

ORIGINAL

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only)**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):	Docket or Case No.:	
Ramon Torres Ruelas		
Place of Confinement:	Prisoner (SID) No.:	
Two Rivers Correctional Institution Yamhill Co		18094434
Petitioner (include the name under which you were convicted)	Respondent (authorized person having custody of petitioner)	
Ramon Torres Ruelas	Troy Bowser Superintendent, 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:

Mariin County Circuit court 100 High street, salem 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. Sedomy 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:

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: Wallowa 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?

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: That no finding of fact or finding of law can be

- 1 failing to arrange and utilize witnesses, lay and expert.
- 2 Failing to conduct adequate investigation ~~and collecting~~
- 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 q.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

GROUND 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 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, 205 SW 4th St. PO Box 1183,
189 Liberty St. NE, Ste 203A, Salem, OR 97301

b. At arraignment and plea:

Ronald M. Hellewell
1596 Liberty St. NE, 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 submission, if you are incarcerated there.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

RAMON TORRES RUELAS,
Petitioner,
v.

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

FINDINGS AND RECOMMENDATION

TROY BOWSER,
Respondent.

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 returned 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 an 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,

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

v.

OPINION AND ORDER

TROY BOWSER,

Respondent.

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 1 – OPINION AND ORDER*

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**

**EXCERPTS OF RECORD -
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**Thomas J. Hester
Assistant Federal Public Defender
101 S.W. Main Street, Suite 1700
Portland, Oregon 97204
(503) 326-2123
Attorney for Petitioner-Appellant**

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Exhibit 127 - Order Substituting Attorney for Defendant (Def's PCR Ex 102)	1/22/2019	16-1	179-181
Exhibit 124 - Declarations (Pet's PCR Ex 15)	1/22/2019	16-1	182-218
Exhibit 122 - Trial counsel's billing records (Pet's PCR Ex 13)	1/22/2019	16-1	219-225
Exhibit 119 - Liberty House response to subpoena (Pet's PCR Ex 8)	1/22/2019	16-1	226-232
Exhibit 118 - Report by Kevin McGovern, Ph.D. (Pet's PCR Ex 5)	1/22/2019	16-1	233-257
Exhibit 117 - Diagram of apartment (Pet's PCR Ex 4)	1/22/2019	16-1	258
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Exhibit 115 - Trial counsel's file (Pet's PCR Ex 2)	1/22/2019	15-2	260-434

Exhibit 112 - First Amended PCR Petition	1/22/2019	15-2	435-446
Exhibit 105 - Transcript of Sentencing	1/22/2019	15-1	447-464
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Exhibit 103 - Transcript of Proceedings, Volume I (index at pp ii-iv)	1/22/2019	15-1	466-671
Exhibit 104 - Transcript of Proceedings, Volume II (index at pp ii-iii)	1/22/2019	15-1	672-734
Exhibit 102 - Indictment	1/22/2019	15-1	735-736
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Civil Docket for Case No. 2:18-cv-01222-SU, United States District Court for the District of Oregon - <i>Ramon Torres Ruelas, Petitioner, v.</i> <i>Troy Bowser, Superintendent, Two Rivers</i> <i>Correctional Institution, Respondent</i>	12/11/2020	USDC Docket	747-752

NOT FOR PUBLICATION

FILED

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.