No. _____

IN THE SUPREME COURT
OF THE UNITED STATES

RAMON TORRES RUELAS,

Petitioner,

v.

TROY BOWSER, Superintendent, Two Rivers Correctional Institution,

Respondent.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether it is an unreasonable determination of the facts and the law to conclude that trial counsel need not investigate witnesses with critical information relating to the putative victims' credibility in a child sex case where there was no physical evidence, no incriminating eye-witnesses observations, and no admissions?

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The petitioner, Ramon Torres Ruelas, respectfully requests that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit entered on October 8, 2021.

1. Opinions Below

On October 8, 2021, the Ninth Circuit affirmed the district court's dismissal of Mr. Ruelas petition in a Memorandum opinion. Append. F. The Circuit panel concluded:

> In this case, the state court's conclusion that Ruelas had not carried his burden under either *Strickland* prong with respect to counsel's investigation and use of lay and expert testimony was not an unreasonable application of *Strickland*. In reaching this conclusion, the state court did not make an unreasonable determination of facts. As to additional lay witnesses, the state court's factual determinations that some of these witnesses were not made known to trial counsel before the trial, and that trial counsel was not provided contact information for others, was not an unreasonable determination of the facts. *See* 28 U.S.C. §§ 2254(d)(2), (e)(1). The record also supports the state court's reasonable factual determinations that testimony from other lay witnesses would have been largely duplicative or else was likely to carry little weight because the trial judge focused on the victims' credibility.

App. at 30.

2. Jurisdictional Statement

This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

3. Constitutional and Statutory Provisions

28 U.S.C. § 2254(a) provides: "The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution . . . of the United States."

28 U.S.C. § 2254(d) provides:

> An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim—
>
> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
>
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

The Sixth Amendment provides that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence."

4. Statement of the Case

This case involves whether counsel was ineffective in the trial of child sex charges. It presents the recurring and important questions of when constitutionally adequate counsel has a duty to investigate specific witnesses concerning the credibility of the accusations and when counsel may performing adequately when forgoing investigation and simply cross-examining the prosecution's witnesses.

A. The Criminal Trial

A Marion County Oregon grand jury charged Mr. Ruelas with four counts of unlawful sexual penetration and two counts of first-degree sodomy. ER 735-36.[1] These crimes were alleged to have occurred in the Ruelas home within a twenty-eight-month span between April 25, 2006, and August 10, 2009. Two sisters, each under twelve years of age, EM and BM, were the stated victims. ER 735-36.

Trial counsel received police reports related to the charges. ER 371-433. The reports explained that Mr. Ruelas' wife, Ms. Leon-Avila, had run a licensed daycare center out of their apartment for fourteen years, caring for approximately eighteen different children (excluding her own kids). Ms. Leon babysat the alleged victims, EM and BM, while their mother attended work and school. At the time the criminal allegations arose, EM was nine years old and BM was six years old. ER 383.

EM and BM occasionally spent the night at Ms. Leon's house. When not being babysat by Ms. Leon, EM and BM lived at their grandmother's house with their mother, two aunts, an uncle,

[1] Although the Excerpt of Record from the Ninth Circuit is not being produced as an Appendix here, citations to that record are provided in the event that the Court wishes to review that record filed in the Ninth Circuit, which counsel will readily provide upon request.

their grandmother, and two of their uncle's friends. EM and BM both reported viewing pornography at their grandmother's house when their "Uncle Miguel, who was 'a little crazy'" ordered pornography using the television's remote control. ER 401, 417, 428.

On August 8, 2009, the girls' mother and their aunt, Ms. Maciel, took EM and BM to Salem Hospital for evaluations. A Marion County Sheriff's deputy went to the hospital and spoke with Ms. Maciel, who then interpreted for EM and BM, as the girls spoke very little English. Through Ms. Maciel, the girls alleged that, when Ms. Leon was not home, Mr. Ruelas would take one or both of the girls into his bedroom where he showed them pornographic films and molested them. EM alleged that he had made sexual contact with her mouth, chest, vagina, anus, and hands, and caused EM to use her hands and mouth to stimulate him, as well as Mr. Ruelas rubbing his hand and penis on her vagina. ER 426-29.

EM also reported waking up in the living room to Mr. Ruelas licking her vagina and seeing Mr. Ruelas lick BM's vagina. Both EM and BM reported that Mr. Ruelas digitally penetrated their vaginas and anuses on multiple occasions. EM said that it hurt badly when Mr. Ruelas penetrated her vagina and rectum and BM made similar comments. ER 378, 433.

On August 10, 2009, Detective Charlene Tucker conducted an unrecorded interview with BM in Spanish. BM alleged that Mr. Ruelas touched her chest, over and under her clothes; sucked on her vagina, breasts, and mouth; touched her buttocks; touched her vagina with his hand and fingers; touched her mouth with his mouth and tongue; and digitally penetrated her vagina and anus. These incidents purportedly took place both in Mr. Ruelas' bedroom and, at other times, in the living room. BM claimed that no one else had ever touched her in those areas and estimated that Mr. Ruelas had probably touched her vagina and anus five times. ER 399-409.

Detective Tucker then conducted an unrecorded interview with EM in Spanish. EM repeated what she alleged at the hospital. EM admitted that she had fun at Ms. Leon's home and loved the couple's children, however she disliked Mr. Ruelas touching her. EM said it hurt when Mr. Ruelas put his finger in her vagina, but it did not hurt when he put it in her anus. She did not know how many times abuse occurred, but said that there were "too many" and that she might be pregnant. She was school age when the touching began and the last time she was touched was during the summer. EM recounted that Mr. Ruelas showed her pornography, which she thought had come from the Playboy channel, explaining that she recognized the Playboy bunny from things she had seen in her cousin's room. ER 410-18.

Based on EM's descriptions, Detective Tucker identified two scenes on pornographic DVDs seized by police from the Ruelas' home, which she believed EM had described. She was unable to locate a third described scene. EM also reported that Mr. Ruelas showed her pictures of naked women kissing one another in a magazine. EM reported that Mr. Ruelas had begun touching BM more recently, and that she had heard the pornographic movies playing in the bedroom when BM was in there, she had seen Mr. Ruelas suck on BM's vagina, and she also saw Mr. Ruelas penetrate BM's anus and vagina with his finger. Mr. Ruelas purportedly told the girls that, if they told, he would tell their mother that they wanted to do it and that they would get in trouble for watching naked people and for letting him touch them. ER 410-21. Trial counsel, who was retained, did not use an investigator in this case.

1. The Investigation Counsel Did Not Undertake.

Five years after the convictions, Mr. Ruelas' state post-conviction relief (PCR) lawyer hired an investigator who contacted numerous witnesses, discovering information which, if it had

been introduced at the criminal trial, would have seriously diminished the credibility of the accusers.

In the state post-conviction case, Mr. Ruelas provided sworn statements that numerous witnesses were available and prepared to testify at the criminal trial. These witnesses included the Oregon Department of Human Services Child Welfare compliance specialist, Ada Chavarria, who normally would have investigated the underlying accusations. She did not investigate because her own children went to the Ruelas home for child-care. ER 182-83.

Prior to initially placing her eldest child in the home, Ms. Chavarria had carefully vetted Ms. Leon and Mr. Ruelas. Thereafter, she sent her children to Mr. Ruelas' home for babysitting for approximately six years. Ms. Chavarria explained; "I stopped taking my kids to Eva and Ramon's because of a conflict with my job, not because I did not trust Eva and Ramon because I did trust them." ER 182. After sex abuse allegations were made, Ms. Chavarria questioned her children at length. Her children had never experienced a bad touch and advised that Mr. Ruelas was always respectful and kind. ER 183.

Trial counsel attempted to contact Ms. Chavarria a single time. However, he did not follow up with her or ask her to testify even though she returned his call and left him a message indicating that she was willing to testify on Mr. Ruelas' behalf. ER 183.

Carolina Paredes took her three children to Mr. Ruelas' home for childcare services. She began doing so when her oldest daughter, Crystal, was six years old. Crystal is now an adult. ER 186. When the girls' allegations were first made, Paredes asked her children about Mr. Ruelas and her children assured her nothing seemed wrong, and Mr. Ruelas had never done anything bad to them. ER 186.

Ms. Paredes also knew that EM and BM repeatedly and falsely blamed others for things EM or BM had done. ER 186-87. Trial counsel never contacted Ms. Paredes, who would have readily provided this information to counsel if he had contacted her. ER 187.

Crystal Sandoval had been babysat by Ms. Leon for six or seven years, and Ms. Sandoval had known Mr. Ruelas for more than fifteen years. ER 207. Ms. Sandoval later worked with Mr. Ruelas at a vineyard for up to twelve hours at a time and had gotten to know Mr. Ruelas quite well. ER 208. Ms. Sandoval was familiar with Mr. Ruelas' character for sexual propriety and her opinion was that he was sexually proper.[2] ER 207. Additionally, during the years she was in daycare in the home, she never saw Mr. Ruelas behave inappropriately with any children. Instead, she described him as being "a second father or father figure to [the kids]." ER 207.

Ms. Sandoval had also dated EM's and BM's uncle, Felix, when she was fifteen or sixteen years old. ER 208. Ms. Sandoval repeatedly visited the girls' house where EM and BM slept in a makeshift room on a plywood bed in the middle of the living room. ER 207. Ms. Sandoval would have been available to testify at Mr. Ruelas' trial. ER 208.

Tatiana Penaloza was also babysat by Ms. Leon at Mr. Ruelas' home beginning in 2006, when Tatiana was approximately eight or nine years old. ER 211. Tatiana was in daycare with EM and BM, but she was not friends with them because they were gossipy and would lie about who was to blame for things. ER 212.

Tatiana remembered either EM of BM telling her that their Uncle Miguel did nasty things to them. ER 212. Tatiana would have testified about Mr. Ruelas' character for sexual propriety

[2] In sex cases, Oregon allows such reputation evidence under Oregon Evidence Rule 404(20)(A) and Rule 405. *See, e.g., State v. Enakiev*, 175 Or. App. 589, 595 (2001)

and would have provided the factual information to trial counsel, but neither trial counsel, nor an investigator, ever contacted her. ER 212.

Ms. Leon had been married to Mr. Ruelas for twenty-two years and she operated an in-home daycare business for nineteen of those years. ER 194. When she and her brother retained Mr. Hellewell to represent Mr. Ruelas, Hellewell "told me it would be $10,000 to hire him and that some of that money would go toward an investigator." ER 196.

Ms. Leon provided trial counsel with a photograph of the girls with Mr. Ruelas, but trial counsel returned it. ER 200. She stressed that the girls loved her husband and called him "Dad." ER 196. She also provided a diagram of the apartment where the girls claimed they were abused. ER 201; ER 258.

Ms. Leon suggested to trial counsel that someone else, probably their Uncle Miguel, had been touching the girls. ER 195. Nevertheless, trial counsel did not investigate. She also noted that the girls' mother owed her between four and five thousand dollars for past childcare when these allegations were made. ER 195.

In her declaration, Ms. Leon detailed discussions about investigation:

> I do not believe that Mr. Hellewell investigated any of the people that I named as potentially having information. Each time I gave Mr. Hellewell names, he would shut me down. He would say things like, "What are they going to know? They weren't around when it happened." It was clear that Mr. Hellewell thought my husband was guilty. He would not investigate to determine other reasons these girls might have said those things. I also asked Mr. Hellewell to subpoena the Dish (satellite television) records to show how much pornography was being played at the house. I wanted him to be able to show that the pornography was at the house and that the girls had access to it. I kept asking Mr. Hellewell if he had retained a private investigator and he kept telling me that he was getting one, but I do not believe that he ever hired an investigator. I also believe that he did not even look for an investigator.
>
> * * *
>
> I also spoke with several parents of the children I babysat. Many parents were willing to testify in Ramon's favor. Parents who had adult children that I used to

> babysit said that their adult children were more than willing to testify on Ramon's behalf. I told all of this to Mr. Hellewell, but he did nothing.
>
> During one of the last visits I had with Mr. Hellewell, he told me that it was not necessary to get a private investigator because it was not like a murder case and he did not need to investigate evidence.

ER 195, 197.

Mr. Ruelas' daughter, Isabel, was about the same age as EM (sixteen years old at the time of Isabel's declaration). ER 192. EM and BM told her that their Uncle Miguel hit them and rubbed "chile" on their lips. ER 193.

Mr. Ruelas' son, Ramon, who was twelve when the allegations were made, would also have testified that the girls told him that their Uncle Miguel rubbed chiles in their faces and yelled at them. The girls also recounted sneaking into Miguel's room when he was out. ER 185.

Trial counsel could have cross-examined EM and BM with this information or asked them what the word "chile" meant to them, and he could have asked a Spanish-speaking witness whether he or she was familiar with the slang use of "chile" for the word "penis." *See, e,g,* https://www.urbandictionary.com/define.php?term=chile.

Trial counsel did not talk to Isabel or Ramon and they could have provided that information to trial counsel. ER 185, 193.

Mr. Ruelas' daughter, Lupe Torres-Avila, was fifteen years old at the time her father was accused of improper sexual acts. ER 313-14. When Ms. Avila had to run errands, Lupe was left in charge of the children, including EM and BM. She was always there when Mr. Ruelas was the only "adult" present; Lupe was still a minor. Lupe never saw the girls go into her father's bedroom. She also never observed any reluctance on the part of EM and BM to come to her home. To the contrary, the girls seemed quite fond of her father. ER 214.

EM and BM described their uncle and cousin showing them pornography and told her that they went into their Uncle Miguel's room when he was not there and watched pornographic movies, and described their uncle showing them dirty things. The sisters spoke very casually about sexual matters. Lupe would have provided this information to trial counsel, but trial counsel never contacted or interviewed her. ER 214.

Blanca Penaloza took three of her children to Mr. Ruelas' home for daycare each day since 2006. ER 205. Her children spent nearly every night at Mr. Ruelas' home and her children reported to her that Mr. Ruelas treated them like his own kids: playing cards; singing, and dancing with them; and helping them with their homework. ER 205-06. Ms. Penaloza is familiar with Mr. Ruelas' character for sexual propriety, and it is that he is sexually proper. ER 206. Trial counsel did not contact Ms. Penaloza. If Ms. Penaloza had been interviewed, she would have provided the information to trial counsel. ER 206.

2. The Bench Trial

Mr. Ruelas' case proceeded to trial on January 12, 2010. ER 467. Testimony established that Ramon Torres Ruelas' wife, Maria Leon-Avila, was the long-time childcare provider for many children including two girls, BM and EM. At the time of trial, BM was seven years old and EM was nine. ER 475, 514.

BM attended the Auburn School but did not know what grade she was in. ER 475-76. Because BM's primary language was Spanish, an interpreter was used for their trial testimony.

ER 476-77. Although she knew she was seven years old, BM did not know when her birthday was. ER 484.[3]

BM identified Ms. Leon as her former babysitter and the "husband of Ramon." ER 487. She testified that she would go to Ms. Leon's house; where Ms. Leon babysat her. ER 488. Her sister was with her whenever she went to Ms. Leon and Mr. Ruelas' house. ER 489. They spent the night there one time. BM and her sister slept on the couch together. ER 489, 490. She testified that Ramon slept "in her room with her husband." ER 490. On cross-examination, BM seemed to testify that she and her sister spent the night on multiple occasions and, when it was especially hot, Ms. Leon set up blankets on the living room floor; even on those occasions when Ms. Leon and Mr. Ruelas slept in their bedroom. ER 511. On re-direct she testified there were times when Mr. Ruelas slept on the floor with them. ER 512.

BM testified she did not like being babysat by Ramon. ER 491. She repeatedly testified: "He chew on my butt." BM then explained that butt was the front part where pee comes out. ER 491, 493. She testified that he also touched her boobies. ER 492. She testified that Mr. Ruelas had inserted his finger where poop comes out, and he had touched where pee comes from with his mouth. ER 494-95.

BM testified that these things happened in the bedroom while Ms. Leon and her kids were at the store, and that her sister, EM, was always present. ER 495-96. She also testified that she and Mr. Ruelas would watch nasty things on television, for example, a boy and a girl behaving sexually. ER 496-98. This happened more than once and always while Ms. Leon was at the store.

[3] Although the question of witness competency was exhausted in Oregon's courts, that issue is not before this Court.

ER 498-99. She first disclosed what had happened to her aunt, and then her aunt told her mother. ER 499.

EM remembered Ms. Leon babysitting her, but did not know when that started. ER 520-21. She and her sisters would go to Ms. Leon's house while her mom worked. ER 521. Ms. Leon had three children of her own. ER 521-22. There were also many other children who Ms. Leon took care of in her home. ER 522. Mr. Ruelas also lived there. ER 522-23. Ms. Leon was Ramon's wife, and he also sometimes babysat the kids. ER 523.

The girls spent the night at Ms. Leon and Mr. Ruelas' house more than once. When they did, the girls would sleep on the couch or couches in the living room and Mr. Ruelas and Ms. Leon would sleep in their room. Occasionally, Mr. Ruelas slept in the living room too. ER 524.

EM testified that Mr. Ruelas would kiss her on the mouth, breasts, legs, and shoulder, which she disliked. ER 524-25. He also kissed her "culo" and touched her "culo" on the outside with his hands. ER 525-26, 528. EM explained that by "culo" she meant the front private part where pee comes out. ER 528. This happened more than once, beginning when she was in first grade. ER 528-29, 530. He also touched her butt. ER 531. EM testified that the touching only happened when her sisters were in the other room and Ms. Leon was at the store. ER 533. EM saw Mr. Ruelas touch her sister, BM. ER 533-34.

EM testified that Mr. Ruelas would show her nasty movies on the television with naked girls. ER 538-39. EM testified that Mr. Ruelas would have her touch his "thing" or "weenie." ER 534-35, 536. She testified that he made her suck it and white stuff came out. ER 536.

On cross-examination, EM testified that her Uncle Miguel had stayed at her house before he moved to California. ER 551-52. She initially testified that there was not a time when Uncle

Miguel had played some inappropriate movies. ER 552. When questioned whether her grandmother had confronted Miguel about inappropriate movies, EM admitted that "[m]y Uncle Miguel, watched them in his room by himself." ER 552, 557.

EM eventually told her Aunt Mayra about what was happening, explaining that she felt her aunt would believe her. ER 540. She and BM told their Aunt Mayra at the same time. ER 540-41, 555. After that, they stopped going to Ms. Leon's house. ER 540.

Mayra Maciel-Ochoa was engaged to the girls' uncle. ER 559, 561. In August of 2009, the girls told Mayra that Mr. Ruelas had been touching them inappropriately when Ms. Leon was not home. ER 562-64. To make sure they were not lying, Mayra had the girls promise in front of God. ER 565. Immediately following that, she took the girls to see their mother and told the girls to tell their mother what they had told her. ER 565-67.

Ms. Maciel-Ochoa was present at the hospital when the police responded about the accusations. She served as an interpreter for the officer who interviewed the girls together. ER 570. When the doctors examined them, neither of the girls reported any physical injuries. ER 576. Nevertheless, the defense presented only testimony from Mr. Ruelas and his wife.

Ms. Leon and Mr. Ruelas lived together for 18 years. ER 640. Throughout that time, she had provided childcare on a regular basis to sixteen to eighteen children in addition to her own daughters and son. None of the other children made any accusations against Mr. Ruelas. ER 640-41.

Ms. Leon provided childcare for EM and BM for most of their lives until December 2009. ER 644-45. While her oldest daughter sometimes helped with childcare, Ms. Leon did not leave EM and BM under the sole supervision of Mr. Ruelas. ER 645-46. She was consistently attentive

to the girls, and she never noted any unusual behavior or animosity by either EM or BM toward Mr. Ruelas. To the contrary, the girls were appropriately affectionate and friendly toward Mr. Ruelas. ER 654-55.

For seven years prior to the trial, Mr. Ruelas worked at a winery, eight to ten hours each day. ER 666-67. He worked at least five days per week, and sometimes on weekends. ER 667. Mr. Ruelas testified explaining that when he got home from work, BM and EM were often present. ER 676. The couples' children, ages eleven, twelve, and sixteen were normally present. ER 640, 676.

Defense counsel's closing argument spanned thirteen transcript pages, and he highlighted the circumstances under which the allegations were made. ER 717-720. He argued that Mr. Ruelas did not have the opportunity to sexually abuse the girls and emphasized the evidence in the trial that the girls had been exposed to pornography at home. ER 717-30.

At the close of the bench trial, the judge indicated that credibility was the big issue and that he wanted to review all of his notes "carefully before making a decision as to the strength of and believability of the evidence in the case. So I'll take the matter under advisement, and I will let the attorneys know" within a few days. ER 731.

At the next court proceeding, the judge began by formally announcing his guilty verdict, noting he particularly believed the testimony of EM and BM who impressed him with their cognitive abilities. ER 447, 451-52.

The prosecutor noted that Mr. Ruelas had no prior criminal convictions, but that each count of conviction carried a mandatory 300-month sentence under "Jessica's law." ER 453. The prosecution asked the judge to impose two of those consecutively for a net sentence of 600 months.

ER 453-54. After acknowledging that it is difficult to prove that something did not happen, but reporting that he ultimately believed the girls, the judge imposed the mandated minimum sentence of 300 months. ER 459-60.

B. State Post-Conviction Proceedings

In post-conviction relief (PCR) case, Mr. Ruelas was represented by the same lawyer who handled his direct appeal. ER 439. Mr. Ruelas' PCR Petition raised a series of claims of ineffective assistance by trial counsel. ER 440-44. As relevant here, these included the failure to adequately investigate the criminal case, *id*. at 440-42, the failure to call helpful witnesses and produce favorable evidence, which such investigation would have discovered. ER 442-43.

According to records obtained by post-conviction counsel, trial counsel worked a total of 1.6 hours for every year of the minimum mandatory incarceration his client faced if convicted. Trial counsel's billing records showed a total of 40.4 hours (including the over twelve hours spent at trial). ER 219-25. Trial counsel did not consult any experts, did not present any character witnesses, he did not interview potential witnesses, and did not hire an invesitgator to conduct interviews.

1. Attorney Hellewell's Deposition

In the post-conviction case, the trial attorney Ronald Hellewell was deposed. ER 50-120. He estimated that seventy percent of his work was criminal defense, with a mix of retained and court-appointed cases. ER 56-57. Mr. Hellewell identified himself as bilingual, speaking both English and Spanish. ER 57. He explained that he had learned Spanish while spending two years in Argentina as a Church missionary. ER 57-58. In his criminal law practice, he estimated that

ninety percent of his clients were Spanish speakers. ER 58. He typically read over discovery with his Spanish-speaking clients, but rarely had documents translated. ER 59-60.

In Mr. Ruelas' case, Mr. Hellewell was retained on an hourly rate. When asked to provide his billing records, Hellewell initially objected that they were privileged, but relented when shown Mr. Ruelas' release of information, which he had previously received. ER 61; ER 219-26; ER 260-434 (counsel's trial file). Mr. Hellewell testified that normally, in an hourly case, he would send out billing statements, but in this case, he did not think he prepared any billing statements. ER 62. He was uncertain why he deviated from his normal practice in this case, but alluded to Mr. Ruelas being in jail. ER 62.

When he was asked about investigation, Mr. Hellewell averred:

> As I recall, near the beginning of my work with Mr. Torres we discussed that it may be useful or necessary or helpful. I don't recall the discussion later about that…. Throughout the course of the case I discussed with Mr. Torres and also the family potential witnesses and other work like that that an investigator could have done. But as the case progressed, we never came to a point where I had a clear work assignment to give to an investigator…. And those discussions that proceeded throughout the case were targeted towards the possibility of using an investigator based on the information the client or the family gave me. But that never happened.

ER. 63-64. Mr. Hellewell then testified that the family never gave him specific contact information for any witnesses. ER 64.

a) Potential Witness Mina Maldonado

Mr. Hellewell was asked about various items within his file. For example, when asked about his notes from an August 21, 2009, conference with Ms. Leon in which Mr. Hellewell had written: "Call Mina," he explained that concerned Mina Maldonado, who worked for the Department of Human Services and was the caseworker who investigated the case. ER 64-66. Mr. Hellewell acknowledged that Ms. Leon had provided him with Ms. Maldonado's business card.

He had produced a copy of that card with his file. ER 65-66. Mr. Hellewell testified he had called Ms. Maldonado once and left a message. ER 66.

Another document in his file reflected that Ms. Maldonado returned his call, and Mr. Hellewell believed that he ultimately spoke with her sometime in February 2010, after the trial concluded. ER 67. Mr. Hellewell was questioned about this post-trial discussion with Ms. Maldonado:

Q. Do you recall the substance of your conversation?

A. Only in general that she had opened a case and, as I recall, decided to take no action.

Q. And do you know what her open case was involving?

A. Well, yes, the allegations of sexual abuse of these two children.

Q. And she decided to take no action?

A. I believe that's correct.

Q. Do you know what investigation she did?

A. No.

Q. Did you ask her?

A. No.

Q. Have you spoken with other DHS workers in other cases where sexual abuse allegations-

A. Yes.

Q. And do you know what types of investigations they have done in those other cases? Have you asked them?

A. In general, I know they speak to people, interview. I -- they review – I'm sure they review reports from other agencies, police, and so on.

ER 69-70.

In her declaration in the post-conviction court, Ms. Leon explained:

> I also asked Mr. Hellewell to talk to the social worker who came to our house. I believe the social worker had a lot of information that would have helped Ramon. She had visited the house several times and asked questions of Ramon. She would have been able to provide information about Ramon's behavior around children and how children behaved around him. The children were not afraid of Ramon - they loved him and looked up to him. The girls, B[M] and E[M], would sometimes be dropped off at our house in the middle of the night because they did not want to be at their house, but wanted to be at our house. I do not think they would want to come to our house if something bad was happening there. It does not make sense.

ER 197.

b) Counsel's Interview with Jorge Torres-Ruelas

Mr. Hellewell was then asked to read a note in his file which he identified as being left by Mr. Ruelas' brother Jorge:

> "I came to see you to talk with you. We want to know" -- again, there is a grammar error. "We want to know what information you have for us about Mr. Ramon Torres-Ruelas.... Some time has passed, and the truth is that we would like to know if you have any good news for us. We would like -- we would like for you to go visit him again." There was a grammar error. I believe it means "Friday morning, if even just for a few minutes, so that you can explain to him" -- another error." So you can explain to him how things are going at this point. Also we would like to know what is happening with Ramon Torres-Ruelas. When you have time, please advise us, Mr. Ronald. Sincerely, Jorge Torres or Eva Avila," and telephone numbers.

ER 68.

In his certification in post-conviction, Jorge Torres averred:

> I visited Mr. Hell[e]well's office several times and the secretary would tell me when Mr. Hellewell would be in the office. If Mr. Hellewell was not in the office, I would leave a note for him. The only time Mr. Hellewell seemed available was when money was due. I specifically told Mr. Hellewell that the Lemus family (the family of the girls...) needed to be investigated, especially Miguel Lemus.

ER 190.

c) Regarding the Girls' Exposure to Sexual Conduct in Their Own Home

Mr. Hellewell also identified his notes of an August 27, 2009, client conference in which he was told that EM and BM "had much knowledge of lewd or sexual materials, and that they had maybe been exposed to it by [the following] persons: Miguel; Pancho; Juan and Chona; Cobi, son of Maya." ER 71.

Next, Mr. Hellewell was questioned about another note in his file, which he read aloud. ER 74. At a conference on September 22, 2009, Ms. Leon and Jorge Torres told him he should investigate two brothers, who had previously lived at the house of girls. Although the provided information contained first names and a possible address, Mr. Hellewell did not investigate further. *Id*. Regarding these brothers, Mr. Hellewell also identified an October 2, 2009, note from another conference with Ms. Leon and Mr. Torres indicating that they did not know where the men were now, but included their last name, Meraz, and that they had lived with EM, BM, and their family for about a month and were involved with drugs. The same note explained that "Chona" was Maria, who was the girls' aunt. ER 75-76. With regard to the uncles, Mr. Hellewell acknowledged that "finding out if Jose and Christian Meraz were a source of [the girls'] sexual information, that might have been important," but explained he had no way to find them. When asked if an investigator might have been able to do so, Hellewell responded: "I had nothing to give a private investigator but those names, Jose and Christian Meraz. And I judged that it wasn't enough information to go on." ER 78.

During his deposition, Mr. Hellewell also read a file note from his January 4, 2010, jail visit in which Mr. Ruelas related that the girls' cousin, Pancho, had watched pornography with the

girls. ER 79. Mr. Hellewell knew, from Ms. Leon, that Pancho was a nickname for Alfonso. ER 79-80. He testified: "I don't see a note anywhere in here where I had that information as to the address or phone number. I believe probably Eva [Leon] knew it or maybe could find out, but I did not attempt to contact the child, Alfonso." ER 79-80.

Mr. Hellewell offered his rationale for not investigating the girl's exposure to pornography: "I'm certain from what I read in all, the reports and from contact with all the people that those children were very highly sexualized, and I believe they probably did get it at the place they were living.... And so going and finding all that did not constitute -- would not have comprised a vigorous defense of Mr. Torres, because the children - were so clear as to what they had seen on video as separate from what Mr. Torres had [showed] them." ER 82-83.

Mr. Hellewell testified he had considered subpoenaing cable records from the girls' house to demonstrate potential exposure to sexual conduct but decided not to do so explaining:

> [T]he issue was not whether or not the children had been exposed. And it appeared that it was clear that they had been exposed to sexual content even at Mr. Torres's house. And so getting records to say that they were, again, was not the issue in the case. And in fact, I had a suspicion it might make things worse.

ER 103-04.

Mr. Hellewell was also asked about the monies Mr. Ruelas' accuser's family owed Ms. Leon at the time the girls accused her husband of sexual abuse. He acknowledged a pretrial meeting in which Ms. Leon advised she "has six plus years of daily records of babysitter days of [EM and BM]. Mother owes $3,400 to Eva." ER 72-73.

Mr. Hellewell acknowledged that his client consistently maintained his innocence throughout his representation. ER 104-05.

2. Other Potential Witnesses

Mr. Hellewell identified a letter from the prosecutor in Mr. Ruelas' case, noting that she had not received a witness list from the defense two weeks in advance of trial. ER 87. He explained that his practice regarding witness lists was varied from case to case, and in Mr. Ruelas' case, he only called Mr. Ruelas and his wife, and he had verbally informed the prosecutor. ER 87-88.

Mr. Hellewell then described his notes from a November 1, 2009, meeting with Ms. Leon and Mr. Torres in which he memorialized getting the following information:

> "Defendant never alone two girls." That's a note of what I believe they told me. We believe that he was never alone with the two girls. Then some family relations. Defendants and bracket, meaning his children, Maria G, 16; Jose Ramon, 12; Isabel, 11. Victims, E[M], 9; B[M], 7.
>
> "Defendant never at home overnight with children without Eva. Eva always slept in sala, "S-A-L-A," that means living room, "with children." Then the next page again is just a note "Mina Maldonado, DHS, investigation." Nothing further on that page.

ER 94.

Mr. Hellewell never spoke with Mr. Ruelas' children. ER 95. Mr. Hellewell never visited the Ruelas' home or obtained a diagram of its layout. ER 95. In other cases of this nature, Mr. Hellewell often did so, but here he did not because "I believe that the prosecution's plan was that there had been so much time that any physical point in the house was certainly a possibility for having had contact." ER 96. In other cases of this nature, Mr. Hellewell subpoenaed Department of Human Services records. In this case, however, he did not do so because he did not believe they would be helpful. ER 102-03.

Mr. Ruelas appealed the post-conviction court's rejection of his ineffective assistance of counsel for failing to investigate and present helpful evidence in this sex abuse case with no

physical evidence of abuse where credibility was central. The case was affirmed without opinion. The Oregon Supreme Court denied review.

C. Federal District Court Proceedings

The district court adopted the Findings and Recommendations of the magistrate judge. App. at 13. The district court stressed that "credibility was 'really, really big issue in this' [bench trial]" and that it took the judge nearly a month to announce a verdict. App. at 16. The district court noted that the trial judge had lauded the accuser's "cognitive abilities" and "felt they were telling the truth." App. at 13.

Ultimately, the district court also embraced the state post-conviction court's "factual" finding that Mr. Ruelas and his family had not provided trial counsel with sufficient detailed information about numerous potential witnesses such that trial counsel's decision to not pursue investigation was a reasonable one. App. at 23.

5. Reasons for Granting the Writ

Although the lower court identified the applicable legal rule dictated by this Court, *see* App. at 14, it misapplied it. Under the guise of following this Court's, and Congress's, dictates on deference, the lower court grossly misapplied the law to the facts before it, and erroneously concluded that trial counsel's performance was not deficient and that Mr. Ruelas did not suffer prejudice. As a consequence, a man with no criminal record -- who is likely innocent -- is serving an extended period of incarceration as a child sex offender.

Although this Court disfavors taking cases for purposes of error correction, the misapplication of *Strickland* is commonplace and this case provides the Court with the opportunity to show the lower courts that deference does not equate with turning a blind eye toward egregiously deficient representation. There are no procedural bars to review in this case.

A. The *Strickland* Standard

The Sixth Amendment to the United States Constitution guarantees criminal defendants the right to the effective assistance of counsel at all critical stages of a criminal proceeding. U.S. Const. Amend. VI; *see also Strickland v. Washington*, 466 U.S. 668 (1984). This Court's "decisions have emphasized that the Sixth Amendment right to counsel exists 'in order to protect the defendant's fundamental right to a fair trial.'" *Lockhart v. Fretwell*, 506 U.S. 364, 368 (1993) (quoting *Strickland v. Washington*, 466 U.S. 668, 684 (1984)).

Strickland establishes the benchmark by which a claim of ineffective assistance of counsel must be evaluated. First, the petitioner must show that counsel's performance was deficient. Second, he must show that the deficient performance prejudiced him. In determining whether prejudice exists, the petitioner must show that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland*, 466 U.S. at 694. This is a lower burden of proof than the preponderance of the evidence standard. *Williams v. Taylor*, 529 U.S. 362, 405-06 (2000).

The *Strickland* standard is one of reasonableness. *Strickland* cautions that review of counsel's conduct must be "highly deferential" and that there should be a "strong presumption" that the representation was adequate. 466 U.S. at 689; *see also Harrington v. Richter*, 562 U.S. 86 (2011). In addition, in determining whether deficient performance has prejudiced the defendant, the reviewing court should consider the weight of the evidence presented against the defendant. *Eggleston v. United States*, 798 F.2d 374 (9th Cir. 1986). When the state's case is weak, there will be more prejudice from a *Strickland* violation.

B. The Duty To Conduct Investigation

"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. The Ninth Circuit has recognized: "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, 1087, opinion amended, 253 F3d 1150 (9th Cir. 2001) *Id.* (internal quotation marks and citations omitted); *see Lord v. Wood*, 184 F.3d 1083, 1094 (9th Cir. 1999) (failure to interview witnesses who could have demonstrated defendant's innocence constitutes deficient performance). Nevertheless, in this case the Circuit has sanctioned counsel's failure to do so.

When trial counsel fails to conduct sufficient investigation, he or she is unable to make the strategic decisions required of an effective advocate. *See Foster v. Lockhart*, 9 F.3d 722, 726 (8th Cir. 1993); *see also Sanders v. Ratelle*, 21 F.3d 1446, 1457 (9th Cir. 1994) (a lawyer cannot be said to have made a "strategic choice" not to investigate a particular line of defense until he or she has sufficient information upon which to base that choice.) A professionally reasonable decision is one that is "informed of the available options." *Jackson v. Herring*, 42 F.3d 1350, 1367 (11th Cir. 1995). Investigation is the underpinning of making credible decisions about a case. In addition, "[a]n attorney's duty of investigation requires more than simply checking out the witnesses that the client himself identifies." *Bigelow v. Haviland*, 576 F.3d 284, 288 (6th Cir. 2009).

Defense counsel is given certain leeway in developing and presenting the case strategy. However, the strategy itself must be reasonable. *United States v. Span*, 75 F.3d 1383, 1389 (9th

Cir. 1996). "In any case, an attorney's decisions are not immune from examination simply because they are deemed tactical." *United States ex rel. Hampton v. Leibach*, 347 F.3d 219, 249 (7th Cir. 2003) (citations omitted). *Strickland* makes clear that "strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation." 347 F.3d at 249 (emphasis by Seventh Circuit; quoting *Strickland*, 466 U.S. at 690-91).

6. Conclusion

For the foregoing reasons, the Court should issue a writ of certiorari.

DATED this January 6, 2022.

/s/ Thomas J. Hester
Thomas J. Hester
Assistant Federal Public Defender
Attorney for Petitioner

PETITION UNDER 28 U.S.C. § 2254 FOR WRIT OF HABEAS CORPUS BY A PERSON IN STATE CUSTODY

2:18-CV-1222-SU

United States District Court	**District of Oregon**
Name (under which you were convicted): Ramon Torres Ruelas	Docket or Case No.:
Place of Confinement: Two Rivers Correctional Institution Umatilla	Prisoner (SID) No.: 18094434
Petitioner (include the name under which you were convicted): Ramon Torres Ruelas	Respondent (authorized person having custody of petitioner): v. Troy Bowser Superintendant, TRCI.
The Attorney General of the State: Ellen Rosenblum	

CONVICTION UNDER ATTACK

1. Name and location of court that entered the judgment of conviction you are challenging:
Marion County Circuit Court 100 High street, Salem Or 97301

2. Criminal docket or case number (if known): 09C47442

3. (a) Date of judgment of conviction (if known): 02/08/2010

(b) Date of sentence: 02/08/2010

4. Length of sentence: 300 months

5. Identify all crimes for which you were convicted and sentenced in this case:
Count 1. Unlawful Sexual penetration in the First Degree
Count 2. (same)
Count 3. (same)
Count 4. (same)
Count 5 Sodomy in The First Degree
Count 6. (same)

6. What was your plea? (Check one)

☒ Not Guilty ☐ Guilty

☐ Nolo Contendere (No Contest) ☐ Insanity Plea

If you entered a guilty plea(s), list what crimes you pleaded guilty to, and what crimes you did not plead guilty to:

7. If you pleaded not guilty, what kind of trial did you have? (Check one)

☐ Jury ☒ Judge Only

8. Did you testify at trial?

☒ Yes ☐ No

#78908

a. Docket or case number (if known): N/A

b. Result: N/A

c. Date of result and citation (if known): N/A

d. Grounds raised: N/A

12. If you did not directly appeal from the judgment of conviction, explain briefly why you did not:

N/A

POST-CONVICTION RELIEF

13. Did you file a petition for state post-conviction relief?

☑ Yes ☐ No

a. Name of court: Umatilla County Circuit court

b. Docket or case number (if known): CV- 142007

c. Nature of proceeding: Collateral Appeal

d. Did you receive an evidentiary hearing?

☑ Yes ☐ No

e. Result: Relief Denied

f. Date of result and citation or case number (if known): 05/09/2016

g. Grounds raised: Ineffective Assistance of trial counsel for:
1 failing to arrange and utilize witnesses, lay and expert.
2 failing to conduct adequate investigation
3 failing to file motion in limine
4 failing to introduce exculpatory evidence
5 Coercing petitioner into waiving right to Jury Trial

14. Did you appeal the result of your state post-conviction case?

☑ Yes ☐ No

EXHAUSTION OF STATE REMEDIES

DIRECT APPEAL

9. Did you directly appeal from the judgment of conviction?

☒ Yes ☐ No

a. Name of court: Oregon Court of Appeals

b. Docket or case number (if known): CA A144949

c. Result: AWOP

d. Date of result and citation (if known): 07/05/2012 - Awop
01/29/2013

e. Grounds raised:

Court erred in affirmatively determining Competency and allowing Testimony of 7-year old child; Court erred by not excluding state witness during testimony of prior witnesses; Court erred in sentencing Defendant To 25 years.

10. Did you seek further review of the decision on appeal by a higher state court?

☒ Yes ☐ No

a. Name of court: Supreme Court of Oregon

b. Docket or case number (if known): S060621

c. Result: Review Denied

d. Date of result and citation (if known): 12/13/2012

e. Grounds raised: Same as 9.e above

11. Did you file a petition for certiorari in the United States Supreme Court?

☐ Yes ☒ No

a. Name of court: Oregon court of Appeals

b. Docket or case number (if known): CA A162281

c. Result: AWCP

d. Date of result and citation (if known): 12/13/2017

e. Grounds raised: PCR court erred in six distinct ways when it denied relief on grounds 1. and 2. from paragraph 13. above; PCR court erred when it granted PCR Defendant's motion in limine.

15. Did you seek further review of the decision on appeal by a higher state court?

☑ Yes ☐ No

a. Name of court: Oregon Supreme Court

b. Docket or case number (if known): S065607

c. Result: Review Denied

d. Date of result and citation (if known): Unknown

e. Grounds raised: Grounds from 14.e. above except not issue regarding motion in limine. Also raised question: "Is the standard whether trial counsel's errors 'could' or 'would' have tended to affect the outcome of the case."

16. If you did not appeal from the adverse decision in your state post-conviction case, explain briefly why you did not: N/A

GROUNDS FOR RELIEF

17. For this petition, state *concisely* every ground on which you claim that you are being held in violation of the Constitution, laws, or treaties of the United States. Attach additional pages if you have more than four grounds. State the facts supporting each ground.

CAUTION: In order to proceed in the federal court, normally you must exhaust (use up) your available state court remedies on each ground on which you request action by the federal court. Also, if you fail to set forth all the grounds in this petition, you may be barred from presenting additional grounds at a later date.

For your information, the following is a list (a-j) of the most frequently raised grounds for relief in habeas corpus proceedings. Each statement preceded by a letter constitutes a separate ground for possible relief. You may raise grounds other than those listed.

a. Conviction obtained by plea of guilty that was unlawfully induced or not made voluntarily with understanding of the nature of the charge and the consequences of the plea.
b. Conviction obtained by use of coerced confession.
c. Conviction obtained by use of evidence gained pursuant to an unconstitutional search and seizure.
d. Conviction obtained by use of evidence obtained pursuant to an unlawful arrest.
e. Conviction obtained by a violation of the privilege against self-incrimination.
f. Conviction obtained by the unconstitutional failure of the prosecution to disclose to the defendant evidence favorable to the defendant.
g. Conviction obtained by a violation of the protection against double jeopardy.
h. Conviction obtained by action of a grand or petit jury that was unconstitutionally selected and impaneled.
i. Denial of effective assistance of counsel at trial or on appeal.
j. Denial of right of appeal.

A. **Ground One:** In violation of his 6th and 14th Amendment U.S. Constitutional rights, Petitioner was denied ~~effect~~ effective assistance of trial counsel. But for counsel's errors, Petitioner would not have been convicted. The state court determination of the facts was objectively unreasonable and its decision to deny relief was contrary to established Supreme Court law.

Supporting FACTS (state *briefly* without citing cases or law):

Trial counsel failed to investigate and utilize lay and expert witnesses that would have addressed credibility of both alleged victims and Petitioner in a case with no physical evidence.

B. **Ground Two:** In violation of his 5th, 6th, 8th and 14th U.S. Constitutional rights, the criminal trial court erred when it, one, affirmatively determined the competency and allowed testimony of a seven-year-old child; two, allowed testimony of state witness who should have been excluded from courtroom during testimony of prior witnesses; and three, sentenced Defendant to a 25 year prison term. These errors unduly prejudiced Petitioner.

Supporting FACTS (state *briefly* without citing cases or law):

The facts will be presented with assistance of subsequently appointed counsel.

C. Ground Three:

Supporting FACTS (state *briefly* without citing cases or law):

D. Ground Four:

Supporting FACTS (state *briefly* without citing cases or law):

OTHER INFORMATION

18. Please answer these additional questions about the petition you are filing:

a. Have all grounds for relief that you have raised in this petition been presented to the highest state court having jurisdiction?

☑ Yes ☐ No

If your answer is "No," state which grounds have not been so presented and give your reason(s) for not presenting them:

b. Is there any ground in this petition that has not been presented in some state or federal court? If so, indicate which ground or grounds have not been presented, and state your reasons for not presenting them:

No.

19. Do you have any petition or appeal now pending (filed and not decided yet) in any court, state or federal, for the judgment you are challenging here?

☒ Yes ☐ No

If the answer is "Yes," state the name and location of the court, the docket or case number, the type of proceeding, and the issues raised:

N/A

20. Give the name and address, if known, of each attorney who represented you in the following stages of the judgment attacked herein:

a. At preliminary hearing:
Linda J. Reynolds, ~~225 Sw 4th St. P.O Box 1183,~~
189 Liberty St. NE. Ste 203A, Salem, OR 97301

b. At arraignment and plea:
Ronald M. Hellewel
1596 Liberty St. SE, Salem, OR 97302

c. At trial:
same

d. At sentencing:
same

e. On appeal:
Kevin T. Lafky, 429 Court St. NE, Salem, OR 97301

f. In any post-conviction proceeding:
same

g. On appeal from any adverse ruling in a post-conviction proceeding:
same

21. Have you previously filed any type of petition, application, or motion in a federal court regarding the conviction that you challenge in this petition?

☐ Yes ☑ No

a. If yes, in what court was the prior action filed? _____

b. What was the prior case number? _____

c. Was the prior action: ☐ Decided on the merits, or

☐ Dismissed on procedural grounds

d. Date of decision: _____

e. Are there any issues in this petition raised in the prior petition?

☐ Yes ☐ No

f. If the prior case was denied on the merits, has the Ninth Circuit Court of Appeals given you permission to file this successive petition?

☐ Yes* ☐ No

*If the answer is "Yes," you *must* attach a copy of the order received from the Ninth Circuit Court of Appeals.

22. Do you have any future sentence to serve after you complete the sentence imposed by the judgment under attack?

☐ Yes ☑ No

a. If so, give the name and location of the court that imposed the sentence to be served in the future:

_____

b. Give the date and length of sentence to be served in the future:

_____

_____

c. Have you filed, or do you contemplate filing, any petition attacking the judgment that imposed the sentence to be served in the future?

☐ Yes ☐ No

23. TIMELINESS OF PETITION: If your judgment of conviction became final over one year ago, you must explain why the one-year statute of limitations as contained in 28 U.S.C. § 2244(d) does not bar your petition:

Since my judgment of conviction became final by the conclusion of direct review I have had a properly filed State post-conviction review pending such that my one-year period of limitation will not have run, to the best of my knowledge, until August 30, 2018.

24. Date you are mailing (or handing to correctional officer for mailing) this petition to the Court:*

07/01/2018

WHEREFORE, petitioner prays that the Court will grant such relief to which he or she may be entitled in this federal petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254 by a person in state custody.

N/A
Signature of Attorney (if any)

DECLARATION UNDER PENALTY OF PERJURY

I declare (or certify, verify, or state) under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

7/01/2018
Date

x Ramon F. R.
Signature of Petitioner

* As noted in the instructions to this form (at #8), if you are incarcerated at Snake River Correctional Institution, you must comply with the requirements of the E-Filing Pilot posted at the institution and set forth in Standing Order 2017-9. Accordingly, you must submit your filings in this case to Snake River Correctional Institution staff for scanning and electronic submission, instead of mailing the filings using the U.S. Postal Service. Please indicate the date you submitted this petition to Snake River Correctional Institution staff for scanning and electronic submisstion, if you are incarcerated there.

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

RAMON TORRES RUELAS,

Petitioner,

v.

TROY BOWSER,

Respondent.

Case No. 2:18-cv-01222-SU

FINDINGS AND RECOMMENDATION

Thomas J. Hester
Assistant Federal Public Defender
101 S.W. Main Street, Suite 1700
Portland, Oregon 97204

Attorney for Petitioner

Ellen F. Rosenblum, Attorney General
Samuel Kubernick, Assistant Attorney General
Department of Justice
1162 Court Street NE
Salem, Oregon 97310

Attorneys for Respondent

SULLIVAN, Magistrate Judge.

Petitioner brings this habeas corpus case pursuant to 28 U.S.C. § 2254 challenging the legality of his Marion County convictions stemming from his sexual abuse of two children. For the reasons that follow, the Petition for Writ of Habeas Corpus (#1) should be denied.

BACKGROUND

Petitioner's wife, Ms. Leon, operated a daycare business out of their apartment. Among the children Ms. Leon watched were two sisters, BM and EM. When they were six and nine years of age, respectively, the girls disclosed to their aunt that Petitioner had repeatedly sexually abused them. The girls' allegations were detailed and graphic, and they alleged that Petitioner would abuse them while playing pornography DVDs on his television.[1]

The Marion County Grand Jury indicted Petitioner on four counts of Unlawful Sexual Penetration in the First Degree and two counts of Sodomy in the First Degree. Respondent's Exhibit 102. Petitioner proceeded to a bench trial where his attorney attempted to challenge the victims' credibility by presenting evidence that: (1) they had been exposed to sexual content separate and apart from anything Petitioner allegedly showed them; (2) Petitioner did not have sufficient opportunity to be

[1] Investigators did not search for the DVDs on their first visit to Petitioner's home. When they retuned the following day, Ms. Leon gave them permission to search the residence for the DVDs, and even helped them with their search. As it turned out, she had removed the DVDs from the home and entrusted the discs with her brother the previous night. Investigators ultimately located the DVDs and determined that some of the scenes from those DVDs matched the descriptions provided by the victims in this case. Trial Transcript, pp. 142-48.

alone with the girls so as to commit the crimes with which he was charged; and (3) the victims' mother owed Petitioner's wife more than $3,000 in overdue daycare expenses such that there could be a more sinister motive underlying her daughters' allegations.

The trial judge, who stated that credibility was "a really, really big issue in this case," did not render a decision for almost a month. Trial Transcript, p. 259. When he did, he found Petitioner guilty on all counts. In arriving at this decision, the trial judge stated that he "particularly believed" the victims' testimony and was "very impressed with their cognitive abilities, and their testimony, and [felt] they were telling the truth." Sentencing Transcript, pp. 2-3. The judge proceeded to sentence Petitioner to 300 months in prison which, at half of the sentence the State sought, reflected the mandatory minimum sentence under Oregon law. Respondent's Exhibit 105, pp. 5-6, 13-14. The Oregon Court of Appeals affirmed the trial court's decision without opinion, and the Oregon Supreme Court denied review. *State v. Ruelas-Torres,* 251 Or. App. 93, 285 P.3d 765, *rev. denied,* 353 Or. 103, 295 P.3d 50 (2012).

Petitioner filed for post-conviction relief ("PCR") in Umatilla County where he alleged, in part, that his trial attorney had been ineffective when he failed to properly investigate the case and call additional witnesses to bolster the defense. The PCR judge denied relief on all of Petitioner's claims, concluding that none of the evidence Petitioner cited would have overcome the credibility of the victims or otherwise changed the outcome of the trial. Respondent's Exhibit 148, p. 4.

The Oregon Court of Appeals affirmed that decision without issuing a written opinion, and the Oregon Supreme Court denied review. *Ruelas-Torres v. Myrick*, 289 Or. App. 377, 412 P.3d 1211 (2017), *rev. denied*, 362 Or. 794, 416 P.3d 1100 (2018).

On July 9, 2018, Petitioner filed his Petition for Writ of Habeas Corpus raising two grounds for relief: (1) trial counsel was ineffective when he failed to investigate and utilize lay and expert witnesses who would have addressed the issue of credibility in a case involving no physical evidence; and (2) the trial court erred when it found the younger victim to be competent to testify, permitted the testimony of state witnesses who should have been excluded from the courtroom during the testimony of prior witnesses, and sentenced Petitioner to a 25-year prison term. Respondent asks the Court to deny relief on the Petition because: (1) Petitioner failed to fairly present his Ground Two claims, leaving them procedurally defaulted; and (2) the PCR court's decision denying relief on Ground One was not objectively unreasonable.

DISCUSSION

I. Standard of Review

An application for a writ of habeas corpus shall not be granted unless adjudication of the claim in state court resulted in a decision that was: (1) "contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States;" or (2) "based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28

U.S.C. § 2254(d). A state court's findings of fact are presumed correct, and Petitioner bears the burden of rebutting the presumption of correctness by clear and convincing evidence. 28 U.S.C. § 2254(e)(1).

A state 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 materially indistinguishable from a decision of [the Supreme] Court and nevertheless arrives at a result different from [that] precedent." *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 decision to be more than incorrect or erroneous. *Id* at 410. Twenty-eight U.S.C. § 2254(d) "preserves authority to issue the writ in cases where there is no possibility fairminded jurists could disagree that the state court's decision conflicts with [the Supreme] Court's precedents. It goes no farther." *Harrington v. Richter*, 562 U.S. 86, 102 (2011).

II. Unargued Claims

On March 8, 2019, the Court appointed counsel to assist Petitioner in this case. With the assistance of appointed counsel, Petitioner provides argument in support of his Ground

One ineffective assistance of counsel claims. He does not, however, argue the merits of the trial court error issues he raises in Ground Two, nor does he address Respondent's contention that the claims are procedurally defaulted and ineligible for merits review. Where Petitioner has not sustained his burden of proof as to these unargued claims, the Court should deny them. *See Silva v. Woodford*, 279 F.3d 825, 835 (9th Cir. 2002) (Petitioner bears the burden of proving his claims).

III. Ineffective Assistance of Counsel

Petitioner argues that he was the victim of ineffective assistance of trial counsel where his attorney failed to devote sufficient time to his case, resulting in a lackluster investigation and the omission of lay and expert witnesses who would have assisted the defense as to the issue of credibility. The Court uses the general two-part test established by the Supreme Court to determine whether Petitioner received ineffective assistance of counsel. *Knowles v. Mirzayance*, 556 U.S. 111, 122-23 (2009). First, Petitioner must show that his counsel's performance fell below an objective standard of reasonableness. *Strickland v. Washington*, 466 U.S. 668, 686-87 (1984). Due to the difficulties in evaluating counsel's performance, courts must indulge a strong presumption that the conduct falls within the "wide range of reasonable professional assistance." *Id* at 689.

Second, Petitioner must show that his counsel's performance prejudiced the defense. The appropriate test for prejudice is whether Petitioner can show "that there is a reasonable

probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id* at 694. A reasonable probability is one which is sufficient to undermine confidence in the outcome of the trial. *Id* at 696. When *Strickland's* general standard is combined with the standard of review governing 28 U.S.C. § 2254 habeas corpus cases, the result is a "doubly deferential judicial review." *Mirzayance*, 556 U.S. at 122.

A. Lay Witnesses

Petitioner first argues that trial counsel failed to present available evidence from numerous lay witnesses that went to the issues of the victims' reputation for dishonesty, their exposure to sexually explicit materials at their own home, possible abuse by their uncles, their fondness for Petitioner, Petitioner's reputation for sexual propriety, and the layout of the apartment and how it could have called the victims' claims into question. He points to his PCR proceedings where he introduced the statements of 13 individuals who were prepared to testify on his behalf regarding these topics. Respondent's Exhibit 124.

Trial counsel testified in a deposition that he discussed the possibility of hiring an investigator with Petitioner, but there was never a clear work assignment with which to task an investigator. Respondent's Exhibit 134, pp. 14-15. He stated that Petitioner and his family did not provide him with the names and contact information of potential witnesses, and that the witnesses whom he could locate were unable to provide any helpful information. *Id* at 15, 27.

Because the Declarations Petitioner offered during his PCR proceeding included new evidence pertaining to his reputation for sexual propriety, the State introduced the Declaration of Cory Jewell Jensen, a licensed psychologist, who opined that sex offenders, by nature, conceal their predatory nature. Respondent's Exhibit 135, p. 5. In this respect, although people who knew Petitioner were prepared testify favorably on his behalf, Dr. Jensen stated that "opinions formed by friends and family about any particular person's sexual propriety . . . will almost certainly be based on the person's behavior in public" which is "entirely unrelated to how the person acts in private." *Id*.

Faced with this record, the PCR court resolved this claim as follows:

> Petitioner failed to prove that his trial attorney was ineffective in failing to hire an investigator and adequately investigate potential witnesses. Trial attorney was prepared to hire an investigator but did not have information for an investigator to pursue. Most of the names of potential witnesses listed in the petition were never provided to the trial attorney as potential witnesses. Others were provided, but without any information as to how to find them. None of the witnesses tendered by the Petitioner had any new information that was not already known and produced at trial. Most of the evidence would have been duplicative. The only new evidence would be the opinions that Petitioner had a reputation for sexual propriety in the community and that they did not see any sign of sexual abuse. Sexual abuse, by its nature, is done in secret and the fact others were not aware of the abuse would have carried very little weight, especially in a case tried before an

> experienced trial judge. Even if petitioner's attorney reasonably should have done more to investigate the potential witnesses identified by Petitioner, there is no evidence that their testimony would have had a tendency to change the outcome of the trial. The judge indicated that he based his decision primarily on the credibility of the two victims. None of the witnesses proposed by Petitioner would change that assessment.

Respondent's Exhibit 148, pp. 3-4.[2]

The PCR court carefully weighed the evidence and issued extensive findings in this case. Among them, it made a factual determination that Petitioner and his family did not provide trial counsel with the identities of most of the witnesses he referenced in his PCR proceedings and, for those they did identify, they failed to provide counsel with contact information. Taking this factual determination as true, and given the remainder of the record, the PCR court's decision was a reasonable one. *See* 28 U.S.C. 2254(e)(1) (factual findings by a state court are presumed correct absent clear and convincing evidence to the contrary). At a minimum, Petitioner has not demonstrated that the PCR court's application of clearly established federal law was so obviously wrong that no fairminded jurist could agree with it. *See Richter*, 562 U.S. at 102 (2011).

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[2] In its resolution of a different claim not at issue here, and consistent with its finding that most of the Declarations in support of Petitioner's PCR Petition offered only duplicative evidence, the PCR court found that "[t]here was ample evidence at trial that the children continued to be friendly and affectionate to Petitioner. There was also testimony about the layout of Petitioner's home and the sleeping arrangements." Respondent's Exhibit 148, p. 7.

B. Expert Testimony

Petitioner next asserts that his trial attorney should have located and called an expert witness to testify as to issues pertaining to the reliability of child memories. During his PCR proceedings, Petitioner introduced ae expert report from forensic psychologist Dr. Kevin McGovern. Dr. McGovern summarized his findings this way:

> In my opinion, the law enforcement investigation did not adequately seek or examine information about the girls' suggestibility or vulnerability, including the statements made to them by adults (or older children) in positions of trust, comments made in their presence, or exposure to pornographic material or sexual conduct that could have created false or inaccurate beliefs that [led] to statements about events that did not occur. In sum, during the criminal trial I would have testified about these important factors that could have [led] to erroneous allegations about the defendant's alleged criminal sexual behavior.

Respondent's Exhibit 118, p. 5.

Dr. McGovern testified at Petitioner's PCR hearing and admitted during cross-examination that he had never seen any of the parties in this case, did not interview anyone associated with the case, had not investigated the victims' intelligence, mental health or psychological functioning (which he believed to be "okay"), was "at a loss" as to whether fostering of inaccurate victim memories actually occurred in this case, and was unable to state whether any interviewers actually engaged in biased interviews of the victims. Respondent's Exhibit 147, pp. 34, 40, 49, 50-52, 69-70. The PCR court denied this claim as follows:

> Petitioner failed to prove that his trial attorney was ineffective for not obtaining a defense psychologist to challenge the testimony of the two children victims. Dr. [McGovern], testified generally at [the PCR hearing] regarding possible issues that could have been addressed about the testimony of the two children, however, he could not point to any improper interviews, did not hear the children testify and did not interview the children. He also did not talk to anyone who interviewed or had contact with the two children after the disclosure. The most he could say was that there were possible problems in the case but could not testify that there were any actual problems with the memories and testimony of the two children. Petitioner has failed to prove that securing and using the testimony of an expert such as Dr. [McGovern] would have provided any benefit to Petitioner at trial. Petitioner has failed to prove any prejudice.

Respondent's Exhibit 148, p. 5.

Petitioner argues that Dr. McGovern noted numerous mistakes pertaining to the girls' interviews, heightening the risk of unreliable memories. *See* Respondent's Exhibit 118. However, Dr. McGovern had not personally met with anyone associated with the case and would have been unable to testify as to specific problems with the memories and testimony of either victim in this case. On this record, any failure by trial counsel to retain an investigator did not result in prejudice. Where the PCR court's decision on this claim did not involve an unreasonable application of clearly established federal law, Petitioner is not entitled to habeas corpus relief.

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RECOMMENDATION

For the reasons identified above, the Petition for Writ of Habeas Corpus (#1) should be denied and a Judgment should be entered dismissing this case with prejudice. The Court should, however, issue a Certificate of Appealability as to Petitioner's Ground One ineffective assistance of counsel claims.

SCHEDULING ORDER

This Findings and Recommendation will be referred to a district judge. Objections, if any, are due within 14 days. If no objections are filed, then the Findings and Recommendation will go under advisement on that date.

If objections are filed, then a response is due within 14 days after being served with a copy of the objections. When the response is due or filed, whichever date is earlier, the Findings and Recommendation will go under advisement.

IT IS SO ORDERED.

DATED this 31st day of August, 2020.

/s/ Patricia Sullivan
Patricia Sullivan
United States Magistrate Judge

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

PENDLETON DIVISION

RAMON TORRES RUELAS,

Petitioner,

v.

TROY BOWSER,

Respondent.

Case No. 2:18-cv-01222-SU

OPINION AND ORDER

MOSMAN, J.,

On August 31, 2020, Magistrate Judge Patricia Sullivan issued her Findings and Recommendation (F. & R.) [54]. Judge Sullivan recommended that I DENY the Petition for Writ of Habeas Corpus [1]. No objections were filed. Upon review, I agree with Judge Sullivan.

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).

CONCLUSION

Upon review, I agree with Judge Sullivan's recommendation and I ADOPT the F. & R. [54] as my own opinion. The Petition for Writ of Habeas Corpus [1] is DENIED. The case is DISMISSED with prejudice. Because Petitioner has made a substantial showing of the denial of a constitutional right, a certificate of appealability is GRANTED as to Petitioner's Ground One ineffective assistance of counsel claims. *See* 28 U.S.C. § 2253(c)(2).

IT IS SO ORDERED.

DATED this 25th day of September, 2020.

MICHAEL W. MOSMAN
United States District Judge

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

PENDLETON DIVISION

RAMON TORRES RUELAS,

Petitioner,

Case No. 2:18-cv-01222-SU

v.

JUDGMENT

TROY BOWSER,

Respondent.

MOSMAN, J.,

Based upon the Order of the Court [56], it is ordered and adjudged that the Petition for Writ of Habeas Corpus [1] is DENIED. The case is DISMISSED with prejudice. Because Petitioner has made a substantial showing of the denial of a constitutional right, a certificate of appealability is GRANTED as to Petitioner's Ground One ineffective assistance of counsel claims. *See* 28 U.S.C. § 2253(c)(2).

DATED this 25th day of September, 2020.

MICHAEL W. MOSMAN
United States District Judge

No. 20-35899

UNITED STATES COURT OF APPEALS

FOR THE

NINTH CIRCUIT

RAMON TORRES RUELAS,

Petitioner-Appellant,

v.

TROY BOWSER, Superintendent,
Two Rivers Correctional Institution,

Respondent-Appellee.

Appeal from the United States District Court
for the District of Oregon

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NOT FOR PUBLICATION

FILED

OCT 8 2021

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

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

RAMON TORRES RUELAS, Petitioner-Appellant, v. TROY BOWSER, Warden, Respondent-Appellee.	No. 20-35899 D.C. No. 2:18-cv-01222-SU MEMORANDUM*

Appeal from the United States District Court
for the District of Oregon
Michael W. Mosman, District Judge, Presiding

Argued and Submitted October 5, 2021
Portland, Oregon

Before: W. FLETCHER, IKUTA, and BRESS, Circuit Judges.

Ramon Torres Ruelas appeals the district court's denial of his habeas petition under 28 U.S.C. § 2254. We review de novo the district court's denial of § 2254 relief. *Carter v. Davis*, 946 F.3d 489, 501 (9th Cir. 2019). We have jurisdiction under 28 U.S.C. § 2253, and we affirm.

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

Under the Antiterrorism Act and Effective Death Penalty Act of 1996 (AEDPA), we may only grant habeas relief if the state court's decision (1) "was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States"; or (2) "was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d). When, as here, the decision of the highest state court is unreasoned, we "'look through' the unexplained decision to the last related state-court decision that does provide a relevant rationale . . . [and] then presume that the unexplained decision adopted the same reasoning." *Wilson v. Sellers*, 138 S. Ct. 1188, 1192 (2018). Here, the last reasoned decision is the decision of the Oregon circuit court that denied Ruelas's petition for post-conviction relief in May 2016.

To establish ineffective assistance of counsel, Ruelas must show that (1) his counsel performed deficiently and (2) counsel's deficient performance prejudiced him. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). Under AEDPA, however, "it is not enough to convince a federal habeas court that, in its independent judgment, the state-court decision applied *Strickland* incorrectly. Rather, [Ruelas] must show that the [Oregon circuit court] applied *Strickland* to the facts of his case in an objectively unreasonable manner." *Bell v. Cone*, 535 U.S. 685, 698–99 (2002) (citation omitted).

In this case, the state court's conclusion that Ruelas had not carried his burden under either *Strickland* prong with respect to counsel's investigation and use of lay and expert testimony was not an unreasonable application of *Strickland*. In reaching this conclusion, the state court did not make an unreasonable determination of facts. As to additional lay witnesses, the state court's factual determinations that some of these witnesses were not made known to trial counsel before the trial, and that trial counsel was not provided contact information for others, was not an unreasonable determination of the facts. *See* 28 U.S.C. §§ 2254(d)(2), (e)(1). The record also supports the state court's reasonable factual determinations that testimony from other lay witnesses would have been largely duplicative or else was likely to carry little weight because the trial judge focused on the victims' credibility. Trial counsel sought to undermine the victims' credibility and constructed a defense that Ruelas was not alone with the victims. While that strategy was unsuccessful, the state court reasonably concluded that trial counsel was not deficient.

For substantially the same reasons, it was not objectively unreasonable for the state court to conclude that there was no "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different" if trial counsel had put forward additional lay testimony at trial. *Strickland*, 466 U.S. at 694. The victims gave graphic and consistent testimony about Ruelas's abuse and provided descriptions of sexual content in pornographic

videos that matched videos located at Ruelas's residence. The state court could reasonably conclude that the additional lay witness testimony Ruelas claims should have been presented would not have changed the result.

The state court also reasonably concluded that Ruelas had not established deficient performance or prejudice as to trial counsel's decision not to use expert testimony to attack the victims' credibility. While Ruelas suggests that an expert could have testified about the "risk that [the victims] were offering implanted memories or [were] otherwise unreliable," the state court reasonably determined that Ruelas's expert on state habeas review had not identified problems with the victims' testimony or their memories. Under AEDPA, Ruelas has not shown that the state court's determinations are "beyond any possibility for fairminded disagreement." *Harrington v. Richter*, 562 U.S. 86, 103 (2011).

AFFIRMED.