

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 2022

HUGO F. MARQUEZ,

Petitioner,

v.

BRANDON KELLY,

Respondent.

Petition for a 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

1. Should the Ninth Circuit have denied Marquez's motion for a certificate of appealability on the issue of ineffective assistance of counsel, where trial counsel failed to timely object to the introduction of two interview tapes of a minor complainant in a sex abuse case on the grounds that the state did not intend to call the interviewer, Kimberly Goldstien, LCSW, to testify, leading to the playing of the tapes for the jury without any opportunity for the defense to cross examine Ms. Goldstien about her interview techniques and the complainant's expanding accusations against Mr. Marquez, all to Mr. Marquez's prejudice.

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The petitioner, Hugo F. Marquez, respectfully requests that this court issue a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit entered on May 25, 2022.

1. The Parties.

The parties to this case are Petitioner Hugo F. Marquez and Respondent Brandon Kelly, the Superintendent of the Oregon State Penitentiary.

2. Official and Unofficial Reports of Opinions and Orders Entered In the Case.

In December 2008, the State of Oregon charged Hugo Fabian Marquez (Marquez) with sexual offenses of TA, a minor. Resp. Ex. 102, Indictment. The Indictment charged four counts of sexual abuse in the first degree (Counts 1, 3, 5, 7); one count of unlawful sexual penetration in the second degree (Count 2); three counts of unlawful sexual penetration in the first degree (Counts 4, 6, 8); one count of criminal mistreatment in the first degree (Count 9); one count of assault in the third degree (Count 10); and two counts of rape in the first degree (Counts 11, 12). Indictment, *State v. Marquez*, Washington County Circuit Court no. C082983CR, Appendix at 1.

The state dismissed counts 2, 9, and 10 before trial, and the jury convicted Marquez on the remaining charges. The jury voted unanimously on all of the sex abuse and sexual penetration charges, and voted 11-1 on the rape charges. The court imposed sentences of 75 months on the sex abuse 1 convictions in counts 1, 3, 5, and 7, sentences of 300 months on the unlawful sexual penetration convictions in counts 4, 6, and 8 (pursuant to ORS 137.700(2)(F)), and day for day sentences of 300 months on the rape 1 convictions in counts 11 and 12 (pursuant to ORS 137.700(2)(D)).

Judgment, Appendix at 4.

Marquez's direct appeal to the Oregon Court of Appeals and the Oregon Supreme raised issues challenging the proportionality of his sentence and the non-unanimous verdict. The Court of Appeals and Supreme Court denied the direct appeal without opinions. *State v. Marquez*, 245 Or. App. 165, 259 P.3d 115 (2011); docket no. A142933, and *State v. Marquez*, 351 Or. 541, 273 P.3d 135 (2012); docket no. S059856. Appendix at 9 and 10.

Marquez then filed a post-conviction petition, *Marquez v. Premo*, Marion County Circuit Court no. 12C17079. The amended petition alleged in paragraph 11(b) that Marquez "was denied adequate assistance of trial

counsel under ...the Sixth and Fourteenth Amendments to the Constitution of the United States" when trial counsel "failed to object to the CARES¹ tape being accepted into evidence without being able to question the interviewer as a violation of Petitioner's confrontation rights." Appendix at 12. The PCR trial court denied relief. PCR Trial Transcript at pp. 14-15, and 20-21; PCR Judgment. Appendix at 22 and 30.

The Oregon Court of Appeals denied Marquez's appeal of the PCR judgment, addressing only the sufficiency of the general judgment (*Marquez v. Premo*, 275 Or. App. 1023, 365 P.3d 695 (2015); docket no. A154928; and the Oregon Supreme Court denied review. *Marquez v. Premo*, 361 Or. 885, 403 P.3d 762 (2017); docket no. S063874. Appendix at 33 and 35.

Marquez then filed a habeas petition pursuant to 28 U.S.C. §2254 in the District of Oregon (*Marquez v. Kelly*, USDC Oregon docket no. 6:17-CV-01978-IM) which alleged, in part, that he was denied effective assistance of counsel in violation of the 5th, 6th, and 14th Amendments because "Trial counsel failed to object to the CARES tape being accepted

¹ . CARES is an agency responsible for investigating allegations of child abuse in the Portland, Oregon metropolitan area.

into evidence without being able to question the interviewer as a violation of petitioner's confrontation rights." Habeas Petition at p. 20, Ex. B ¶3(b).

Appendix at 36. After briefing, the District Court denied Marquez's petition. Opinion and Order, USDC Or. 6:17-cv-01978-IM, ECF #64, Appendix at 59. The portion of the opinion and order denying the IAC claim presented here appears at pp. 11 – 16.

Marquez then moved the Ninth Circuit Court of Appeals for a certificate of appealability, which the Ninth Circuit denied on January 31, 2022. The Ninth Circuit then denied Marquez's motion for reconsideration on May 25, 2022. *Marquez v. Kelly*, USCA Ninth Circuit docket no. 21-35630, Appendix at 80, 94, 95 and 99.

3. Statement of the Basis for Jurisdiction.

Marquez seeks review of the Ninth Circuit's January 31, 2022 and May 25, 2022 orders denying his motion for a certificate of appealability and his motion for reconsideration. This court has jurisdiction pursuant to 28 U.S.C. §1254(1) and 28 U.S.C. §2253(c) because Marquez has made a substantial showing of the denial of his constitutional right to the effective assistance of counsel under the Sixth and Fourteenth Amendments. *Miller-El v. Cockrell*, 537 U.S. 322, 123 S.Ct. 1029, 154 L.Ed.2d 931 (2003).

4. The Statutes and Constitutional Provisions Involved in the Case.

Marquez's trial counsel failed to provide effective assistance as required by the Sixth and Fourteenth Amendments, which provide in pertinent part:

Rights of accused in criminal prosecutions. In all criminal prosecutions, the accused shall enjoy the right to ... have the Assistance of Counsel, for his defence.

Amendment XIV.

Section 1. ... nor shall any State deprive any person of life, liberty, or property, without due process of law;....

5. Statement of the Case.

The case began on the night of November 29, 2008 when Marquez's girlfriend Aracely saw him kiss and fondle a visiting minor, TA. Aracely ordered Marquez out of the house, and TA's family called the police. When interviewed at a local ER, TA said that Marquez had been kissing and touching her on her vagina and "boob" for a period of time, but always with his hands and over clothing, and denied penetration. When interrogated following his arrest that night, Marquez admitted kissing and touching, but denied any penetration.

TA then had two interviews with CARES. In the first, on December 2, 2008, she claimed that Marquez had digitally penetrated her. Finally, a

week later on December 9, in a second CARES interview, she claimed that Marquez had sexual intercourse with her. Those later accusations led to the unlawful sexual penetration charges in counts 4, 6, and 8, and the rape charges in counts 10 and 11, on which the court gave Marquez 300-month sentences.

The litigation over evidence from CARES began with a defense motion *in limine* to exclude any testimony of a medical diagnosis of child abuse. At the hearing on the motion, the state explained in detail the importance of a witness from CARES, even without a diagnosis of sexual abuse. The court denied the motion *in limine*. At the time, the defense had the two CARES reports, which disclosed that Deborah Munson, PNP performed the medical examination portion of the CARES evaluation, and that Kimberly Goldstien, LCSW conducted the videotaped interview. The defense also knew before the trial began that the state intended to call Munson, but not Goldstien – the state’s witness list included Munson, but not Goldstien, and before *voir dire* the trial judge recited the names of all of the anticipated witnesses, which included Munson but not Goldstien.

At the conclusion of Officer Duncan’s testimony, who authenticated videotapes of Goldstien’s two CARES interviews, the state offered them.

Defense counsel did not object, and the court received them. It wasn't until the state sought to play the tapes the next day that defense counsel raised an objection, on the grounds that the state did not intend to call interviewer Goldstien, and that the failure to present her as a witness violated Marquez's confrontation rights. The state argued that the exhibit had already been admitted, and that the defense could cross examine Munson. The court overruled the objection.

The state played the videotapes at the end of Munson's direct examination, and the defense cross examination did not go well. Munson claimed to be unfamiliar with CARES interview guidelines and avoided questions designed to establish that an untrained examination has a tendency to lead a complainant to embellish. When first asked about the guidelines for conducting interviews, Munson responded "I'm not really sure what you're referring to." When asked about the current guidelines (2004), Munson testified "[t]hat one, because you said 2004, and it has some names on there that I am not familiar with". When defense counsel renewed his objection to the CARES videotape, he emphasized the difficulty encountered in cross examining Munson:

I would renew my objection to the CARES tape coming in on confrontation grounds. Just the grounds that I think that was

demonstrated by the evaluator's testimony when I tried to explore sort of the interview thing, she sort of pushed it off, and said 'Well, it's actually the interviewer who's trained in that stuff, I don't know about it.'

The cross examination of Goldstien would have been of great value to Marquez. He admitted the "peck" kiss and breast fondling that Aracely witnessed, but he denied the later disclosed digital penetration sex abuse charges and the rape charges.

Mr. Marquez raised a claim in his petition for post-conviction relief that his trial lawyer was ineffective for failing to timely object to introduction of the CARES tape without Goldstien's testimony.

The post-conviction trial court denied the claim, stating on the record:

B, didn't object to the cross-examination of the interviewer while the tape was played and I guess the interviewer could have been cross-examined. Defense counsel again in the affidavit indicates he doesn't think that that would have been necessarily helpful. In a sense the interviewer could have reiterated why they asked certain questions and indicated the need for non-leading questions and all of that, it may have given more credibility. In any case, I'm not convinced by a preponderance of the evidence that it affected the outcome.

Resp. Ex.147 at 14:22 – 15:7

Marquez pursued the issue in his post-conviction appeal. It appears in his opening brief (Resp. Ex. 149 at pp. 2 and 16 - 26), was not addressed by the Court of Appeals (Resp. Ex. 152), and it appears in Marquez's petition for review, which the Supreme Court denied. Resp. Ex. 154.

Marquez then raised the issue in his federal habeas petition. It appears as issue 3(b) on page 20 of the petition. In support of the argument, Marquez moved for discovery of the CARES tapes themselves, which the District Court denied. *See*, Appendix at 57.

The District Court's denial of the claim appears in its Opinion and Order at pp. 11 – 16 concluding:

Although TA's disclosure of the abuse to her mother and CARES staff was incremental, her trial testimony was credible and consistent with her eventual disclosure of the full scope of the sexual abuse. Defense counsel's cross examination of Wendy [TA's mother], in an attempt to prove that she tainted TA's recollection, was not compelling when contrasted with (1) Wendy's description of her daughter's distress when [Aracely] witnessed the abuse, and (2) the fact that TA's final disclosure was prompt by the discovery that she had obtained a pregnancy test. Additionally, the prosecution proved that Marquez had the opportunity to abuse TA during the children's many playdates and sleepovers and [Aracely's] sons testified they saw him go into a room alone with TA on at least two occasions.

District Court Opinion and Order, at 16. Appendix at 59.

6. Reasons for Granting The Writ.

The Court of Appeals should have granted Marquez's motion for a certificate of appealability, and his motion for reconsideration, because he has made a substantial showing of the denial of his right to effective assistance of counsel. 28 U.S.C. §2253(c)(2).

The test for such a showing is whether a habeas petitioner can “show that reasonable jurists could debate whether (or, for that matter, agree that) the petition should have been resolved in a different manner or that the issues presented were 'adequate to deserve encouragement to proceed further.’” *Miller-El v. Cockrell*, 537 U.S. 322, 336, 123 S.Ct. 1029, 154 L.Ed. 931 (2003), quoting *Slack v. McDaniel*, 529 U.S. 473, 484 146 L. Ed. 2d 542, 120 S. Ct. 1595 (2000); see also *Barefoot v. Estelle*, 463 U.S. 880, 77 L. Ed. 2d 1090, 103 S. Ct. 3383 (1983). The standard does not require a showing that the petitioner will succeed. *Miller-El*, 537 U.S. at 337. A petitioner must show something more than the absence of frivolity or the existence of good faith, but a claim can be debatable even though every jurist of reason might agree, after the COA has been granted and the case has received full consideration, that petitioner will not prevail.” *Id.* at 338. See also, *Buck v. Davis*, 580 U.S. 100, 117, 137 S.Ct. 759, 197 L.Ed.2d 1 (2017). Since Marquez received a 300-month day for day sentence, it is appropriate to take into account the length of the sentence when considering whether reasonable jurists could debate whether he has made a substantial showing. *Graves v. Cockrell*, 351 F.3d 143, 150 (2003) (“severity of the penalty may be considered in making this determination”).

Trial counsel’s failure to object to introduction of the CARES interview tapes without the testimony of the interviewer prejudiced Marquez because it deprived him of the opportunity to show the jury how the accusations against Marquez grew over time. The PCR trial court’s judgment and the District Court’s opinion and order finding otherwise rest on unreasonable determinations of the facts. The state went on at length about the importance of calling a CARES witness to testify about interrogation methods when it opposed defendant’s motion *in limine* to exclude evidence of a sex abuse diagnosis: the state emphasized that such a witness can “discuss the CARES process”; talk about “the procedures at CARES”; will discuss the “non-suggestive, non-leading types of questions that are specifically asked”; and may “discuss delayed disclosures, and the fact that this particular child … came in twice to CARES. And that’s a little bit unusual”. Resp. Ex. 106 at pp. 10 and 11.

The witness who could be successfully cross examined on those issues was Goldstien, not Munson. In fact, as the transcript of Munson’s cross shows, and trial counsel acknowledged, the cross examination of Munson did not go well. Munson refused to acknowledge the guidelines that govern CARES interviews and thwarted counsel at every turn.

The failure to cross examine Goldstien left the defense without a good explanation for the reasons not to believe the late disclosed unlawful sexual penetration and the rape charges. The result of the trial on those counts would have been different if the defense had been able to cross examine Goldstien.

7. CONCLUSION.

The Ninth Circuit opinion denying a certificate of appealability on the grounds that Marquez did not make a substantial showing of the denial of a constitutional right is wrong. This court should grant certiorari to correct that issue in this case, and to set a guidepost for future cases to assist courts in similar circumstances.

DATED THIS August 23, 2022 JAMES F. HALLEY, P.C.

/s/ James F. Halley
James F. Halley
Attorney for Petitioner Hugo F. Marquez

CERTIFICATE OF SERVICE

I hereby certify that on August 23, 2022, I served the attached Petition for a Writ of Certiorari on:

Solicitor General of the United States
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by xxx depositing in the United States Mail at Portland, Oregon two full, true and correct copies in a sealed envelope with postage prepaid, addressed as shown above, the last known address for the addressees listed;

by hand delivering to the attorneys shown above a full, true, and correct copy of the original.

by xxx efiling.

/s/ James F. Halley
James F. Halley, OSB #911757

The foregoing is a true, correct and complete copy of the original.

James F. Halley, OSB #911757