

20-7552

ORIGINAL

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

HUGO ALVAREZ-REYES

Supreme Court, U.S.
FILED

MAR 12 2021

OFFICE OF THE CLERK

Petitioner

VS.

**BRAD CAIN, Superintendent,
Snake River Correctional Institution**

Respondent

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

PETITION FOR WRIT OF CERTIORARI


Petitioner Pro Se,
Hugo Alvarez-Reyes
Sid # 14370011
Snake River Correctional Institution
777 Stanton Blvd
Ontario, OR. 97914

Questions Presented:

1. Where petitioner is actually innocent and being held in violation of the 8th and 14th Amendments to the United States Constitution, where such petitioner denied his Due Process of law, 1. where petitioner On or about January 4th 2010 petitioner was given a polygraph examination by Tamera Jessen-Iverson as part of a psycho-sexual evaluation conducted by William Davis, Psy.D., a Clinical psychologist. The polygraph concludes that there was no significant reaction to the relevant issue questions tested in this exam and that in the examiners opinion petitioner was truthful in his responses.
2. Where petitioner was denied his right to 'Due Process of Law' in violation of the Sixth and Fourteenth Amendments to the United States Constitution, when trial counsel failed to object to the experts diagnosis with no evidence, where such petitioner denied his Sixth Amendment right to effective assistance of counsel, (1) where trial counsel failed to object, move to strike and move for a mistrial when prosecution expert witness. (2) Where Kerri Hecox testified as follows: "Q: In fact, in your opinion was this was highly concerning for sexual abuse. A Yes" Trial counsel should have objected to the prosecutor's question and witness Hecox's response as it was inadmissible speculation under Oregon case and Oregon evidence code 401 and 403, impermissible bolstering of K.N. 's credibility under OEC 608, and as a violation of the rule that one witness will never testify about the credibility of another witness. Counsel should have further moved to strike this testimony and moved for a mistrial alleging a violation of petitioner's right to due process of law under the 14th Amendment to the U.S. Cons. Because no physical evidence corroborated the accusations of K.N. against petitioner, it is probable that this testimony affected the result of the verdict against petitioner.
3. Where petitioner was denied his right to 'Due Process of Law' in violation of the Sixth and Fourteenth Amendments to the United States Constitution, when trial counsel advised petitioner NOT to take the stand and would defend petitioner on the theory of a shoddy investigation, where such petitioner denied his Sixth Amendment right to effective assistance of counsel and due process of law,

4. Where petitioner was denied his right to 'Due Process of Law' in violation of the Sixth and Fourteenth Amendments to the United States Constitution, when both trial and PCR, counsels failed by NOT calling Dept. of Human Services employee, Marcy Stenerson, who authored a prior unsubstantiated report violated his 6th, and 14 Amendments to the United States Constitution. (1) where trial and Post-conviction counsels were aware of report written by Marcy Steneson, from the Department of human Services. (2) where Ms. Steneson had been contacted prior to the allegations of this case about an incident of a prior sexual assault.(3) where "Her conclusion of the investigation and allegation was "could not be substantiated ". This is clear evidence of a prior false allegation, which is authorized and admissible in Oregon Courts. This would have caused a different out come in the trial.
5. Where petitioner was denied his right to 'Due Process of Law' in violation of the Sixth Fifth and Fourteenth Amendments to the United States Constitution, when both trial and PCR counsels failed by not raising the issue of mistaking identity at tria, where such petitioner denied his Sixth Amendment right to effective assistance of counsel, (1) where both counsels were aware of the facts that the alleged incident occurred before sunrise, so the room was dark and she didn't see who the abuser was.,(2) where the complaining witness, KN is Caucasion and she claimed that the alleged abuser was latino, (3) where two latino males, approximately the same age and build, were living in the household where the alleged abuse occurred.

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**Petition for a Writ of Certiorari to the
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PETITION FOR WRIT OF CERTIORARI

Hugo Alvarez-Reyes the petitioner, petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit, rendered in his appeal, which judgment affirmed the denial by the district court of his Federal Habeas Corpus petition pursuant to 28 U.S. C. § 2253 (c) (2).

OPINIONS BELOW

The opinions of the Court of appeals and the District Court (are below).

JURISDICTION

The judgment of the U.S. Court of appeals for the 9th Circuit was entered on **Dec-14th 2020**.

The Jurisdiction of this Court is invoked under 28 U.S. C. § 1254 (1) This petition is timely filed pursuant to 28 U.S.C. § 2101 (c).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Sixth Amendment to the United States Constitution provides in relevant part: "In criminal prosecutions, the accused shall...have assistance of counsel for his defense."

Right to Due Process of Law Under the Fourteenth Amendment to the U.S. Constitution.

STATEMENT

The Circuit Court, Direct Appeal court, the Post conviction Court and PCR appeal Court as well as the US District Court for the District of Oregon in this case held that petitioner's rights to effective assistance of counsel and due process of law *were not denied* when petitioner is actually innocent and being held in violation of the 8th and 14th Amendments to the U.S. Constitution; when trial counsel failed to object, to the expert's diagnosis with no evidence; when trial counsel advised him to NOT take the stand; when both trial and Post-conviction counsels failed to call Dept. of Human Services employee, Marcy Stenerson, who authored a prior unsubstantiated report; when both trial and Post-conviction counsels failed to introduce competent evidence regarding the dimension of the bedroom and the bed where the alleged sexual abuse occurred; when both trial and Post-conviction counsels failed to raised the issue of *mistaken identity* at trial; PCR counsel failed by not raising grounds 5-7, therefore affirming the all lower Court's decision at the state level.

STATEMENT OF THE CASE

A. State trial Court Proceedings.

In August 2009, petitioner had a Bench trial. Mr. Alvarez-Reyes, was charged in In Marion County with Sodomy in the First Degree Counts 1, and Count 2, Sexual Abuse in the First Degree. The trial court merged Count 2, into Count 1, and sentenced petitioner to 300 months in prison and lifetime post prison supervision. The charges were based on the allegations that while KN was staying with her mother and Mr. Alvarez-Reyes, Mr. Alvarez-Reyes, came into her bedroom in the middle of the night, and sexually abused her. ***KN was examined by Dr. Kerri Hecox, a doctor at the Children's Advocacy Center. ***Dr. Hecox found no physical abuse, but based on her interview of KN, she diagnosed her as "highly concerning" for sexual

abuse.***Mr. Alvarez-Reyes, maintained his innocence of the charges. His defense theory focused on the custody issues between Ms. Scott and Ms. Lewis.

B. Direct Appeal, Oregon Appellate Court case number: CA A146213.

In 2011, Petitioner took a direct appeal. The Court of appeals denied relief affirming the lower courts decision, without opinion in *State v. Alvarez-Reyes*, 246 Or.App. 686, 268 P.3d 821(Table) (Or. App., 2011), petitioner than petitioned for review in the Oregon Supreme court. Review was denied without opinion in In *State v. Alvarez-Reyes*, 351 Or. 675, 276 P.3d 1123 (Or. 2012). Petitioner challenged that “trial court erred by admitting the doctor's diagnosis that KN was 'highly concerning' for sexual abuse.” arguing Trial court erroneously admitted Dr. Hecox's opinion that KN was highly concerning for sexual abuse, because that opinion was based solely on the doctor's assessment of KN's credibility.

The erroneous admission of that opinion was harmful. The Court of appeals has repeatedly reached such an error as plain error under ORAP 5.45(1). Dr. Hecox's opinion that KN was “highly concerning” for sexual abuse was inadmissible because there was no physical evidence of abuse. The Oregon Court of appeals affirmed the trial court's decision without a written opinion. *In State v. Alvarez-Reyes*, 246 Or.App. 686, 268 P.3d 821(Table) (Or. App. 2011). This court's decision is “contrary to ...clearly established precedent as explained above and below.

C. Petition for review to the Oregon Supreme Court

Following Petitioner's appeal counsel filed a petition for review with the Oregon Supreme court. The Oregon Supreme court DENIED review without a written opinion. In *State v. Alvarez-Reyes*, 351 Or. 675, 276 P.3d 1123 (Or. 2012).

E. State Post-conviction Relief Proceedings. Case No. 12099633P

Following the Supreme Court's denial of review; petitioner filed for post-conviction Relief (“PCR”) in Malheur County were the PCR Court denied relief on a variety of ineffective assistance of counsel claims.

1. Petitioner's First and Second Claims for relief: -Ineffective Assistance of trial counsel regarding exercise of petitioner's right to testify in his own defense.
3. Petitioner's Third Claim for relief: Ineffective Assistance of trial counsel for Failure to Object.
4. Petitioner's Fourth Claim for relief: Ineffective Assistance of trial counsel regarding Actual innocence.

5. Petitioner's Fifth Claim for relief: Ineffective Assistance of trial counsel *regarding Actual innocence*. Petitioner alleges that has been prejudiced by trial counsel's ineffectiveness under the Sixth Amendment to the United States Constitution as well as *Strickland v. Washington*, 466 U.S. At 694. PCR Court's decision also contradict, and conflicts clearly established state and federal law.

F. Post Conviction Appeal Case No. A156596

Following the Post Conviction's court's denial, petitioner filed a PCR appeal, challenging Actual innocence and that reversible “[e]rror may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected[.] OEC 103(1). The harmless error analysis articulated under OEC 103 “is consistent with the standard for reversible error set forth in Article VII, section 3, of the Oregon Constitution.” *State v. Hansen*, 304 Or 169, 181, 743 P2d 157 (1987). Under the standard, this court may affirm despite the error affected the verdict.” Id. At 180. This court does not weigh the evidence, disregarding the erroneously admitted evidence, and determine the defendant's guilt. *State v. Davis*, 336 Or 19, 32, P3d 1111 (2003). See also *Hansen*, 304 Or at 180 (“Whether there was substantial and convincing evidence of guilt is not *the issue*; *the issue* is whether the error was likely to have affected the result.”); *State v. Tyon*, 226 Or App 428, 442, 204 P3d 106 (2009). Erroneously admitted evidence that relates to a central issue in the case is more likely to be harmful than erroneously admitted evidence that relates to tangential issues. *State v. Johnson*, 225 Or App 545, 550, 202 P3d 225 (2009) Additionally, erroneously admitted scientific evidence carries with it a higher degree of harm than lay evidence, due to the persuasive power of scientific evidence. *Johnson*, 225 Or App at 555.

The Oregon Court of appeals affirmed the Post Conviction trial court's decision without a written opinion. In *Alvarez-Reyes v. Nooth*, 278 Or.App. 625, 379 P.3d 870(Table) (Or. App. 2016) Petition for review was also filed with the Oregon Supreme Court. The Supreme Court denied review without Written opinion, In *Alvarez-Reyes v. Nooth*, 360 Or. 568, 385 P.3d 79(Table) (Or. 2016) Case No. S064314
The Court of Appeals and Supreme Court's ruling was “contrary to ...clearly established precedent” as shown above and bellow.

G. Federal Habeas Corpus Proceedings, Case # 2:17-cv-00181-AA

Petitioner filed a writ of federal habeas Corpus pursuant to 28 U.S.C. § 2254, challenging his convictions for sexual abuse and alleging several, discrete instances of ineffective assistance of trial counsel claims. Petitioner alleges “actual innocence” as a primary claim . The U.S. District Court denied relief on all Claims, stating that “petitioner's claims are unexhausted and barred from federal review through procedural default.” furthermore the Court states that “Regardless of exhaustion, petitioner's claim fails on the merits and the petition is **denied**.

Petitioner's grounds for relief presented before the U.S. District Court:

1. petitioner is actually innocent and being held in violation of the 8th and 14th Amendments to the United States Constitution
2. petitioner was denied his right to 'Due Process of Law' in violation of the Sixth and Fourteenth Amendments to the United States Constitution, when trial counsel failed to object to the experts diagnosis with no evidence, where such petitioner denied his Sixth Amendment right to effective assistance of counsel.
3. Petitioner was denied effective and adequate assistance when counsel advised him not to take the stand violating his 6th and 14th Amendments to the United States Constitution.
4. Trial counsel was ineffective and Inadequate in failing to argue the excessive and harsh sentence in violation of the 6th , 8th and 14Amendments to the United States Constitution.
5. Petitioner's right to due process was violated when both trial and post-conviction counsel were Ineffective and Inadequate by not calling Department of Human Services employee Marcy Stenerson, who authored a prior unsubstantiated report violated his 6th , and 14 Amendments to the United States Constitution.
6. Petitioner's right to due process was violated when both trial and post-conviction counsel failed to introduce competent evidence regarding the dimension of the bedroom and the bed where the alleged sexual abuse occurred in violation of his 6th , and 14 Amendments to the United States Constitution.
7. Trial and post-conviction counsel were Ineffective and Inadequate by not raising the issue of mistaking identity at trial in violation of the 5th 6th and 14 Amendments to the United States Constitution.
8. post-conviction counsel was Ineffective and Inadequate by not raising ground 5-7in violation of the 5th 6th and 14 Amendments to the United States Constitution.

Petitioner alleges that he is actually innocent of the offenses conduct for which he is convicted and which he is now serving sentences of 25 years in prison. In every step at the State level and federal habeas, petitioner argued his “innocence” and several other ineffective assistance of counsel claims. The District Court ORDERED AND JUDGED that “the petition for writ of habeas corpus is DENIED and this case is Dismissed. A certificate of appealability is denied on the basis that petitioner has not made a substantial showing of the denial of

constitutional right pursuant to 28 U.S.C. § 2253 (c) (2)". This court's decision also contradicts, and conflicts clearly established state and federal law.

H. The Ninth Circuit Court of Appeals denied request for certificate of appealability;
Following the U.S. District Court's denial of habeas petition appealability, petitioner filed a 'petition for appealability to the Ninth Circuit Court of Appeals for the District of Oregon arguing that, he has made a substantial showing of a denial of Constitutional Rights pursuant to 28 U.S.C.A. § 2253(c)(2). Petitioners constitutional rights were violated by the conviction, sentence entered in Marion County Court Case No. 09C47352, this Court's decision also contradict, and conflicts clearly established state and federal law.

REASONS FOR GRANTING THE WRIT:

Certiorari should be granted because petitioner's Constitutional rights are violated, the Ninth Circuit Court of appeals denied Certificate of appealability and as discussed below, the U.S. District court erroneously diminished petitioner's ineffective assistance of counsel claims and denied appointment of counsel. The state courts erroneously diminished record evidence critical to the Strickland analysis and, doing so, contradict, conflicts clearly established state and federal law.

Petitioner prays that the Supreme Court consider this writ of certiorari and reviews his case in which an innocent man has been prosecuted. Petitioner knows there are bad people who have done really bad things and would still claim innocence, but there are people also claiming to be victims out of personal gain, to victimize an innocent person. This is not new or unheard of, the oldest known story to my knowledge is Joseph in the Holy Bible, who was falsely accused of rape. He knows that the world is not perfect and that is what he is really getting at; it is important to protect the accused because they may be innocent. We can't read the minds or hearts, and we assuredly can't see into the past events without evidence proving beyond a reasonable doubt that an event even occurred. This is why the States influence and power in criminal trial courts needs to be adjusted. Because the prosecutions, detectives, and any in conflict will have bitter feelings possibly destroying innocent lives.

Petitioner claims ACTUAL INNOCENCE

On July 6, 2009, petitioner was given a polygraph examination by Vancouver Polygraph for purposes of a DHS determination of his suitability to be around children following KN's

accusations. The pertinent portions of that examinations and its result are as follows:

“ANALYSIS RESULTS:

Stress Indicator: Probable no deception indicated:

SC/BP Counter-Measure Indicator. No Counter Measures Indicated P1/P2 Counter-Measure Indicated Analysis type: Chart Analysis Algorithm Relevant Questions Asked: R3: Have you ever touched (KN) in any sexual way ? Examinee: NO

R5: Did you sexually touch (KN) in December 2008? Examinee: NO

R8: Did you have any sexual contact with (KN) like your being accused of ? Examinee: NO

R9: Have you lied to anyone regarding any sexual contact with (KN) ? Examinee: NO

EVALUATION OPINION: 'After carefully reviewing and analyzing the polygraph charts, it is the opinion of the examiner that there was No Deception Indicated during this polygraph examination. In addition, the computer-analysis, numerical, and autochart Scoring programs, also produced a strong No deception Indicated examination test result.'

This examination test results were reviewed by second polygraph examiner who also obtained these same *NDI* examination scoring conclusions."

On or about January 4, 2010, petitioner was give a polygraph examination by Tamera Jessen-Iverson as part of a psychosexual evaluation conducted by Dr. William Davis Psy.D., himself, a clinical psychologist whose evaluation and opinion are regularly accepted by the Marion County District Attorney's Office in resolving alleged sexual assault offenses. The pertinent question and results of this polygraph test are set forth in DR. Davis' evaluation report as follows:

1. Beforeage 21. did you have sex with someone three or more years younger than you ? Answer, "No,"
2. After you turned 21, did you have sex with someone under the age of 18 years ? Answer, "No." Petitioner's polygraph examination of January 4, 2010, concludes that there was no significant reaction to the relevant issue questions tested in the exam and that , in the examiner's opinion , petitioner was truthful in his response to the relevant issue questions tested in this exam. Both before trial, after petitioner's conviction and at the time of sentencing, counsel knew that the prosecutor was aware of the foregoing polygraph results and that his office regularly relied on such results to dismiss charges against criminal defendants. Despite this knowledge, trial counsel failed to move to have petitioner's charges dismissed as a violation of his rights to due process of the law under the Fourteenth Amendment to the United States Constitution on grounds that the prosecutor knew or should have known that petitioner was actually innocent of his indicted offenses yet elected to prosecute to prosecute him anyway. In addition to objecting to petitioner's and sentences on the forgoing grounds , counsel should have objected to them as violations of petitioner's rights to be free of 'cruel and unusual punishment as guaranteed by Article 1, § 16 of the Oregon Constitution and the Eight Amendment to the United States Constitution. Petitioner alleges that he is actually innocent of the offenses conduct for which he is convicted and which he is now serving sentences of 25 years in prison."

As such, petitioner continued confinement on these convictions and sentences viiolates his right to due process of the law under the fourteenth Amendment to the United States Constitution and his right to be free from cruel and unusual punishment as guaranteed by the Eight Amendment to the United States Constitution. ***exclusion of polygraph evidence offered by an accused to support his credibility violates his Sixth Amendment right to present a defense.

1. Petitioner presents Ineffective Assistance of counsel regarding Actual Innocence, as Ground one, and was denied relief by all below courts.

Petitioner has proven his innocence through his State and federal attorneys and to fairly present several other claims of Ineffective Assistance of Trial and Post-conviction counsel. Petitioner Claims that his conviction and sentences are the product of ineffective assistance of counsel; specially, counsel's failure to introduce testimony from an important witness on the issue of innocence. Petitioner Mr. Alvarez-Reyes, maintained his innocence to the charges of sexual abuse, and his defense centered on the fact that the accusations have been fabricated as part of an ongoing custody dispute between the alleged victim's mother and great-grandmother. Counsel's pretrial investigation discovered a parallel state investigation into the charges that concluded Mr. Alvarez-Reyes, was not a threat to his other children, and that several aspects of primary investigation made it possible to determine whether the abuse had occurred.

Despite having the state worker who conducted the helpful investigation present at the courthouse, counsel never called her to testify. Counsel's failure to call the state worker to testify had prejudiced petitioner's entire case. Defending his mistake in making a poor decision, counsel claimed that the state worker's testimony was effectively cumulative of other trial witness. *But* counsel was wrong. No other witnesses were able to provide the same information as the state worker-and that information was incredibly important for Mr. Alvarez-Reyes's defense. Thus, there was no reasonable strategy for excluding the testimony. Further, had the trier of fact heard abut the parallel investigation, its independent and contrary conclusions, and its criticism of the primary investigation there is a reasonable provability that Mr. Alvarez-Reyes would not have been convicted. He has thus demonstrated ineffective assistance of counsel in violation of *Strickland v. Washington*, 466 U.S. 668 (1984).

Moreover, an investigation was necessary to inquire into a second individual who potentially could have been the person who committed the alleged sexual abuse. Based on a letter that was submitted by the trial attorney Mr. Grefenson, in petitioner's Post-conviction in response to the PCR claims. This document states "there was evidence that was presented that there was another *Hispanic male* in the household more often and had more access to Kaylie than Alvarez-Reyes did. Because of that, in closing argument, on pg 386 of the transcripts, I pointed out that Kaylie's allegations concerning abused kaylie who had more access to her than

Mr. Alvarez-Reyes.” further, the attorney says “This is my response to the amended petition for post-conviction relief. Again, I do believe Mr. Alvarez-Reyes is innocent. Also, at the same time, I believe that kaylie Nevin might have been sexually abused by someone else and that at the time that Mr. Alvarez-Reyes was in her life, he ended up being the scapegoat for custody battles regarding other family members.”*** Moreover trial attorney states “In hindsight, I believe I let down Mr. Alvarez-Reyes. I represented an innocent man that was convicted in my opinion. That weights heavily on me to this day. Now, I wish we would have had a jury trial where Mr. Alvarez-Reyes testified and I objected to Dr. Hecox's diagnosis of “highly concerning for sexual abuse.” This was the last bench trial that I ever had with Judge Wilson.” As this Court can see that the ruling of the lower courts has been prejudicial to petitioner.

2. **Court's decisions contrary to clearly established federal law.**

A Court decision is “contrary to …clearly established precedent if the state court applies a rule that contradicts the governing law set forth in [the Supreme Court's] cases” or “if the state court confronts a set of facts that are material indistinguishable from a decision of [the Supreme] president. *“Williams v Taylor*, 529 U.S. 362, 405-06 (2000). Under the “unreasonable application” clause, a federal Habeas court may grant relief “if the state court identifies the correct governing legal principle from [the Supreme Court's] decisions but unreasonably applies that principle to the facts of the prisoner's case.” Id at 413. The “unreasonable application” clause requires the state court's decision to be more than incorrect or erroneous. In this case the decisions of the courts are unreasonable incorrect and erroneous.

In petitioner's case, the state circuit court, the state court of appeals, the post conviction court, the PCR court of appeals, the (U.S. District Court and Ninth Circuit Court of Appeal's decision was unreasonable and in violation of clearly established state and federal constitutional law. As explained below, it is shown that the relevant state and U.S District -court's decision was contrary to, or involved an unreasonable application of, clearly established federal law, and was based on an unreasonable determination of the facts in light of the evidence presented in the state-court proceeding. 28 U.S.C.S. § 2254(d).

Marion County Circuit court and Court of appeals had erred when it denied petitioner's “Innocence” claim and several other claims of ineffective assistance of counsel. In this present case the state court's decision was erroneous and contrary to clearly state and

federal established law, because the court of appeals denied relief on the following claim in which petitioner alleged his innocence and that "trial court erred by admitting the doctor's diagnosis that KN was 'highly concerning' for sexual abuse."

The following case law supports petitioner's claims and reveals that the state court's ruling contravenes the following case law and authorities.

A. State Appeals Proceedings:

Trial court erroneously admitted Dr. Hecox's opinion that KN was highly concerning for sexual abuse, because that opinion was based solely on the doctor's assessment of KN's credibility. The erroneous admission of that opinion was harmful. This court the Court of appeals has repeatedly reached such an error as plain error under *ORAP 5.45(1)*. Dr Hecox's opinion that KN was "highly concerning" for sexual abuse was inadmissible because there was no physical evidence of abuse. A doctor's opinion that a child has been sexually abused is admissible in the absence of any physical evidence of abuse. *State v. Southard*, 347 Or 127, 140-41, 218 P3d 104 (2009). In *State v. Merrimon*, this court applied the Southard rule to a case where the diagnosis was "highly concerning of sexual abuse." *Merrison*, 234 Or App 515, 517, 228 P3d 666 (2010). There, the defendant 's daughter reported abuse to several persons. Id. At 517-18.

Furthermore in a similar newer case *State v. Murillo-Bejar*, 296 Or App. 14, 437 P3d 282 (Or App 2019), the defendant contends that the trial court plainly erred when it admitted a police officer's testimony that the victim, A, had received a diagnosis of "highly concerning for sexual abuse***, the court agreed with defendant that the "trial court plainly erred in admitting that evidence and that it is appropriate to exercise our discretion to correct that error. See *Ailes v. Portland Meadows, Inc.* , 312 Or. 376, 382, 823 P.2d 956 (1991); And reverse and remand defendant's convictions for first-degree sexual abuse.

See, e.g. , State v. Lopez-Cruz , 256 Or. App. 32, 37, 299 P.3d 569 (2013) (admission of a diagnosis of "abusive contact of an adult with a patient, no penetration or genital contact," in the absence of physical evidence, constituted plain error warranting reversal); State v. Volynets-Vasylchenko , 246 Or. App. 632, 639, 267 P.3d 206 (2011) (trial court plainly erred by admitting evidence that a nurse practitioner who evaluated a child had made treatment recommendations including that the child receive therapy from a therapist "skilled in working with children who have been victims of abuse"); State v. Lovern , 234 Or. App. 502, 508-12, 228 P.3d 688 (2010)

(it is plain error to admit a diagnosis of child sexual abuse in the absence of physical evidence). And we have so held even in circumstances where the diagnosis was not definitive, but was phrased in terms of being "concerning" or "highly concerning" for sexual abuse. *See, e.g. , State v. Feller*, 247 Or. App. 416, 418, 269 P.3d 110 (2011) (trial court plainly erred in admitting physician's diagnosis of "concerning" for sexual abuse); *State v. Merrimon*, 234 Or. App. 515, 517, 228 P.3d 666 (2010) (trial court committed plain error in admitting, in the absence of physical evidence, a diagnosis of "highly concerning of sexual abuse"). As we explained in *Merrimon*, like "the definitive diagnosis at issue in *Southard*—indeed, perhaps more so—a diagnosis of 'highly concerning of sexual abuse' without confirming physical evidence has marginal probative value." 234 Or. App. at 520-21, 228 P.3d 666.

3. The erroneous admission of Dr. Hecox's opinion was harmful.

Reversible "[e]rror may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected[.] OEC 103(1). The harmless error analysis articulated under OEC 103 "is consistent with the standard for reversible error set forth in Article VII, section 3, of the Oregon Constitution." *State v. Hansen*, 304 Or 169, 181, 743 P2d 157 (1987). Under the standard, this court may affirm despite the error affected the verdict." Id. At 180. This court does not weigh the evidence, disregarding the erroneously admitted evidence, and determine the defendant's guilt. *State v. Davis*, 336 Or 19, 32, P3d 1111 (2003). See also *Hansen*, 304 Or at 180 ("Whether there was substantial and convincing evidence of guilt is not *the issue*; *the issue* is whether the error was likely to have affected the result."); *State v. Tyon*, 226 Or App 428, 442, 204 P3d 106 (2009). Erroneously admitted evidence that relates to a central issue in the case is more likely to be harmful than erroneously admitted evidence that relates to tangential issues. *State v. Johnson*, 225 Or App 545, 550, 202 P3d 225 (2009) Additionally, erroneously admitted scientific evidence carries with it a higher degree of harm than lay evidence, due to the persuasive power of scientific evidence. *Johnson*, 225 Or App at 555. Even though defendant tried his case to the court rather than to a jury and himself elicited evidence that Dr. Hecox recommended counseling to recover from sexual abuse and cope with family tension, the admission of Dr. Hecox's testimony was still harmful, because KN's credibility was the central issue in this case. FIRST, state's court has already rejected the argument that the erroneous admission of a diagnosis of "highly concerning for sexual abuse" is

harmless in the context of a bench trial. *State v. Almanza-Garcia*, 242 Oapp. 350, 255, P3d 613 (Or. App. 2011) In *State v. Almanza-Garcia*, 242 Or App. 350, The state argues that, because defendant was “tried to the court rather than to a jury, it is not plain that error occurred and this court should not exercise its discretion to review the error.” The disputed evidence, however, was part of the record in a case that hinged on whether defendant or the victim was more credible. As the trial court observed while rendering its verdict, “[t]his is a case where there were only two people present, as is usually the case in this type of offense, and I wasn’t there. * * * I have to go by piecing everything together like a puzzle, based on what people tell me in court.” Although the trial court did not specifically refer to the diagnosis in making its findings of fact—noting only that the doctor clarified some points and was very good at avoiding asking leading questions or putting words in anyone’s mouth—that does not mean that the court did not consider the diagnosis in reaching its verdict. *State v. Davilia*, 239 Or.App. 468, 478, 244 P.3d 855 (2010). The Court concluded “that the admission of the evidence was error, and we exercise our discretion to correct the error for the reasons set forth in *State v. Gonzales*, 241 Or.App. 353, 360, 250 P.3d 418 (2011).”

A Court decision is “contrary to ...clearly established precedent if the state court applies a rule that contradicts the governing law set forth in [the Supreme Court’s] cases” or “if the state court confronts a set of facts that are material indistinguishable from a decision of [the Supreme] president. *Williams v Taylor*, 529 U.S. 362, 405-06 (2000). Under the “unreasonable application” clause, a federal Habeas court may grant relief “if the state court identifies the correct governing legal principle from [the Supreme Court’s] decisions but unreasonably applies that principle to the facts of the prisoner’s case.” Id at 413. The “unreasonable application” clause requires the state court’s decision to be more than incorrect or erroneous. In this case the decisions of the courts are unreasonable incorrect and erroneous.

B. State Post-Conviction Proceedings

4. Trial counsel's advise to petitioner was that he not take the stand and testify An attorney exercising reasonable professional skill and judgment under the circumstances of petitioner's case would not have provided petitioner such advise.

In the context of petitioner's case, defense counsel had no good reason to advise petitioner against taking the stand. Petitioner never admitted to counsel or any other person that he committed this offense. No other person had witnessed the supposed abuse. Counsel knew that

petitioner emphatically professed his innocence and passed multiple polygraph examinations on whether he had sexually assaulted KN. Counsel knew or should have known that petitioner's protestations of innocence would ring loud and clear in his testimony and that his testimony was the ingredient which would breathe life into his defense theories.

Petitioner will testify that defense counsel never provided him with detailed advise concerning his right to testify or explained to him the risks and benefits of waiving that right. The federal constitution guarantees every defendant the fundamental right to testify in his or her own behalf. *Rock v. Arkansas*, 483 U.S. 44, 49-53, 107 S. Ct. 2704, 2708-(1987). This right is personal and can only be waived by the defendant. *See Jones v. Barnes*, 463 U.S. 745, 751, 103 S. Ct. 3308, 3312 (1983) ("the accused has the ultimate authority to make certain fundamental decisions regarding the case, as to whether to plead guilty, waive a jury, testify in his or her own behalf, or taken an appeal"); *United States v. Joelson*, 7 F. 3d 174, 177 (9th Cir. 1993).

Since the right to testify is essential to due process of law in a fair adversary process, a waiver of that right must be knowingly, voluntary and intelligent and requires "the express and intelligent consent of the defendant." *State v. Gornick*, 196 Or App. 397, 102 P.3d 734 citing *Patton v. United States*, 281 U.S. 276, 312, 50 S. Ct. 253, 74 L Ed 854 (1930)., abrogated on other grounds by *Williams v. Florida*, 399 U.S. 78, 90 S. Ct. 1893, 26 L Ed 2d 446 (1970), *Schneckloth v. Bustamonte*, 412 U.S. 218, 241, 93 S. Ct. 2041, 2055 (1930). give the importance of this fundamental right, it is equal important that a defendant contemplating its waiver receive competent effective aadvice from counsel. *See Krummacher*, 290 Or. 867, 874-875 (1981) (stressing importance of counsel's function to provide sound, understandable advise to petitioner contemplating waiver of important constitutional rights).

Unfortunately, counsel never conveyed to petitioner the importance of his right to take the stand in the context of this trial. Counsel never explained to petitioner that give the dynamics at trial, the case would turn on KN's credibility and that petitioner was the one person who could refute her accusations. Counsel never explained to petitioner absent his testimony there was a substantial probability of conviction. Had counsel spent the time discussing with petitioner his right tp testify and the importance of exercising that right in this trial, petitioner would never have waived his right to testify. Instead, petitioner would have taken the stand in his own defense and testified that during the time period of the alleged incident he was NOY even around his

home. Petitioner would have explained to the trial court that his native language is Spanish, his english is broken and his grasp of english vernacular is poor such that he would not never have made the statement which KN claimed he made to her during the sexual assault to wit: "Oh my goodness. I did not know you were going to go awake." Petitioner would further have testified that he had discussed with KN the concept of adoption, that Scott the (*gray-gray mother*) intended to adopt her and that Lewis (*KN's mother*) would never allow that to take place. As is always the case, the trial court was required to determine, in a general sense, the relative credibility of the plaintiff's and defendant's at trial. Clearly the trial court believed KN because it convicted petitioner. Given the evidence described above and based upon this Court's assessment of the testimony petitioner will present in his own behalf, there is a reasonable probability that petitioner's testimony would have affected the result of his trial. In this case the post conviction court 's decision was contrary to clearly established state and federal law. The "unreasonable application" clause requires the state court's decision to be more than incorrect or erroneous. In this case the decisions of the courts are unreasonable incorrect and erroneous. As explained above and below.

5. A criminal defendant is constitutionally entitled to effective and adequate representation.

D. Federal Habeas Proceedings Case # 17-cv-00181-AA

The U.S. District Court's decision was prejudicial to petitioner's case and contradicts established federal law. The U.S. District Court's decision contravenes below Court's precedent that allows relief to petitioner. On February 2, 2017, this court filed MR. Alvarez-Reyes's Pro Se petition for writ of habeas corpus. In this proceedings petitioner alleges his Sixth Amendment right to effective assistance of counsel. As explained below.

Argument: A. Mr. Alvarez-Reyes, Received Ineffective Assistance Of Counsel In Violation Of The Sixth Amendment To The United States Constitution When Counsel Failed

The Sixth Amendment to the United States constitution guarantees the "right to the effective assistance of counsel ." *Strickland v. Washington*, 466 U.S. 668, 687, 104, S Ct 2052, 80 L Ed 2d 674 91984). (quoting *McMann V. Richardson*, 397 U.S. 759, 771, n. 14 (1970)). To prevail on a claim of ineffective assistance of counsel , a habeas petitioner must show that counsel's representation fell below an objective standard of reasonableness and that, as a result, the petitioner was prejudiced. *Id. At 690, 694.*

1. *Counsel's failure to introduce Marcy Stenson's testimony fell below Sixth Amendment standards.*

The requirement of investigation (or a reasonable decision not to investigation) is a well-established aspect of effective representation. *Strickland* v. 466 U.S. at 691. But investigation by itself is meaningless unless counsel properly utilizes the information he receives. See, e.g., *Hart v. Gomez*, 174 F.3d 1067, 1070 (9th Cir. 19990 (holding that defense counsel must investigate "and introduce into evidence records demonstrate factual innocence or that raise sufficient doubt on that question to undermine confidence in the verdict" and that failure to do so is deficient performance). Defense counsel has a "duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." *Strickland*, 466 U.S. at 691. "This includes a duty to investigate the defendant's 'most important defense,' and a duty adequately to investigate and introduce into evidence records that demonstrate factual innocence, or that raise sufficient doubt on that question to undermine confidence in the verdict." *Bragg v. Galaza*, 242 F.3d 1082, 1088 (9th Cir. 2001) (citing *Sanders*, 21 F.3d 1446, 1457 (9th Cir. 1994) and *Hart v. Gomez*, 174 F.3d 1067, 1070 (9th Cir. 1999)). Indeed, "[t]he duty to investigate derives from counsel's basic function which is 'to make the adversarial process work in the particular case.'" *Town v. Smith*, 395 F.3d 251, 258, (6th Cir. 2005) (quoting 1 477 U.S. 365, 384 (1986)). Counsel cannot fulfill that basic function without using helpful information that he uncovers. Here, counsel had a report from Ms. Stenson which detailed her independent investigation into KN's allegation. Resp. Ex. 122 at 5-15. That investigation included witness interviews of the people involved in the case (with the exception of KN), an evaluation of KN's interview with Det. Harris-Powers, staffing with Mr. Alvarez-Reyes. At the end of her investigation Ms. Steneson made two conclusions. **First**, she determined that there was no threat of harm to the other two children who lived with Mr. Alvarez-Reyes.

Second, given the circumstances surrounding KN's disclosure, she decided it was "unable to determine" whether KN had been abused.***In addition Dr. Johnson was only able to opine about perceived errors in Det. Harris-Powers's interview of KN. In contrast, Ms. Steneson was able to provide other information about Mr. Alvarez-Reyes, specifically that the State of Oregon did not think he posed any threat of harm to children. Finally, on cross-examination, Dr. Johnson agreed that, in general, delayed and partial disclosures are normal, kids are resistant to

suggestibility, and very few kids make up allegations for abuse, thereby confirming the state's theory that KN's disclosures were truthful. Tr. 288. Having another witness to reinforce Dr. Johnson's critique of KN's interview would have provided important support for the defense. In sum, counsel had a critical witness present in the Courthouse. That witness had powerful information that supported his client's innocence. Counsel's failure to call Ms. Steneson fell below an objective standard of reasonable representation. Counsel's failure prejudiced Mr. Alvarez-Reyes.

B. Although Mr Alvarez-Reyes's Claim Is Procedurally Defaulted, This Court Can Still Grant Relief On The Claim Because Mr. Alvarez-Reyes Can Establish Cause And Prejudice Under *Martinez v. Ryan*, 566 U.S. 1 (2012).

Mr. Alvarez-Reyes's claim of trial counsel's ineffective representation was not fairly presented to the Oregon courts, as required by 28 U.S.C. § 2254(b). *Baldwin v. Reese*, 541 U.S. 27, 29 (2004). See Resp. Ex. 124 (second amended PCR petition, listing claims but not including a claim of ineffective assistance of counsel for failing to call Ms. Stenerson at trial.) Because Oregon courts would now find Mr. Alvarez-Reyes's claim to be procedurally barred under Or. Rev. Stat. § 138,550(3), his claim is considered procedurally defaulted. See *Cooper v. Neven*, 641 F.3d 322, 327 (9th Cir. 2011) (comparing exhaustion and procedural default and recognizing that if a claim has never been presented to the state court and "state procedural rules would now bar consideration of the claim, it is technically exhausted but will be deemed procedurally defaulted"). A petitioner can excuse a procedural default by establishing cause and prejudice. *Coleman v. Thompson*, 501 U.S. 727, 735 n.1, 750 (1991). Here, Mr. Alvarez-Reyes can establish cause and prejudice for the procedural default of his ineffective assistance of counsel claim under *Martinez v. Ryan*, 566 U.S. 1 (2012).

1. The *Martinez* Framework

In *Martinez*, the United States Supreme Court held that "[i]nadequate assistance of counsel at initial-review collateral proceedings may establish cause for a prisoner's procedural default of a claim of ineffective assistance of counsel." 566 U.S. at 9. To establish cause, a petitioner must demonstrate that "counsel in the state post-conviction proceeding was ineffective under the standards of *Strickland*." *Clabourne v. Ryan*, 745 F.3d 362, 377 (9th Cir. 2014) (overruled in part on other grounds by *McKinney v. Ryan*, 813 F.3d 798 (9th Cir. 2015)). That

requires him to prove both that post-conviction counsel's representation was deficient and that there was a reasonable probability that absent the deficient performance the result of the post-conviction proceedings would have been different. *Id.*

Second, the petitioner must demonstrate prejudice. In order to do so, he must show that the “underlying ineffective-assistance-of-trial-counsel claim is a substantial one, which is to say the the prisoner must demonstrate that the claim has some merit.” *Id.* (citing *Martinez*, 566 U.S. at 14) The Ninth Circuit recognized that the “reasonable probability that the result of the post-conviction trial could have been different, is necessarily connected to the strength of the argument that trial counsel's assistance was ineffective.” *Id.* Similarly, although the “prejudice at issue id the prejudice at the post-conviction relief level, [] if the claim of ineffective assistance of trial counsel is implausible, then there could not be a reasonable probability that the result of post-conviction proceedings would have been different.” *Id.* at 377. Therefore, “it will be generally necessary to look through to what happened at the trial stage” when considering whether the post-conviction proceedings would have been different, absent post-conviction counsel's ineffective representation. *id.* at 377-78.

2. Post-conviction counsel's representation was deficient when he failed to a raise a meritorious claim of trial counsel's ineffective assistance.

Post-conviction counsel's representation fell below the standards mandated by the Sixth Amendment when he failed to raise a claim of ineffective assistance of trial counsel for he failure to call Ms. Stenerson as a trial witness. As the Ninth Circuit recognized, the elements of a *Martinez* analysis overlap, and, at its core, the analysis centers on the merits of the underlying claim if ineffective assistance of counsel. *Clabourne*, 745 F.3d at 377-78. Accordingly, the argument on counsel's ineffectiveness, *see* pages 9-14, *supra*, demonstrates both post-conviction counsel's deficient representation (the first part of cause for *Martinez*).

In addition, post-conviction counsel's failure to raise the claim cannot be considered a matter of reasonable strategy. Here, post-conviction counsel focused the case on Mr. Alvarez-Reyes's innocence. Resp. Ex. 124 at 3-9. He even raised a stand-alone claim of innocence under the Eighth Amendment. Resp. Ex. 124 at 9. But despite that focus, he failed to raise a claim regarding counsel's failure to call Ms. Stenerson to support that defense. The claim was readily available from the documents that post-conviction counsel had; indeed, he submitted Ms.

Stenerson's report and counsel's letter to the post-conviction court as part of trial counsel's entire file. Resp. Ex. 122. Not only that, but several of the claims that post-conviction counsel did raise had no chance of success. First, actual innocence is not recognizable in a post-conviction case. Resp. Ex. 126 at 35 (post-conviction trial court holding that "as we have all admitted, actual innocence is not a grounds for PCR"); 127 at 2 (post-conviction court's formal findings that "Actual innocence not grounds for PCR"). Next, there is no legal support – apart for a general appeal to due process – for claims that a prosecutor and the trial court have a duty to dismiss an indictment after a defendant passed a polygraph. There is no reasoned basis to abandon a meritorious claim that supports one's theory of the case in favor of meritless claims.

Moreover, post-conviction counsel's role is not to winnow claims. Winnowing applies to representation at the appellate level. *Smith v. Murray*, 477 U.S. 527, 536, (1986) ("Th[e] process of winnowing out weaker arguments *on appeal* and focusing on those more likely to prevail, far from being evidence of incompetence, is the hallmark of effective *appellate advocacy*." (emphasis added and internal quotation marks omitted)). Instead similar to the role of a trial counsel, post-conviction counsel at the trial level has a duty to investigate claims and develop a trial strategy, *see Martinez*, 566 U.S. at 11-12, and raise meritorious issues that would provide relief to his client. Post-conviction counsel's failure to raise the claim was not the product of a reasonable strategic decision. It was ineffective representation under *Strickland*.

3. Failure to raise the meritorious claim prejudiced petitioner Mr. Alvarez-Reyes.

In this case, there is reasonable probability that if the claim had been litigated in the PCR, case petitioner would have had a better outcome in his PCR trial, because more evidence of his innocence would have been presented.

E. The Ninth Circuit Court of Appeals denied request for certificate of appealability;

Following the U.S. District Court's denial of habeas petition and denial of certificate of appealability, petitioner filed a 'petition for appealability to the Ninth Circuit Court of Appeals for the District of Oregon.

On August 6th 2020, had denied certificate of appealability stating that "because appellant has not shown that 'Jurists of reason' would find it debatable whether the petition states 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.” (*citing*) *Slack v. McDaniel*, 529 U.S. 473, 484, (2000); 28 U.S.C. 2253 (c)(2).

Petitioner has made a substantial showing of a denial of Constitutional Rights pursuant to 28 U.S.C.A. § 2253(c)(2). Petitioners constitutional rights were violated by the conviction, sentence entered in Marion County Circuit Court Case No. 09C47352, and review of said sentence in the Oregon Court of Appeals, Supreme Court and District Court for the District of Oregon. The Court's decision was prejudicial to petitioner's case and contradicts established federal law. The U.S. District Court's decision contravenes this Court's precedent that allows appointment of counsel to Pro Se litigants in federal habeas corpus when the circumstances of the case indicate that appointment of counsel was necessary to prevent due process violations. Counsel must be appointed if the complexities of the case are such that denial of counsel would amount to a denial of due process, and where the petitioner is a person of such limited education as to be incapable of fairly presenting his claims. *See Chaney*, 801 F.2d at 1196; *see also Hawkins v. Bennett*, 423 F.2d 948 (8th Cir. 1970).

By denying certificate of appealability in this case, the Ninth Circuit Court is also making an unreasonable decision and violates of petitioner's due process of law and Equal protection. Review is necessary because as explained above and below,

As explained above, U.S. District Court and Ninth Circuit Court of Appeal's decision was unreasonable and “contrary to, and involved an unreasonable application of, clearly established Federal law.” § 2254(d)(1). These decisions had prejudiced the petitioner.

This Court should, at a minimum, grant certiorari, vacate the Ninth Circuit Court's decision as well as the U.S. District's decision, and order it to remand this matter to the proper court for further proceedings. *“there was evidence that was presented that there was another Hispanic male in the household more often and had more access to Kaylie than Alvarez-Reyes did. Because of that, in closing argument, on pg 386 of the transcripts, I pointed out that Kaylie's allegations concerning abused kaylie who had more access to her than Mr. Alvarez-Reyes. “ further, the attorney says “This is my response to the amended petition for post-conviction relief. Again, I do believe Mr. Alvarez-Reyes is innocent. Also, at the same time, I believe that kaylie Nevin might have been sexually abused by someone else and that at the time that Mr. Alvarez-Reyes was in her life, he ended up being the scapegoat for custody battles regarding other family members. ***Moreover trial attorney states “In hindsight, I believe I let down Mr. Alvarez-Reyes.”*

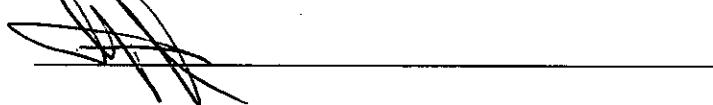
Reyes. I represented an innocent man that was convicted in my opinion. That weights heavily on me to this day. Now, I wish we would have had a jury trial where Mr. Alvarez-Reyes testified and I objected to Dr. Hecox's diagnosis of "highly concerning for sexual abuse." This was the last bench trial that I ever had with Judge Wilson."

Based upon the foregoing points and authorities, petitioner has met his burden to prove a substantial violation of his state and federal constitutional right to effective and adequate assistance of counsel on every claim alleged herein. Wherefore, petitioner respectfully request that based upon the points and authorities set forth above, the Court grant him the claims presented in his writ of federal habeas corpus and grant relief in the form of remand to the Marion County Circuit Court for a trial and sentencing.

CONCLUSION

For the foregoing reasons, a writ of certiorari should be granted.

DATED this 12th day of March 2021

A handwritten signature is written over a horizontal line.