt. No.
18 31.) After receiving additional briefing from the parties (Dkt. Nos. 34, 36, 38), Judge Christel
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20 ¹ The Court notes that Ms. Tricomo did not object to Judge Christel’s denial of the second and
21 third grounds for her petition (*see* Dkt. No. 40 at 1) and the Court approves of Judge Christel’s
22 recommendation as to these grounds in their entirety.

23 ² The second ground for relief raised in the Petition is that Ms. Tricomo’s multiple convictions for
24 assault and murder violated the double jeopardy provisions of the Fifth and Fourteenth
Amendments. (Dkt. No. 1 at 7.) The third ground for relief raised in the Petition is that Ms.
Tricomo did not knowingly and voluntarily plead guilty in violation of the Fourteenth
Amendment’s Due Process Clause. (*Id.* at 8.)

1 issued his Second R&R on October 31, 2022, which recommended denying Ms. Tricomo’s
2 Petition on all grounds. (Dkt. No. 39 at 1.) Ms. Tricomo filed objections to the Second R&R on
3 November 14, 2022. (Dkt. No. 40.) And Respondent Jeneva Cotton filed a response to Ms.
4 Tricomo’s objections on November 23, 2022. (Dkt. No. 41.)

5 III DISCUSSION

6 A. Legal Standard

7 “To respect our system of dual sovereignty, the availability of habeas relief is narrowly
8 circumscribed.” *Shinn*, 142 S. Ct. at 1730 (citation omitted). Federal courts may only grant
9 habeas relief under the Antiterrorism and Effective Death Penalty Act (“AEDPA”) in limited
10 circumstances. Under AEDPA, the Court may grant habeas relief if the adjudication of a claim
11 in state court “resulted in a decision that . . . involved an unreasonable application of, clearly
12 established Federal law, as determined by the Supreme Court of the United States; or . . . was
13 based on an unreasonable determination of the facts.” 28 U.S.C. § 2254(d). “The question under
14 AEDPA is thus not whether a federal court believes the state court’s determination was incorrect,
15 but whether that determination was unreasonable—‘a substantially higher threshold’ for a
16 prisoner to meet.” *Shoop v. Twyford*, 142 S. Ct. 2037, 2043 (2022).

17 Out of concerns for comity and finality, a federal court typically may not review “the
18 merits of claims, including constitutional claims, that a state court declined to hear because the
19 prisoner failed to abide by a state procedural rule.” *Martinez v. Ryan*, 566 U.S. 1, 9 (2012).
20 Notwithstanding this limitation, a court may review a federal habeas claim that has been
21 procedurally defaulted if “the prisoner can demonstrate cause for the default and actual prejudice
22 as a result of the alleged violation of federal law.” *Coleman v. Thompson*, 501 U.S. 722, 750
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1 (1991). The *Coleman* court clarified that attorney ignorance or error did not constitute “cause”
2 to excuse procedural default. *Id.* at 753.

3 In *Martinez*, the Supreme Court modified its ruling in *Coleman* and held that
4 “[i]nadequate assistance of counsel at initial-review collateral proceedings may establish cause
5 for a prisoner’s procedural default of a claim of ineffective assistance at trial.” 566 U.S. at 9.
6 Under the equitable principles articulated in *Martinez*, a petitioner may show cause to overcome
7 procedural default if they can establish:

8 (1) the underlying ineffective assistance of trial counsel claim is “substantial”; (2)
9 the petitioner was not represented or had ineffective counsel during the PCR
10 proceeding; (3) the state PCR proceeding was the initial review proceeding; and (4)
state law required (or forced as a practical matter) the petitioner to bring the claim
in the initial review collateral proceeding.

11 *Dickens v. Ryan*, 740 F.3d 1302, 1319 (9th Cir. 2014). “Substantiality” requires a petitioner to
12 demonstrate that “reasonable jurists could debate whether (or, for that matter, agree that) the
13 petition should have been resolved in a different manner or that the issues presented were
14 adequate to deserve encouragement to proceed further.” *Detrich v. Ryan*, 740 F.3d 1237, 1245
15 (9th Cir. 2013) (quoting *Miller–El v. Cockrell*, 537 U.S. 322, 336 (2003)). Counsel is considered
16 to have been “ineffective” under the second *Martinez* prong if “counsel made errors so serious
17 that counsel was not functioning as the ‘counsel’ guaranteed the defendant by the Sixth
18 Amendment . . . [and] the deficient performance prejudiced the defense.” *Strickland v.*
19 *Washington*, 466 U.S. 668, 687 (1984); *see also Detrich*, 740 F.3d at 1245.

20 Overhanging this elaborate set of judicial remedies, however, lies AEDPA. And the
21 Supreme Court recently elaborated in *Shinn* and *Shoop* that equitable remedies must yield to
22 AEDPA’s statutory directives. *See Shinn*, 142 S. Ct. at 1736. In particular, the *Shinn* court
23 emphasized the language of 28 U.S.C. § 2254(e)(2), which directs that courts shall not hold
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1 evidentiary hearings where “the applicant has failed to develop the factual basis of a claim in
2 State court proceedings.” 28 U.S.C. § 2254(e)(2). And *Shoop* reenforced that such an analysis
3 must be conducted “at the outset” before even reaching the question of whether an evidentiary
4 hearing is appropriate. 142 S. Ct. at 2044. The Supreme Court in *Shinn* made clear that a
5 petitioner may “fail” to develop the record through the negligence of their counsel. Indeed, the
6 Court emphasized that “‘a failure to develop the factual basis of a claim,’ as § 2254(e)(2)
7 requires, ‘is not established unless there is lack of diligence, or some greater fault, attributable to
8 the prisoner or the prisoner’s counsel.’” *Id.* at 1735.³

9 **B. *Shinn* compels a finding that Petitioner “failed to develop” the factual basis of her**
10 **claims in state court**

11 The Second R&R did not directly address whether Petitioner “failed to develop” the
12 record in state court, which the Court understands to be a preliminary matter under *Shinn* and
13 *Shoop*. The Court finds, under the reasoning of *Shinn*, Petitioner ultimately failed to develop the
14 trial court record and the Court cannot hold an evidentiary hearing.

15 As discussed above, *Shinn* reaffirmed that the equitable remedy created by *Martinez*
16 remains subject to the language of 28 U.S.C. § 2254(e)(2), which precludes an evidentiary
17 hearing where the petitioner failed to develop the factual basis for their claim in state court
18 proceedings. A petitioner “fails” to develop the factual basis for their claim where there is either
19 a “lack of diligence, or some greater fault.” *Williams v. Taylor*, 529 U.S. 420, 432 (2000); *see*

20 ³ As noted by Justice Sotomayor, *Shinn* “all but overrules” *Martinez* and *Trevino v. Thaler*, 569
21 U.S. 413, 429 (2013), creating a situation where a petitioner’s default may be excused by IAC but
22 that IAC bars the holding of an evidentiary hearing because counsel’s negligence is attributable to
23 the petitioner. *Id.* at 1747 (Sotomayor, J., dissenting); *see also Habeas Corpus-Ineffective*
24 *Assistance of Counsel-Procedural Default-Shinn v. Ramirez*, 136 HARV. L. REV. 400, 404 (2022)
(noting that “despite the double ineffectiveness of state-provided counsel, the petitioner is barred
from developing the evidence required to prove her underlying claim on the merits--a result that
‘guts Martinez’s and Trevino’s core reasoning.’”).

1 *also Shinn*, 142 S. Ct. at 1734 (noting that “[a] prisoner is ‘at fault’ if he ‘bears responsibility for
2 the failure’ to develop the record.”).

3 Ms. Tricomo bears responsibility for her failure to develop the state court record. As in
4 *Shinn*, Ms. Tricomo failed to raise her specific IAC claims in state court in accordance with state
5 procedural rules—namely, Ms. Tricomo did not raise in her first personal restraint petition
6 (“PRP”) the argument that she suffered from IAC when her sentencing counsel failed to retain
7 the proper expert to introduce evidence about the role that Paxil may have played in her violent
8 behavior. (See Dkt. No. 15-1 at 238–247). While Ms. Tricomo’s counsel subsequently raised
9 this specific argument in an amended PRP (see Dkt. No. 15-2 at 2) and sought an evidentiary
10 hearing, the Washington Court of Appeals ultimately determined that Ms. Tricomo’s argument
11 was untimely and that it did not “possess the inherent authority to extend the statutory time-bar.”
12 (Dkt. No. 15-1 at 24.)

13 Ms. Tricomo also argues that the Court should view Judge Marsha J. Pechman’s ruling in
14 *Mothershead v. Wofford*, No. C21-5186 MJP, 2022 WL 2275423 (W.D. Wash. June 23, 2022),
15 *motion to certify appeal granted*, No. C21-5186 MJP, 2022 WL 2755929 (W.D. Wash. July 14,
16 2022) as persuasive authority and that *Mothershead* supports a finding that Ms. Tricomo did not
17 fail to develop the record. (Dkt. No. 40 at 9–10.) The Court finds *Mothershead* distinguishable.
18 The petitioner in *Mothershead* actually raised her IAC claim in her first, timely PRP, unlike Ms.
19 Tricomo. See *Mothershead*, 2022 WL 2275423 at *1. This matter was decisive for Judge
20 Pechman, who noted that “[t]he record here shows Petitioner’s consistent efforts to squarely
21 present the merits of her IAC claim to the State courts in her PRP.” *Id.* at *5. Here, Ms.
22 Tricomo’s failure to initially raise her specific IAC argument on collateral review prevented the
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1 Washington state courts from assessing the merits of her arguments until much later in the appeal
2 process.

3 The Court is also not convinced that the holding of *Shinn* is as narrow as Judge
4 Pechman’s construction. Judge Pechman argued that “[i]f postconviction counsel's negligence
5 not only inures to the petitioner but also undercuts any other record of diligence, then §
6 2254(e)(2) will apply to every procedurally-defaulted postconviction IAC claim.” *Id.* at *6. But
7 the Court in *Shinn* in no uncertain language held that “under § 2254(e)(2), a prisoner is ‘at fault’
8 even when state postconviction counsel is negligent,” *Shinn*, 142 S. Ct. at 1735, and we agree
9 with other courts that have construed this language to “close[] the door on many petitioners’
10 arguments and ability to overcome the procedural default of ineffective assistance of trial
11 counsel claims.” *MICHAEL E. BOSSE, Petitioner, v. WARDEN TYRELL DAVIS, Respondent.*,
12 No. 1:21-CV-00256-BLW, 2023 WL 35278, at *3 (D. Idaho Jan. 4, 2023); *see also Shinn*, 142 S.
13 Ct. at 1750 (Sotomayor, J., dissenting) (“The Court's decision thus reduces to rubble many
14 habeas petitioners' Sixth Amendment rights to the effective assistance of counsel.”).

15 Ms. Tricomo’s status as a pro se when filing her PRP is also not sufficient to excuse the
16 requirements of § 2254(e)(2). The Court disagrees with the conclusion of the court in *Marks v.*
17 *Johnson*, No. 217CV01413JCMBNW, 2022 WL 13815652, at *4 (D. Nev. Oct. 21, 2022) that
18 *Shinn* did not assess whether § 2254(e)(2) applied to a petitioner “who was pro se in his state
19 habeas action, failed to develop the factual basis of a claim in that action within the meaning of §
20 2254(e)(2).” *Id.* at *4. The Supreme Court in *Shinn* specifically contemplated pro se applications
21 when it noted that “‘a failure to develop the factual basis of a claim,’ as § 2254(e)(2) requires, ‘is
22 not established unless there is lack of diligence, or some greater fault, attributable **to the**
23 **prisoner** or the prisoner's counsel.’” *Shinn*, 142 S. Ct. at 1735 (emphasis added).

1 Given the broad reach of *Shinn*, the Court is compelled to find that Ms. Tricomo failed to
2 develop the record and thus the Court is barred from conducting an evidentiary hearing regarding
3 her underlying IAC claim.

4 **C. Petitioner’s other objections are unavailing**

5 The Court approves of Judge Christel’s analysis that 28 U.S.C. § 2254(d) bars relief even
6 on the basis of the existing state court record. Ms. Tricomo appears to argue Judge Christel
7 applied the wrong standard in assessing her *Martinez* claim. (Dkt. No. 40 at 6.) However, Judge
8 Christel’s analysis focused on whether Ms. Tricomo’s IAC claim was “substantial” (Dkt. No. 39
9 at 18–19)—the same standard Ms. Tricomo asserts should apply. An IAC claim is substantial or
10 has merit “where (1) counsel's ‘performance was unreasonable under prevailing professional
11 standards,’ and (2) ‘there is a reasonable probability that but for counsel's unprofessional errors,
12 the result would have been different.’” *Cook v. Ryan*, 688 F.3d 598, 610 (9th Cir. 2012). The
13 Court agrees that “Petitioner has not shown there is a reasonable probability that the result would
14 have been different had Petitioner’s sentencing counsel submitted the new evidence attached to
15 the amended PRP to the trial court.” (Dkt. No. 39 at 21.) Nor is the Court convinced the
16 different results reached by the First and Second R&R indicate there is a reasonable probability
17 Ms. Tricomo would prevail on her underlying IAC claim. The state court record indicates the
18 sentencing judge considered the impacts of Paxil on Ms. Tricomo, various psychological
19 opinions, and only excluded a small portion of Ms. Tricomo’s expert’s report. (*See, e.g.*, Dkt.
20 No. 15-2 at 657–60.)

21 For these same reasons, the Court adopts Judge Christel’s recommendation that no
22 certificate of appealability (“COA”) be issued. *See Martinez*, 566 U.S. at 14 (incorporating the
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1 standard for determining whether to issue a “COA” into the Court’s substantiality analysis for a
2 procedurally defaulted IAC claim.).⁴

3 **IV CONCLUSION**


4 Accordingly, the Court, having reviewed the Report and Recommendation of Magistrate
5 Judge David W. Christel (Dkt. No. 39), objections to the Report and Recommendation, and the
6 remaining record, does hereby find and ORDER:

7 (1) The Court ADOPTS the Report and Recommendation.

8 (2) Petitioner’s federal habeas Petition (Dkt. 1) is DENIED and a certificate of
9 appealability is DENIED.

10 (3) The Clerk is directed to send copies of this Order to counsel for Petitioner, counsel
11 for Respondent, and to the Hon. David W. Christel.

12 Dated this 18th day of January, 2023.

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15 David G. Estudillo
16 United States District Judge

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24 ⁴ The Court does not consider Ms. Tricomo’s constitutional objections to the COA process (*see*
Dkt. No. 40 at 11–12) as these are not properly before the Court.