APPENDICES

FILED

DEC 23 2019

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U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

CHRISTOPHER S. ANDERSEN, Petitioner-Appellant, v. JERI TAYLOR, Respondent-Appellee.	No. 19-35721 D.C. No. 2:16-cv-02384-JR District of Oregon, Pendleton ORDER

Before: TALLMAN and NGUYEN, Circuit Judges.

The request for a certificate of appealability (Docket Entry No. 2) is denied because appellant has not made a "substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2); *see also Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003).

Any pending motions are denied as moot.

DENIED.

No. 19-35721

UNITED STATE COURT OF APPEALS

FOR THE

NINTH CIRCUIT

CHRISTOPHER S. ANDERSEN,

Petitioner-Appellant,

v.

JERI TAYLOR,

Respondent-Appellee.

Appeal from the United States District Court

for the District of Oregon

MOTION FOR CERTIFICATE OF APPEALABILITY

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FOR THE NINTH CIRCUIT

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Christopher S. Andersen ("Petitioner"), pursuant to Fed. R. App. P. 27 and Ninth Cir. Rule 22-1(d) and through undersigned counsel, hereby moves that this Court issue a certificate of appealability. Mr. Andersen seeks a certificate of appealability on his claim that trial counsel rendered ineffective assistance of counsel in failing to seek to exclude from the bench trial hearsay testimony corroborating the complaining witness' testimony where:

• the complainant's was the only percipient witness testimony,

• there was no physical evidence that the offenses of conviction were committed at all, regardless of by whom,

• the inadmissible hearsay evidence described alleged admissions and confessions by Mr. Andersen corroborating the complainant's testimony,

• 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 (*see* D. Ct. Dkt. 32 (Supporting Brief) at 17 n. 3),

• the prosecution relied on the inadmissible hearsay testimony in closing argument, and

• the trial court expressly relied on the inadmissible hearsay testimony in reaching its guilty verdicts.

The District Court denied relief, finding "that the totality of evidence against Petitioner is such that even if the objectionable testimony had been excluded, the result would have been the same." Dkt. 51 ("Opinion and Order") at 2. Mr. Andersen, though, contends that the result would have been different because Oregon state law requires reversal where hearsay testimony tending to prove guilt in a child sex case is wrongly admitted in an evidentiary context which includes no physical evidence of sexual abuse and no testimony from any percipient witness other than the complainant. Mr. Andersen relied on two Oregon state appellate decisions, which the District Court distinguished by creating an exception not recognized by the Oregon courts.

STATEMENT OF FACTS AND PROCEDURAL HISTORY

A. The Oregon State Criminal Case

In September 2011, a Deschutes County, Oregon, grand jury returned an indictment charging Mr. Andersen with multiple counts of sex offenses against his stepdaughter. D. Ct. Dkt. 17-1 at 9-10 (Judgment of Conviction). Mr. Andersen waived a jury in favor of a bench trial.

At trial, the mother of CW, Therese Arnott, was a key state's witness. During her testimony, she recited at length to the contents of notes which, she testified, she had written down during telephone calls with Mr. Andersen. Her testimony demonstrates (1) that the prosecution was asking her to testify to what her notes contained and (2) that the content of her testimony came from her notes rather than her independent memory. D. Ct. Dkt. 18-1 at 279-80, 283 (trial transcript). To illustrate this, Petitioner's brief in the court below contains a chart comparing quotations from Ms. Arnott relevant testimony to quotations from her handwritten notes. Supporting Brief at 7-14.

While Mr. Andersen's statements themselves are not hearsay as a matter of Oregon state law, *see* OEC Rule 801 (4)(b)(A)[1], Ms. Arnott did not testify directly to them. Rather, she testified that her written notes contained certain information,

[1] "A statement is not hearsay if . . . [it] is offered against a party and is . . . [t]hat party's own statement, in either an individual or representative capacity[.]"

namely, questions she asked Mr. Andersen and his responses to those questions. 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.

Not only did the prosecution rely on Ms. Arnott's testimony in closing argument (D. Ct. Dkt. 18-1 at 612 (Tr. at 610)), the trial court did as well to reach its guilty verdicts (D. Ct. Dkt. 18-1 at 634 (Tr. at 632)).

The trial court returned seven convictions against Mr. Andersen, then sentenced him to 300 months' imprisonment on each of five counts, 75 months' imprisonment on the remaining two counts, all terms to run concurrently with one another but consecutively to sentences imposed in a case from Clackamas County. *Id.* at 13-14. The trial court noted that its sentence "result[ed in] a total sentence of 40 years . . . between the two counties." D. Ct. Dkt. 18-1 at 672. Mr. Andersen was 38 years old when sentenced. D. Ct. Dkt. 17-1 at 2 (DOC facesheet noting that Mr. Andersen's date of birth is July 24, 1971).

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 (St.'s Exs. 106) (Court of Appeal's AWOP) & D. Ct. Dkt. 17-1 at 82 (105) (Supreme Court Order Denying Review).

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 (St. Ex. 107 at 5). Respondent conceded in the court below that Mr. Andersen's claim is exhausted. D. Ct. Dkt. 15 at 2, 4-5, 10.

B. The Federal Habeas Corpus Proceedings In District Court

On December 27, 2016, the District Court docketed Mr. Andersen's pro se Petition for Writ of Habeas Corpus Pursuant to 28 U.S.C. § 2254. D. Ct. Dkt. 1. On August 6, 2018, Mr. Andersen, through undersigned counsel, filed his Brief in Support of Petition for Writ of Habeas Corpus. D. Ct. Dkt. 32. On October 5, 2018, Respondent, through counsel, filed a reply. D. Ct. Dkt. 37.

On April 1, 2019, the Magistrate Judge filed her Findings and Recommendation. D. Ct. Dkt. 41. The Magistrate Judge determined that Mr. Andersen was not entitled to habeas corpus relief on his IATC claim because he had failed to establish that "even if the testimony to which [he] objects had been excluded, the result of [his] trial would have been different." F&R at 6 (citing to *Strickland v. Washington*, 466 U.S. 668, 694 [(1984)).

Mr. Andersen filed objections that, among other things, the Magistrate Judge mistakenly failed to consider that, as he argued in his supporting brief at 18-20, had the claim been preserved and raised on direct appeal, Oregon state law would have required reversal because the trial court's consideration of the inadmissible hearsay evidence affected the verdict – and, thus, the failure to seek to exclude the hearsay testimony was prejudicial under *Strickland v. Washington*, 466 U.S. 668 (1984). D. Ct. Dkt. 49 (Objections to F&R) at 1-3. The District Court rejected this objection and adopted the F&R, ruling that the result would have been the same without the objectionable testimony because there was a great amount of other inculpatory evidence and because "the trial judge states that the strongest evidence was the victim's own description of the abuse." Opinion and Order at 2. The District Court distinguished the state cases on which Mr. Andersen relied on the ground that in neither case did the defendant make confessional or incriminating statements whereas Mr. Andersen had.

The District Court entered its Opinion and Order and its Judgment on July 26, 2019. D. Ct. Dkts. 51 & 52.

ARGUMENT

A. The Certificate of Appealability Standard

Where, as here, a district court has rejected a constitutional claim on its merits, a COA should issue when the petitioner shows that "reasonable jurists could debate whether (or, for that matter, agree that) the petition should have been resolved in a different manner or that the issues presented were 'adequate to deserve encouragement to proceed further.'" *Slack v. McDaniel*, 529 U.S. 473, 484 (2000) (quoting *Barefoot v. Estelle*, 463 U.S. 880, 893 n. 4 (1983)). This inquiry "does not require full consideration of the factual or legal bases adduced in support of the claims. In fact, the statute forbids it." *Miller-El v. Cockrell*, 537 U.S. 322, 336 (2003). Thus, "a court of appeals should not decline the application of a COA merely because it believes the applicant will not demonstrate an entitlement to relief." *Id.* at 337. While issuing a "COA must not be *pro forma* or a matter of course[,]" nevertheless a petitioner need not, to obtain a COA, prove that some jurists would grant habeas relief. *Id.* at 338. Rather, he need show only "that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong." *Slack*, 529 U.S., at 484. "It is consistent with § 2253 that a COA will issue in some instances where there is no certainty of ultimate relief. After all, when a COA is sought, the whole premise is

that the prisoner 'has already failed in that endeavor.'" *Miller-El* at 337 (quoting *Barefoot v. Estelle*, 463 U.S. 880, 893 n. 4 (1983)). Further, "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* at 338. A COA should issue unless the District Court's conclusion is "beyond all debate." *Welch v. United States*, 136 S.Ct. 1257, 1264 (2016).

B. Reasonable Jurists Could Debate Whether, In Assessing Mr. Andersen's Ineffective Assistance of Trial Counsel Claim, The District Court Failed To Properly Apply The State Law Test For Whether A Trial Court Evidentiary Error Requires Relief And, For That Reason, Improperly Found That Mr. Andersen Had Not Established Prejudice.

The District Court determined that even if the objectionable hearsay testimony had been excluded from evidence, the result would have been the same. Opinion and Order at 2. However, Oregon state law requires relief on an ineffective assistance of counsel claim when "trial counsel's [deficient] acts or omissions '*could have tended to affect*' the outcome of the case." *Green v. Franke*, 350 P.3d 188, 200 (Or. 2015) (en banc) (italics added). Here, where a motion to exclude Ms. Arnott's inadmissible hearsay testimony would have been granted had only it been filed, trial counsel's omission clearly did influence the verdict, as the trial court expressly relied on that evidence in reaching its verdict. In particular,

the trial court expressly relied on the objectionable hearsay testimony from Ms. Arnott in reaching its guilty verdicts:

> He denied penetration, but he did acknowledge that some sort of sexual offense had occurred. The testimony was that he initially did not admit or deny when confronted by Therese Arnott. He was more forth coming [sic] with the hotline, but he gave no timeline for the occurrence, no frequency for the occurrence, and as I said he denied that any penetration occurred at that time. *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 [CW]." The difficulty with that standing alone is that there was no real indication at what specifically he may have been admitting, or what [CW] ought to have been believed about.*
>
> *However*[,] *he did at some point, at least it was attributed to him 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."*

D. Ct. Dkt. 18-1 at 634 (Tr. at 632).

The Oregon appellate courts leave no room to doubt that, in an evidentiary context which includes no physical evidence of abuse and no testimony from percipient witnesses other than the complainant, the erroneous admission of hearsay evidence tending to prove guilt is not harmless. In *State v. Marrington*, 73 P.3d 911, 917 (Or. 2003), where the trial court did not mention the inadmissible testimony in announcing its decision, the Oregon Supreme Court described the state of the evidence:

> This case involved a swearing contest. The victim claimed that there had been sexual contact in the form of inappropriate touching; defendant denied that it had occurred. There were no other witnesses to the touching, and there was no physical evidence of any kind that corroborated the alleged abuse.

Id. "In light of those circumstances, and the fact that 'there [was] nothing in the record to indicate that the testimony played *no role* in the trial court's assessment[,]' *id.* [] (emphasis added), the court concluded the error was not harmless and reversed." *State v. Davilia*, 244 P.3d 855, 860 (Or. Ct. App. 2010). In *Davilia*, also a child sex abuse case, the Court of Appeals relied on *Marrington*, to rule that the erroneous admission of inadmissible evidence required reversal of the bench trial guilty verdict even though the trial court had not specifically discussed that evidence in its remarks concerning the verdict. *Davilia*. In the instant case, of course, the trial court specifically relied on the inadmissible evidence in reaching its guilty verdicts.

The District Court ruled that neither *Marrington* nor *Davilia* govern because in neither "did the defendant make confessional or incriminating statements." Opinion and Order at 2. However, because neither those cases nor any other Oregon state case contain this exception to the legal rule relied on in *Marrington* and *Davilia*, the District Court went well beyond established state law.

CONCLUSION

For all these reasons and for all those reasons set out in his briefing before the District Court, Mr. Andersen respectfully asks that the Court grant a certificate of appealability in this case.

Respectfully submitted this 27th day of September 2019.

/s/ Oliver W. Loewy
Oliver W. Loewy
Assistant Federal Public Defender
Attorney for Petitioner-Appellant

CERTIFICATE OF SERVICE

I hereby certify that on September 27, 2019, I electronically filed the foregoing Petitioner-Appellant's Motion for Certificate of Appealability with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

/s/ Michelle Rawson
Michelle Rawson

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

PENDLETON DIVISION

CHRISTOPHER S. ANDERSEN,

Petitioner,

v.

JERI TAYLOR,

Respondent.

No. 2:16-cv-02384-JR

OPINION AND ORDER

MOSMAN, J.,

On April 1, 2019, Magistrate Judge Jolie A. Russo issued her Findings and Recommendation (F&R) [41], recommending that I DENY Petitioner's Writ of Habeas Corpus. Petitioner filed Objections to the F&R [49] and Respondent filed a Response to Objections [50].

DISCUSSION

The magistrate judge makes only recommendations to the court, to which any party may file written objections. The court is not bound by the recommendations of the magistrate judge, but retains responsibility for making the final determination. The court is generally required to make a de novo determination regarding those portions of the report or specified findings or recommendation as to which an objection is made. 28 U.S.C. § 636(b)(1)(C). However, the court is not required to review, de novo or under any other standard, the factual or legal conclusions of the magistrate judge as to those portions of the F&R to which no objections are

addressed. *See Thomas v. Arn*, 474 U.S. 140, 149 (1985); *United States v. Reyna-Tapia*, 328 F.3d 1114, 1121 (9th Cir. 2003). While the level of scrutiny under which I am required to review the F&R depends on whether or not objections have been filed, in either case, I am free to accept, reject, or modify any part of the F&R. 28 U.S.C. § 636(b)(1)(C).

Petitioner makes two objections to the F&R. First, Petitioner objects to the F&R's finding that he did not establish *Strickland* prejudice. Obj. [49] at 2–3. Petitioner argues that the verdict was affected by inadmissible hearsay evidence and was therefore prejudicial under *Strickland*. *Id*. Petitioner draws comparisons between his case and two cases in which Oregon courts held that consideration of inadmissible evidence was not harmless. *Id*. In those cases, the courts held that testimonial evidence from experts admitted without proper foundation, tending to prove the credibility of the victims, likely had an effect on the verdicts. *See State v. Davillia*, 244 P.3d 855, 860 (Or. Ct. App. 2010); *State v. Marrington*, 73 P.3d 911, 917 (Or. 2003). As in this case, both cases involved alleged sexual abuse of a child. In one case the alleged victim was three and the reporting was ambiguous, in the other the reporting by the alleged victim was delayed. In neither case did the defendant make confessional or incriminating statements.

But as the F&R points out, in evaluating proof of prejudice the court "must consider the totality of the evidence before the judge or jury." *Strickland v. Washington*, 466 U.S. 668, 695 (1984). The F&R summarizes the rest of the evidence against Petitioner and finds that the totality of evidence against Petitioner is such that even if the objectionable testimony had been excluded, the result would be the same. F&R [41] at 5–6. I agree with Judge Russo. Even without the testimony of Ms. Arnott, the victim's mother, the amount of damning evidence against Petitioner—including confessions—is great. Further, the trial judge stated that the strongest evidence was the victim's own description of the abuse. I find that Petitioner's case is

distinguishable from *Davilla* and *Marrington* and any error in admitting Ms. Arnott's testimony was harmless.

Petitioner next objects to the F&R's recommendation that I deny a Certificate of Appealability (COA). 28 U.S.C. § 2253(c) "permits the issuance of a COA only where a petitioner has made a 'substantial showing of the denial of a constitutional right.'" *Miller-El v. Cockrell*, 537 U.S. 322, 336 (2003). I agree with the F&R; I do not believe Petitioner has made a substantial showing of the denial of a constitutional right.

CONCLUSION

Upon review, I agree with Judge Russo's recommendation and I ADOPT the F&R [41] as my own opinion. Petitioner's Petition for Writ of Habeas Corpus is DENIED. I further agree that Petitioner has not made a substantial showing of the denial of a constitutional right pursuant to 28 U.S.C. § 2253(c)(2) and therefore decline to issue a Certificate of Appealability.

IT IS SO ORDERED.

DATED this 26 day of July, 2019.

MICHAEL W. MOSMAN
Chief United States District Judge

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

PENDLETON DIVISION

CHRISTOPHER S. ANDERSEN,

Petitioner,

v.

JERI TAYLOR,

Respondent.

No. 2:16-cv-02384-JR

JUDGMENT

MOSMAN, J.,

Based upon the Order of the Court [51] adopting Judge Russo's Findings and Recommendation [41], it is ordered and adjudged that Petitioner's Petition for Writ of Habeas Corpus is DENIED and this action is DISMISSED.

DATED this 26 day of July, 2019.

MICHAEL W. MOSMAN
Chief United States District Judge