No._____

IN THE SUPREME COURT OF THE UNITED STATES

CHRISTOPHER S. ANDERSEN,

Petitioner,

v.

JERI TAYLOR,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the test for granting a Certificate of Appealability in a habeas action on an ineffective assistance of trial counsel claim must incorporate the *Strickland v. Washington*, 466 U.S. 668 (1984), test for whether trial counsel was ineffective (i.e., whether the petitioner has shown that, but for the deficient performance, there is a *reasonable likelihood that the outcome would have been different*), or, whether it may incorporate a more demanding test (e.g., the test the District Court employed in this case, whether the petitioner has shown that, but for the deficient performance, the outcome *would have been different*).

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The United States District Court for the District of Oregon denied Mr. Andersen's petition for writ of habeas corpus in an unpublished opinion and order. Appendix at 17 (*Andersen v. Taylor*, 2019 WL 3400633 (D. Or. July 26, 2019). That Court also denied a Certificate of Appealability. *Id.* at 19. On appeal, the United States Court of Appeals for the Ninth Circuit also denied a Certificate of Appealability. Appendix at 1 (*Andersen v. Taylor*, __ WL __, No. 19-35721 (9th Cir. December 23, 2019) (Order).

JURISDICTIONAL STATEMENT

This Court has jurisdiction to review this petition for writ of certiorari under 28 U.S.C. § 1254(1) (2012). The Ninth Circuit filed its order sought to be reviewed on December 23, 2019. Appendix at 1.

CONSTITUTIONAL AND STATUTORY PROVISIONS

U.S. Const. Amend. VI provides:

> In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defense.

28 U.S.C. § 2253(c)(1) (2012) 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 process issued by a State court . . .

28 U.S.C. § 2253(c)(2) (2012) provides:

> A certificate of appealability may issue . . . only if the applicant has made a substantial showing of the denial of a constitutional right.

STATEMENT OF THE CASE

A. State Court Proceedings

Following a 2012 bench trial, during which the State introduced without objection compelling but inadmissible hearsay testimony from the child-complainant's mother attributing admissions and confessions to Mr. Andersen, the trial court found Mr. Andersen guilty of sex crimes against a child and sentenced him to 300 months' imprisonment. *See infra* at 5 -13. The sentence was ordered to run consecutive to an earlier imposed sentence on another offense, resulting in a total sentence of 40 years' imprisonment. Mr. Andersen was 38 years old at the time of sentencing.

On appeal, the Oregon Court of Appeals affirmed the trial court judgment without opinion, and the Oregon Supreme Court denied Mr. Andersen's petition for review. D. Ct. Dkt. 17-1 at 84 (Court of Appeal's order) & 82 (105) (Supreme Court order). Mr. Andersen then filed a pro se petition seeking postconviction relief alleging, among other things, that his trial counsel had "failed to object to the use of hearsay evidence [which] was ruled as hearsay." D. Ct. Dkt. 17-1 at 90 (Petition for Post-Conviction Relief). Later, however, appointed postconviction

counsel filed a notice stating that he believed that "the original petition cannot be construed to state a ground for relief under ORS 138.510 to ORS 138.689, and cannot be amended to state a ground for relief." D. Ct. Dkt. 17-1 at 95 (Notice of Counsel). In his declaration filed together with his notice, postconviction counsel acknowledged that Mr. Andersen claimed, in his pro se petition, that trial counsel "did not object to evidence considered to be hearsay." D. Ct. Dkt. 17-1 at 97 (declaration). But, postconviction counsel explained that, having "reviewed the files and transcripts in their entirety," he was unable to find any "basis by which I can certify a claim, and this does not give rise to any claims for relief." *Id.* The postconviction court ordered the action dismissed for failure to state a claim.

D. Ct. Dkt. 17-1 at 109-110 (St. Ex. 109 at 9-10) (Court's Order Regarding Sufficiency Notice). *See also* D. Ct. Dkt. 17-1 at 115-116 (General Judgment). No appeal was taken, as orders dismissing postconviction actions for failure to state a claim are not appealable under Oregon state law. *Pedroso v. Nooth*, 284 P.3d 1207 (Or. Ct. App. 2013).

B. Federal Habeas Proceedings

Mr. Andersen's habeas proceedings commenced on December 27, 2016, when the District Court filed his pro se Petition for Writ of Habeas Corpus Pursuant to 28 U.S.C. § 2254. D. Ct. Dkt. 1. As he had in state post-conviction proceedings, Mr. Andersen claimed that trial counsel rendered ineffective

assistance by failing to move to exclude powerfully incriminating hearsay evidence from the complainant's mother, Therese Arnott. In particular, Ms. Arnott testified to the contents of notes rather than to her independent memory as summarized in the following table, which was included in Mr. Andersen's Brief in Support of Petition for Writ of Habeas Corpus filed with the District Court.[1] *See* D. Ct. Dkt. 32 at 7-14.

[1] While Mr. Andersen's statements themselves are not hearsay as a matter of Oregon state law, *see* OEC Rule 801 (4)(b)(A), Ms. Arnott did not testify directly to them. Rather, she testified that her written notes contained certain information, namely, questions she asked Mr. Andersen and his responses to those questions. Ms. Arnott's written notes are statements for purposes of determining whether they are hearsay statements within the scope of the Oregon rule of evidence generally excluding hearsay. OECR 801 (1)(a) (verbal and written assertions are "statements" for hearsay rule purposes). Further, those statements are hearsay statements under Oregon Evidence Code Rule 801(3), as that rule defines hearsay as "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Thus, Ms. Arnott's testimony to the contents of those out of court written statements was inadmissible hearsay testimony. While defense counsel did move to exclude Ms. Arnott's notes themselves, and ultimately, after the parties rested and moments before closing arguments, the court did exclude them as hearsay, defense counsel failed to move to exclude Ms. Arnott's testimony to the contents of those notes.

Ms. Arnott's Trial Testimony (Tr. at 279-87)		Ms. Arnott's Notes (Trial St. Ex. 6A, *see* Exhibit)
Q. Okay. I want you to as best you can, tell the Court the questions that you – that you asked Mr. Andersen and the answers that he gave you. A. Okay. I asked him how did this begin with [CW] and he said that it started at the apartment, and that it wasn't skin on skin, it was just playful, and it wasn't meant to be anything, and it just grew from there.		It started at apartment. Not as skin on skin Playful not ment [sic] to be anything. Grew from there.
Q. Okay. A. He also said that he never intended it to happen and never though that anything like this would happen.		I never intend for this to happen – I never thought it would happen.
Q. Were you writing this down while you're on the phone with Mr. Andersen or – A. I was, and I was very nervous that he would hear me writing.		

Ms. Arnott's Trial Testimony (Tr. at 279-87)		Ms. Arnott's Notes (Trial St. Ex. 6A, *see* Exhibit)
Q. Okay. You can continue. A. [ ] And when I told him that this was very traumatic for CW in the beginning, he told me, "that's bullshit."		I told him it was traumatic in the beginning [sic] according to [CW] – He said bullshit.
Q. Okay. A. I asked him how did – how did this abuse start , and he said that she was laying on his lap and asking him to scratch his [sic] back and stuff – asking him to scratch her back, and that she stuck her butt in the air while she was laying on his lap and I asked him, so did that arouse you, and he said, "no, he had just started rubbing her bottom." And I'd asked if she was clothed and he said yes. And then he didn't really go into any more detail about that. I kind of hit a dead end with that.		How it started. Stuck butt in air. Lay on lap. Asked if it aroused him he said no Started by Rubbing butt. Clothed until they were. -No more-

Ms. Arnott's Trial Testimony (Tr. at 279-87)		Ms. Arnott's Notes (Trial St. Ex. 6A, *see* Exhibit)
Q. Okay. A. I asked him, "Well, when did it change to rubbing?" and he said that they were lying down together and that she had reached back – and he had said this happened in the fairy house, that she had reached back and had grabbed him on purpose, is what he said, and he didn't stop her. And I asked him, "Well, how would she know to do that. How would she know to grab somebody there?" You know, and he said that he didn't know. And I asked, "Where did that happen?" and –		When did it change – We were laying down together She reached back and grabbed him there –on purpose—He didn't stop her. How do you think she knew to do that behavior IDK! Where was this
Q. Were you sort of writing freehand? Like the "I don't know," is that IDK? A. No, I think I might have wrote it out. Let me see if the original ones – yeah, IDK. [] IDK means I don't know.		

Ms. Arnott's Trial Testimony (Tr. at 279-87)		Ms. Arnott's Notes (Trial St. Ex. 6A, *see* Exhibit)
Q. Okay. [] A. I also asked him, "[W]as I home when this type of stuff was going on?" And he told me that I wasn't home. Q. Did you talk to him about how this has changed CW? A. I did. I told him that she's become extremely sexualized, and that she's – almost has a compulsion to, you know, want to act out. And that he's – I remember talking to him and talking to him about how she was like now, since she was sexualized, and how she was craving sexual attention and that sort of a thing. Q. Okay. What did he say? A. I got that in my notes somewhere.		Where was this W Linn Where was I – Home?

Ms. Arnott's Trial Testimony (Tr. at 279-87)		Ms. Arnott's Notes (Trial St. Ex. 6A, *see* Exhibit)
Q. I want to go back – A. *This is going to take me a second because I have to find it. I think some of these notes are out of order, that's why it's taking me a minute. I'm not sure.*		
Q. Okay. Whenever – whenever you mentioned that you said, hey this has been traumatic – in the beginning it was traumatic for CW and he said "that's bullshit," did he say anything else? Did he expand on that at all? A. He said that she never cried. Because I remember asking – I remember wondering – because I couldn't ask CW something like that. . . . And he said that she never cried, and that it never hurt, and she never said no.		He said she never said no. and never cried.

Ms. Arnott's Trial Testimony (Tr. at 279-87)		Ms. Arnott's Notes (Trial St. Ex. 6A, *see* Exhibit)
Q. Okay. At some point, did you ask him if he ever wanted to stop? A. I did. I asked him if he ever wanted to stop. I also asked him why didn't you just leave us or -- that was all in the same line of questioning, "Why didn't you leave us? Did you ever try to stop?" And he said that he tried to stop one time, only once, when we lived in West Linn, and he told CW that they needed to quit, and that CW told him that if he stopped, that he would – that CW would tell me. Everything that I asked him, he was always putting it back on CW. Never took accountability that he was the one that scrambled her boundaries. He always made it sound like she was just this willing person in all of this, do, do, do. Nonchalant.		Commented on why he didn't leave Said he can't imagine life without us girls

Ms. Arnott's Trial Testimony (Tr. at 279-87)		Ms. Arnott's Notes (Trial St. Ex. 6A, *see* Exhibit)
Q. Now, did you ask him how many times this occurred? A. I did. I'd asked – that is one of the questions that I asked CW as well. Q. Okay. A. And he told me that it happened about 20, and she said that it happened about 30 times. []		How many times – He said 20 She said 30
Q. Okay. Can you remember any other questions that you asked him? A. Mm-hmm. Right after that question, I wanted to know if I'd ever almost caught them or, you know, what I needed to know from him was, is my mother's beacon working. "Did I ever almost catch you? Did I ever almost walk in?" And he said that I almost caught him – caught them twice. [ ]		He says I almost caught them 2x She said 3

Ms. Arnott's Trial Testimony (Tr. at 279-87)		Ms. Arnott's Notes (Trial St. Ex. 6A, *see* Exhibit)
Q. Did you ask him when the last time it was? A. They had both told me before Disneyland. Q. Okay. A. They had both told me before Disneyland. [ ]		When was the last time! [blank]
Q. [] Did you ask him any questions concerning penetration of the anus? A. *I did. I asked him, you know, I told him that she had told me that he had tried to anally penetrate her, using cream, and I asked him, you know, did he do that. And he's like "[W]hat do you want me to say, Therese?"* Q. That was his answer? A. Yeah. Like what do you want me to say. And that was after I'd asked him all these other questions – while I was asking him all these other questions.		Not hurt cream? did you try to do anal? did not deny! He did not deny – he said What do you want me to say?

Ms. Arnott's Trial Testimony (Tr. at 279-87)		Ms. Arnott's Notes (Trial St. Ex. 6A, *see* Exhibit)
Q. Okay. Did . . . you ask him whether or not any oral to genital contact occurred? A. I did and he told me that there was – that she had put his [] mouth on his penis, and that he has also put his mouth on hers – on her vagina, sorry. Q. Okay. A. He also admitted that to me.		
Q. Did he say how many times? A. He told me that he had stuck his mouth on her vagina once, and that she had put her mouth on his penis a couple times. Q. Was it a couple or was it twice? A. Twice.		oral twice

Ms. Arnott's testimony was particularly compelling because the only percipient witness testimony came from the complainant, there was no physical evidence that the offenses of conviction were committed at all let alone by Mr. Andersen, Ms. Arnott's inadmissible hearsay testimony described alleged admissions and confessions by Mr. Andersen corroborating the complainant's testimony, and the only other record evidence of admissions or confessions from Mr. Andersen was crisis-line operator testimony attributing statements to him which were non-specific as to the victim or the act. In addition to the testimony being compelling, the prosecution relied on it in closing argument. D. Ct. Dkt. 18-1 at 612 (transcript) ("When described in one interview – or excuse me, described to Therese Arnott, how did this begin, rubbing her back, she puts her butt up in the air, so he starts to rub it."). Further, the trial court expressly relied on Ms. Arnott's testimony in reaching its guilty verdicts. *Id.* at 634 ("Ms. Arnott testified – Therese Arnott testified that in being confronted at a later date, I think by telephone, Mr. Andersen made the comment, "Well you have to believe [the complainant]." The difficulty with that standing alone is that there was no real indication at [sic] what specifically he may have been admitting, or what [the complainant] ought to have been believed about. However[,] he did at some point, at least it was attributed to him [by Ms. Arnott] the statement of, 'Well, what you want me to say?' when he

was confronted with the specific allegation of, I think of sodomy in that case at that point.").

Nevertheless, the District Court rejected Mr. Andersen's claim, ruling that "even if the objectionable testimony had been excluded, the result would be the same." Appendix at 18 (D. Ct. Opinion and Order at 2). Put differently, the District Court held that Mr. Andersen had failed to show that the result would have been different. This is a higher burden than under *Strickland v. Washington*, 466 U.S. 668 (1984), which held that, to meet his Sixth Amendment burden, a petitioner need show only that, but for the deficient performance, it is reasonably likely that the outcome would have been different. *Id.* at 694.

In seeking a Certificate of Appealability from the Ninth Circuit Court of Appeals, Mr. Andersen urged that reasonable jurists would find it debatable whether the District Court had applied the correct test for determining whether he had established that trial counsel had rendered ineffective assistance, noting that it had rejected a COA based on its applying too high a burden to petitioner. Appendix at 10-13 (Motion for Certificate of Appealability at 9-12). The Ninth Circuit Court of Appeals denied Mr. Andersen's motion without ruling on whether the District Court had improperly applied too high a burden in determining whether to grant a Certificate of Appealability on the ineffective assistance of trial counsel claim.

REASONS FOR GRANTING THE WRIT

WHAT THE CORRECT STANDARD IS FOR DETERMINING IF A CERTIFICATE OF APPEALABILITY SHOULD BE GRANTED RESPECTING AN INEFFECTIVE ASSISTANCE OF TRIAL COUNSEL CLAIM IS AN IMPORTANT FEDERAL QUESTION

Whether, in determining the merits of a motion for a Certificate of Appealability respecting an ineffective assistance of counsel claim, a federal habeas court should determine if reasonable jurists could debate whether, absent the deficient performance, the outcome would have been different or, merely whether there is some likelihood that the outcome would have been different, is an important federal question. In the instant case, for example, while reasonable jurists might not debate whether, but for the error, the outcome would have been different, they might debate whether there was little likelihood that the error affected the outcome. This is an important federal question because federal habeas courts regularly determine whether to grant certificates of appealability respecting ineffective assistance of counsel claims.

CONCLUSION

For these reasons, this Court should grant certiorari to clarify whether, in determining the merits of a motion for a Certificate of Appealability respecting an ineffective assistance of counsel claim, a federal habeas court should determine if reasonable jurists could debate whether, absent the deficient performance, the

outcome would have been different or, merely whether there is some likelihood that the outcome would have been different.

Respectfully submitted on May 26, 2020.

/s/ Oliver W. Loewy
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