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U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

DARREN HOGUE, Petitioner-Appellant, v. MARK NOOTH, Respondent-Appellee.	No. 17-35393 D.C. No. 2:12-cv-02300-CL District of Oregon, Pendleton ORDER

Before: WARDLAW and OWENS, Circuit Judges, and MÁRQUEZ,* District Judge.

The panel has voted to deny Petitioner-Appellant's petition for panel rehearing. Judges Wardlaw and Owens have voted to deny Petitioner-Appellant's petition for rehearing en banc, and Judge Márquez has so recommended.

The full court has been advised of the petition for rehearing en banc, and no judge of the court has requested a vote on it.

The panel has voted to amend the memorandum disposition filed on July 11, 2018. The superseding amended memorandum disposition will be filed concurrently with this order.

The petitions for panel rehearing and for rehearing en banc are denied. No

* The Honorable Rosemary Márquez, United States District Judge for the District of Arizona, sitting by designation.

further petitions for rehearing or petitions for rehearing en banc will be entertained.

NOT FOR PUBLICATION

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UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

DARREN HOGUE, Petitioner-Appellant, v. MARK NOOTH, Respondent-Appellee.	No. 17-35393 D.C. No. 2:12-cv-02300-CL AMENDED MEMORANDUM*

Appeal from the United States District Court
for the District of Oregon
Michael J. McShane, District Judge, Presiding

Submitted July 9, 2018**
Portland, Oregon

Before: WARDLAW and OWENS, Circuit Judges, and MÁRQUEZ,*** District Judge.

Darren Hogue, an Oregon state prisoner, appeals from the denial of his petition for a writ of habeas corpus. As the parties are familiar with the facts, we

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

** The panel unanimously concludes this case is suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

*** The Honorable Rosemary Márquez, United States District Judge for the District of Arizona, sitting by designation.

do not recount them here. We have jurisdiction under 28 U.S.C. § 1291, and we affirm.

1. Petitioner's waiver of any collateral challenge to his conviction or sentence does not strip this court of jurisdiction under 28 U.S.C. § 2254 because his petition challenges that waiver's validity on ineffective-assistance grounds. *Washington v. Lampert*, 422 F.3d 864, 871 (9th Cir. 2005).

2. The Oregon post-conviction-relief ("PCR") court adjudicated petitioner's ineffective-assistance claim "on the merits," and 28 U.S.C. § 2254(d) therefore applies. In addition to finding that petitioner had failed to file his state habeas petition within his appeal waiver's sixty-day deadline, the PCR court also found "that petitioner was of sound mind, and that he executed the waiver of post conviction remedies and collateral relief freely, voluntarily and knowingly." This invocation of the test for the constitutional validity of guilty pleas, *see North Carolina v. Alford*, 400 U.S. 25, 31 (1970), indicates that the court "understood itself to be deciding a question with federal constitutional dimensions," *Johnson v. Williams*, 568 U.S. 289, 305 (2013), in turn indicating that the court sought to address petitioner's claim on its merits.

The lack of an express reference to *Strickland v. Washington*, 466 U.S. 668 (1984), or *Hill v. Lockhart*, 474 U.S. 52 (1985), does not indicate otherwise: even if contrary to clearly established federal law, the PCR court's application of the

due-process "voluntary and knowing" test indicates that it sought to render a judgment on petitioner's claim based on "the intrinsic rights and wrongs of [the] case as determined by matters of substance, in distinction from matters of form." *Johnson*, 568 U.S. at 302 (emphasis and alteration removed) (quoting Black's Law Dictionary 1199 (9th ed. 2009)).

Contrary to petitioner's argument, the PCR court's use of the term "dismissal" in disposing of his petition sheds no light on whether the court adjudicated petitioner's claim "on the merits"; Oregon law uses the term "dismissal" to describe the adverse disposition of a state habeas petition even when the petition is resolved on its merits. *See* Or. Rev. Stat. § 34.680(1); *Dunn v. Hill*, 156 P.3d 72, 76 (Or. Ct. App. 2007). Finally, we reject petitioner's reliance on respondent's state-court briefing, which does not overcome the express indications in the PCR court's decision that it evaluated petitioner's claim "based on the intrinsic right and wrong of the matter." *Johnson*, 568 U.S. at 303.

3. Petitioner offers no clear and distinct argument that the PCR court's adjudication of the merits of his claim "was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States," or that it "was based on an unreasonable determination of the facts" under 28 U.S.C. § 2254(d). He has therefore waived any argument that he has overcome that provision. *See Avila v. L.A. Police Dep't*,

758 F.3d 1096, 1101 (9th Cir. 2014).

Petitioner raises *Lafler v. Cooper*, 566 U.S. 156, 172–73 (2012), for the first time in his petition for rehearing or rehearing en banc. Under longstanding circuit precedent, petitioner's reliance on that case is waived "because at no point in this litigation until the petition for rehearing did [he] argue that we should apply [*Lafler*], or even consider it." *Picazo v. Alameida*, 366 F.3d 971, 971–72 (9th Cir. 2004); *see also, e.g.*, *Fields v. Palmdale Sch. Dist.*, 447 F.3d 1187, 1190 (9th Cir. 2006) (per curiam) ("We do not consider on rehearing new issues previously not raised, briefed or argued.").

4. Because 28 U.S.C. § 2254(d) governs, and because petitioner has waived any argument that the state PCR court's resolution of his claim was either contrary to or an unreasonable application of clearly established federal law, our inquiry is restricted to the factual record before the state courts, and petitioner is not entitled to an evidentiary hearing. *See Cullen v. Pinholster*, 563 U.S. 170, 182–85 (2011); *see also* 28 U.S.C. § 2254(d)(2) (restricting federal habeas review to "the evidence presented in the State court proceeding").

AFFIRMED.

NOT FOR PUBLICATION

FILED

JUL 11 2018

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

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

DARREN HOGUE, Petitioner-Appellant, v. MARK NOOTH, Respondent-Appellee.	No. 17-35393 D.C. No. 2:12-cv-02300-CL MEMORANDUM*

Appeal from the United States District Court
for the District of Oregon
Michael J. McShane, District Judge, Presiding

Submitted July 9, 2018**
Portland, Oregon

Before: WARDLAW and OWENS, Circuit Judges, and MARQUEZ,*** District Judge.

Darren Hogue, an Oregon state prisoner, appeals from the denial of his petition for a writ of habeas corpus. As the parties are familiar with the facts, we

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*** The Honorable Rosemary Marquez, United States District Judge for the District of Arizona, sitting by designation.

do not recount them here. We have jurisdiction under 28 U.S.C. § 1291, and we affirm.

1. Petitioner's waiver of any collateral challenge to his conviction or sentence does not strip this court of jurisdiction under 28 U.S.C. § 2254 because his petition challenges that waiver's validity on ineffective-assistance grounds. *Washington v. Lampert*, 422 F.3d 864, 871 (9th Cir. 2005).

2. The Oregon post-conviction-relief ("PCR") court adjudicated petitioner's ineffective-assistance claim "on the merits," and 28 U.S.C. § 2254(d) therefore applies. In addition to finding that petitioner had failed to file his state habeas petition within his appeal waiver's sixty-day deadline, the PCR court also found "that petitioner was of sound mind, and that he executed the waiver of post conviction remedies and collateral relief freely, voluntarily and knowingly." This invocation of the test for the constitutional validity of guilty pleas, *see North Carolina v. Alford*, 400 U.S. 25, 31 (1970), indicates that the court "understood itself to be deciding a question with federal constitutional dimensions," *Johnson v. Williams*, 568 U.S. 289, 305 (2013), in turn indicating that the court sought to address petitioner's claim on its merits.

The lack of an express reference to *Strickland v. Washington*, 466 U.S. 668 (1984), or *Hill v. Lockhart*, 474 U.S. 52 (1985), does not indicate otherwise. The PCR court's application of the due-process "voluntary and knowing" test

necessarily reflected a judgment that petitioner's counsel had adequately investigated petitioner's case and advised him about his plea agreement: were that not so, petitioner's plea and post-conviction-remedies waiver could be neither voluntary nor intelligent. *See Hill*, 474 U.S. at 56-57; *Washington*, 422 F.3d at 872-73.

Contrary to petitioner's argument, the PCR court's use of the term "dismissal" in disposing of his petition sheds no light on whether the court adjudicated petitioner's claim "on the merits"; Oregon law uses the term "dismissal" to describe the adverse disposition of a state habeas petition even when the petition is resolved on its merits. *See* Or. Rev. Stat. § 34.680(1); *Dunn v. Hill*, 156 P.3d 72, 76 (Or. Ct. App. 2007). Finally, we reject petitioner's reliance on respondent's state-court briefing, which does not overcome the express indications in the PCR court's decision that it evaluated petitioner's claim "based on the intrinsic right and wrong of the matter," *Johnson*, 568 U.S. at 303.

3. Petitioner offers no clear and distinct argument that the PCR court's adjudication of the merits of his claim "was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States," or that it "was based on an unreasonable determination of the facts" under 28 U.S.C. § 2254(d). He has therefore forfeited any argument that he has overcome that provision. *See Avila v. L.A. Police Dep't*,

758 F.3d 1096, 1101 (9th Cir. 2014).

4. Because 28 U.S.C. § 2254(d) governs, and because petitioner has forfeited any argument that the state PCR court's resolution of his claim was either contrary to or an unreasonable application of clearly established federal law, our inquiry is restricted to the factual record before the state courts, and petitioner is not entitled to an evidentiary hearing. *See Cullen v. Pinholster*, 563 U.S. 170, 182-85 (2011); *see also* 28 U.S.C. § 2254(d)(2) (restricting federal habeas review to "the evidence presented in the State court proceeding").

AFFIRMED.

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

DARREN HOGUE,

Petitioner,

v.

MARK NOOTH,

Respondent.

Civ. No. 2:12-cv-02300-CL

ORDER

MCSHANE, Judge:

The Ninth Circuit Court of Appeals remanded this matter for the limited purpose of granting or denying a certificate of appealability. ECF No. 93. As reasonable jurists could debate the merits of petitioner's claims that: the PCR court denied his Sixth Amendment claims related to his guilty plea and waiver on procedural grounds; his Sixth Amendment rights were violated; and he is entitled to an evidentiary hearing, I grant plaintiff a certificate of appealability on those claims. *See* 28 U.S.C. § 2253(c)(2); *Slack v. McDaniel*, 529 U.S. 473, 483-84 (2000).

IT IS SO ORDERED.

DATED this 27th day of June, 2017.

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

1 –ORDER

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

DARREN HOGUE,

Petitioner,

v.

MARK NOOTH,

Respondent.

Civ. No. 2:12-cv-02300-CL

OPINION AND ORDER

MCSHANE, Judge:

For the following reasons, Judge Mark Clarke's Findings and Recommendation (ECF No. 79) is ADOPTED, and Petitioner's Petition for Writ of Habeas Corpus (ECF No. 1) is DENIED.

BACKGROUND

Magistrate Judge Mark Clarke filed his Findings and Recommendation on September 12, 2016. Magistrate Judge Clarke recommended that the petition for habeas corpus relief be denied, finding that (1) the state court adjudicated petitioner's claim on its merits and (2) the court owes deference to the Post-Conviction Relief (PCR) court's conclusion that petitioner knowingly, voluntarily, and intelligently entered his plea agreement, which is supported by the record. Further, Judge Clarke recommended that petitioner's request for an evidentiary hearing be denied. The matter is now before me. *See* 28 U.S.C. § 636(b)(1)(B); Fed. R. Civ. P. 72(b).

When either party objects to any portion of a magistrate judge's Findings and Recommendation, the district court must make a *de novo* determination of that portion of the magistrate judge's report. 28 U.S.C.§ 636(b)(1); *McDonnell Douglas Corp. v. Commodore Business Machines, Inc.*, 656 F.2d 1309, 1313 (9th Cir. 1981). Petitioner has filed timely objections to the Findings and Recommendation. Therefore, I have given *de novo* review of Judge Clarke's rulings.

DISCUSSION

Petitioner argues ineffective assistance of counsel, claiming that his attorney failed to ensure the petitioner's waiver of collateral remedies was knowing, intelligent, and voluntary, making his guilty pleas and waivers effectively coerced. He further argues that he is entitled to an evidentiary hearing. Judge Clark determined that the sole issue was whether petitioner's wavier of collateral remedies, which was included in his plea agreement, is enforceable.

A. Whether the Post-Conviction Court's Ruling was Determined on the Merits

Under the Antiterrorism and Effective Death Penalty Act (AEDPA), 28 U.S.C. § 2254, where the claim was adjudicated on the merits in state court, this court shall grant habeas relief 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 of the United States," or "was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d).

Petitioner argues that the PCR court dismissed his claim on procedural grounds. The PCR court's Order Granting Defendant's Motion for Summary Judgment did find that "[P]etitioner failed to file his petition within the 60 day period provided in his detailed Waiver of Direct Appeal and Collateral Remedies." However, the PCR court also found that:

> 4. The discussion on the record at the plea hearing regarding the plea agreement and the contents of the waiver document, evidence that petitioner was of sound mind, and that he executed the waiver of post conviction remedies and collateral relief freely, voluntarily and knowingly.

In his Findings and Recommendation, Judge Clarke determined that "petitioner's argument that 'because Mr. Hogue initiated his post-conviction case outside the negotiated sixty-day time limit, the PCR court dismissed his case on procedural grounds,' . . . is somewhat disingenuous," and that "[i]mplicit in the finding that petitioner's waiver was voluntary and knowing is that his attorney was not defective for failing to properly advise him regarding the plea and waiver." He therefore found that the PCR court's finding that the petitioner's plea and waiver was knowing and voluntary was the PCR court's finding on the merits of petitioner's ineffective assistance of counsel claim.

Having determined that the state court decided the petitioner's claim on the merits, Judge Clarke applied 28 U.S.C. § 2254(d)'s reasonableness standard and determined that the PCR court's finding is supported by the record and entitled to deference. While Judge Clarke's reading of the PCR court's Order is reasonable, because the PCR court did not expressly find that petitioner's counsel was not defective I will analyze the merits of petitioner's claim of ineffective assistance of counsel here. As the analysis will show, petitioner does not meet his burden.

B. Strickland Analysis of the Ineffective Assistance of Counsel Claim

The test applied to an ineffective assistance of counsel claim is from the United States Supreme Court's decision in *Strickland v. Washington*, 466 U.S. 668 (1984). To "show that counsel's assistance was so defective as to require reversal of a conviction," *Strickland* requires the petitioner to meet both prongs of a two-prong test: (1) counsel's performance was deficient, and (2) the deficient performance prejudiced the defense. *Id.* at 687. To demonstrate that counsel's performance was deficient, petitioner must show that "counsel's representation fell below an objective standard of reasonableness." *Id.* at 688. To show prejudice, petitioner must evidence "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different," with a reasonable probability being "a probability sufficient to undermine confidence in the outcome." *Id.* at 694.

To meet the prejudice requirement regarding a plea agreement, the petitioner must show "a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial." *Hill v. Lockhart*, 474 U.S. 52, 59 (1985). Resolution of the prejudice question in a plea case "will depend largely on whether [an] affirmative defense likely would have succeeded at trial." *Id.*

i. The Record

The record does not meet petitioner's *Strickland* burden. Rather, the record reflects that petitioner's attorney negotiated a highly favorable plea. Petitioner was indicted on six measure 11 counts: two counts each of Rape in the First Degree, Sodomy in the First Degree, and Sexual Abuse in the First Degree. The District Attorney, as part of the plea agreement, agreed to dismiss all the indictment's charges and allow petitioner to enter a guilty plea on two counts of Rape in the Second Degree, a lesser charge. The plea reduced petitioner's potential sentence exposure by 400 months, from 550 to 150.

The record reflects that petitioner's victim, who is also his daughter, described the facts leading to the charges in a written statement and that the trial court told the petitioner:

> Well [petitioner], certainly the facts that are presented by [G's] letter suggest to this court that this would have been a pretty nasty trial and you are fortunate that your attorney and [the prosecutor] were able to come to a compromise because certainly the potential term of incarceration you face if you had gone to trial and been convicted would have been significantly more time. So in that regard, your attorney has done an able job . . . to get you this negotiation.

Based on the victim's letter, the potential sentence exposure, and the trial court's statement, it appears that petitioner's trial attorney negotiated a favorable agreement on petitioner's behalf and that petitioner would not have insisted on going to trial but for his counsel's error.

Petitioner alleges evidence casting doubt on the victim's statements, but he did not offer that evidence to the PCR court nor has he presented it here. He has further failed to allege facts to support his coercion claim. The record fails to support petitioner's Sixth Amendment ineffective assistance of counsel claim.

ii. Whether the Court Looks Beyond the Record

Petitioner claims, however, that this court should look outside of the record by way of an evidentiary hearing. Petitioner does not meet his burden for this court to grant an evidentiary hearing.

"Federal courts sitting in habeas are not an alternative forum for trying facts and issues which a prisoner made insufficient effort to pursue in state court proceedings." *Williams v. Taylor*, 529 U.S. 420, 437 (2000). For this court to look outside of the record where "the applicant has failed to develop the factual basis of a claim in State court proceedings," petitioner must meet the requirements put forward in 28 U.S.C. § 2254(e)(2). That statute prohibits an evidentiary hearing on the claim unless petitioner can show that the claim relies on either a new rule of constitutional law, which was previously unavailable and which the Supreme Court has since made retroactive to cases on collateral review or "a factual predicate that could not have been previously discovered through the exercise of due diligence," in addition to the underlying facts of the claim being sufficient to show "by clear and convincing evidence that but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense." 28 U.S.C. § 2254(e)(2)(A) – (B).

The AEDPA does not apply if petitioner has acted diligently in developing his claims at the state court level but has not been able to do so. *Williams v. Taylor*, 529 U.S. at 423. In *Williams*, the Court allowed the petitioner to develop evidence relating to some claims because nothing in the record would have put a reasonable attorney on notice regarding those issues, but the Court did not allow petitioner to develop new evidence for his ineffective assistance claim because his state habeas attorney did not diligently develop the claim despite evidence that should have put the attorney on notice. *Id.* at 439-40.

Petitioner argues that he was not able to develop his claims because his claim was dismissed on a procedural bar. Even assuming the PCR court dismissed petitioner's claim on procedural grounds, that court still heard arguments relating to the merits. Further, Petitioner had more than a year from the time he filed his petition until the hearing for summary judgment. He failed to develop evidence during that time, which constitutes a lack of diligence. Therefore, petitioner did not meet the diligence requirement of 28 U.S.C. § 2254(e)(2)(A)(ii) and is not entitled to an evidentiary hearing.

CONCLUSION

Based on the facts as reported in the record and petitioner's failure to meet the requirements for an evidentiary hearing, I ADOPT Judge Clarke's Recommendation (ECF No. 79), and Petitioner Hogue's petition for writ of habeas corpus (ECF No. 1) is DENIED.

IT IS SO ORDERED.

DATED this 1 day of May, 2017.

Michael J. McShane
United States District Judge

UNITED STATES DISTRICT COURT

DISTRICT OF OREGON

DARREN HOGUE,

Petitioner, 2:12-cv-02300-CL

v. FINDINGS AND RECOMMENDATION

MARK NOOTH,

Respondent.

CLARKE, Magistrate Judge.

Petitioner is in the custody of the Oregon Department of Corrections pursuant to a judgment dated July 17, 2009 from the Jackson County Circuit Court after convictions for two counts of Rape in the Second Degree. Exhibit 101. After petitioner entered a guilty plea, the court imposed two 75 month sentences of imprisonment with the second to run consecutively to the first. *Id.*

Petitioner did not directly appeal his convictions.

Petitioner filed a Final Amended Petition for Post-Conviction Relief, but the Malheur County Circuit Court granted the state's motion for summary judgment. Exhibits 117 - 118. The Oregon Court of Appeals affirmed without opinion and the Oregon Supreme Court denied review. Exhibits 119 - 124.

Petitioner filed a pro se Petition for habeas corpus relief under 28 U.S.C. § 2254 alleging 16 claims for relief. Respondents argue that this court should deny relief on those claims because under a plea agreement petitioner voluntarily waived his right to seek any state post-conviction or federal habeas corpus relief. Respondent further contends that "to the extent that petitioner challenges the voluntariness of his waiver, the state post-conviction court rejected that claim in a reasonable application of federal law." Response to Petition (#23) p. 1-2.

After respondent's Response was filed, counsel was appointed to represent petitioner. Counsel for petitioner filed a "Brief in Support of Petition for Writ of Habeas Corpus; and request for evidentiary hearing" arguing that "petitioner was denied effective assistance of counsel when his attorney failed to ensure that his waiver of collateral remedies was knowing, intelligent and voluntary. The guilty pleas and waivers were effectively coerced." Brief in Support

#55) p. 7. Petitioner further argues that petitioner is entitled to an evidentiary hearing in this court "because the appellate waiver in his case is unenforceable, he presents a colorable claim for relief, his claims were not adjudicated on the merits, and he has diligently pursued them. *Id.*, p. 9,

Thus, the sole issue before the court at this point of the proceeding is whether petitioner's waiver of collateral remedies as part of his plea agreement is enforceable.

The relevant factual and procedural background is as follows.

In August 2008, the State of Oregon indicted petitioner on two counts of Rape in the First Degree, two counts of Sodomy in the First Degree, and two counts of Sexual Abuse in the First Degree. Exhibit 102. In each count, the victim was petitioner's daughter. On July 17, 2009, petitioner signed a plea petition, in which the State agreed to dismiss the indictment and file an information charging petitioner with two counts of Rape in the Second Degree, to which petitioner agreed to plead guilty. Exhibit 103. The plea petition provided that the State would recommend that the court impose 75-month sentences on each count as required by Measure 11, and that the court would impose the sentences consecutively.

Petitioner also signed a "Waiver of Direct Appeal and Collateral Remedies" which provided as follows:

> I understand and agree that the state and the victim(s) have a strong interest in foreclosing any further litigation on the charges(s) in this csae. Therefore, in consideration for the state's promises that are set forth in this plea agreement, **I hereby waive forever my right to file wither a petition for post-conviction relief or a petition for federal habeas corpus relief that would challenge the validity of the conviction(s) and sentence entered in this case.**

Exhibit 115, pp. 2-3 (emphasis in original).

The waiver further provided that petitioner "may be entitled to petition for post-conviction or *habeas corpus* relief for the limited purpose of challenging the validity of the waiver, and set out an abbreviated limitations period for filing such proceedings. The waiver further provided "[i]n view of the "strong interest in ensuring that the convictions and sentences ... become final as soon as possible," petitioner agreed

> **... that if I choose to file either a petition for post-conviction relief or a petition for federal *habeas corpus* relief in order to challenge the validity of my waiver set forth above, I will do so not later than 60 days after the entry of the conviction(s).** I hereby specifically waive my right to file such a petition within the longer period otherwise allowed by the state and federal statutes cited above.

Exhibit 115, p. 3.

Lastly, the waiver provided that petitioner was "completely satisfied" with his attorney. *Id.*

After signing the plea agreement, petitioner

attended a hearing in which the court questioned petitioner extensively concerning his understanding of the agreement. Exhibit 104, pp. 3-4. Subsequently, the court concluded that petitioner signed the waiver "freely and voluntarily." Exhibit 104, p. 5.

Petitioner did not file a direct appeal. On December 10, 2009, petitioner filed a petition for post-conviction relief (PCR) - outside of the 60-day time limit set forth in the plea agreement waiver.[1] The petition alleged that trial counsel was ineffective in several respects, but it did not allege that trial counsel was ineffective in relation to the waiver or otherwise challenge the validity or voluntariness of the waiver. Exhibit 125. On October 5, 2010, petitioner filed an amended PCR petition at alleged, *inter alia*, that trial counsel was inadequate in that he "failed to advise and make sure that petitioner had a clear understanding of the consequences of he waiver of appeals." Exhibit 105, p. 18, Exhibit 128, p. 2.

The PCR court granted the state's motion for summary judgment and denied the PCR petition on the ground that

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1 Petitioner's judgment of conviction was entered on July 17, 2009. Exhibit 127, p. 8. Petitioner's initial PCR petition was filed 146 days later, on December 10, 2009. Exhibit 128, p. 1.

petitioner had failed to file his petition within 60 days of entry of the judgment as required by the waiver. Exhibit 117. The court also concluded that petitioner's waiver of his rights to collateral relief was knowing and voluntary, finding:

> The discussion on the record at the plea hearing regarding the plea agreement and the contents of the waiver document, evidence that petitioner was of sound mind, and that he executed the waiver of post conviction remedies and collateral relief freely, voluntarily, and knowingly.

Exhibit 117, p. 2.

As noted above, the Oregon Court of Appeals affirmed the PCR court without opinion and the Oregon Supreme Court denied review.

Petitioner's pro se petition for habeas corpus relief alleges sixteen grounds for relief. However, petitioner's counsel advances only one argument in his Brief in Support of Petition: "Mr. Hogue was denied effective assistance of counsel when his attorney failed to ensure that his waiver of collateral remedies was knowing, intelligent and voluntary. The guilty pleas and waivers were effectively coerced." Brief in Support (#55) p. 7. Petitioner also argues: "Mr. Hogue is entitled to an evidentiary hearing in this court because the appellate waiver in his case is unenforceable, he

presents a colorable claim for relief, his claims were not adjudicated on the merits, and he has diligently pursued them." Id.

Under the Antiterrorism and Effective Death Penalty Act ("AEDPA"), 28 U.S.C. § 2254, habeas relief may be granted only when a state court's decision was "contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States" or "was based on an unreasonable determination of the facts in light of the evidence presented at the state court proceedings." 28 U.S.C. § 2254(d); Wiggins v. Smith, 539 U.S. 510, 520 (2003).

A state court's decision is "'contrary to' federal law if it fails to apply the correct controlling Supreme Court authority or comes to a different conclusion ... [from] a case involving materially indistinguishable facts." Pirtle v. Morgan, 313 F.3d 1160, 1167 (9th Cir. 2002) (citing Bell v. Cone, 535 U.S. 685, 694). The Supreme Court has held that "a federal habeas court making the 'unreasonable application' inquiry should ask whether the state court's application of clearly established federal law was objectively unreasonable." Williams v. Taylor, 529 U.S. 362, 409 (2000).

In addition, under 28 U.S.C. § 2254(d)(2), "a determination of a factual issue made by a state court shall be presumed to be correct.. The applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence." Miller-El v. Cockrell, 537 U.S. 322, 351 (2003).

"[I]t is past question that the rule set forth in Strickland, qualifies as 'clearly established Federal law, as determined by the Supreme Court of the United States.'" Williams v Taylor, supra at 391. Under Williams, a petitioner may therefore be granted habeas corpus relief on a claim of ineffective assistance of counsel only if the decision of the state court was contrary to, or an unreasonable application of Strickland v. Washington, 466 U.S. 668 (1984).

Under Strickland, a claim that counsel's assistance was so ineffective as to require reversal of a conviction has two components. First, the petitioner must show that counsel's performance was deficient; second, the petitioner must show that the deficient performance prejudiced the defense. Id. at 687.

The first prong of the Strickland test required the petitioner to demonstrate that "counsel's representation fell below an objective standard of reasonableness.

Strickland, supra at 688. The second component of the test requires the petitioner to demonstrate that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Id., at 694. A "reasonable probability" is one that is sufficient to undermine confidence in the outcome." Id.

In order to satisfy the prejudice requirement in the context of a plea agreement, the petitioner must demonstrate that there is a "reasonable probability that, but for counsel's errors, he would have not pleaded guilty and would have insisted on going to trial." Hill v. Lockhart, 474 U.S. 52, 58-59 (1985). In plea agreement cases, the "resolution of the 'prejudice' inquiry will depend largely on whether [an] affirmative defense likely would have succeeded at trial. Id. at 59.

Petitioner alleges in Ground Two of his pro se petition that his conviction was "obtained by a plea of guilty which was unlawfully induced or not made voluntarily with understanding of nature and consequences." Petitioner alleges in Ground Fifteen thaqt he was "induced to sign away rights to appeal the judgment against him by a court held in secret of which trial attorney failed to inform and judge failed to

secure due process rights." (Sic)

Petitioner's counsel frames these grounds as follows: "Mr. Hogue was denied effective assistance of counsel when his attorney failed to ensure that his waiver of collateral remedies was knowing, intelligent and voluntary. The guilty pleas were effectively coerced."

In his Final Amended Petition for Post-Conviction Relief, petitioner presented a similar claim:

> Trial counsel failed to advise and make sure petitioner the petitioner had a clear understanding of the consequences of the waiver of appeals. Trial Counsel compelled petitioner to sign the waiver of appeals without fully explaining the contents or consequences. Trial counsel failed to provide a copy of waiver of appeals for petitioner's review prior to the plea hearing.

Exhibit 105, at p. 18 - Claim 23).

Respondent filed a motion for summary judgment based on the argument that petitioner's petition was not filed within the 60 day limitations period set forth in the pleas agreement waiver.

At a hearing held on January 25, 2011, the state argued that the post-conviction petition should be dismissed "because the petitioner waived his post-conviction proceedings, pursuant to the plea agreement." Exhibit 116, p. 1. The state offered the "fairly detailed" plea agreement, Exhibit

104, as evidence that petitioner was satisfied with his attorney's performance and advice and that he clearly understood the terms of the agreement.

Although the Motion for Summary Judgment (document) made reference to the fact that petitioner filed his petition "well beyond the 60 day limitation," Exhibit 113, counsel for the state made no mention of the limitations period in oral argument. In closing, counsel stated: "The petitioner in this case waived his post conviction rights and we would ask the court, respectfully, to dismiss the petition *based on petitioner's agreement and contract with the state.*" Exhibit 116, p. 3. After petitionre's argument, the state again asked the court to "dismiss the case *because there is no issue [INAUDIBLE] on whether or not petitioner waived his post-conviction rights." Exhibit 116, p. 7.*

Petitioner's attorney argued:

> There are many facts in dispute in this case. Mr. Hogue indicates that his trial attorney failed to adequately represent him, they (sic) failed to investigate ... I don't ... if you look at his [INAUDIBLE] filing of an amended petition for post-conviction relief, it brings a lot of issues that Mr. Hogue believes he was not properly represented on and there is no evidence to counter that other than their exhibit 104, that Mr. Lay has submitted.

Exhibit 116, p. 5.

Petitioner's counsel argued at some length that although petitioner was entitled to waive his collateral remedies, he

could not waive his right to claim ineffective assistance of counsel. Exhibit 116, p. 4-6.

The PCR court granted the motion for summary judgment finding that the waiver was "clearly part of the (plea) agreement" and that the agreement was an enforceable contract. The court further found that "[t]here is no indication ...in fact ... is a lengthy discussion on the record and in the agreement that Mr. Hogue was of sound mind, that he executed this freely, voluntarily and knowingly." Exhibit 116, p. 8.[2]

In the written Order granting the motion for summary judgment, the court found that "[P]etitioner failed to file his petition within the 60 day period provided in his detailed Waiver of Direct Appeal and Collateral Remedies." Exhibit 117, p. 1.

The court further found:

> 4. The discussion on the record at the plea hearing regarding the plea agreement and the contents of the waiver document, evidence that petitioner was of sound mind, and that he executed the waiver of post conviction remedies and collateral relief freely, voluntarily and knowingly.

Exhibit 117, Order Granting Defendant's Motion for

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[2] The court also noted: "I think Mr. Hogue is lucky that Jackson County simply didn't go back, take back his plea and go after him for everything he was charged with." {the agreement provided for reinstating the charges in the event that petitioner breached the contract by appealing].

Summary Judgment p. 1-2.

Thus petitioner's argument that "[b]ecause Mr. Hogue initiated his post-conviction case outside the negotiated sixty-day time limit, the PCR court dismissed his case on procedural grounds," Brief in Support (#55) p. 1 is somewhat disingenuous. The state did not even mention the 60 day limitations period as a grounds for dismissal and although the court made reference to it, the argument that petitioner's PCR claims were rejected on procedural grounds and not an adjudication on the merits is controverted by the record. The focus of petitioner's argument before the court was that his waiver was "un-counseled" and not knowing and voluntary. The court expressly rejected that contention and found that the waiver was knowing and voluntary. Implicit in the finding that petitioner's waiver was voluntary and knowing is that his attorney was not defective for failing to properly advise him regarding the plea and waiver.

Petitioner's appeal of the PCR court ruling did not raise the statute of limitations issue. Instead, petitioner's argument focused on the merits of his ineffective assistance of counsel claims, and specifically Claim 17 (alleged inadequate advice concerning petitioner's guilty plea) and Claim 23

(concerning advice regarding the waiver of appeal and collateral remedies).

A careful review of the record establishes that petitioner was granted a hearing despite failing to comply with the 60 day limitations period. The purpose of the hearing was to determine whether petitioner's plea agreement - which included the waiver of appeal and collateral review rights - was enforceable and petitioner had a full and fair opportunity to present evidence that his attorney's advice regarding the plea was inadequate or deficient. I find that the court's express finding that petitioner's plea and waiver was knowing and voluntary constitutes an adjudication on the merits of petitioner's claim in this proceeding.

Moreover, §2254 does not require a state court to give reasons before its decision can be deemed to have been adjudicated on the merits. Jarrington v. Richter, 131 S.Ct. 770, 85 (2011). "When a federal claim has been presented to a state court and the state court has denied relief, it may be presumed that the state court adjudicated the claim on the merits in the absence of any indication or state-law procedural principle to the contrary." *Id.* at 784-785; *see also*, Runningeagle v.

Ryan, 686 F.3d 758, 768-69 (9th Cir. 2012).

In this case, petitioner's ineffective assistance of counsel claim was alleged in the PCR petition and argued to the court. It was also alleged as a ground for relief in petitioner's appeal from the PCR court decision. Under these circumstances, even if the PCR court had not specifically addressed the issues (and I find that it did), it would be presumed to have been adjudicated because petitioner has not presented evidence to the contrary.

Although petitioner *alleges* that he would not have taken the plea agreement and proceeded to trial but for his attorney's failure to adequately advise him regarding the plea agreement, he has failed to present any convincing evidence in support of his allegation.

On the contrary, the record reflects that his attorney negotiated a very favorable plea on petitioner's behalf.

Petitioner was indicted on six measure 11 counts of two counts each of Rape in the First Degree, Sodomy in the First Degree, and Sexual Abuse in the First Degree. Exhibit 102. As part of the negotiated plea agreement, the District Attorney agreed to dismiss all of the charges in the indictment and allow petitioner to enter

a guilty plea to two counts of a lesser charge, Rape in the Second Degree. Petitioner's negotiated plea reduced petitioner's potential sentence exposure from 550 months to 150 months.

Petitioner's victim (his daughter) offered a written statement at sentencing describing in lurid detail the facts giving rise to the charges against petitioner. *See*, Exhibit 102 p. 6-8. The trial court noted:

> Well [petitioner], certainly the facts that are presented by {"G's] letter suggest to this court that this would have been a pretty nasty trial and you are fortunate that your attorney and [the prosecutor] were able to come to a compromise because certainly the potential term of incarceration you face if you had gone to trial and been convicted would have been significantly more time. So in that regard, your attorney has done an able job ... no pun intended[3] ... to get you this negotiation.

Exhibit 104, at p. 9-10.

Thus, petitioner's trial attorney reasonably anticipated that the trial testimony from the victim would include descriptions of instances of sexual abuse by petitioner in extreme terms. Petitioner now alleges that there is evidence that would cast doubt on his daughter's statements, but petitioner did not marshal that evidence before the post-conviction trial and has not alleged any facts in support of his allegation that

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[3]Petitioner trial counsel was Robert Able.

his plea was "effectively coerced."

In other words, the record before this court reflects that petitioner received a very favorable plea offer and that under the circumstances and in face of the evidence petitioner made an intelligent decision to accept the plea deal.

Based on the foregoing, I find that the PCR court's determination that petitioner entered his plea knowingly, voluntarily and intelligently is supported by the record and entitled to deference by this court.

Request for Evidentiary Hearing: 28 U.S.C. § 2254 provides:

If the applicant has failed to develop the factual basis of a claim in State court proceedings, the court shall not hold an evidentiary hearing on the claim unless the applicant shows that --

(A) the claim relies on --

(i) a new constitutional law, made retroactive to cases on collateral review by the Supreme Court that was previously unavailable; or

(ii) a factual dispute that could not have been previously discovered through the exercise of due diligence; and

(B) the facts underlying the claim would be

sufficient to establish by clear and convincing evidence that but for constitutional errors, no reasonable fact finder would have found the applicant guilty of the underlying offense.

28 U.S.C. §§ 2254 (e) (2) (A) -(B).

Petitioner argues that he is entitled to an evidentiary hearing as to his claims of ineffective assistance of counsel "(b)ecause he has diligently pursued his claims and has never been granted a hearing on the merits... The Antiterrorism and Effective Death Penalty Act, which restricts the availability of evidentiary hearings in habeas cases, does not apply when a defendant has acted diligently to develop his claims in state court, but has been unable to do so. Williams v. Taylor, 529 U.S. 420, 423 (2000)." Brief in Support (#55) p. 10.

In *Williams the Court held:*

> Diligence will require in the usual case that the prisoner, at a minimum, seek an evidentiary hearing in state court in the manner prescribed by state law.. For state courts to have their rightful opportunity to adjudicate federal rights, the prisoner must be diligent in developing the record and presenting, if possible, all claims of constitutional error. If the prisoner fails to do

> so, himslf or herself contributing to the absence of a full and fair adjudication in sate court, § 2254(e)(2) prohibits an evidentiary hearing to develop the relevant claims in federal court, unless the statute's other stringent requirements are met. Federal courts sitting in habeas are not an alternative forum for trying facts and issues which a prisoner made insufficient effort to pursue in state court proceedings.

Wlliams v. Taylor, 529 U.S. at 437.

In *Williams* the Court allowed the petitioner to develop new information related to juror bias and prosecutorial misconduct because the trial court record contained no evidence that wold have put a reasonable attorney on notice of the existence of those issues. However, the Court held that the petitioner was not entitled to develop new evidence related to a *Brady* claim because it appeared that trial counsel had knowledge of the evidence which could establish the claim and its potential importance. Id at 439.

Petitioner argues that he never had the opportunity for a merits adjudication of the claim because his "Sixth Amendment claims were dismissed on a procedural bar, and a rote finding of voluntariness that was drawn exclusively from the plea colloquy and petition." Brief in Support (# 55) p. 11.

As set forth above, petitioner's contention that there was no adjudication of his claim on the merits is

not supported by the record. Although the PCR court held that the proceeding was time barred pursuant tothe 60 days limitations agreement, the court also clearly addressed the voluntariness issue.

Petitioner's allegation that the state court failed to provide a full and fair hearing and that the material facts were not developed at the state court hearing because the case was "prematurely dismissed" is also unfounded.

The record reflects that on December 4, 2009 (beyond the 60 day time limit set forth in the waiver) petitioner signed a petition for post-conviction relief. Exhibit 125. On September 30, 2010, petitioner's counsel signed and filed a Final Amended Petition. Exhibit 105. On January 11, 2011, defendant filed a motion for summary judgment and a hearing on the motion was held on January 25, 2011. Exhibit 113; Exhibit 116.

Petitioner's Final Amended (PCR) Petition alleged twenty-six claims of ineffective assistance of counsel including the claims in this proceeding that counsel was ineffective for failing to adequately advise petitioner regarding the consequences of his plea [Claim 17] and ensure that petitioner had a clear understanding of the consequences of the waiver of appeals [Claim 23].

Petitioner had over 13 months from the filing of his PCR petition to the time of the hearing on respondents motion for summary judgment to gather and develop evidence of those claims to present to the court. His failure to do so constitutes a lack of diligence to establish those claims in state court.

Plaintiff has not explained why the PCR court hearing on the motion for summry judgment did not constitute a full and fair opportunity to present evidence in support of his ineffective assistance of counsel claim.

As the Court held in *Williams*, this court is not an alternate forum for trying facts and issues which petitioner made insufficient effort to pursue in state court proceedings. The record reflects that petitioner was afforded a full and fair opportunity to to develop and present evidence in support of his ineffective assistance of counsel claims in state court but was not diligent in doing so. Therefore, petitioner's request for an evidentiary hearing should be denied.

Based on all of the foregoing, petitioner's Petition (#1) should be denied. The Clerk of the Court should be directed to enter a judgment dismissing this proceeding.

This recommendation is not an order that is

immediately appealable to the Ninth Circuit Court of Appeals. Any notice of appeal pursuant to Rule 4(a)(1), Federal Rules of Appellate Procedure, should not be filed until entry of the district court's judgment or appealable order. The parties shall have fourteen (14) days from the date of service of a copy of this recommendation within which to file specific written objections with the court. Thereafter, the parties have fourteen (14) days within which to file a response to the objections. Failure to timely file objections to any factual determinations of the Magistrate Judge will be considered a waiver of a party's right to de novo consideration of the factual issues and will constitute a waiver of a party's right to appellate review of the findings of fact in an order or judgment entered pursuant to the Magistrate Judge's recommendation.

Certificate of Appealability

Should petitioner appeal, a certificate of appealability should be allowed.

DATED this 12 day of September, 2016.

Mark D. Clarke
United States Magistrate Judge

IN THE CIRCUIT COURT OF THE STATE OF OREGON

FOR THE COUNTY OF JACKSON

STATE OF OREGON, Plaintiff, v. DARREN LANCE HOGUE, Defendant.	Case No. 08-3575-FE TRANSCRIPT OF PROCEEDINGS

BE IT REMEMBERED that, pursuant to notice duly given to all parties in interest, the above-entitled cause came on regularly for trial in the Circuit Court of the State of Oregon for the County of Jackson on the 17th day of July, 2009.

APPEARANCES

The Honorable Lisa C. Greif, Jackson County Circuit Court Judge.

David G. Hoppe, Deputy District Attorney, appeared on behalf of the plaintiff.

Robert L. Abel, Attorney at Law, appeared on behalf of the defendant.

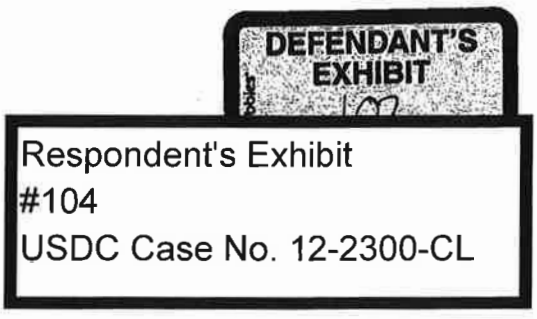
Darren Lance Hogue, defendant.

(Whereupon, the following proceedings were had, to-wit:)

THE COURT: Somebody clear off the case we're dealing with. Okay, so time is now set for plea and sentencing in the matter of State of Oregon v. Darren Lance Hogue. Are both parties ready to proceed?

MR. ABEL: Yes.

MR. HOPPE: Yes, Your Honor.



THE COURT: Alright. I have been handed a new district attorney's information that has been filed charging two counts of Rape in the Second Degree. And it's my understanding that Mr. Hogue will be entering a plea of Guilty to those two charges, that you will be signing a waiver of presentation of indictment and order as well as a waiver of direct appeal and collateral remedies. Is that correct, Mr. Abel?

MR. ABEL: That is correct, Your Honor.

THE COURT: Alright. Do you have those documents ready for the Court?

MR. ABEL: I do, Your Honor. And for the record, we'd waive formal arraignment.

THE COURT: Thank you.

MR. HOPPE: Also for the record, Your Honor, I believe that you conducted a hearing and have issued an order which I am not in receipt. I'd like that stated for the record.

THE COURT: Sure. You should be getting a copy. I signed it yesterday. We did…thank you for reminding me of that…we did have a discussion a couple of different times in chambers – Mr. Hoppe, Mr. Abel, and myself – regarding Mr. Hogue's fitness to proceed because Mr. Abel did have Mr. Hogue examined by Dr. Jake Cooley, a licensed psychologist out of the Portland area. Dr. Cooley wrote a fairly detailed report which the Court was allowed to review pursuant to stipulation of the parties as well as with the understanding that Mr. Hogue was okay with that. And the Court's review of that and Mr. Abel's comments were regarding that there might be a possible issues regarding fitness to proceed. And so the Court did set a hearing for that in order to determine whether or not Mr. Hogue was able to aid and assist in his own defense pursuant to ORS 161.370. The parties…the attorneys and I then met again in chambers on the 15th I believe it was, and we called Dr. Cooley…the Court called Dr. Cooley on the phone, had a conversation with him regarding Mr. Hogue's ability to aid and assist in his own defense in relation to his having the understanding and ability to enter a plea and be sentenced pursuant to the negotiations. Dr. Cooley stated to the Court, which I then conveyed to

counsel, and he believed that he had no concerns about that, that Mr. Hogue did have that capacity, and so therefore based on the Court's conversation with Dr. Cooley I did enter an order on Mr. Abel's motion for a determination of defendant's fitness to proceed finding that Mr. Hogue is in fact fit to proceed under the relevant statute. So with that being said, Mr. Hogue, you have had an opportunity to review the new charges with your attorney, Mr. Abel?

MR. HOGUE: Yes.

THE COURT: The two counts of Rape in the Second Degree?

MR. HOGUE: Yes.

THE COURT: And do you agree sir that you…or do you acknowledge sir that you do have a right to have those new charges presented to a grand jury for review and that you have by signing this waiver of presentment of indictment and order waived your right to do so?

MR. HOGUE: Yes.

THE COURT: Alright, I do find the waiver of presentment to be knowingly and voluntarily made, will sign it at this time. Did you have a plea petition?

MR. ABEL: Yes Your Honor, I do.

THE COURT: Okay.

MR. ABEL: And it was signed in open court this morning.

THE COURT: Alright, thank you. Alright, Mr. Hogue, I'm in receipt of a plea petition to enter a plea of Guilty and order permitting the same that has been signed by both you and Mr. Abel stating that you intend to plead Guilty to Counts 1 and 2 in the new district attorney's information, each count charging you with Rape in the Second Degree. Is that your understanding of the situation this morning?

MR. HOGUE: Yes.

THE COURT: And do you have any questions about the plea petition that you have signed?

MR. HOGUE: No.

THE COURT: Alright. What is your plea to Count 1 charging you with Rape in the Second Degree?

MR. HOGUE: Guilty.

THE COURT: Do you admit that on or about July 23, 2008 in Jackson County, Oregon you unlawfully and knowingly engaged in sexual intercourse with Gabriella Rain Hogue, a child under the age of 14 years?

MR. HOGUE: Yes.

THE COURT: And what is your plea in Count 2 to the charge of Rape in the Second Degree?

MR. HOGUE: Guilty.

THE COURT: Do you admit that on or about June 15, 2008 in Jackson County, Oregon you unlawfully and knowingly engaged in sexual intercourse with Gabriella Rain Hogue, a child under the age of 14 years?

MR. HOGUE: Yes.

THE COURT: I do find the pleas to Counts 1 and 2 to be knowingly and voluntarily made, and Mr. Hogue you also have signed a document here, a waiver of direct appeal and collateral remedies. Essentially what this means is that, you know, in a year you can't come back and say no, I feel I didn't mean what I was doing, I didn't mean to plead Guilty…that you are essentially waiving your right to ask the Court at a future date to invalidate your plea, set it aside, set aside the conviction and sentencing. Do you understand that by your signature on this document you do waive that right?

MR. HOGUE: Yes.

THE COURT: And I do need to have you sign this, Mr. Abel.

MR. ABEL: Your Honor, I have in the past chosen not to sign. The district attorney's office can do so at that time.

THE COURT: Alright. And I'm assuming that is because…because it essentially…it would be somewhat ineffective for you to say to your client that he couldn't down the road say you were ineffective?

MR. ABEL: Yes.

THE COURT: Does that sum it up?

MR. ABEL: That sums it up, yes.

THE COURT: Okay. I remember the same issue when I was an attorney, so I understand the reasoning behind that. Okay, so I will note the defendant's waiver of direct appeal and collateral remedies at this time and note that he has signed that freely and voluntarily. Mr. Hoppe, anything on behalf of the State?

MR. HOPPE: As far as the plea or sentencing?

THE COURT: As far as…are we going to go forward with sentencing today?

MR. ABEL: Yes.

MR. HOPPE: I think that's what we agreed to, Your Honor, was to waive the PSI and he would waive his 48 hours, and we would do it today.

THE COURT: Okay.

MR. HOPPE: I will say as far as the plea petition goes, Mr. Abel had shown that to me, that you've agreed to do the 150 months with the 75 months consecutive to each other, that he would receive credit for time served, and that because they are B felonies, I believe that it ends up being a three-year post-prison supervision?

THE COURT: It's actually because of the nature of the offense that it's up to 10 years…the balance of 10 years.

MR. HOPPE: But he'll be incarcerated for more than 10 years.

THE COURT: Oh, sure.

MR. HOPPE: So that's why I would ask for at least the three years, and I think Mr. Hogue himself and Mr. Abel have discussed that issue and are aware that he will be looking at three years once he gets out of the institution.

THE COURT: Okay.

MR. ABEL: That's right, Judge.

MR. HOPPE: I assume all other conditions will be imposed by his post-prison supervisor, just ask that you impose that sentence. If you're ready for sentencing, the victim does wish to speak through me.

THE COURT: Okay.

MR. HOPPE: If you want us to go first?

THE COURT: Sure.

MR. HOPPE: Okay. Dear Judge, my name is Gabriella and I'd like you to know my story. My dad first molested me when I was 6 years old. It all started when I wet the bed and he had to put rash cream on me. I trusted him because I couldn't trust anyone else in my family and couldn't call my mom over. At that time he would stroke my private parts. I felt confused and scared. Then he started stroking me without the rash cream. He kept on doing it more and more often. I started to feel scared and didn't know what to do. I wanted to call my mom but I couldn't because there was a no contact order on her. When Beverly moved out, things got even worse for me because now it was happening more often and more violently. He began looking down my shirt and seeing if I'd shaven, and he started to ejaculate in my mouth. And when he felt like it, he made me pose in front of him with all these nasty-looking clothes. He also made me watch porn movies and act out the things that I watched. He started having sex with me two to three times a week, normally at night or before daylight in the morning...normally at night or before daylight in the morning. He would do all these things, he said, were sexy to me. He started beating me and then threatening to kill me if I told someone about the abuse. He would hit me with his hand, a belt, and a wooden spoon. If I didn't know

what he said, he said he would kill me. If I didn't do what he said, he said he would kill me. He had three guns in the house. These made me feel like he would kill me in the next day or so. He would say, I have three guns and I know how to use them. He would say I'd never get to see my friends. I had to go along with whatever he said. I tried to run away to find a better place. I'd work for money so I could try to get away for a week from my dad, get some break time. I tried to go to the bus station, but they wouldn't sell me a ticket because I was too young. He would make me smoothies and drinks with alcohol. I used to puke whenever I could because the vodka tasted so bad. I used to puke in the shower to get it all out. When he was angry, he would forget to feed me so I'd be all alone in my room starving. My dad would get mad if I said something like I didn't like him or love him or want to be with him. Then he'd be really mad and then change and say he was sorry, and then he would get mad all over again. He used to get angry if I asked to get in contact with my mom. He'd be angry for days at a time and he wouldn't even shower. He'd be really smelly and think that he could do anything that he wanted with me. I told my friend Skylar and his parents about the abuse and they reported it to Child Welfare. Then I was taken to Grandma Judy's for a few weeks. Then one day she packed up all my stuff and told me I was going back to live with my dad. I was really scared. Then my dad made me write a letter saying I made it all up. I had to go along with whatever he said. After I came back from Grandma Judy's, the sex was more and more violent and aggressive and without a condom. When I put on my underwear, I'd have a slimy feeling that I would turn all crusty. He'd make me wear a thong. No girl 10 years old wants to wear a thing like that, especially in a woman's size. He'd make me stay with him all the time. I'd missed most of the school year and almost got held back. He also made me clean the house, do the dishes and the laundry. After I came back from Grandma Judy's, there was a mound of dishes on the counter and in the sink. I had to wash them all by hand. He wouldn't let me use the dishwasher. Grandma Judy thinks I'm a liar and that I made it all up. She never knew me. She only really was around for two years or so. Child Welfare couldn't protect me because my dad is such a good liar. I was taken from my

mom because my dad decided he wanted me and that he needed me. Child Welfare gave me to him. My mom is aggressive because of all the things that my dad said. And my mom's life was easy and nice. It was good to live there. I thought I was never going to be able to get out of this house again. I was afraid to tell people because my dad had so many guns and a whole bunch of knives. I wonder why I just didn't die from all the tension and stress and abuse? What hurts me the most is that no one believed me. My mom and Sharon Kelly didn't believe me. Now you've heard my story. I hope you'll make a wise decision. Gabriella.

THE COURT: Thank you, Mr. Hoppe. Where is Gabriella right now?

MR. HOPPE: Her foster parents are here.

THE COURT: Foster parents, okay. Is that case moving towards adoption? A termination petition been filed?

UNKNOWN: No, not yet.

MR. HOPPE: Yes. Judge Mejia knew that you were going to sentence him today so I believe that it has been set for Tuesday for a disposition. So it will be an automatic termination at that time, I believe.

THE COURT: Okay. Alright. And has Gabriella been going through counseling?

MR. HOPPE: She has Sharon Kelly, a special counselor. Also through Jackson County Mental Health, we have counseling.

THE COURT: Okay. How is that going? Anyone have a report?

UNKNOWN: It's ongoing, Your Honor.

THE COURT: She is making progress?

UNKNOWN: She is making very good progress.

THE COURT: Okay. Alright. Thank you to the foster parents…foster parents?

UNKNOWN: Right.

THE COURT: Thank you. Mr. O'Conner, are you her CASA?

MR. O'CONNER: I am with CASA.

THE COURT: Nice to see you. Anything you wish to add, sir…Mr. O'Conner?

MR. O'CONNER: No, I'm just so pleased with the activities that are going now. And she is in a wonderful home. We've monitored her, doing things together. So, everything is good.

THE COURT: Okay, thank you. Anything foster parents you wish to add? And are you intending to be the potential adoptive parents?

UNKNOWN: Yes.

THE COURT: Thank you on behalf of the Court for your willingness to be there for Gabriella. It sounds like it's a good place for her. Alright. And would someone, you Mr. Hoppe or Ms. Norton, foster parents, CASA…please just convey to Gabriella the Court's appreciation of the letter that she wrote and just let her know that the Court is hoping that she continues to move forward with her life and realizes that what happened here today was certainly nothing of her own fault and that, you know, she can still be a…or still be able to become and have hopefully as normal as possible future life as she can. So. Alright. Mr. Abel and Mr. Hoppe.

MR. ABEL: Your Honor, I believe my client does not wish to make a statement at this time considering that the plea is in place, unless I'm…is that correct?

THE COURT: Anything you wish to say, sir?

MR. HOGUE: I have a lot to say but I'm not going to.

THE COURT: Okay. Alright. Anyone else have anything this morning?

MR. ABEL: No.

THE COURT: Okay. Well Mr. Hogue, certainly the facts that are presented in Gabriella's letter suggest to this Court that this would have been a pretty nasty trial and you are fortunate that your attorney and Mr. Hoppe were able to come to a compromise because certainly the potential term of incarceration you face if you had gone to trial and been convicted would

have been significantly more time. So in that regard, your attorney has done an able job…no pun intended…to get you this negotiation. And certainly it does having sat through several of these trials recently and watched the victims on the stand testify and the gut-wrenching experience it is for them, I guess to your credit not making your daughter go through this does give the Court a little bit of comfort. Alright, pursuant to negotiations on Count 1 you are sentenced pursuant to Measure 11 ORS 137.700, you're sentenced to 75 months in prison. You will receive credit for time served. You are ordered to register as a sex offender. You will pay a $500 unitary assessment fee and repay the State for the cost of your court-appointed attorney in the amount of $1,990. You're also subject to three years of post-prison supervision. Your parole officer will make any recommendations regarding the terms of your post-prison supervision.

MR. HOPPE: I thought we'd have a PSI, so it's hard to remember all the statutory requirements, but also he is subject to DNA blood sampling and HIV testing in this case.

THE COURT: Right. You're subject to DNA HIV testing as required by Oregon law, and I don't know if I stated that you'll register as a sex offender. On Count 2, you're sentenced to 75 months in prison pursuant to ORS 137.700 Measure 11, and that will run consecutive to Count 1. You will receive credit for time served. You're subject to a $500 unitary assessment fee…

MR. HOPPE: Your Honor, on the second count it's running consecutive to the first count. We didn't anticipate him receiving credit for the time he has already served. That would only apply to the first count. He's going to get the full 75 months consecutive.

THE COURT: Okay. I guess that's fine. Alright, and then I guess we want to impose credit for time served. I mean it doesn't make any difference. He's going to have to do his 75 months.

MR. HOPPE: Right, he'll do the full 75 months. But, I just…

THE COURT: Okay. Pay a $500 unitary assessment fee. You're subject to DNA and HIV testing pursuant to Oregon law. The post-prison supervisor will determine the other conditions of your post-prison supervision. You will register as a sex offender. And the reason for not ordering a pre-sentence investigation is pursuant to ORS 144.791, when the defendant is going to be subject to a determinate sentence and no departure is being sought by either party, the Court has the ability to waive a pre-sentence investigation. And so that is why we are not going forward with that on this type of a case. Anything further that I need in terms of...

COURT CLERK: Did you want pot-prison on that...

THE COURT: Oh, I'm sorry. Post-prison supervision.

MR. HOPPE: Okay.

THE COURT: Three years post-prison supervision. I apologize, my brain is a little fried this morning. I've been in a two-day divorce trial. Oh, does he have any record?

MR. ABEL: No.

MR. HOPPE: Well, I believe he does have Crim Mischief and Trespass.

THE COURT: Were those A misdemeanors? Just misdemeanor charges?

MR. HOPPE: They're misdemeanor charges. So he's either an H or an I. Since it's Measure 11, it doesn't matter.

THE COURT: Right. He's a...excuse me...he's a Gridblock 8-H on each count, but pursuant to Measure 11, a determinate sentence. Anything further from anyone?

MR. ABEL: No, Your Honor.

MR. HOPPE: No, Your Honor.

THE COURT: Okay, thank you.

I, Sharon Knudsen, do hereby certify that the proceedings were digitally recorded by the Jackson County Circuit Court, supplied to me by the Oregon Department of Justice, and thereafter reduced to typewriting by me, and that the foregoing is an accurate and complete transcript to the best of my ability of such digitally-recorded proceedings.

IN WITNESS WHEREOF I have hereunto set my hand in the City of Lyons, County of Marion, State of Oregon, this 7th day of February, 2010.

Sharon Knudsen
Court Transcriber

IN THE CIRCUIT COURT OF THE STATE OF OREGON
FOR THE COUNTY OF JACKSON

STATE OF OREGON, Plaintiff	No. 083575FE
v.	**WAIVER OF DIRECT APPEAL AND COLLATERAL REMEDIES**
DARREN LANCE HOGUE, Defendant.	

I. WAIVER OF DIRECT APPEAL. I understand that under Oregon law I have a right to appeal from the final judgment entered in this case, and I understand that in such an appeal I would be allowed to challenge the legal correctness of any ruling made by the trial court in this case, the validity of my conviction(s), and the lawfulness of the sentence imposed on my conviction(s). I understand and agree, however, that the state and the victim(s) have a strong interest in foreclosing any further litigation on the charge(s) in this case.

Therefore, in consideration for the state's promises that are set forth in the plea petition/agreement in this case, **I hereby waive my right to appeal from the judgment entered in this case, and I hereby waive forever any challenge that I could make on direct appeal to the correctness of any of the trial court's rulings, the validity of my conviction(s), and the lawfulness of the sentence imposed.**

I further acknowledge and agree that this waiver of my right to appeal from the final judgment is an essential and material part of the plea agreement. Therefore, in consideration for the state's promises that are set forth in the plea agreement, **I further agree that if I file an appeal that violates this agreement, my filing of that appeal will constitute a material breach of this agreement for which the state will be entitled to demand an immediate remedy. In addition to any other remedy that is available to the state upon such a breach, I agree that the state may elect to move to dismiss my appeal, and I agree that the appellate court must dismiss my appeal if the state so moves.**

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II. WAIVER OF COLLATERAL REMEDIES. I understand that under Oregon law I have a right to file a petition for post-conviction relief in which I may challenge the legal validity of my guilty or no-contest plea and the legal validity of the conviction(s) and sentence entered in this case. I also understand that under federal law I may file a petition for *habeas corpus* relief in which I may challenge the legal validity of my guilty [no-contest] plea and the legal validity of the conviction(s) and sentence entered in this case. I understand that in either such proceeding, I may ask the court to invalidate and set aside my plea, the conviction(s), and the sentence entered in this case based on a claim that my attorney in this case failed to conduct an adequate investigation, failed to file and prosecute appropriate motions prior to trial, gave me incorrect or inadequate advice, or otherwise did not provide me with adequate and effective assistance as required by state and federal law. I also understand that, in such a proceeding, I may ask the court to invalidate and set aside my plea, the conviction(s), and the sentence entered in this case based on a claim that the state unlawfully obtained evidence against me or unlawfully withheld evidence that may have been useful to my defense.

I acknowledge and agree that:

(1) I am completely satisfied with the investigation that my attorney has conducted in this case. There is no additional factual investigation that I believe my attorney should do in my defense.

(2) I am completely satisfied with the steps that my attorney has taken to defend me in this case. There are no additional pretrial motions that I believe my attorney should file in my defense.

(3) I am not aware of any evidence that the state has obtained or withheld unlawfully in this case.

(4) I am completely satisfied with the advice my attorney has given me in this case. I have no further questions regarding potential defenses to the charge(s), the potential sentence, or the terms of this agreement.

(5) I am completely satisfied with the advice my attorney has given me with regard to this plea agreement and waiver. I have no further questions regarding the purpose, scope, and effect of this agreement and waiver, and I am willing to execute this agreement and waiver in return for the state's promises.

I understand and agree that the state and the victim(s) have a strong interest in foreclosing any further litigation on the charge(s) in this case. Therefore, in consideration for the state's promises that are set forth in this plea agreement, **I hereby waive forever my right to file either a petition for post-conviction relief or a**

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petition for federal *habeas corpus* relief that would challenge the validity of the conviction(s) and sentence entered in this case.

III. STIPULATION TO SHORTER TIME LIMITATION. I understand that despite my general waiver of collateral remedies as set forth in Section II above, I may be entitled to petition for post-conviction or *habeas corpus* relief for the limited purpose of challenging the validity of that waiver. I understand that Oregon law allows me up to two years in which to file a petition for post-conviction relief to challenge the conviction(s) and sentence entered in this case. ORS 138.510(3). I further understand that federal law allows me up to one year to file a petition for federal *habeas corpus* relief to challenge the conviction(s) and sentence entered in this case. 28 USC § 2244(d). I understand and agree, however, that the state and the victim(s) have a strong interest in ensuring that the conviction(s) and sentence entered in this case become final as soon as is possible.

Therefore, in consideration for the state's promises that are set forth in this plea agreement, **I hereby agree that if I choose to file either a petition for post-conviction relief or a petition for federal *habeas corpus* relief in order to challenge the validity of my waiver set forth above, I will do so not later than 60 days after entry of the conviction(s).** I hereby specifically waive my right to file such a petition within the longer period that otherwise is allowed by the state and federal statutes cited above. I also agree that if I file such a petition more than 60 days after entry of the conviction(s) in this case, the state, at its sole election and at any time it chooses: (1) may move to dismiss that petition based on this waiver, and/or (2) may declare my filing of that petition to be a material breach of this agreement and ask this court to reinstate all the charge(s) as set forth in Section IV below.

IV. STATE'S REMEDIES UPON BREACH. I acknowledge and agree that this waiver and limitation of my right to appeal and to petition for post-conviction relief and federal *habeas corpus* relief is an essential and material part of this plea agreement. I also acknowledge and agree that the state and the victim(s) have a strong interest in ensuring that the conviction(s) entered in this case become final as soon as is possible.

Therefore, in consideration for the state's promises that are set forth in this plea agreement, **I hereby acknowledge and agree that if I ever file an appeal, a petition for post-conviction relief, or a petition for federal *habeas corpus* relief that violates this agreement, my filing of that appeal or petition will constitute a material breach of this agreement for which the state will be entitled to demand a remedy.** I further agree that if I breach of this agreement by filing such an appeal or petition, the state, at its sole election and at any time it chooses, may do any one or more of the following:

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(1) The state may appear in that proceeding and contest that appeal or petition on the merits. I agree that if the state initially elects this option, it may at any time thereafter, and at its sole election, choose either of the two following options during the course of that proceeding.

(2) The state may move to dismiss that appeal or petition for post-conviction or *habeas corpus* relief based on this waiver. I agree that if the state moves to dismiss the appeal or petition based on this waiver, the court shall grant that motion.

(3) The state may ask this court to vacate my plea and reinstate any charge that either was dismissed or was not filed as part of this agreement, as set forth in Section V below. I agree that if the state files such a motion, the court shall grant it.

V. REINSTATEMENT OF CHARGES UPON BREACH. I acknowledge and agree that this waiver and limitation of my right to appeal and to petition for post-conviction relief or federal *habeas corpus* relief is in return for the state's promises set forth in the plea petition, including the state's agreements: to dismiss count(s) in the indictment, not to file additional charges, to allow me to plead guilty or no contest to a reduced charge, and/or to agree that the court should impose a specific sentence in my case.

I acknowledge and agree that the state and the victim(s) have a strong interest in ensuring that any charging or sentencing concession made by the state in this plea agreement is treated as an integral part of the parties' agreement along with my waiver of appeal and collateral remedies.

Therefore, I hereby agree that if I ever breach any part of this agreement, if I ever withdraw my guilty or no-contest plea in this case, or if any conviction entered in this case otherwise ever is set aside or vacated, the state, at its sole election, will be entitled to demand that this court, as a remedy, shall set aside this agreement in its entirety by vacating each plea in this case, by reinstating any charge that the state reduced or dismissed as part of this agreement, and by allowing the state to withdraw any other charging or sentencing concession that it made as part of this agreement. For that purpose, I hereby waive any and all defenses that I would have to the reinstatement or filing of any such charge, including the statute of limitations, any speedy-trial objection, and any former-jeopardy bar under either Oregon statutes or the state and federal constitutions.

VI. ADMISSIONS WILL BE ADMISSIBLE IF CHARGES ARE REINSTATED. I acknowledge and agree that the state and the victim(s) have a strong interest in ensuring that the conviction(s) entered in this case become final as soon as is possible

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because further delay may make it more difficult for the state to prosecute me on the charge(s) in this case.

Therefore, in consideration for the state's promises that are set forth in the plea agreement, **I hereby agree that if I ever breach any part of this agreement, if I ever withdraw my guilty or no-contest plea in this case, or if any conviction entered in this case otherwise is ever set aside or vacated, the state, at its sole election, may use against me in any subsequent proceeding, and for any relevant purpose, any statement, admission, confession, stipulation, or disclosure that I have made or will make in this proceeding during plea negotiations or any pretrial hearing, at the change-of-plea hearing, or at sentencing.** For that purpose, I hereby waive any right that I otherwise would have under ORS 135.037(4), ORS 135.435, or Rule 410 of the Oregon Evidence Code to exclude any such statement, admission, confession, stipulation, or disclosure.

I further agree that the state may introduce against me in any such proceeding, and for any relevant purpose, the written or recorded record of any statement(s) I have made in court and the content of any statements I may have made as a part of a pre-sentence investigation conducted in this case, and I hereby waive any objection that I otherwise would have to admission of such statements or testimony based on the hearsay rules or my rights under the state and federal constitution to confront witnesses.

DATED this 17 day of 7, 2009.

Defendant

Defendant's Counsel

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IN THE CIRCUIT COURT OF THE STATE OF OREGON
FOR THE COUNTYOF MALHEUR

DARREN L. HOGUE,)	Malheur County Circuit Court Case No. 09127778P
Petitioner-Appellant,)	
vs.)	CA A147997
MARK NOOTH,)	
Defendant-Respondent.)	

TRANSCRIPT OF PROCEEDINGS

BE IT REMEMBERED that the Motion for Summary Judgment on January 25, 2011, at 10:52 AM, regularly for hearing in the Circuit Court of the State of Oregon, for the County of Malheur, in the Malheur County Courthouse at Vale, Oregon, before the HONORABLE PATRICIA A. SULLIVAN, Presiding Judge.

APPEARANCES

FOR THE DEFENDANT /RESPONDENT

MARK D. LAY, #954687
Assistant Attorney General
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(503) 947-4700

FOR THE PETITIONER/APPELLANT

MANUEL PEREZ, #81452
Attorney at Law
Rader, Stoddard & Perez
381 W. Idaho Avenue
Ontario, Oregon 97914
(541) 889-2351

Sharon A. Ball, Transcriber, 107 Birch Street, Lakevie

Respondent's Exhibit
#116
USDC Case No. 12-2300-CL

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MOTION FOR SUMMARY JUDGMENT

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JUDGE SULLIVAN: We are taking up Case Number 09127778. This is the time set for hearing on a summary judgment motion filed by the defendant. Attached to that is several exhibits, 101, 102, 103 and 104; 104 is particularly sufficient -- uh -- significant, 105. And, the defendant -- or, the petitioner has filed a response just requesting a hearing. I haven't received anything -- anything else from the defendant on this other than some things that don't relate to this hearing.

Mr. -- Do I have Mr. Lay? Mr. Lay, do you have anything to add to the written materials?

(Mr. Lay appears telephonically.)

AAG LAY: I'm just going to make a brief statement, Judge.

JUDGE SULLIVAN: Okay.

AAG LAY: Judge, the defendant, pursuant to ORCP 47, moves for the court for an order granting summary judgment. (INAUDIBLE) are no genuine issues of material fact and that the defendant is entitled to a judgment as a matter of law. The petitioner's post-conviction petition should be dismissed because the petitioner waived his post-conviction proceedings, pursuant to the plea agreement.

The Court has with it Exhibit 104, the waiver of direct appeal of collateral remedy, which was submitted to the -- at the petitioner's plea. That document, which the petitioner signed, was

very clear that petitioner was waiving his right to post-conviction relief.

This is a case where it was a stipulated sentence of 150 months. The petitioner acknowledged in his plea that he was stipulating to that sentence. He also understood that he was waiving his right to post-conviction relief. The document, his waiver of collateral remedies document, clearly states that -- that he understood that if he filed post-conviction that a motion to dismiss could be filed and would be granted, if he filed.

And, when the petitioner did file, the waiver is -- is fairly detailed including the provisions that he was completely satisfied with his -- with trial counsel's investigation, that he was satisfied with the steps that his attorney -- that his attorney had taken to defend him. He was not aware of any evidence that was not obtained. He was completely satisfied with the advice of his attorney and he stated, in the -- in the document, that he waived forever his right to file either a petition for post-conviction relief or other collateral remedies.

The waiver document also provides, under Section 4, that the wavier is an essential and material part of the agreement and that the petition acknowledged that the State and the victim have a strong interest in ensuring that the convictions are complied on. And, I would also state for the record a case that I have just located, Judge, and I will just -- it's Oregon -- excuse me, *Washington v. Johnson*, 165 Or App 578. And, in that case, the

Oregon Court of Appeals had stated that the unknowing waiver of a constitutional right has been held to be inherently prejudicial but that a petitioner has no constitutional right to either appeal or post-conviction relief.

The petitioner in this case waived his post-conviction rights and we would ask the Court, respectfully, to dismiss the petition based on the petitioner's agreement and contract with the State. Thank you, Judge.

JUDGE SULLIVAN: And, Mr. Perez?

(Mr. Perez appears telephonically.)

MR. PEREZ: Thank you, Judge. Procedurally, the first issue is whether or not Mr. Lay has standing to raise the basis for a motion to dismiss in this case. The agreement itself, Exhibit 104, indicates that the State has certain remedies available to it in the event that Mr. Hogue were to breach the agreement. The defendant in this case is the superintendant of the Snake River Correctional Institution. It is not the State.

Mr. Lay represents Mr. Nooth and not the State in this case. Therefore, it is our position that Mr. Lay does not have standing to enforce the agreement, even if it is -- if the Court finds it valid, which we don't think it is. And, I will wait for the Court to rule on that issue.

JUDGE SULLIVAN: The -- he's -- he's -- he's arguing for summary judgment indicating that the -- that this document disposes of any factual basis. So, I'm going to rule that it is -- he

can properly raise it in this proceeding and then, you can forward.

MR. PEREZ: Secondly, Judge, the -- the basis for summary judgment would be that there is no material issue -- there are no facts in dispute in this case. There are many facts in dispute in this case. Mr. Hogue indicates that his trial counsel failed to adequately represent him, they failed to investigate -- I don't -- if you look at his (INAUDIBLE) filing an amended petition for post-conviction relief, it brings a lot of issues that Mr. Hogue believes he was not properly represented on and there is no evidence to counter that other than their Exhibit 104, that Mr. Lay has submitted.

We do believe that the case deserves to proceed forward -- to go forward on the matter.

Thirdly, it is our position that there is no case law that indicates that a defendant can waive his right to a constitutional -- can waive -- can waive rights that are granted to him by the constitution.

The (INAUDIBLE) post-conviction relief is part of Article I, Section 11 and also -- of the Oregon Constitution and the Sixth Amendment of the U.S. Constitution. While constitutional rights can be waived, the Court generally goes through a whole colloquy before it accepts any waiver of a constitutional right. There is no such colloquy in this case. If the Court will look at the transcript that was submitted by the State, and I'm assuming the Court has Exhibit 102, the -- on page -- on page 4, it says -- at about line 15,

the Court says, "I do find the pleas to Count 1 and 2 to be knowingly and voluntarily made. And, Mr. Hogue, you have also signed a document, your waiver of direct appeal or collateral remedy. Essentially what this means, is that, you know, in a year you can't come back and say, "No, I didn't -- I feel I didn't mean what I was doing. I didn't mean to plead guilty." So, you are essentially waiving your right to ask the Court at a future date to invalidate your plea, set it aside, set aside the conviction and sentencing. Do you understand that by your signature on this document you waive that right?" Nowhere in that colloquy is there a discussion of the potential place for ineffective assistance of counsel. Basically, what they -- what they are discussing is -- what they are discussing there is a claim by Mr. Hogue that he didn't understand what he was doing. And, that is significantly different than an ineffective assistance of counsel claim, which is not recognized even where a person waives collateral remedy in federal court. I would cite case -- excuse me, *Ruffler v. U.S.*, 173 F.2d 489, from the Eastern District of Virginia in 2001. What *Ruffler v. U.S.* talks about is the fact that a -- that a person can waive the collateral remedy with -- and -- and most circuits recognize that a person can waive the right to collateral remedy but you cannot waive your right to argue ineffective assistance of counsel. The Ninth Circuit case that talks about that is *U.S. v. Abaraka*. It's at 985 F.2d 1012. In other words, ten-twelve. It's a Ninth Circuit case from 1992. So, even though a person can waive collateral

remedy, in both of those cases, the collateral remedy that was upheld that had been waived knowingly was the right to appeal. And, Mr. Hogue did waive his right to appeal. He did not appeal in this case. But, as the federal courts have recognized, even though you waive collateral remedy, you cannot waive, with that collateral remedy, a right to claim ineffective assistance of counsel.

The Court inquired of Mr. Hogue's trial counsel whether he, Mr. Able, had -- had signed the agreement where Mr. Hogue had waived his collateral consequences, his collateral remedies. Mr. Able has indicated that it would be a conflict of interest for Mr. Able to advise Mr. Hogue on whether or not he should sign that agreement. So, in other words, Mr. Hogue's waiver of those collateral consequences was uncounseled. He received no advice of counsel. In fact, he could not have received advice of counsel on that because Mr. Able would in effect be telling him, "Sign here indicating that you waive any claim that in the future you might believe that I was ineffective." That -- that agreement is void and it is our position that it cannot be relied upon in -- in -- in this motion for summary judgment. Thank you, Judge.

JUDGE SULLIVAN: Mr. Lay, anything in response?

AAG LAY: Judge, the petitioner, the defendant, has the right to waive to post-conviction relief. The petitioner understood and knew he was waiving his right to post-conviction relief. He was advised in regards to that right. He signed a detailed document acknowledging that he was waiving post-conviction relief. There

was a strong interest by petitioner and the State (INAUDIBLE) the matter with the waiver and with his agreement. And, he acknowledged that.

The petitioner's right to waive post-conviction relief, that is important. He has that right. He exercised that right and now he is in breach of his agreement. And, we would ask the Court to dismiss the case because there is no issue (INAUDIBLE) on whether or not petitioner waived his post-conviction rights. Thank you, Judge.

JUDGE SULLIVAN: All right. I -- I note that in -- that Exhibit 104 is, in fact, a detailed waiver of collateral remedies, which includes factual statements regarding the advice of attorney and it does have a provision that should the -- Mr. Hogue want to file something, he has to do it within sixty days, which he didn't do.

CLERK: I think that we have lost him.

(PAUSE.) (Connection to SRCI is temporarily lost.)

JUDGE SULLIVAN: Okay. Does he need to do anything?

CLERK: He's the user. There we go.

AAG LAY: Okay. There we go.

JUDGE SULLIVAN: All right.

AAG LAY: Can you hear me okay?

JUDGE SULLIVAN: Yes. The -- the -- this document has to be taken in -- in conjunction with the colloquy engaged by the Court regarding the document and the -- the defendant's overall

competency to enter into the plea agreement that he entered into. The -- the waiver was clearly a part of the agreement. It was -- it was a legally enforceable contract. Consideration was given by the State in the form of the plea agreement. There is no indication, in fact there -- in fact, there is lengthy discussion on the record and in the agreement that Mr. Hogue was of sound mind, that he executed this freely, voluntarily and knowingly. I see no reason why it is not an enforceable contract. And, in fact, I think Mr. Hogue is lucky that Jackson County simply didn't go back, take back his plea and go after him for everything he was charged with. But, they have elected not to do that. There are no facts in dispute.

In view of this agreement, I -- it's -- it is enforceable and I will grant the motion for summary judgment and Mr. Lay, --

DEFENDANT: Your Honor, do I have an opportunity to speak at all?

JUDGE SULLIVAN: No, you don't. You're represented by Counsel and your counsel has argued for you. And then, Mr. Lay, you can prepare the judgment. Thank you.

MR. PEREZ: And, Judge, just one more thing. I -- Normally, I would advise Mr. Hogue of his right to appeal, at this point. It is my policy now that when I get a judgment from the Court, I file the notice of appeal on behalf of the client unless they instruct me that they don't want to appeal it. I'm assuming that Mr. Hogue will want me to appeal this issue.

JUDGE SULLIVAN: All right.

MR. PEREZ: I just wanted to put that on the record that I will, Mr. Hogue, file a notice of appeal on your behalf and ask the Court to appoint an attorney (INAUDIBLE).

JUDGE SULLIVAN: Okay. And, that is the next step, Mr. Hogue, and your attorney will proceed with that. Thank you.

MR. PEREZ: Thank you, Judge.

(RECESS.)

MOTION FOR SUMMARY JUDGMENT

MOTION FOR SUMMARY JUDGMENT

COURT TRANSCRIBER'S CERTIFICATE

STATE OF OREGON)
) ss.
County of Malheur)

I, Sharon A. Ball, a Court Transcriber for the State of Oregon, do hereby certify that I transcribed the digital recordings of the proceedings had upon the hearing of this cause, previously captioned herein, before the HONORABLE PATRICIA SULLIVAN, Judge of the Circuit Court of the County of Malheur, State of Oregon; that I thereafter had reduced to typewriting the foregoing transcript; consisting of Pages 1 through 9, both inclusive, constitutes a full, true and accurate record of the proceedings had upon the hearing of said cause, and of the whole thereof.

WITNESS my hand as Court Transcriber this 31st day of March 2011.

DATED this 31st of March, 2011.

Sharon A. Ball

Sharon A. Ball
Court Transcriber
(541) 947-2585

IN THE COURT OF APPEALS OF THE STATE OF OREGON

DARREN L. HOGUE,)	Malheur County Circuit Court Case No. 09127778P
Petitioner-Appellant,)	CA A147997
vs.)	
MARK NOOTH,)	
Defendant-Respondent.)	

CERTIFICATE OF PREPARATION AND SERVICE OF TRANSCRIPT

I certify that I prepared all of the transcript designated as part of the record for this appeal.

I certify that the original of this Certificate was filed with the Appellate Court Administrator and copies were served on the trial court administrator and transcript coordinator on the 31st day of March, 2011.

I certify that on the 31st day of March, 2011, a copy of the transcript or part thereof prepared by me and a copy of this Certificate were served on:

MARY H. WILLIAMS, #911241
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OREGON APPELLATE CONSORTIUM
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DATED this 31st day of March, 2011.

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Attorney for Petitioner

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

DARREN HOGUE **Case No.: 2:12-cv-02300-CL**

Petitioner, **AFFIDAVIT OF DARREN HOGUE**

v.

MARK NOOTH,

Respondent

STATE OF OREGON)
) ss.
County of Malheur)

I, Darren Hogue, being first duly sworn, depose and say:

1. I am the petitioner in this habeas corpus case. I am presently incarcerated at the Snake River Correctional Institution in Ontario, Oregon. I am seeking to overturn my

convictions from the case of *State v. Hogue*, Jackson County Case No. 083575FE. I am making this affidavit based on my personal knowledge and recollection of events.

2. I maintain my complete innocence of the offenses to which I pled guilty and to those charged in the original indictment as well. I only pled guilty based on undue pressure from my lawyer and others in the judicial system. I would like the opportunity to present evidence of my actual innocence and to testify concerning the circumstances surrounding my guilty plea in order to explain the coercion and duress I felt prior to, and at the time of, my change of plea.

3. Similarly, the document entitled: "Waiver of Direct Appeal and Collateral Remedies," which I signed, was also made under duress. I only signed that document because of the extreme pressure I was subjected to and due to my lawyer's ineffectiveness.

4. I sought to challenge my convictions and guilty pleas in my post-conviction case filed in Malheur Circuit Court in 09-12-7778P. However the case was dismissed and I did not have a chance to testify in support of my constitutional claims.

5. The sixty-day filing deadline contained in the waiver was itself the product of duress and coercion. I only agreed to that time limit under intense pressure and it was not a voluntary decision. Because of that waiver, I did not have time to adequately develop and present my post-conviction challenge to my convictions. I would therefore like an opportunity to explain to the Court why I believe the waiver is invalid and should not be enforced against me.

6. I was represented at the trial level by attorney Robert Abel. I strongly believe that Mr. Abel did not conduct necessary factual investigation of my case. This claim is elaborated upon in my Final Amended Post-conviction petition which was filed in October 2010. The amended PCR petition is Respondent's Exhibit 105 in this Habeas Corpus case. I signed that twenty-page petition, with my certification of it, on September 19, 2010. The claims contained in my petition were supported by a detailed memorandum of law that I intended to file in support of the final amended petition. However, summary judgment in favor of the Respondent was granted and I did not have an opportunity to submit that memorandum.

7. Moreover, my lawyer did not share all of the available, important evidence and discovery, including exculpatory evidence, with me that would have permitted me to make a fully informed decision on whether to plead guilty or go to trial. Nor did he adequately examine the forensic evidence, particularly the DNA testing conducted by law enforcement. Had my lawyer performed those tasks and responsibilities, as required by professional and constitutional standards of practice, and had the relevant information been presented to me in an unpressured setting, I would have rejected the plea offer and I would have, instead, gone to trial on my previous plea of not guilty. This point was made in my

post-conviction petition. My federal habeas corpus petition and my Motion for Evidentiary Hearing (CR 30) and Memorandum in Support (CR 37) elaborate on these matters.

Darren Hogue

SUBSCRIBED AND SWORN to before me this 30th day of Jan, 2015.

OFFICIAL SEAL
CATHY F BRYANT KAAE
NOTARY PUBLIC - OREGON
COMMISSION NO. 478696
MY COMMISSION EXPIRES JUNE 03, 2017

Notary Public for Oregon
My Commission Expires: 6/3/17