
No. _____

IN THE SUPREME COURT
OF THE UNITED STATES

RANDY L. POPE,

Petitioner,

v.

STEVE FRANKE,

Respondent.

MOTION FOR LEAVE
TO PROCEED *IN FORMA PAUPERIS*

The petitioner, Randy L. Pope, requests leave to file the attached petition for writ of certiorari to the United States Court of Appeals for the Ninth Circuit without prepayment of costs and to proceed *in forma pauperis* pursuant to Rule 39.1 of this

Court and 18 U.S.C. § 3006A(d)(7) (2006). The petitioner was represented by counsel appointed under the Criminal Justice Act in the District of Oregon and on appeal in the United States Court of Appeals for the Ninth Circuit, and therefore no affidavit is required.

Respectfully submitted February 13, 2019.

/s/ Tonia L. Moro

Tonia L. Moro
Attorney for Petitioner

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On Petition for Writ of Certiorari
to the United States Court of Appeals
for the Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

WHEN THE STATE CONCEDES IN HABEAS CORPUS PROCEEDINGS AND ASKS THE COURT TO VACATE SOME OF THE CONVICTIONS CHALLENGED, WHETHER THE DISTRICT COURT MUST GRANT RELIEF BY ADHERING TO THE RELIEF DICTATED BY STATE LAW - REQUIRING REMAND FOR RE-SENTENCING AFTER CONVICTIONS ARE NULLIFIED- TO PUT THE PETITIONER IN THE POSITION HE WOULD HAVE OTHERWISE BEEN AND TO DISPOSE OF THE MATTER AS LAW AND JUSTICE REQUIRE.

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

The petitioner, Randy Pope, respectfully requests that a writ of certiorari issue to review the decision of the United States Court of Appeals for the ninth Circuit denying petitioner's motion for a Certificate of appealability and/or to review the United states District Court for the District of Oregon's decision denying petitioner's petition for a writ of habeas corpus. The order of the United States Court of Appeals

for the Ninth Circuit (“Ninth Circuit”) denying the certificate of appealability entered on November 16, 2018, in case number 18-35476. Appendix (“App.”) B.

1. Opinions Below

The United States District Court for the District of Oregon issued its unpublished opinion and order and Judgment on May 3, 2018. Appendix A. The opinion and order grants Mr. Pope’s petition but denies the relief he requested. The opinion and order also denies certificates of appealability.

Mr. Pope argued that to be made whole, he should receive the relief afforded under state law to those similarly situated - to be resentenced. The district court declined to grant that relief without sufficient explanation and with the intent to shield its decision from review by claiming that, because it did not technically rule on the merit, that Mr. Pope is not entitled to a certificate of appealability.

Mr. Pope timely requested the issuance of a certificate of appealability from the United States Court of Appeals for the Ninth Circuit. In the attached one paragraph Orders issued November 16, 2018, the Court denied his request. Appendix B.

2. Jurisdictional Statement

The Ninth Circuit’s order denying a COA was filed on November 16, 2018. App. B. This Court’s jurisdiction is invoked under 28 U.S.C. § 1254(1) (2006).

3. Constitutional and Statutory Provisions

The Fifth Amendment to the United States Constitution provides in pertinent part that “... nor shall any person ... [] be deprived of life, liberty, or property, without due process of law....

28 U.S.C. § 2254 (2006) provides:

(d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim--

(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or

(2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

28 U.S.C. § 2253(c)(1) (2006) provides:

Unless a circuit justice or judge issues a certificate of appealability, an appeal may not be taken to the court of appeals from—

(A) the final order in a habeas corpus proceeding in which the detention complained of arises out of a process issued by a State court

28 U.S.C. § 2253(c)(2) (2006) provides:

A certificate of appealability may issue under paragraph (1) only if the applicant has made a substantial showing of the denial of a constitutional right.

4. Statement of the Case

Mr. Pope has been a prisoner of the state of Oregon for the past 14 years. In 2005, he was convicted in state court of multiple counts and sentenced to a 54 year sentence. Two of his convictions were unlawful and the state conceded in the Habeas Corpus proceedings. The district court, however, failed to give Mr. Pope the opportunity he would have had if the state had conceded during his second state post-conviction challenge which raised the same issue. That decision requires review. So too does the district court's decision that not to grant a certificate of appealability to avoid review of its decision when the record is clear that Mr. Pope made a substantial showing of the denial of his constitutional rights.

Therefore, this case calls for the Court's review to exercise supervisory powers regarding the relief to be granted after the state concedes in habeas corpus proceedings to vacate challenged convictions and to, therefore, determine whether the district's courts' decision denying the relief dictated by state law when convictions are vacated is subject to review despite the district court's determination not to issue a certificate of appealability. Thus, on one hand, this case presents a simple issue of the appropriate relief that should be granted when the state concedes in habeas corpus proceedings that a conviction should be vacated. But, it also presents the novel issue of whether a district court can attempt to shield its decision from review on the basis that it did not rule on the merits but merely granted the state's motion.

A. Legal Standards

1. Certificate of Appealability

As this Court has recently stated:

Until the prisoner secures a COA, the Court of Appeals may not rule on the merits of his case. *Miller–El v. Cockrell*, 537 U.S. 322, 336, 123 S.Ct. 1029, 154 L.Ed.2d 931 (2003).

The COA inquiry, we have emphasized, is not coextensive with a merits analysis. At the COA stage, the only question is whether the applicant has shown that “jurists of reason could disagree with the district court’s resolution of his constitutional claims or that jurists could conclude the issues presented are adequate to deserve encouragement to proceed further.” *Id.*, at 327, 123 S.Ct. 1029. This threshold question should be decided without “full consideration of the factual or legal bases adduced in support of the claims.” *Id.*, at 336, 123 S.Ct. 102. “When a court sidesteps [the COA] process by first deciding the merits of an appeal, and then justifying its denial of the COA based on its adjudication of the actual merits, it is in essence deciding an appeal without jurisdiction.” *Id.*, at 336-337, 123 S.Ct. 1029, 154 L.Ed.2d 931.

Buck v Davis, 137 S.Ct. 759, 773, 197 L.Ed.2d 1 (2017).

As *Buck* demonstrates, the standard is the same in the context of an appeal of a ruling on a procedural basis. When the district court denied a habeas petition on procedural grounds without reaching the prisoner's underlying constitutional claim, a COA should issue so long as the prisoner shows that jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether the district court was

correct in its procedural ruling. *Slack v. McDaniel*, 529 U.S. 473, 484 (2000); See also, *Buck*, 137 S. Ct at 777 (affirming this holding in *Slack*).

“[A] claim can be debatable even though every jurist of reason might agree, after the COA has been granted and the case has received full consideration, that petitioner will not prevail.” *Miller–El*, 537 U.S., at 338, 123 S.Ct. 1029. The statute sets forth a two-step process: an initial determination of whether a claim is reasonably debatable, and then—if it is—an appeal in the normal course. We do not mean to specify what procedures may be appropriate in every case. But whatever procedures are employed at the COA stage should be consonant with the limited nature of the inquiry. *Buck*, 137 S. Ct at 774.

Mr. Pope’s claims and the district court’s rulings meet that debatable standard.

2. State Law Requires Re-sentencing Upon Nullification of Conviction

As Mr. Pope argued to the District Court (CR 84), the Oregon Court of Appeals, in *State v. Zolotoff*, 275 Or. App. 384 (2015), made it abundantly clear that Oregon requires remand after convictions are nullified.

The Oregon court of appeals in *Zolotoff* found the trial court’s reasoning that it was not authorized to re-sentence the defendant after a remand for failure to merger two guilty verdicts was plainly erroneous. The court of appeals applied a plain error review standard and remanded a second time. The court quoted the colloquy between

the parties and the trial court at the first re-sentencing at length. Part of the discussion centered on the defendant's request to offer additional argument on mitigation and another discussion concerned his entitlement to good time credits. At the first remand proceeding, the trial court opined that to be re-sentenced the defendant would have to throw himself at the mercy of the District Attorney. The trial court determined that without an agreement from the state, the only reason for re-sentencing was the erroneous position of the Department of Corrections which treats all of the sentences as voided. The court of appeals rejected this argument. Not only did it find that the Department of Corrections properly treats all of the sentences as voided, it found that the legislature directed that a remand be ordered.

When an appellate court's decision affects a component of the sentencing package - including finding error for failure to merge guilty verdicts - "ORS 138.222(5) affords a sentencing court the opportunity to restructure its sentence in light of that decision." *Id.* (citing to *State v. Rodvelt*, 187 Or.App. 128, 132, rev den, 336 Or 17 (2003) (re-sentencing is required "because felony sentencing under the guidelines is complex, and the way that one conviction is sentenced affects how the remaining convictions are classified on the sentencing guideline grid')). see also *State v. Link*, 260 Or.App. 211, 217 (2013) (where an appellate court reverses one conviction of a multiple-conviction judgment, all of a defendant's convictions must

be remanded for re-sentencing.). The court further cited the extensive authority holding that the applicable statute was enacted to “safeguard the integrity of the trial court’s sentencing package.” *Id.* at 394 (quoting *State v. Hagan*, 140 Or.App. 454, 457 n 4 (1996)).

This result and relief is also appropriate when the remand is from post-conviction relief proceedings and involves vacating convictions based upon a finding of ineffective assistance of counsel. *Bogle v. Armenakis*, 184 Or.App. 326 (2002). Moreover, re-sentencing relief is granted when the court vacates convictions in analogous 28 U.S.C § 2255 proceedings. See, *United States v. Romero*, 183 F.3d 1145 (9th Cir. 1999) (vacating 18 U.S.C. § 924(c) conviction and remanding for resentencing on the drug conviction); *United States v. Hellbusch*, 234 F.3d 1050 (8th Cir. 2000) (applying *Bousely* innocence standard to vacate a § 924(c) conviction and remanding for resentencing). Sentencing is a complex matter under both state and federal law and this is one basis for spending resources to re-sentence.

B. Relevant Facts

In the habeas proceedings below, Mr. Pope challenged his convictions for attempted compelling prostitution, which were 2 of 35 counts he was convicted of after a bench trial. He argued that he is actually innocent of those convictions under

the holding of *State v. Vargas-Torres*, 237 Or. App. 619, 242 P.3d 619, 623 (2010). In *Vargas-Torres* the court interpreted the compelling prostitution statute, to apply only to defendants who induce someone to “engage in prostitution with others.” This was a new rule interpretation, and so Mr. Pope argued, that he was entitled to relief under the Ninth Circuit’s ruling in *Vosgien v. Persson*, 742 F.3d 1131 (2014) (reversing dismissal of untimely filed habeas corpus petition based upon petitioner’s demonstration, in light of subsequent Oregon case law - of *Vargas-Torres*, of his actual innocence under *Schlup* as to his compelling prostitution convictions and remanding for merits). The state ultimately conceded and agreed to vacate the convictions but the district court failed to properly address Mr. Pope’s claim that the appropriate relief, to avoid his being treated unfairly, is that which is available and dictated by state law - a remand for re-sentencing.

1. Relevant State Proceedings

Mr. Pope was prosecuted on a 40-count indictment for a variety of offenses stemming from allegations that, while he was a manager at a motel, he solicited or engaged in sexual activity with or without consent with teenage boys and adult males by or while furnishing marijuana and methamphetamine to them. Mr. Pope waived a jury and was tried to the bench. The trial court convicted Mr. Pope of all but five

of the counts and sentenced him to a net prison term of 54 years - more than the state had requested during the sentencing hearing.

Regarding the attempted compelling prosecution counts, the state presented evidence that Mr. Pope twice asked one individual to perform a sexual act with Mr. Pope for money. The individual rejected the offers. At the conclusion of the state's case, counsel moved for acquittal on eight counts but they did not include the compelling prostitution counts. He did, however, argue that the state's proof was deficient because Mr. Pope's comment to the individual was a joke and that Mr. Pope was not really trying to be a "John, so to speak, and get this guy to, uh, prostitute himself for him for money."

While Mr. Pope was only sentenced to a 30 month sentence on each of those compelling prostitution counts - running concurrently - the sentencing hearing was complex. The court noted:

It's been -- It's also argued here as part of the, uh, pleadings I'm dealing with that the current sentencing would, uh, result in the Court imposing a judgment which does not acknowledge the impact the defendant had on each of these victims. Once again, this is a balancing, uh, test that the Court must employ, not, uh, imposing consecutive sentences solely because there are more than, than one victim, uh, or separate victims, uh, but the fact around each of these, uh, considerations on the front end. And that, of course, is what we'll do.

Another factor making the sentencing complex was the number of counts causing Mr. Pope's criminal history category to change often as the court imposed the sentences on each count. The prosecutor noted this in her sentencing materials:

Even though defendant is being sentenced in a single judicial proceeding, the crimes of conviction should be sentenced in chronological order of their occurrence, if such chronology can be determined. Even though case law is silent on this point, sentencing in chronological order avoids any appearance that defendant's criminal history score is being unfairly calculated merely by joinder of the crimes in a single indictment.

The court's pronouncement of sentence contained emotional statements describing how the conduct was disturbing, troubling, and inexplicable and it demonstrated the court's disdain for Mr. Pope's mitigation arguments which described his own painful childhood and intense addiction to methamphetamine. The sentencing court made one observation arguably tied to the erroneous encouraging prostitution conviction for which there was only evidence that Mr. Pope asked to pay for sex:

I believe there was also some testimony here in the case about, uh -- there were discussions the defendant -- or an education the defendant sought to impart upon a couple of these youngsters about the benefits of drug use and the, uh, the physical rewards that would, uh, befall someone who used drugs, especially in a sexual context.

Soon thereafter the court announced that the "defendant deserves a lengthy prison sentence to be sure." Mr. Pope received that sentence - a sentence no less in length than a sentence for manslaughter or murder in Oregon.

Mr. Pope filed post-conviction proceedings in state court, including filing a second petition after the Oregon Court of Appeals issued its decision in *Vargas-Torres*. The state moved to dismiss it as an unauthorized successive petition and time barred. So, despite trying, Mr. Pope was unable to obtain relief from the state court and neither did the state concede the issue then as it should have.

2. Relevant Federal Habeas Proceedings

In briefing before the District Court, Mr. Pope argued that the Ninth Circuit's decision in *Vosgien* was directly on point. In *Vosgien*, the court applied *Bousley v. United States*, 523 U.S. 614, 620 (1998) (holding that a claim of actual innocence may be based on establishing that the petitioner was convicted for conduct not prohibited by law when subsequent authority established that his behavior was not sufficient to find him guilty of the crime). The subsequent authority applied in *Vosgien* was the new interpretation of Oregon's compelling prostitution offense espoused in *Vargas-Torres*. In *Vosgien*, the Court excused petitioner's procedural default because the subsequent case law of *Vargas-Torres* demonstrated that the petitioner was actually innocent of the Oregon compelling prostitution charges. The undisputed evidence was that Mr. Vosgien merely induced the individual to have sex with him in exchange for money. *Id.* at 1136. The court remanded the case to the district court

to consider the merits of claims related to ineffective assistance of counsel regarding those charges. *Id.* at 1136-37.

Initially, the state rejected Mr. Pope's argument and submitted a reply in opposition. In the meantime, the Ninth Court issued an opinion, in *Moon v. Coursey*, 599 Fed.Appx. 697 (9th Cir. 2015), reversing Judge Brown's decision in a case applying *Bousley* to a claim of innocence regarding a kidnapping conviction based upon intervening state law. Thereafter, Judge Brown set Mr. Pope's matter for oral argument. A few days before the argument, the state moved to vacate Mr. Pope's compelling prostitution convictions. Mr. Pope sought and obtained an opportunity to submit briefing on the remedy that the district court should impose upon granting the motion to vacate the convictions.

Thereafter, on remand in the *Moon* case Judge Brown found that Mr. Moon was entitled to habeas relief finding that his "freestanding claim of actual innocence is cognizable and warrants federal habeas relief because [Mr. Moon] has demonstrated he is factually innocent of Kidnaping in light of an intervening change in the law." *Moon v. Coursey*, 2016 WL 4059659 *10 (D.Or. 2016).

Eventually, Judge Brown issued her decision in Mr. Pope's case. She rejected all of the claims that Mr. Pope traversed in his pro se brief and denied Mr. Pope's requested relief on the compelling prosecution grounds, erroneously finding that he

had not provided specific supporting argument. The district court stated that it was to follow the rule and “put[] the defendant back in the position he would have been in if the violation had never occurred” but determined that merely vacated the convictions and sentences satisfied that standard. App. A at 9-10.

Mr. Pope disagrees and so can jurists of reason and thus, the issues presented are adequate to deserve encouragement to proceed further and he should have the opportunity for review by the Circuit.

C. Argument

Re-sentencing is the policy of Oregon and had Mr. Pope obtained relief at trial or in post-conviction, he would have been re-sentenced. Moreover, had the state not argued that he was not entitled to have his *Vargas-Torres* claim presented to the post-conviction court in a second petition and had the convictions been vacated, the post-conviction court would have remanded for re-sentencing. See *State v. Urbina*, 249 Or App 267 (2011) (reversing the conviction for compelling prosecution based upon *Vargas-Torres* and remanding for re-sentencing).

Thus, contrary to the district court’s opinion, Mr. Pope was not put back in the position he would have been in and unlike others who obtained relief based upon the *Vargas-Torres* interpretation, he has not yet obtained his re-sentencing proceeding.

Johnson v. Uribe, 700 F.3d 413, 425 (9th Cir. 2012) directs district courts to

provide relief that puts the defendant back in the position he would have been in if the violation had not occurred. Yet, the district court supported its denial of a remand for re-sentencing pointing to two cases in which the district court in Oregon granted rare and elusive habeas corpus relief vacating convictions, *Moon v. Coursey*, referenced above, and *Gillespie v. Taylor*, 2016 WL 1588394 (D. Or. 2016). In neither of those cases did the petitioner request re-sentencing or argue that he would be treated unfairly if he could not be re-sentenced because state law directed such relief upon the nullification of convictions.

Clearly jurists of reason would find it more than debatable that Mr. Pope presented a valid claim of the denial of a constitutional right - the state conceded to vacate his sentences after this Court issued its decision in *Moon* - and that it is debatable that the district court was not correct in its procedural ruling regarding relief. The district court neither disposed of the matter as law and justice required nor did it put Mr. Pope in a position he would have been in if the erroneous convictions had not been rendered.

5. Reasons For Granting The Writ

This Court recently reminded the lower courts that the certificate of appealability analysis is not coexistent with a merits analysis. See *Buck* at 137 S.Ct. 759 (2017). From the plethora and petulance of recent citations to *Buck* issued in the

past year, if appears that the bench, and likely the bar as well, did not understand what the Court was attempting to convey. The district court and the Ninth Circuit's decisions denying the certificate of appealability are contrary to this recent admonishment and calls for an exercise of this Court's supervisory powers.

The District Court's opinion oncludes with the statement that "Petitioner has not made a substantial showing of the denial of a constitutional right." Similarly, the Circuit Court's Order(s) in both cases merely state that "appellant has not made a 'substantial showing of the denial of a constitutional right.'" What is crucially missing from all of the orders is any statement (straight faced or otherwise) that no reasonable jurist might disagree with these legal conclusions.

Because these decision conflict with this Court's directives in *Buck* and *Miller-Ell*, the decisions should be reviewed and a certificate of appealability issued.

6. Conclusion

For these reasons, the Court should grant the writ of certiorari to the United States Court of Appeals for the Ninth Circuit.

Respectfully submitted on February 13, 2019.

/s/ Tonia Moro

Tonia L. Moro
Attorney for Petitioner

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

RANDY L. POPE,

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STEVE FRANKE,

Respondent.

Civil No. 3:11-cv-00882-BR

OPINION AND ORDER

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1 - OPINION AND ORDER -

BROWN, Senior Judge.

Petitioner, an inmate at the Two Rivers Correctional Institution, brings this habeas corpus action pursuant to 28 U.S.C. § 2254. For the reasons that follow, the Court GRANTS IN PART and DENIES IN PART the Second Amended Petition for Writ of Habeas Corpus (ECF No. 34).

BACKGROUND

On January 31, 2005, a Lincoln County grand jury issued a 40-count indictment against Petitioner for a variety of offenses. Resp. Exh. 102. The charges stemmed from allegations that Petitioner, who was a manager at a motel, habitually lured underage boys to his room and provided them with drugs, often in "exchange" for sexual activity. Resp. Exh. 103, pp. 37, 87, 132, 157, 198, 239, 262, 273, 295. Petitioner's room had video equipment and many videotapes, and Petitioner filmed his encounters with the underage boys; sometimes the boys were unconscious or unaware Petitioner was filming them. Resp. Exh. 103, pp. 19, 23, 53, 103, 173, 192, 224-25.

Counts 32 and 33 of the Amended Indictment against Petitioner alleged attempted compelling prostitution offenses related to one of the victims:

COUNT 32: ATTEMPTED COMPELLING PROSTITUTION (ORS 167.017; 161.405 F/C)-
The said defendant, on or about September through December 2004, in the County of Lincoln and State of Oregon, did unlawfully and intentionally attempt to

induce [the victim], a child under the age of 18 years, to engage in prostitution.

COUNT 33: ATTEMPTED COMPELLING PROSTITUTION (ORS 167.017; 161.404 F/C) -

As a separate act from any act alleged in Count 32 or any other Counts herein, the said defendant, on or about September through December 2004, in the County of Lincoln and State of Oregon, did unlawfully and intentionally attempt to induce [the victim], a child under the age of 18 years, to engage in prostitution.

Resp. Exh. 102, p. 5.

Petitioner waived his right to trial by jury, and a judge adjudicated his case. Petitioner did not testify at trial. The victim identified in Counts 32 and 33 testified that he worked for cash on occasion at the hotel Petitioner managed. The victim asked on two occasions to be paid for his work, and each time Petitioner handed him a \$100 bill, which was more money than Petitioner owed the victim for his work. Each time, Petitioner told the victim he could keep the extra money if the victim would perform oral sex on Petitioner. Both times the victim declined and handed the money back to Petitioner.

Petitioner's trial counsel moved for acquittal on eight counts, but did not include Counts 32 and 33 in these motions. Counsel did, however, argue that the state's proof was deficient on these Counts because Petitioner's comment to the victim was a joke, that Petitioner was not really trying to be a "John, so to speak, and get this guy to, uh, prostitute himself for him for money." Resp. Exh. 103, p. 248. The trial judge found Petitioner guilty on

Counts 32 and 33, as well as other counts totalling 35 of the 40 charges. The trial judge imposed a 30-month sentence on each of Counts 32 and 33 to run concurrently with each other and consecutive to the sentence on Count 27. The trial judge sentenced Petitioner to a total of 54 years of imprisonment. Petitioner is presently scheduled to begin serving his sentence on Counts 32 and 33 in approximately 2046.

Petitioner filed a direct appeal, assigning error to three convictions for Delivery of a Controlled Substance to a Minor. The Oregon Court of Appeals affirmed without opinion, and the Oregon Supreme Court denied review. *State v. Pope*, 215 Or. App. 359, 168 P.3d 359, *rev. denied*, 343 Or. 554, 173 P.3d 831 (2007).

Petitioner sought state post-conviction relief ("PCR"), alleging several claims of ineffective assistance of trial and appellate counsel. Following an evidentiary hearing, the state PCR trial judge denied relief. Petitioner appealed, but again the Oregon Court of Appeals affirmed without opinion and the Oregon Supreme Court denied review. *Pope v. Mills*, 239 Or. App. 629, 246 P.3d 755 (2010), *rev. denied*, 349 Or. 664, 249 P.3d 1282 (2011).

On October 6, 2010, the Oregon Court of Appeals decided *State v. Vargas-Torres*, 237 Or. App. 619, 242 P.3d 619 (2010). In *Vargas-Torres*, the court determined that the legislative intent behind the Attempted Compelling Prostitution statute (Or. Rev. Stat. § 167.017) requires proof of a third-party promoter of

prostitution; *i.e.*, the statute applies only to defendants who induce someone to engage in prostitution with others, not solely the third-party promoter.

On February 1, 2011, Petitioner filed a second state PCR petition, arguing that under *Vargas-Torres*, his two convictions for Attempted Compelling Prostitution should be overturned. The PCR trial court dismissed the second PCR complaint as successive and time-barred. On appeal, the Oregon Court of Appeals affirmed without opinion. *Pope v. Franke*, 254 Or. App. 418, 295 P.3d 695 (2012). Petitioner did not seek review from the Oregon Supreme Court.

Petitioner then filed this habeas corpus action in this Court. In his Second Amended Petition, Petitioner alleges twenty separate claims for relief, summarized as follows:

Ground One: Ineffective assistance of trial counsel when counsel failed to investigate or challenge a search warrant, controvert the affidavit filed in support of the search warrant, and otherwise move for a *Franks* hearing or suppression.

Ground Two: Ineffective assistance of trial counsel when counsel failed to file a motion to suppress illegally obtained evidence.

Ground Three: Ineffective assistance of trial counsel when counsel failed to move for a judgment of acquittal or otherwise object to the sufficiency of the evidence as to Counts Ten and Fifteen.

Ground Four: Ineffective assistance of trial counsel when counsel failed to move for a judgment of acquittal on Count One or otherwise object to the court's determination that the state was not required to prove

that petitioner "knowingly" committed the offense alleged in Count One.

Ground Five: Ineffective assistance of trial counsel when counsel failed to prepare and present an affirmative defense to Counts Seventeen and Eighteen.

Ground Six: Ineffective assistance of trial counsel when counsel failed to move for judgment of acquittal on Counts Eleven and Sixteen based upon the state's failure to prove Petitioner was aware of the victim's age.

Ground Seven: Ineffective assistance of trial counsel when counsel failed to move for a judgment of acquittal as to Count Twenty-eight on the basis that the state failed to establish petitioner delivered marijuana to the victim.

Ground Eight: Ineffective assistance of trial counsel when counsel failed to challenge the admission of an incomplete and partial showing of a video tape related to Count Six.

Ground Nine: Ineffective assistance of trial counsel when counsel failed to object to convictions on Counts Two, Four, and Five based upon incorrect and insufficient evidence.

Ground Ten: Ineffective assistance of trial counsel when counsel failed to prepare petitioner before trial by informing him of the charges and allowing him to discover and view the evidence.

Ground Eleven: Ineffective assistance of trial counsel when counsel failed to properly inform petitioner of his right to have a jury trial and jury findings on sentencing factors.

Ground Twelve: Ineffective assistance of trial counsel when counsel failed to object to incorrect sentencing.

Ground Thirteen: Ineffective assistance of trial counsel when counsel failed to move for judgment of acquittal on County Twenty-eight based on the state's failure to establish petitioner knew the victim was under the age of eighteen.

Ground Fourteen: Ineffective assistance of trial counsel when counsel failed to investigate by contacting two witnesses.

Ground Fifteen: Trial court error when the court denied petitioner's motions for judgment of acquittal on Counts Nineteen, Twenty-six, and Twenty-seven based on the state's failure to prove petitioner "delivered" controlled substances to the victims.

Ground Sixteen: Ineffective assistance of trial counsel when counsel failed to move for a judgment of acquittal on Counts Thirty-two and Thirty-three based on the state's failure to prove Petitioner acted or attempted to act as a third-party promoter of prostitution.

Ground Seventeen: Ineffective assistance of appellate counsel when counsel failed to pursue meritorious issues on appeal.

Ground Eighteen: Ineffective assistance of appellate counsel when counsel failed to pursue issues preserved by trial counsel relating to the convictions and sentences imposed on Counts Seven, Eight, Eleven, Nineteen, Twenty, Twenty-six, Twenty-seven, Twenty-eight, Twenty-nine, Thirty-four, and Thirty-five.

Ground Nineteen: Prosecution misconduct based on the prosecutions failure to present any evidence petitioner was a third-party promoter of prostitution.

Ground Twenty: Petitioner is actually innocent of his conviction and sentences on the promoting prostitution counts.

In response, Respondent argues that Petitioner procedurally defaulted the claims alleged in Grounds Three through Six and Eight through Nineteen, that all of Petitioner's claims for relief fail on the merits either because they were denied by the state courts in decisions entitled to deference or because they are not supported by the record, and that Petitioner's freestanding claim

of actual innocence is not cognizable in this proceeding and, in any event, lacks merit.

In his counseled Brief in Support of Petition for Writ of Habeas Corpus, Petitioner addresses only the claims alleged in Grounds Sixteen, Seventeen, and Nineteen, challenging his convictions for attempting to compel prostitution. Petitioner argues his procedural default of those claims was excused by actual innocence because, under *Vargas-Torres*, he did not commit the crime of Attempted Compelling Prostitution. With permission of the Court, Petitioner also submitted a *pro se* Supplemental Brief presenting arguments on the claims not addressed by counsel.

After additional briefing, Respondent ultimately submitted a motion to vacate Petitioner's convictions on Count 32 and Count 33. Although Respondent did not concede that Petitioner's challenge to the Attempted Compelling Prostitution convictions had merit, Respondent nevertheless agreed that, in the interests of conservation of state and judicial resources, these convictions should be vacated. After the Court held oral argument and accepted the parties' stipulation to the vacation of Petitioner's convictions on Count 32 and 33, the parties, nevertheless, disputed the appropriate remedy. The Court, therefore, withheld ruling pending additional briefing.

According to Petitioner, the appropriate remedy upon entry of an order vacating the convictions on Counts 32 and 33 is to remand

the case to Lincoln County Circuit Court for re-sentencing on all of the remaining convictions. Without specific supporting argument, Petitioner states he "believes there are grounds to direct the state to re-sentence him on all of the counts." On the other hand, Respondent contends that the appropriate remedy upon granting the motion to vacate the convictions on Counts 32 and 33 is to allow the Oregon Department of Corrections to recalculate Petitioner's sentence without the two convictions or to allow the state court to enter an Amended Judgment consistent with this Court's order to vacate the convictions.

A district court has broad discretion to fashion a remedy and in conditioning a judgment granting habeas corpus relief. *Hilton v. Braunskill*, 481 U.S. 770, 775 (1987). Pursuant to 28 U.S.C. § 2243, the court must "dispose of the matter as law and justice require." The Supreme Court has instructed that "remedies should be 'tailored to the injury suffered from the constitutional violation and should not unnecessarily infringe on competing interests.'" *Lafler v. Cooper*, 566 U.S. 156, 132 S. Ct. 1376, 1388-89 (2012) (quoting *United States v. Morrison*, 449 U.S. 361, 364 (1981)). "Thus, a remedy must 'neutralize the taint' of a constitutional violation, while at the same time not grant a windfall to the defendant or needlessly squander the considerable resources the State properly invested in the criminal prosecution." *Id.* (quoting *Morrison*, 449 U.S. at 365). "The court's remedy

'should put the defendant back in the position he would have been' if the violation had never occurred. *Johnson v. Uribe*, 700 F.3d 413, 425 (9th Cir. 2012) (quoting *Chioino v. Kernan*, 581 F.3d 1182, 1184 (9th Cir. 2009)).

Here, the Court notes it has not independently found a constitutional violation, but, instead, the Court is granting habeas relief based on the parties' stipulation to vacate the convictions on Counts 32 and 33. Under all of the circumstances, the Court finds the appropriate remedy to put Petitioner back in the position he would have been had he not been convicted on Counts 32 and 33 is simply to order the convictions vacated. The Court does not find any basis, and, therefore, declines to remand the case to the Lincoln County Circuit Court for re-sentencing on all of Petitioner's remaining convictions. See *Wilkinson v. Dotson*, 544 U.S. 74, 85 (2005) (Scalia, J., concurring) ("when a habeas petitioner challenges only one of several consecutive sentences, the court may invalidate the challenged sentence even though the prisoner remains in custody to serve the others"); *Moon v. Coursey*, Case No. 3:10-cv-00616-BR, 2016 WL 4059659, at *12 (D. Or. July 28, 2016) (vacating conviction of Kidnaping in the First Degree, but leaving intact conviction and sentence for Aggravated Murder); *Gillespie v. Taylor*, Case No. 2:14-cv-00062-JE, 2016 WL 1588394, at *1) (D. Or. April 18, 2016) (vacating conviction for a single count

in a multi-count conviction and ordering respondent to re-calculate the petitioner's sentence in accordance with the court's order).

As noted, the Brief in Support filed on Petitioner's behalf by counsel addresses only the claims alleged in Grounds Sixteen, Seventeen, and Nineteen, which the Court addresses above. Although Petitioner also submitted a Pro Se Supplemental Brief in Support of Petition for Writ of Habeas Corpus, the Court, after a full review of the record, concludes Petitioner is not entitled to habeas corpus relief on any of the remaining grounds for relief for the following reasons:

Petitioner procedurally defaulted the claim alleged in Ground Fifteen because it was raised on direct appeal only as a state-law claim. Petitioner procedurally defaulted the claim alleged in Ground Thirteen because it was not raised at any time during his initial state PCR proceedings. Petitioner procedurally defaulted the claims alleged in Grounds Three through Six, Eight through Twelve, and Fourteen, because he failed to present them to the Oregon Supreme Court during his appeal from his initial state PCR proceeding. In addition, Petitioner has not established cause and prejudice or a fundamental miscarriage of justice excusing the procedural default of any of these claims. Finally, the claims alleged in the remaining four grounds for relief, Grounds One, Two, and Seven, were denied by the state courts on the merits. Because those state court decisions were not contrary to or an unreasonable

application of clearly established federal law, they are entitled to deference and habeas corpus relief may not be granted. See 28 U.S.C. § 2254(d).

CONCLUSION

For these reasons, the Court GRANTS IN PART and DENIES IN PART the Second Amended Petition for Writ of Habeas Corpus. The Court ORDERS that Petitioner's convictions for Attempted Compelling Prosecution in Count 32 and Count 33 are hereby VACATED. The Court DENIES habeas corpus relief on the remaining claims.

The Court DENIES a certificate of appealability as Petitioner has not made a substantial showing of the denial of a constitutional right. See 28 U.S.C. § 2253(c)(2).

IT IS SO ORDERED.

DATED this 3rd day of May, 2018.



ANNA J. BROWN
United States Senior District Judge

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FILED

NOV 16 2018

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

RANDY L. POPE,

Petitioner-Appellant,

v.

STEVE FRANKE, Superintendent Two
Rivers Correctional Institution,

Respondent-Appellee.

No. 18-35476

D.C. No. 3:11-cv-00882-BR
District of Oregon,
Portland

ORDER

Before: LEAVY and SILVERMAN, Circuit Judges.

The request for a certificate of appealability (Docket Entry No. 6) is denied because appellant has not shown that “jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling.” *Slack v. McDaniel*, 529 U.S. 473, 484 (2000); *see also* 28 U.S.C. § 2253(c)(2); *Gonzalez v. Thaler*, 565 U.S. 134, 140-41 (2012); *Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003).

Any pending motions are denied as moot.

DENIED.

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

RANDY L. POPE,

Petitioner,

v.

STEVE FRANKE,

Respondent.

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

CERTIFICATE OF SERVICE AND MAILING

I, Tonia L. Moro, counsel of record, certify that pursuant to Rule 29.3
service has been made of the within MOTION FOR LEAVE TO PROCEED *IN*
FORMA PAUPERIS and PETITION FOR WRIT OF CERTIORARI on the counsel

for the respondent by depositing in the United States Post Office, in Medford, Oregon, on this 13th day of February, 2019, first class postage prepaid, a true, exact and full copy thereof addressed to:

Benjamin Gutman
Solicitor General
1162 Court Street N.E.
Salem, OR 97301-4096

Noel Fransisco
Solicitor General
Department of Justice
950 Pennsylvania Ave. N.W.
Washington, D.C. 20530-0001

Additionally, an electronic copy of the MOTION FOR LEAVE TO PROCEED *IN FORMA PAUPERIS* and PETITION FOR WRIT OF CERTIORARI was served on the Solicitor General via email at: SupremeCtBriefs@USDOJ.gov

Further, the original and ten copies were mailed to Scott Harris, Clerk of the United States Supreme Court, by depositing them in a United States Post Office Box, addressed to 1 First Street, N.E., Washington, D.C., 20543, for filing on February 13, 2019, with first-class postage prepaid and an electronic copy filed with the Court via its electronic filing system.

DATED this 13th day of February, 2019.

/s/ Tonia Moro

Tonia L. Moro
Attorney for Petitioner