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

APPENDIX

James F. Halley
James F. Halley, P.C.
300 Oswego Pointe Drive, Suite 101
Lake Oswego, OR 97034
(503) 295-0301
Attorney for Petitioner Hugo F. Marquez

INDEX TO APPENDIX

12/13/17

2008 DEC 14 AM 10:44

IN THE CIRCUIT COURT OF THE STATE OF OREGON FOR WASHINGTON COUNTY

STATE OF OREGON,
Plaintiff,

vs.

HUGO FABIAN MARQUEZ,
Defendant(s).

No. C082983CR

INDICTMENT - Secret

The above named defendant(s) is/are accused by the Grand Jury of Washington County by this indictment of the crime(s) of

Count 1: SEXUAL ABUSE IN THE FIRST DEGREE--Victim under 14 years old--Touching her--breast(s) (FSG=8; B Felony; ORS 163.427) FPC#: 81094994
Count 2: UNLAWFUL SEXUAL PENETRATION IN THE SECOND DEGREE--Penetration of vagina (FSG=8; B Felony; ORS 163.408) FPC#:
Count 3: SEXUAL ABUSE IN THE FIRST DEGREE--Victim under 14 years old--Touching her--vaginal area (FSG=8; B Felony; ORS 163.427) FPC#:
Count 4: UNLAWFUL SEXUAL PENETRATION IN THE FIRST DEGREE--Victim under 12 years old--Penetration of vagina (FSG=10; A Felony; ORS 163.411) FPC#:
Count 5: SEXUAL ABUSE IN THE FIRST DEGREE--Victim under 14 years old--Touching her--vaginal area (FSG=8; B Felony; ORS 163.427) FPC#:
Count 6: UNLAWFUL SEXUAL PENETRATION IN THE FIRST DEGREE--Victim under 12 years old--Penetration of vagina (FSG=10; A Felony; ORS 163.411) FPC#:
Count 7: SEXUAL ABUSE IN THE FIRST DEGREE--Victim under 14 years old--Touching her--vaginal area (FSG=8; B Felony; ORS 163.427) FPC#:
Count 8: UNLAWFUL SEXUAL PENETRATION IN THE FIRST DEGREE--Victim under 12 years old--Penetration of vagina (FSG=10; A Felony; ORS 163.411) FPC#:
Count 9: CRIMINAL MISTREATMENT IN THE FIRST DEGREE--Assumed Supervision of Another--Dependent Person--Cause Phys Injury (FSG=7; C Felony; ORS 163.205) FPC#:
Count 10: ASSAULT IN THE THIRD DEGREE--Intentionally--Cause physical injury--Injury to Child under 10 (FSG=6; C Felony; ORS 163.165) FPC#:
Count 11: RAPE IN THE FIRST DEGREE--Victim under 12 years old (FSG=10; A Felony; ORS 163.375) FPC#:
Count 12: RAPE IN THE FIRST DEGREE--Victim under 12 years old (FSG=10; A Felony; ORS 163.375) FPC#:

committed as follows:

DEFENDANT'S EXHIBIT
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12C-17029

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COUNT 1
The defendant, on or about November 29, 2008, in Washington County, Oregon, did unlawfully and knowingly subject Tayler Alderman, a person less than 14 years of age, to sexual contact by touching her breasts, a sexual and intimate part of the said victim.

COUNT 2
That as a separate act and transaction from that alleged in count 1: The defendant, on or about November 29, 2008, in Washington County, Oregon, did unlawfully and knowingly penetrate the vagina of Tayler Alderman, a child under 14 years of age, with an object other than the defendant's mouth or penis, to wit: his finger.

COUNT 3
That as a separate act and transaction from that alleged in counts 1-2: The defendant, on or between May 1, 2007 to November 8, 2008, in Washington County, Oregon, did unlawfully and knowingly subject Tayler Alderman, a person less than 14 years of age, to sexual contact by touching her vaginal area, a sexual and intimate part of the said victim.

COUNT 4
As part of the same act and transaction alleged in count 3: The defendant, on or between May 1, 2007 to November 8, 2008, in Washington County, Oregon, did unlawfully and knowingly penetrate the vagina of Tayler Alderman, a person under 12 years of age, with an object other than the defendant's mouth or penis, to wit: his finger.

COUNT 5
That as a separate act and transaction from that alleged in counts 1-4: The defendant, on or between May 1, 2007 to November 8, 2008, in Washington County, Oregon, did unlawfully and knowingly subject Tayler Alderman, a person less than 14 years of age, to sexual contact by touching her vaginal area, a sexual and intimate part of the said victim.

COUNT 6
As part of the same act and transaction alleged in count 5: The defendant, on or between May 1, 2007 to November 8, 2008, in Washington County, Oregon, did unlawfully and knowingly penetrate the vagina of Tayler Alderman, a person under 12 years of age, with an object other than the defendant's mouth or penis, to wit: his finger.

COUNT 7
That as a separate act and transaction from that alleged in counts 1-6: The defendant, on or between May 1, 2007 to November 8, 2008, in Washington County, Oregon, did unlawfully and knowingly subject Tayler Alderman, a person less than 14 years of age, to sexual contact by touching her vaginal area, a sexual and intimate part of the said victim.

COUNT 8
As part of the same act and transaction alleged in count 7: The defendant, on or between May 1, 2007 to November 8, 2008, in Washington County, Oregon, did unlawfully and knowingly penetrate the vagina of Tayler Alderman, a person under 12 years of age, with an object other than the defendant's mouth or penis, to wit: his finger.

///

COUNT 9
That as a separate act and transaction from that alleged in counts 1-8: The defendant, on or between September 1, 2007 to June 30, 2008, in Washington County, Oregon, having assumed the temporary care, custody and responsibility for the supervision of David Ibarra, a dependent person, did unlawfully and intentionally cause physical injury to the said victim.

COUNT 10
As part of the same act and transaction alleged in count 9: The defendant, on or between September 1, 2007 to June 30, 2008, in Washington County, Oregon, did unlawfully and intentionally cause physical injury to David Ibarra, a child 10 years of age or younger, the said defendant being at least 18 years of age.

COUNT 11
That as a separate act and transaction from that alleged in counts 1-10: The defendant, on or between May 1, 2008 to ~~September~~ November 1, 2008, in Washington County, Oregon, did unlawfully and knowingly engage in sexual intercourse with Tayler Alderman, a person under 12 years of age. (RK) 5/29/08

COUNT 12
That as a separate act and transaction from that alleged in counts 1-11: The defendant, on or between May 1, 2008 to ~~September~~ November 1, 2008, in Washington County, Oregon, did unlawfully and knowingly engage in sexual intercourse with Tayler Alderman, a person under 12 years of age. (RK) 5/29/08

contrary to the statutes and against the peace and dignity of the State of Oregon.

It is hereby affirmatively declared for the record, upon appearance of the defendant for arraignment, and before the Court asks how the defendant pleads to the charges, that the State intends that any misdemeanor offenses charged herein each proceed as a misdemeanor.

Dated: 12-15-08

Witnesses subpoenaed, examined and appeared in person unless otherwise indicated before the Grand Jury for the State of Oregon:
Kary Duncan
Taylor Alderman
Aracely Ibarra

A TRUE BILL
Eileen O Nuckle
Foreperson of the Grand Jury

BOB HERMANN, District Attorney
K. S. Barton
Kevin Barton
Deputy District Attorney
Oregon State Bar # 022471

DA # 08-11503
TGP 08-2066238
DOB 02/05/1962
☒ Security Amount - $1,760,000
☐ Recognizance/Conditional Release

IN THE CIRCUIT COURT OF THE STATE OF OREGON

FOR THE COUNTY OF WASHINGTON

STATE OF OREGON, Plaintiff; vs. HUGO FABIAN MARQUEZ, Defendant.	Case No. C082983CR (DA 08-11503) **JUDGMENT OF CONVICTION AND SENTENCE**

This matter came before Judge Rick Knapp on June 8, 2009 for sentencing. The State of Oregon appeared by Kevin Barton, Deputy District Attorney, and the defendant appeared in person, with court appointed counsel, Conor Huseby, the Court having determined the defendant to be indigent.

It appears to the Court that the defendant has been indicted, arraigned, tried and found guilty by jury verdict of the crimes of Sexual Abuse in the First Degree (Class B Felony, crime seriousness 8, criminal history I) in Count 1, Sexual Abuse in the First Degree (Class B Felony, crime seriousness 8, criminal history D) in Count 3, Unlawful Sexual Penetration in the First Degree (Class A Felony, crime seriousness 10, criminal history D) in Count 4, Sexual Abuse in the First Degree (Class B Felony, crime seriousness 8, criminal history B) in Count 5, Unlawful Sexual Penetration in the First Degree (Class A Felony, crime seriousness 10, criminal history B) in Count 6, Sexual Abuse in the First Degree (Class B Felony, crime seriousness 8, criminal history A) in Count 7, Unlawful Sexual Penetration in the First Degree (Class A Felony, crime seriousness 10, criminal history A) in Count 8, and Rape in the First Degree (Class A Felony, crime seriousness 10,

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Hillsboro, Oregon 97124
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criminal history A) in Counts 11 and 12. It further appearing to the Court that Counts 2, 9, and 10 were dismissed at trial.

It further appears to the Court that more than 48 hours have passed since said verdicts were rendered, and there appears no good cause why sentence should not now be passed.

It is therefore CONSIDERED, ORDERED AND ADJUDGED by the Court that, pursuant to ORS 137.700 (Ballot Measure 11), defendant be committed to the legal and physical custody of the Corrections Department of the State of Oregon for a period of seventy-five (75) months in each of Counts 1, 3, 5, and 7; and three hundred (300) months in each of Counts 4, 6, 8, 11, and 12. Said sentences shall be served concurrently. Defendant shall serve the entire three hundred (300) months imposed by the Court. During the term of imprisonment, defendant is not eligible for release on post-prison supervision, early release, or any form of leave or temporary leave from custody. Defendant is not eligible for any reduction of this sentence for any reason whatsoever under ORS 421.120, ORS 421.121, or any other statute.

It is further ORDERED that the term of post-prison supervision shall be for a period of ten (10) years minus time served in Counts 1, 3, 5, and 7; and for the remainder of defendant's life in Counts 4, 6, 8, 11, and 12, pursuant to ORS 137.765. Violation of post-prison supervision shall subject defendant to sanctions or additional imprisonment.

Further, the Court recommends the following conditions be made a part of defendant's post-prison supervision:

1. That the defendant have no direct or indirect contact with the victim, Tayler Alderman without the prior written permission of the supervising officer.

2. That the defendant shall not enter onto the premises, or within 100 yards of the premises, where the victim resides, works, or attends school without the prior written permission of the supervising officer.

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3. That the defendant be prohibited from any contact whatsoever with children without the prior written permission of the supervising officer.

4. That the defendant shall not be at any residence where children are residing without the prior written permission of the supervising officer.

5. That the defendant not be at places where children are likely to congregate (e.g. playgrounds, schools, arcades) without the prior written permission of the supervising officer.

6. That the defendant undergo a complete sex offender evaluation at the direction of his supervising officer.

7. That the defendant be involved in any mental health treatment program(s) relating to sexually deviant behavior, and that he remain in said program(s) until successfully completed or given permission to withdraw.

8. That the defendant shall not possess any printed, electronic, photographed or recorded materials or have exposure to live adult entertainment, that he may use for the purpose of his deviant arousal; nor shall the defendant be at any place where such material is available, including the use of a computer or the Internet, without the prior written permission of the supervising officer.

9. That the defendant submit to any program of physiological assessment at the direction of the supervising officer, to include the use of the plethysmograph, to assist in treatment, planning, and case monitoring; any refusal to submit to said testing is a violation.

10. That the defendant submit to polygraph testing, at his own expense, to assist in treatment or to determine compliance with the special conditions of supervision; any refusal to submit to said testing is a violation.

11. That the defendant waive all client/psychotherapist privileges.

12. That the defendant bear financial responsibility, as directed by the supervising officer, for any counseling, therapy, treatment and/or medical costs incurred by the victim as a result of this offense.

13. It is recommended that any amount remaining due under the Money Award at the time of defendant's release from prison, be a condition of post-prison supervision.

Also, it shall be the sentence of the Court that the defendant be required to register as a sex offender with the proper authorities of the State of Oregon for the rest of his life, and that the defendant be required to update the registration with the Oregon State Police as required by law.

//

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Further, it shall be the sentence of the Court that the defendant submit a blood or buccal sample at his own expense, unless he lacks the ability to pay, to the Oregon State Police for the purposes of establishing a DNA profile.

Further, it shall be the sentence of the Court that the defendant, pursuant to ORS 135.139, submit to a test for HIV and any other communicable diseases and if the HIV test is negative, the defendant shall be tested six months after the first test was administered. The results of the testing shall be sent to a physician designated by the victim. The cost of testing shall be paid pursuant to ORS 135.139, and the defendant shall pay restitution to the State for the testing and counseling if provided.

It is further ORDERED that the financial obligations in the Money Award section be referred to the Oregon Department of Revenue for collection.

MONEY AWARD

The State of Oregon is the creditor and the defendant, Hugo Fabian Marquez, is the debtor.

The following shall be paid as part of the Money Award:

1.	$963.00	Unitary Assessment ($107 in each of Counts 1, 3, 4, 5, 6, 7, 8, 11, and 12).
2.	$4,500.00	Unitary Assessment (ORS 163 ($500 in each of Counts 1, 3, 4, 5, 6, 7, 8, 11, and 12)).
3.	$2,976.00	Court Appointed Attorney Fees (in Count 1).
4.	$3,519.43	Victim Restitution. Pay to Crime Victims' Compensation Program, Department of Justice, 1162 Court Street NE, Salem OR 97301 REF: CV 00022-09, 05323-08, 00021-09, 00029-09

TOTAL MONEY AWARD: $11,958.43

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12C17079 - Marquez Def's Exhibit List620

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All financial obligations specified in the Money Award shall be made payable to the State of Oregon and shall be paid through the Clerk of the Court (150 North First Avenue, First Floor, Hillsboro, Oregon 97124) as set forth in ORS 137.295.

Dated this 1st day of ~~June~~ July, 2009.

Judge Rick Knapp

Interpreter: John Mathis
Court Reporter: FTR (410J)
cc: Conor Huseby 6-19-09
Control #: 81094994
sej

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FILED: August 17, 2011

IN THE COURT OF APPEALS OF THE STATE OF OREGON

STATE OF OREGON,
Plaintiff-Respondent,

v.

HUGO FABIAN MARQUEZ,
Defendant-Appellant.

Washington County Circuit Court
C082983CR

A142933

Rick Knapp, Judge.

Submitted on July 28, 2011.

Before Haselton, Presiding Judge, and Brewer, Chief Judge, and Armstrong, Judge.

Attorney for Appellant: Anne Fujita Munsey.

Hugo Fabian Marquez filed the supplemental brief *pro se*.

Attorney for Respondent: Timothy A. Sylwester.

AFFIRMED WITHOUT OPINION

DESIGNATION OF PREVAILING PARTY AND AWARD OF COSTS

Prevailing party: Respondent

[ ] No costs allowed.
[ ] Costs allowed, payable by

53614 AFM

IN THE SUPREME COURT OF THE STATE OF OREGON

STATE OF OREGON,
Plaintiff-Respondent,
Respondent on Review,

v.

HUGO FABIAN MARQUEZ,
Defendant-Appellant,
Petitioner on Review.

Court of Appeals
A142933

S059856

ORDER DENYING REVIEW

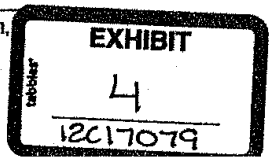
Upon consideration by the court.

The court has considered the petition for review and orders that it be denied.

1/12/2012
9:04:56 AM
PAUL J. DE MUNIZ
CHIEF JUSTICE, SUPREME COURT

c: Anne Kimiko Fujita Munsey
Timothy A Sylwester

aa



IN THE COURT OF APPEALS OF THE STATE OF OREGON

STATE OF OREGON,
Plaintiff-Respondent,

v.

HUGO FABIAN MARQUEZ,
Defendant-Appellant.

Washington County Circuit Court
C082983CR

A142933

APPELLATE JUDGMENT

Rick Knapp, Judge.

Submitted on July 28, 2011.

Before Haselton, Presiding Judge; Brewer, Chief Judge; and Armstrong, Judge.

Attorney for Appellant: Anne Fujita Munsey.

Hugo Fabian Marquez filed the supplemental brief *pro se*.

Attorney for Respondent: Timothy A. Sylwester.

AFFIRMED WITHOUT OPINION

DESIGNATION OF PREVAILING PARTY AND AWARD OF COSTS

Prevailing party: Respondent

[ ] No costs allowed.

Appellate Judgment
Effective Date: March 1, 2012

COURT OF APPEALS
(seal)

fmc

THIS IS THE APPELLATE JUDGEMENT OF THE APPELLATE COURTS AND SHOULD BE ENTERED PURSUANT TO ORS 19.450.

APPELLATE JUDGMENT

REPLIES SHOULD BE DIRECTED TO: State Court Administrator, Records Section, Supreme Court Building, 1163 State Street, Salem OR 97301-2563
Page 1 of 1

DEFENDANT'S EXHIBIT
tabber
125
12C-17009

Received 3-5-12
by Appeals Coord.

Ans Due
1/11/13
BDH

IN THE CIRCUIT COURT OF THE STATE OF OREGON

FOR THE COUNTY OF MARION

HUGO F. MARQUEZ, Petitioner, V. **JEFF PREMO,** Superintendent, Oregon State Penitentiary, Respondent.	**Case No. 12C17079** **AMENDED PETITION FOR POST-CONVICTION RELIEF**

Comes now the above-named petitioner, by and through counsel, to respectfully petition this court for post-conviction relief, alleging as follows:

1.

That Petitioner is unlawfully imprisoned and restrained of liberty by Respondent at the Oregon State Penitentiary, City of Salem, County of Marion, State of Oregon.

2.

Petitioner's imprisonment is by virtue of a judgment and sentence imposed by the Washington County Circuit Court in the case of *State of Oregon v. Huge F. Marquez, Case No. C082983CR. (Petitioner's Exhibit 1, Judgment).*

3.

Petitioner was convicted and sentenced on June 8, 2009. The trial and sentencing judge was **Honorable Rick Knapp.** *Id.*

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285 Liberty Street NE, Suite 360, Street, Salem, Or 97301
Telephone: (503) 365-8800 . Facsimile: (503) 365-8822
vanness@qwest.net

4.

Petitioner was indicted in the foregoing proceeding with the following offenses:

Sexual Abuse in the First Degree (Counts 1,3,5,7)

Unlawful Sexual Penetration in the Second Degree (Count 2)

Unlawful Sexual Penetration in the First Degree (Counts 4,6,8)

Criminal Mistreatment in the First Degree (Count 9)

Assault in the Third Degree (Count 10)

Rape in the First Degree (Counts 11,12)

(Petitioner's Exhibit 2, Indictment).

5.

Following a jury trial, Petitioner was convicted of Sexual Abuse in the First Degree (Counts 1,3,5,7), Unlawful Sexual Penetration in the First Degree (Counts 4,6,8), and Rape in the First Degree (Counts 11,12).

6.

Petitioner was represented at trial by appointed counsel, **Conor Huseby,** OSB #063737, Metro Public Defender, Inc., 400 E. Main St., Suite 210, Hillsboro, OR 97123.

7.

After conviction and sentencing, Petitioner took a direct appeal to the Oregon Court of Appeals. Petitioner was represented on appeal by appointed counsel, Anne Kimiko Fujita Munsey, OSB #994080, Office of Public Defense Services, 1175 Court Street NE Salem, OR 97301..

8.

Upon appeal, the Oregon Court of Appeals affirmed without opinion. Petitioner filed a petition for review with the Oregon Supreme Court and the petition for review was denied on January 12, 2012. The Appellate Judgment was issued on March 1, 2012. *(Petitioner's Exhibit 3, Appellate Judgment). (Petitioner's Exhibit 4, Order Denying Review).*

9.

Petitioner has not previously applied for post-conviction relief.

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10.

Petitioner believes and alleges that his imprisonment is illegal and that the conviction was wrongfully obtained in violation of ORS 138.530 because of the following:

FIRST CLAIM FOR RELIEF

(INADEQUATE ASSISTANCE OF TRIAL COUNSEL)

11.

Petitioner was denied adequate assistance of trial counsel under Article 1, Section 11 of the Constitution of the State of Oregon and the Sixth and Fourteenth Amendments to the Constitution of the United States, resulting in violation of his federal and state rights to a fair trial and due process. Petitioner was denied adequate assistance of appellate counsel under the Fourteenth Amendment to the United States Constitution. Trial counsel failed to exercise professional skill and judgment in a reasonable, diligent and conscientious manner as follows:

a) failed to object to Officer Duncan vouching for the training and credibility of CARES when she stated, "we use CARES – they are highly trained to interview kids, and examine kids, and they're trained to talk to kids in a way that don't ask questions that could be potentially leading". TR 150.

b) failed to object to the CARES tape being accepted into evidence without being able to question the interviewer as a violation of Petitioner's confrontation rights. TR 183.

c) failed to object to the State's use of a medical professional to diagnose child sex-abuse without corroborating physical evidence as required by *State v. Southard,* 347 Or. 127, 218 P.3d 104 (2009). TR 448.

d) failed to object when the prosecutor stated physical evidence proved Petitioner guilty. There was no physical findings of abuse and the prosecutor did not explain how such non-findings proved guilt. TR 429.

e) failed to object to the prosecutor testifying, without presenting evidence, that: 1] there are hundreds of studies about child abuse; 2] there are the Oregon Medical Association Guidelines about child abuse victims; and 3] that Petitioner is the

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reason for these studies, guidelines, etc. TR 421.

f) failed to employ an expert in child sex-abuse and interview techniques to evaluate the CARES tape and interviewing procedures. TR 449.

g) allowed the prosecution to suggest that CARES is an independent agency simply because Nurse Munson needed a HIPAA release before talking with the prosecution. HIPAA releases are not necessary for transfer of medical information between all agencies and does not necessarily indicate independent action. Trial counsel failed to object or otherwise rebut this assertion. Trial counsel should have better examined the alleged independent nature of CARES. TR 462.

h) trial counsel improperly agreed to have petitioner put on the stand before the jury was brought so that the jury would not see a security device that was attached to his leg. Counsel speculated on what the jury would "probably" think, but counsel's speculation was misplaced. It is unknown what case the jury might have assumed by petitioner being placed in the witness stand before they were allowed to come in. It may very well be that they assumed that special security measures were necessary. Such action by the court, without objection by counsel, is alleged to be just as harmful as allowing petitioner to be seen in shackles and has a high likelihood of negatively impacting the jury. TR 388,392.

i) failed to employ an expert in child sex-abuse who could have challenged the state's conclusion that the lack of physical signs of non-penetration was mostly irrelevant. This was particularly important because the prosecution made extensive efforts to diminish the fact that there were no physical signs of penetration. TR 447.

j) where petitioner's ability to speak and understand English was a particular importance during trial, trial counsel failed to have petitioner examined by a linguist to determine his level of comprehension. TR 156.

k) trial counsel relied upon written references to cross-examine the CARES practitioner. However, such examination was weakened because it was not

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substantiated by a defense expert who was familiar with the written material and who had credentials to bolster the credibility of the experts opinion and the written material relied upon. TR 285-289.

l) failed to investigate security tapes of the apartment complex where petitioner lived and where victim lived. Such investigation would have allowed petitioner the ability to prove that the victim was not at his apartment on the days the crimes were alleged to have occurred.

m) failed to investigate evidence that petitioner was in Seattle during the time he was accused of the actions involved with his criminal charges.

n) failed to investigate an airplane ticked, showing that petitioner was not in the area during part of the time related to the charges.

SECOND CLAIM FOR RELIEF

(INADEQUATE ASSISTANCE OF APPELLATE COUNSEL)

12.

Petitioner was denied adequate assistance of appellate counsel under Article 1, Section 11 of the Constitution of the State of Oregon and the Sixth and Fourteenth Amendments to the Constitution of the United States, resulting in violation of his federal and state rights to a fair trial and due process. Petitioner was denied adequate assistance of appellate counsel under the Fourteenth Amendment to the United States Constitution. Appellate counsel failed to exercise professional skill and judgment in a reasonable, diligent and conscientious manner as follows:

a) failed to assign error to the court's acceptance of the 911 tape over trial counsel's objection on hearsay grounds. TR 235,320.

b) failed to assign error to a leading question by the prosecution. TR 327.

c) failed to assign error to the state's use of a medical professional's diagnosis of child sex-abuse without providing corroborating physical evidence as required by *Southard, Supra.*

13.

All of the above listed errors, individually and/or in combination, substantially prejudiced

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petitioner. If not for errors committed by trial counsel and the State of Oregon, the outcome of Petitioner's case would have been different.

DATED: This the 13th day of December, 2012

JAMES D. VAN NESS
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OSB# 99119
VAN NESS, MOONEY LLC
285 Liberty Street NE, Suite 360
Salem, Oregon 97301
(503) 365-8800
(503) 365-8822 Facsimile
Attorney for Petitioner

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I made service of the foregoing FORMAL PETITION FOR POST-CONVICTION RELIEF, upon the parties hereto causing it to be mailed in the United States Post Office in Salem, Oregon on December 14, 2012, or in the method and manner indicated:

Bryon D. Hadley
1162 Court Street NE
Salem, OR 97301
Attorney for Respondent

(X) First Class Mail
( ) Facsimile
( ) Overnight Mail
( ) Email
( ) Hand Delivery

Amber Rudishauser, Legal Assistant

IN THE CIRCUIT COURT OF THE STATE OF OREGON

FOR THE COUNTY OF MARION

HUGO MARQUEZ, Petitioner, v. JEFF PREMO, Superintendent Oregon State Penitentiary, Defendant.	Case No. 12C-17079 **AFFIDAVIT OF CONOR T. HUSEBY** **ORS 20.140 - State fees deferred at filing**

STATE OF OREGON)
) ss.
County of Washington)

I, Conor T. Huseby, being first duly sworn, depose and say:

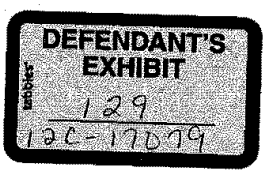
I am an attorney licensed to practice law in the State of Oregon, and in that capacity I represented Hugo F. Marquez in *State of Oregon v. Hugo F. Marquez*, Washington County Circuit Court Case No. C082983CR. I make this affidavit in response to petitioner's claim of inadequate assistance of trial counsel.

I have been an attorney for approximately 6 ½ years. I have tried approximately 50 cases to a jury, with approximately 20 of those trials being Ballot Measure 11 cases including two murder cases. I have tried several child sex cases and have obtained acquittals in at least four of those cases. Currently I handle Aggravated Murder cases for the Metropolitan Public Defender. I have always been a criminal defense attorney.

The following information is true to the best of my recollection:

1. One of the theories of defense was that the trained questioning by CARES contrasted with the untrained and unreliable questioning by the victim's mother had tainted the

Department of Justice
1162 Court Street NE
Salem, OR 97301-4096
(503) 947-4700 / Fax: (503) 947-4794



alleged victim's recollection. Once the victim got to CARES, it was already too late; she had been irrevocably tainted by her mother's untrained questioning. Objecting to Officer Duncan's testimony that CARES personnel are highly trained would not have promoted that defense theory. Furthermore, my professional assessment was that an objection did not have a reasonable likelihood of success.

2. At the time that the CARES tape was received into evidence, I believed the state planned on call the CARES interviewer. I made an objection within a reasonable amount of time after learning the State's actual intention. Based on my previous experience, as well as my observations of the trial court during arguments, I have no reason to believe that the court would have ruled any differently if I had made the motion sooner. Moreover, my objection was one I was not entirely sure I wanted the court to grant. If the court had forced the CARES interviewer to testify, she would not have been a favorable witness to the defense. My hope was that the objection, once over ruled, would provide Mr. Marquez with appeal issues.

3. The *Southard* opinion did not exist at the time of my representation, so I did not have any binding legal authority for that objection.

4. The trial court instructed the jury that counsel's statements and arguments were not evidence. I had no reason to believe that the jury disregarded the court's instructions. I saw no basis for a viable objection to the State's opening statement or closing arguments. There was DNA evidence linking Mr. Marquez to the allegations.

5. I consulted with an expert in interview techniques. The expert would not have provided testimony favorable to the defense, so I elected not to use him. He would have been detrimental to our case.

6. My cross-examination of State witnesses, including CARES personnel, should speak for itself. I have no reason to believe that additional questioning would have convinced the jury to render a different verdict.

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7. Mr. Marquez and I discussed how to best present his testimony. I asked him if he would like to walk up to the stand in front of the jury and we practiced it. He stated he would prefer to already be seated on the stand, as he had difficulty walking to the stand with the leg restraint on. My assessment at the time, with which Mr. Marquez expressed agreement, was that it was better to avoid having the jury actually see him wear any restraining device.

8. I attempted to retain an expert regarding the lack of physical evidence. Based on the facts of this case, I was not able to locate an expert with testimony helpful to the defense. I had no reason to believe that consultation with additional experts would have produced helpful testimony.

9. I had no reason to believe that examination by a linguist would have been a productive line of inquiry. Particularly when Mr. Marquez testified in his own defense, the jury evaluated his English proficiency and comprehension level. I have no reason to believe that testimony by a linguist would have altered the jury verdicts.

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10. Based on the version of events that Mr. Marquez provided to me, I had no reason to believe that security tapes would have been helpful to the defense. Mr. Marquez did not claim to me that the alleged victim was not at his apartment. Mr. Marquez mentioned that he was in Seattle at some point during the wide date range alleged in the indictment, but did not tell me that he was in Seattle during the days in question, or suggest that he was anywhere else other than at his apartment on the days and times at issue. Mr. Marquez did not claim in my presence to have flown out of the area during the days and times at issue. I had no reason to investigate an airplane ticket or any other alleged alibi evidence that Mr. Marquez now asserts in his post-conviction claims, nor did I feel that is was relevant or useful to prove he was in Seattle on a random date when the allegations did not take place.

DATED this 22nd day of February, 2013.

OFFICIAL SEAL
BRIAN K HAMPTON
NOTARY PUBLIC-OREGON
COMMISSION NO. 459701
MY COMMISSION EXPIRES JUNE 29, 2015

CONOR T. HUSEBY

SUBSCRIBED AND SWORN to before me this 22nd day of February, 2013.

Brian K. Hampton
Notary Public for Oregon
My Commission Expires: 6/29/2015

Department of Justice
1162 Court Street NE
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IN THE CIRCUIT COURT OF THE STATE OF OREGON

FOR THE COUNTY OF MARION

HUGO MARQUEZ, Petitioner,	)	
v.	)	No. 12C-17079
JEFF PREMO, Superintendent, Oregon State Penitentiary, Defendant.	)	

TRANSCRIPT OF PROCEEDINGS

BE IT REMEMBERED That, pursuant to notice duly given to all parties in interest, the above-entitled cause came on regularly for trial in the Circuit Court of the State of Oregon for the County of Marion, at Salem, on the 18th day of July, 2013, the Honorable Rick J. McCormick presiding.

APPEARANCES

Mr. James Van Ness, Attorney at Law, appeared on behalf of the Petitioner

Mr. Byron Hadley, Assistant Attorney General, appeared on behalf of the Defendant.

Transcribed by:
Robin Curl
Court Transcriber
P. O. Box 5966
Salem, OR 97304
(503)585-7252

THE COURT: No, that's fine. Anything else then?

MR. VAN NESS: Nothing, Your Honor.

THE COURT: Well, there's several allegations and I'm going to kind of go through them quickly. Allegation 11A is the failed to object to Officer Duncan vouching for the training and credibility of the CARES when they indicated that they are highly trained to interview kids. I'm not convinced under the law that this is vouching as defined by our appellate courts, but even so, I guess based upon defense counsel's affidavit, there was a strategy I think as pointed out by Petitioner's counsel that basically the alleged victim in this case had been coached and tainted, if you will, by leading questions and suggestions from her mother and that the fact that the CARES evaluation was the way it was was basically a trial strategy that they tried to do. In other words, that rather than attacking CARES, they were saying by the time she got there, that's what she believed, and so I don't find a violation of *Stricklin* there.

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 indicted 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.

C, failed to object to the State's use of medical professional diagnosis. I don't think they did use the diagnosis. There was -- actually, the defense attorney in this case filed a motion before it. It's kind of amazing, I mean, it was kind of a *Southard* motion before the fact, and I guess rather than finding a violation of *Stricklin*, it's amazing, he did almost everything he could have done but for the *Southard* opinion being there, and I thought was very effective. And so as a practical matter, the pre-trial motion I thought was very well stated and very well done, and there was not a medical diagnosis admitted based upon the motion and the Court's rulings. There was clearly testimony about the circumstances, questions, reactions, that sort of thing, but I think that's admissible even under *Southard*.

D, failed to object when the prosecutor stated the physical evidence proved Petitioner guilty.

As far as appellate counsel is concerned, there was three allegations, failed to assign error to the Court's acceptance of the 911 tape over trial counsel's objection. I don't know that it's offered as hearsay anyway, frankly, but as a practical matter, counsel said it was an excited utterance. The point is it would have come in as non-hearsay. I don't think the Court of Appeals is going to overturn a case based on that.

Failed to assign error to leading questions by prosecutor. As I understand it, there was only a few, and again, I don't think that's going to change the opinion of Court of Appeals.

And failed to assign error to the State's use of medical professional's diagnosis. I'm not convinced that there was a medical diagnosis offered in violation of *Southard*, and again, I would note that as far as I'm concerned, counsel did a great job pre-*Southard* to make a record in this particular case.

And so for all of those reasons, I do not find that I am convinced by a preponderance of the evidence there was a violation of effective counsel that caused prejudice to defendant and I'm going to deny the petition. Mr. Marquez, that means I'm going to sign an order. That order will be filed. When it's filed, the

appeal time starts to run. You have an appeal from this. You're going to advise him of the particulars of that appeal, Counsel?

MR. VAN NESS: Yes, Your Honor.

THE COURT: Very well. And for the reasons stated then, that's going to be the Court's decision. Anything else for the record?

MR. VAN NESS: Nothing, Your Honor.

MR. HADLEY: Nothing from the State, Your Honor.

THE COURT: Very well. We'll go off the record.

(Concluded)

I, Robin Curl, do hereby certify that I am a court transcriber in and for the State of Oregon.

I further certify that the proceedings were recorded and supplied to me, and thereafter reduced to typewriting by me, and that the foregoing is an accurate and complete transcript to the best of my ability of such recorded proceedings.

IN WITNESS WHEREOF, I have hereunto set my hand in the City of Salem, County of Polk, State of Oregon, this 11th day of September, 2013.

Robin Curl, Court Transcriber
PO Box 5966
Salem, OR 97304
(503)585-7252
rcurl3@aol.com

IN THE CIRCUIT COURT OF THE STATE OF OREGON

FOR THE COUNTY OF MARION

Hugo F. Marquez, SID #13495605, Petitioner, vs. Jeff Premo, Superintendant, Oregon State Penitentiary, Defendant.	Case No. 12C17079 GENERAL JUDGMENT (After Trial)

The above-entitled matter came before the Court on July 18, 2013 for a Trial on 1st Amended Petition for Post Conviction Relief. Petitioner withdrew the following claims: _____

_____.

NOW, THEREFORE, IT IS HEREBY ORDERED AND ADJUDGED:

1. The 1st Amended Petition for Post Conviction Relief is:

☐ Allowed and the following relief is granted: _____

_____

_____

_____.

☐ The Petition is dismissed pursuant to ORS 138.525, as meritless, and this judgment is therefore not appealable.

☒ Denied.

2. The parties stipulated to Petitioner's Exhibits _____ and Respondent's Exhibits _____. After considering objections ☐ Exhibits _____ were admitted and ☐Exhibits _____ were not admitted. all exhibits offered + received

DOJ/atty

IN THE CIRCUIT COURT OF THE STATE OF OREGON

FOR THE COUNTY OF MARION

Hugo F. Marquez, SID #13495605, Petitioner, vs. Jeff Premo, Superintendant, Oregon State Penitentiary, Defendant.	Case No. 12C17079 GENERAL JUDGMENT (After Trial)

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_____.

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1. The 1st Amended Petition for Post Conviction Relief is:

☐ Allowed and the following relief is granted: _____

_____

_____

_____.

☐ The Petition is dismissed pursuant to ORS 138.525, as meritless, and this judgment is therefore not appealable.

☒ Denied.

2. The parties stipulated to Petitioner's Exhibits _____ and Respondent's Exhibits _____. After considering objections ☐ Exhibits _____ were admitted and ☐Exhibits _____ were not admitted. all exhibits offered + received

DOJ/atty

3. Pursuant to the burden of proof of ORS 138.620(2), the Court has considered the record evidence submitted by the parties, made determinations as to its relevancy and materiality, assessed the credibility of witnesses and testimony whether written or oral and ascertained for its purposes the probative significance of the evidence presented.

4. The Court makes the following findings and conclusions:

A. findings made in the record

B.

C.

D.

E. With regard to any issues not specifically addressed above, the Court relies upon and adopts the facts and law in ☐Petitioner's Trial Memorandum or ☐Defendant's Trial Memorandum as the Court's findings of facts and conclusions of law. Petitioner has ☐met his burden of proof ☒failed to meet his burden of proof. Except as specifically provided herein, this judgment determines all issues presented.

5. If either party contends that it is entitled to costs and/or attorney fees, that party may make application for a Supplemental Judgment pursuant to ORCP 68.

6. This matter involves ☐Federal and/or ☐State Constitutional Issues.

DATED this 18 day of July, 2013.

Rick J. McCormick Judge

Marquez v. Premo, 275 Or.App. 1023 (2015)
365 P.3d 695

275 Or.App. 1023
Court of Appeals of Oregon.

Hugo F. MARQUEZ, Petitioner–Appellant,
v.
Jeff PREMO, Superintendent, Oregon State Penitentiary, Defendant–Respondent.

12C17079;
A154928

Submitted on Sept. 21, 2015.

Decided Dec. 30, 2015.

Marion County Circuit Court.
Rick J. McCormick, Senior Judge.

Attorneys and Law Firms

Jason Weber and O'Connor Weber LLP filed the brief for appellant. Hugo Marquez filed the supplemental brief pro se.

Ellen F. Rosenblum, Attorney General, Anna M. Joyce, Solicitor General, and Peenesh H. Shah, Assistant Attorney General, filed the brief for respondent.

Before ARMSTRONG, Presiding Judge, and HADLOCK, Judge, and EGAN, Judge.

Opinion

PER CURIAM.

***1024** Petitioner appeals a judgment denying his petition for post-conviction relief (PCR), ****696** raising three assignments of error. We reject without written discussion petitioner's first and supplemental assignments of error.[1] In his second assignment of error, petitioner contends that the post-conviction court erred in entering a judgment that does not comply with ORS 138.640(1), as construed in *Datt v. Hill,* 347 Or. 672, 227 P.3d 714 (2010). In *Datt,* the Supreme Court held that a judgment denying claims for post-conviction relief must, at a minimum:

> "(1) identify the claims for relief that the court considered and make separate rulings on each claim; (2) declare, with regard to each claim, whether the denial is based on a petitioner's failure to utilize or follow available state procedures or a failure to establish the merits of the claim; and (3) make the legal bases for denial of relief apparent."
> 347 Or. at 685, 227 P.3d 714 (footnote omitted). Petitioner asserts that the form judgment entered in this case is deficient in all three respects. However, that argument is foreclosed by *Datt* itself and by our recent decision in *Asbill v. Angelozzi,* 275 Or.App. 408, 365 P.3d 587 (2015).

As in *Datt,* the judgment here identifies the relevant petition for post-conviction relief, states that the judgment "determines all issues presented," and states that petitioner has "failed to meet his burden of proof." That is sufficient to satisfy the first two *Datt* requirements. 347 Or. at 685, 227 P.3d 714. Moreover, in *Asbill,* we held that a post-conviction court can satisfy the third *Datt* requirement—that the court explain the "legal bases for denial of relief"—by "oral findings that the post-conviction court makes on the record and incorporates into the judgment by reference." 275

Or.App. at 413, 365 P.3d 587. That is precisely what the post-conviction court did here. *1025 Accordingly, petitioner's second assignment of error lacks merit. We therefore affirm the post-conviction judgment.

Affirmed.

All Citations

275 Or.App. 1023, 365 P.3d 695 (Mem)

Footnotes

1 In his first assignment of error in his opening brief, petitioner contends that the post-conviction court erred in denying his second claim for relief, "that trial counsel was ineffective because he failed to confront the CARES witness who testified against petitioner via video." In his *pro se* supplemental brief, petitioner asserts that the post-conviction court "committed plain error when it allowed PCR counsel's performance to fall below the level of suitability required by ORS 138.590 and when it allowed petitioner to be represented by ineffective PCR counsel under the U.S. Constitution, Am. 5, 6, and 14."

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IN THE SUPREME COURT OF THE STATE OF OREGON

HUGO F. MARQUEZ,
Petitioner-Appellant,
Petitioner on Review,

v.

JEFF PREMO, Superintendent, Oregon State Penitentiary,
Defendant-Respondent,
Respondent on Review.

Court of Appeals
A154928

S063874

ORDER DENYING REVIEW

Upon consideration by the court.

The court has considered the petition for review and the supplemental *pro se* petition for review and orders that they both be denied.

09/14/2017
10:41 AM
THOMAS A. BALMER
CHIEF JUSTICE, SUPREME COURT

c: Jason L Weber
Peenesh Shah

ms

AO 241 (Rev. 09/17)

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

United States District Court	District: OREGON
Name (under which you were convicted): HUGO F. MARQUEZ	Docket or Case No.: 6:17-cv-1978-BR
Place of Confinement: OREGON STATE PENITENTIARY	Prisoner No.: 13495605
Petitioner (include the name under which you were convicted): HUGO F. MARQUEZ	Respondent (authorized person having custody of petitioner): v. BRANDON KELLY
The Attorney General of the State of: OREGON	

PETITION

1. (a) Name and location of court that entered the judgment of conviction you are challenging:
WASHINGTON COUNTY CIRCUIT COURT
HILLSBORO, OREGON

(b) Criminal docket or case number (if you know): C0 82983 CR

2. (a) Date of the judgment of conviction (if you know): JUNE 29, 2009

(b) Date of sentencing: JUNE 8, 2009

3. Length of sentence: 300 MONTHS

4. In this case, were you convicted on more than one count or of more than one crime? ☑ Yes ☐ No

5. Identify all crimes of which you were convicted and sentenced in this case:
SEX ABUSE IN THE FIRST DEGREE x 4 (COUNTS 1,3,5,7)
UNLAWFUL PENETRATION IN THE FIRST DEGREE x 3 (COUNTS 4,6,8)
RAPE IN THE FIRST DEGREE x 2 (COUNTS 11,12)

6. (a) What was your plea? (Check one)

☑ (1) Not guilty ☐ (3) Nolo contendere (no contest)

☐ (2) Guilty ☐ (4) Insanity plea

(b) If you entered a guilty plea to one count or charge and a not guilty plea to another count or charge, what did you plead guilty to and what did you plead not guilty to?

(c) If you went to trial, what kind of trial did you have? (Check one)

☒ Jury ☐ Judge only

7. Did you testify at a pretrial hearing, trial, or a post-trial hearing?

☒ Yes ☐ No

8. Did you appeal from the judgment of conviction?

☒ Yes ☐ No

9. If you did appeal, answer the following:

(a) Name of court: OREGON COURT OF APPEALS

(b) Docket or case number (if you know): A142933

(c) Result: AFFIRMED WITHOUT OPINION

(d) Date of result (if you know): AUGUST 17, 2011

(e) Citation to the case (if you know): 245 OR. APP. 165, 259 P.3d 115 (2011)

(f) Grounds raised: PLEASE SEE EXHIBIT A

(g) Did you seek further review by a higher state court? ☒ Yes ☐ No

If yes, answer the following:

(1) Name of court: OREGON SUPREME COURT

(2) Docket or case number (if you know): S059856

(3) Result: REVIEW DENIED

(4) Date of result (if you know): JANUARY 12, 2012

(5) Citation to the case (if you know): 351 OR 541, 273 P.3d 135 (2012)

(6) Grounds raised: SAME AS 8, ABOVE

(h) Did you file a petition for certiorari in the United States Supreme Court? ☐ Yes ☑ No

If yes, answer the following:

(1) Docket or case number (if you know):

(2) Result:

(3) Date of result (if you know):

(4) Citation to the case (if you know):

10. Other than the direct appeals listed above, have you previously filed any other petitions, applications, or motions concerning this judgment of conviction in any state court? ☐ Yes ☑ No

11. If your answer to Question 10 was "Yes," give the following information:

(a) (1) Name of court:

(2) Docket or case number (if you know):

(3) Date of filing (if you know):

(4) Nature of the proceeding:

(5) Grounds raised:

(6) Did you receive a hearing where evidence was given on your petition, application, or motion?

☐ Yes ☐ No

(7) Result:

(8) Date of result (if you know): _____

(b) If you filed any second petition, application, or motion, give the same information:

(1) Name of court: _____

(2) Docket or case number (if you know): _____

(3) Date of filing (if you know): _____

(4) Nature of the proceeding: _____

(5) Grounds raised: _____

(6) Did you receive a hearing where evidence was given on your petition, application, or motion?

❒ Yes ❒ No

(7) Result: _____

(8) Date of result (if you know): _____

(c) If you filed any third petition, application, or motion, give the same information:

(1) Name of court: _____

(2) Docket or case number (if you know): _____

(3) Date of filing (if you know): _____

(4) Nature of the proceeding: _____

(5) Grounds raised: _____

(6) Did you receive a hearing where evidence was given on your petition, application, or motion?

❒ Yes ❒ No

(7) Result:

(8) Date of result (if you know):

(d) Did you appeal to the highest state court having jurisdiction over the action taken on your petition, application, or motion?

(1) First petition: ❒ Yes ❒ No

(2) Second petition: ❒ Yes ❒ No

(3) Third petition: ❒ Yes ❒ No

(e) If you did not appeal to the highest state court having jurisdiction, explain why you did not:

12. For this petition, state 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. Any legal arguments must be submitted in a separate memorandum.

CAUTION: To proceed in the federal court, you must ordinarily first 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.

GROUND ONE: PLEASE SEE EXHIBIT B

(a) Supporting facts (Do not argue or cite law. Just state the specific facts that support your claim.):

PLEASE SEE EXHIBIT B

(b) If you did not exhaust your state remedies on Ground One, explain why:

(c) **Direct Appeal of Ground One:**

(1) If you appealed from the judgment of conviction, did you raise this issue? ☑ Yes ☐ No

(2) If you did not raise this issue in your direct appeal, explain why: _____

(d) **Post-Conviction Proceedings:**

(1) Did you raise this issue through a post-conviction motion or petition for habeas corpus in a state trial court?

☐ Yes ☑ No

(2) If your answer to Question (d)(1) is "Yes," state:

Type of motion or petition: _____

Name and location of the court where the motion or petition was filed: _____

Docket or case number (if you know): _____

Date of the court's decision: _____

Result (attach a copy of the court's opinion or order, if available): _____

(3) Did you receive a hearing on your motion or petition? ☐ Yes ☐ No

(4) Did you appeal from the denial of your motion or petition? ☐ Yes ☐ No

(5) If your answer to Question (d)(4) is "Yes," did you raise this issue in the appeal? ☐ Yes ☐ No

(6) If your answer to Question (d)(4) is "Yes," state:

Name and location of the court where the appeal was filed: _____

Docket or case number (if you know): _____

Date of the court's decision: _____

Result (attach a copy of the court's opinion or order, if available): _____

(7) If your answer to Question (d)(4) or Question (d)(5) is "No," explain why you did not raise this issue:

BECAUSE IT WAS RAISED ON DIRECT APPEAL

(e) **Other Remedies:** Describe any other procedures (such as habeas corpus, administrative remedies, etc.) that you have used to exhaust your state remedies on Ground One:

GROUND TWO: PLEASE SEE EXHIBIT B

(a) Supporting facts (Do not argue or cite law. Just state the specific facts that support your claim.):

PLEASE SEE EXHIBIT B

(b) If you did not exhaust your state remedies on Ground Two, explain why:

(c) **Direct Appeal of Ground Two:**

(1) If you appealed from the judgment of conviction, did you raise this issue? ☑ Yes ☐ No

(2) If you did not raise this issue in your direct appeal, explain why:

(d) **Post-Conviction Proceedings:**

(1) Did you raise this issue through a post-conviction motion or petition for habeas corpus in a state trial court?

☐ Yes ☑ No

(2) If your answer to Question (d)(1) is "Yes," state:

Type of motion or petition:

Name and location of the court where the motion or petition was filed:

Docket or case number (if you know):

Date of the court's decision:

Result (attach a copy of the court's opinion or order, if available):

(3) Did you receive a hearing on your motion or petition? ❒ Yes ❒ No

(4) Did you appeal from the denial of your motion or petition? ❒ Yes ❒ No

(5) If your answer to Question (d)(4) is "Yes," did you raise this issue in the appeal? ❒ Yes ❒ No

(6) If your answer to Question (d)(4) is "Yes," state:

Name and location of the court where the appeal was filed:

Docket or case number (if you know):

Date of the court's decision:

Result (attach a copy of the court's opinion or order, if available):

(7) If your answer to Question (d)(4) or Question (d)(5) is "No," explain why you did not raise this issue:

BECAUSE IT WAS RAISED ON DIRECT APPEAL

(e) **Other Remedies:** Describe any other procedures (such as habeas corpus, administrative remedies, etc.) that you have used to exhaust your state remedies on Ground Two :

GROUND THREE: PLEASE SEE EXHIBIT B

(a) Supporting facts (Do not argue or cite law. Just state the specific facts that support your claim.):

PLEASE SEE EXHIBIT B

(b) If you did not exhaust your state remedies on Ground Three, explain why:

(c) **Direct Appeal of Ground Three:**

(1) If you appealed from the judgment of conviction, did you raise this issue? ☐ Yes ☒ No

(2) If you did not raise this issue in your direct appeal, explain why: BECAUSE IT WAS RAISED IN POST-CONVICTION PROCEEDINGS

(d) **Post-Conviction Proceedings:**

(1) Did you raise this issue through a post-conviction motion or petition for habeas corpus in a state trial court?

☒ Yes ☐ No

(2) If your answer to Question (d)(1) is "Yes," state:

Type of motion or petition: PETITION FOR POST CONVICTION RELIEF

Name and location of the court where the motion or petition was filed: MARION COUNTY CIRCUIT COURT

Docket or case number (if you know): 12C17079

Date of the court's decision: JULY 19, 2013

Result (attach a copy of the court's opinion or order, if available): NOT AVAILABLE

(3) Did you receive a hearing on your motion or petition? ☒ Yes ☐ No

(4) Did you appeal from the denial of your motion or petition? ☒ Yes ☐ No

(5) If your answer to Question (d)(4) is "Yes," did you raise this issue in the appeal? ☒ Yes ☐ No

(6) If your answer to Question (d)(4) is "Yes," state:

Name and location of the court where the appeal was filed: OREGON COURT OF APPEALS, SALEM, OREGON

Docket or case number (if you know): A154928

Date of the court's decision: DECEMBER 30, 2015

Result (attach a copy of the court's opinion or order, if available): NOT AVAILABLE

(7) If your answer to Question (d)(4) or Question (d)(5) is "No," explain why you did not raise this issue:

(e) **Other Remedies:** Describe any other procedures (such as habeas corpus, administrative remedies, etc.) that you have used to exhaust your state remedies on Ground Three:

GROUND FOUR: PLEASE SEE EXHIBIT B

(a) Supporting facts (Do not argue or cite law. Just state the specific facts that support your claim.):

PLEASE SEE EXHIBIT B

(b) If you did not exhaust your state remedies on Ground Four, explain why:

(c) **Direct Appeal of Ground Four:**

(1) If you appealed from the judgment of conviction, did you raise this issue? ☐ Yes ☑ No

(2) If you did not raise this issue in your direct appeal, explain why: BECAUSE IT WAS RAISED IN POST-CONVICTION PROCEEDINGS.

(d) **Post-Conviction Proceedings:**

(1) Did you raise this issue through a post-conviction motion or petition for habeas corpus in a state trial court?

☑ Yes ☐ No

(2) If your answer to Question (d)(1) is "Yes," state:

Type of motion or petition: PETITION FOR POST-CONVICTION RELIEF

Name and location of the court where the motion or petition was filed: MARION COUNTY CIRCUIT COURT

Docket or case number (if you know): 12C17079

Date of the court's decision: JULY 19, 2013

Result (attach a copy of the court's opinion or order, if available): NOT AVAILABLE

(3) Did you receive a hearing on your motion or petition? ☑ Yes ☐ No

(4) Did you appeal from the denial of your motion or petition? ☑ Yes ☐ No

(5) If your answer to Question (d)(4) is "Yes," did you raise this issue in the appeal? ☑ Yes ☐ No

(6) If your answer to Question (d)(4) is "Yes," state:

Name and location of the court where the appeal was filed: OREGON COURT OF APPEALS

Docket or case number (if you know): CA A154928

Date of the court's decision: 12-30-15

Result (attach a copy of the court's opinion or order, if available): NOT AVAILABLE

(7) If your answer to Question (d)(4) or Question (d)(5) is "No," explain why you did not raise this issue:

(e) **Other Remedies:** Describe any other procedures (such as habeas corpus, administrative remedies, etc.) that you have used to exhaust your state remedies on Ground Four:

13. 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, which ground or grounds have not been presented, and state your reasons for not presenting them:

NO.

14. 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

If "Yes," state the name and location of the court, the docket or case number, the type of proceeding, the issues raised, the date of the court's decision, and the result for each petition, application, or motion filed. Attach a copy of any court opinion or order, if available.

15. Do you have any petition or appeal now pending (filed and not decided yet) in any court, either state or federal, for the judgment you are challenging? ☐ Yes ☑ No

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

AO 241 (Rev. 09/17)

16. Give the name and address, if you know, of each attorney who represented you in the following stages of the judgment you are challenging:

(a) At preliminary hearing:

(b) At arraignment and plea: CONOR HUSEBY, OSB# 063737, 400 E. MAIN STREET, STE 210, HILLSORO, OR 97123

(c) At trial: SAME AS (b), ABOVE

(d) At sentencing: SAME AS (b), ABOVE

(e) On appeal: ANNE FUJITA MUNSEY, OSB # 994080, 1175 COURT ST., N.E., SALEM, OR 97301

(f) In any post-conviction proceeding: JAMES VANNESS, OSB # 991193, 285 LIBERTY STREET, N.E., STE 360, SALEM, OR 97301

(g) On appeal from any ruling against you in a post-conviction proceeding: JASON WEBER, OSB # 054109, YEON SUITE 1125, 522 S.W. 5TH AVE, PORTLAND, OR 97204

17. Do you have any future sentence to serve after you complete the sentence for the judgment that you are challenging? ☐ Yes ☑ No

(a) If so, give name and location of court that imposed the other sentence you will serve in the future:

(b) Give the date the other sentence was imposed:

(c) Give the length of the other sentence:

(d) Have you filed, or do you plan to file, any petition that challenges the judgment or sentence to be served in the future? ☐ Yes ☐ No

18. 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.*

BECAUSE THE STATUTE OF LIMITATION WAS TOLLED WHILE I WAS LITIGATING IN STATE COURT AND THE LIMITATION PERIOD HAS NOT EXPIRED FOR ANY UNTOLLED TIME.

* The Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA") as contained in 28 U.S.C. § 2244(d) provides in part that:

(1) A one-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court. The limitation period shall run from the latest of -

(A) the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review;

(B) the date on which the impediment to filing an application created by State action in violation of the Constitution or laws of the United States is removed, if the applicant was prevented from filing by such state action;

(C) the date on which the constitutional right asserted was initially recognized by the Supreme Court, if the right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or

(D) the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.

AO 241 (Rev. 09/17)

(2) The time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted toward any period of limitation under this subsection.

Therefore, petitioner asks that the Court grant the following relief: REVERSAL OF PETITIONERS CONVICTIONS AND SENTENCES

or any other relief to which petitioner may be entitled.

Signature of Attorney (if any)

I declare (or certify, verify, or state) under penalty of perjury that the foregoing is true and correct and that this Petition for Writ of Habeas Corpus was placed in the prison mailing system on _____ (month, date, year).

Executed (signed) on 12-7-17 (date).

Signature of Petitioner

If the person signing is not petitioner, state relationship to petitioner and explain why petitioner is not signing this petition.

EXHIBIT A

DIRECT APPEAL CLAIMS

a. The trial court erred when it imposed a 300-month sentence required by "Jessica's Law," under ORS 137.700(2)(b)(D), (F). Such sentence was unconstitutionally disproportionate.

b. The trial court erred when if failed to give an instruction that the jury was required to reach unanimity on all counts under the Sixth Amendment in order to find him guilty

c. The trial court erred when it imposed a term of post-prison supervision of 10-years "minus time served."

d. The trial court erred when it sustained the prosecution's "speculation" objection to a question asked by defense counsel.

e. The trial court erred when it overruled defense counsel's "relevance" objection.

POST-CONVICTION CLAIMS

First Claim for Relief

Petitioner's imprisonment was and is illegal and the proceedings resulted in a substantial denial of Petitioner's rights in violation of ORS 138.510 to 138.680 in that Petitioner was denied effective and adequate assistance of trial counsel, in violation of the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution, and Article I, Sections 11 and 16, of the Oregon Constitution in the following particulars:

a. Trial Counsel failed to object to Officer Duncan vouching for the training and credibility of CARES when she stated, "We use CARES - - they are highly trained to interview kids, and examine kids, and they're trained to talk to kids in a way that don't ask questions that could potentially be leading. Tr., at 150.

b. Trial counsel failed to object to the CARES tape being accepted into evidence without being able to question the interviewer as a violation of petitioner's confrontation rights. Tr., at 183.

c. Trial counsel failed to object to the state's use of a medical professional to diagnose child sex-abuse without corroborating physical evidence as required by *State v. Southard*, 347 Or. 127, 218 P.3d 104 (2009). Tr., at 448.

d. Trial counsel failed to object when the prosecutor stated physical evidence proved petitioner's guilty. There were no physical findings of abuse and the prosecutor did not explain how such non-findings proved guilt. Tr., at 429.

e. Trial counsel failed to object to the prosecutor testifying, without presenting evidence, that: a) there are hundreds of studies about child abuse, b) there are the Oregon Medical Association Guidelines about child abuse victims, and c) that petitioner is the reason for these studies, guidelines, etc. Tr., at 421.

f. Trial counsel failed to employ an expert in child sex-abuse and interviewing techniques to evaluate the CARES tape and interviewing procedures. Tr., at 449

g. Trial counsel allowed the prosecution to suggest that CARES is an independent agency simply because Nurse Munson needed a HIPAA release before talking with the prosecution. HIPAA releases are necessary for transfer of medical information between all agencies and does not necessarily indicated independent action. Trail counsel failed to object or otherwise rebut this assertion. Trial counsel should have better examined the alleged independent nature of CARES. Tr., at 462.

h. Trial counsel improperly agreed to have petitioner put on the stand before the jury was brought so that the jury would not see a security device that was attached to his leg. Counsel speculated on what the jury would "probably" think, but counsel's speculation was misplaced. It is unknown what cause the jury might have assumed by petitioner being placed in the witness stand before they were allowed to come in. It may very well be that they assumed that special security measures were necessary. Such action by the court, without objection by counsel, is alleged to be just as harmful as allowing petitioner to be seen in shackles and has a high likelihood of negatively impacting the jury. Tr., at 388, 392.

i. Trial counsel failed to employ an expert in child sex-abuse who could have challenged the state's conclusion that the lack of physical signs of non-penetration was mostly irrelevant. This was particularly important because the prosecution made extensive efforts to diminish the fact that there were no physical signs of penetration. Tr., at 447.

j. Where petitioner's ability to speak and understand English was of particular importance during trial, trial counsel failed to have petitioner examined by a linguist to determine his level of comprehension. Tr., at 156.

k. Trial counsel relied upon written references to cross-examine the CARES practitioner. However, such examination was weakened because it was not substantiated by a defense expert who was familiar with the written material and who had credentials to bolster the credibility of the experts opinion and the written material relied upon. Tr., at 285-289.

l. Trial counsel failed to investigate security tapes of the apartment complex where

petitioner lived and where the victim lived. Such investigation would have allowed petitioner the ability to prove that the victim was not at his apartment on the days the crimes were alleged to have occurred.

m. Trial counsel failed to investigate evidence that petitioner was in Seattle during the time he was accused of the actions involved with his criminal charges.

n. Trial Counsel failed to investigate an airplane ticket, showing that petitioner was not in the area during part of the time related to the charges.

Second Claim for Relief

Petitioner's imprisonment was and is illegal and the proceedings resulted in a substantial denial of Petitioner's rights in violation of ORS 138.510 to 138.680 in that Petitioner was denied effective and adequate assistance of appellate counsel, in violation of the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution, and Article I, Section 11 and 16, of the Oregon Constitution in the following particulars:

a. Appellate counsel failed to assign error to the court's acceptance of the 911 tape over trial counsel's objection on hearsay grounds. Tr., at 235, 320.

b. Appellate counsel failed to assign error to a leading question by the prosecution. Tr., at 327.

c. Appellate counsel failed to assign error to the state's use of a medical professional's diagnosis of child sex-abuse without providing corroborating physical evidence as required by *Southard, Supra.*

EXHIBIT B

Grounds for Habeas Corpus Relief

First Ground for Relief
(Due Process, Am. V)

Petitioner was denied fair and adequate due process under the Fifth and Fourteenth Amendments to the United States Constitution. The actions of the Trial Court were constitutionally defective because:

a. The trial court erred when it imposed a 300-month sentence required by "Jessica's Law," under ORS 137.700(2)(b)(D), (F). Such sentence was unconstitutionally disproportionate.

b. The trial court erred when it overruled defense counsel's "relevance" objection.

c. The trial court erred when it imposed a term of post-prison supervision of 10-years "minus time served."

d. The trial court erred when it sustained the prosecution's "speculation" objection to a question asked by defense counsel.

Second Ground for Relief
(Jury Trial Right, Am. VI)

Petitioner was denied his right to a fair jury trial under the 6th Amendment to the United States Constitution. The actions of the Trial Court were constitutionally defective because:

a. The trial court erred when if failed to give an instruction that the jury was required to reach unanimity on all counts under the Sixth Amendment in order to find him guilty

Third Ground for Relief
(Right to Counsel, Am. VI)

Petitioner's imprisonment was and is illegal and the proceedings resulted in a substantial denial of Petitioner's rights in violation of ORS 138.510 to 138.680 in that Petitioner was denied effective and adequate assistance of trial counsel, in violation of the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution, and Article I, Sections 11 and 16, of the Oregon Constitution in the following particulars:

a. Trial Counsel failed to object to Officer Duncan vouching for the training and credibility of CARES when she stated, "We use CARES - - they are highly trained to interview kids, and examine kids, and they're trained to talk to kids in a way that don't ask questions that could potentially be leading. Tr., at 150.

b. Trial counsel failed to object to the CARES tape being accepted into evidence without being able to question the interviewer as a violation of petitioner's confrontation rights. Tr., at 183.

c. Trial counsel failed to object to the state's use of a medical professional to diagnose child sex-abuse without corroborating physical evidence as required by *State v. Southard*, 347 Or. 127, 218 P.3d 104 (2009). Tr., at 448.

d. Trial counsel failed to object when the prosecutor stated physical evidence proved petitioner's guilty. There were no physical findings of abuse and the prosecutor did not explain how such non-findings proved guilt. Tr., at 429.

e. Trial counsel failed to object to the prosecutor testifying, without presenting evidence, that: a) there are hundreds of studies about child abuse, b) there are the Oregon Medical Association Guidelines about child abuse victims, and c) that petitioner is the reason for these studies, guidelines, etc. Tr., at 421.

f. Trial counsel failed to employ an expert in child sex-abuse and interviewing techniques to evaluate the CARES tape and interviewing procedures. Tr., at 449

g. Trial counsel allowed the prosecution to suggest that CARES is an independent agency simply because Nurse Munson needed a HIPAA release before talking with the prosecution. HIPAA releases are necessary for transfer of medical information between all agencies and does not necessarily indicated independent action. Trail counsel failed to object or otherwise rebut this assertion. Trial counsel should have better examined the alleged independent nature of CARES. Tr., at 462.

h. Trial counsel improperly agreed to have petitioner put on the stand before the jury was brought so that the jury would not see a security device that was attached to his leg. Counsel speculated on what the jury would "probably" think, but counsel's speculation was misplaced. It is unknown what cause the jury might have assumed by petitioner being placed in the witness stand before they were allowed to come in. It may very well be that they assumed that special security measures were necessary. Such action by the court, without objection by counsel, is alleged to be just as harmful as allowing petitioner to be seen in shackles and has a high likelihood of negatively impacting the jury. Tr., at 388, 392.

i. Trial counsel failed to employ an expert in child sex-abuse who could have challenged the state's conclusion that the lack of physical signs of non-penetration was mostly irrelevant. This was particularly important because the prosecution made extensive efforts to diminish the fact that there were no physical signs of penetration. Tr., at 447.

j. Where petitioner's ability to speak and understand English was of particular importance during trial, trial counsel failed to have petitioner examined by a linguist to determine his level of comprehension. Tr., at 156.

k. Trial counsel relied upon written references to cross-examine the CARES

practitioner. However, such examination was weakened because it was not substantiated by a defense expert who was familiar with the written material and who had credentials to bolster the credibility of the experts opinion and the written material relied upon. Tr., at 285-289.

l. Trial counsel failed to investigate security tapes of the apartment complex where petitioner lived and where the victim lived. Such investigation would have allowed petitioner the ability to prove that the victim was not at his apartment on the days the crimes were alleged to have occurred.

m. Trial counsel failed to investigate evidence that petitioner was in Seattle during the time he was accused of the actions involved with his criminal charges.

Trial Counsel failed to investigate an airplane ticket, showing that petitioner was not in the area during part of the time related to the charges

Fourth Ground For Relief
(Right to Appellate Counsel, Am. VI)

Petitioner's imprisonment was and is illegal and the proceedings resulted in a substantial denial of Petitioner's rights in violation of ORS 138.510 to 138.680 in that Petitioner was denied effective and adequate assistance of appellate counsel, in violation of the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution, and Article I, Section 11 and 16, of the Oregon Constitution in the following particulars:

a. Appellate counsel failed to assign error to the court's acceptance of the 911 tape over trial counsel's objection on hearsay grounds. Tr., at 235, 320.

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c. Appellate counsel failed to assign error to the state's use of a medical professional's diagnosis of child sex-abuse without providing corroborating physical evidence as required by *Southard, Supra.*

Jim Halley

From: info@ord.uscourts.gov
Sent: Tuesday, September 24, 2019 1:09 PM
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U.S. District Court

District of Oregon

Notice of Electronic Filing

The following transaction was entered on 9/24/2019 at 1:08 PM PDT and filed on 9/24/2019
Case Name: Marquez v. Kelly
Case Number: 6:17-cv-01978-IM
Filer:
Document Number: 62

Docket Text:
ORDER: This Court DENIES Marquez's Motion for Order Directing Respondent to Furnish Missing Portion of the Trial Record or, in the Alternative, to Permit Discovery (ECF No. [54]). If, upon consideration of Marquez's habeas petition, this Court determines that Pinholster does not preclude consideration of the CARES tapes, this Court will reconsider whether there is good cause for discovery. IT IS ORDERED that Marquez shall file any supplemental briefing in support of his Habeas Petition, by October 7, 2019. Marquez's Habeas Petition (ECF No. [2]) will be taken under advisement on October 22, 2019. Signed on 9/24/2019 by Judge Karin J. Immergut. (joha)

6:17-cv-01978-IM Notice has been electronically mailed to:

James F. Halley jimhalley@halleylaw.com, thayes@halleylaw.com

Samuel A. Kubernick samuel.a.kubernick@doj.state.or.us, linda.reid@doj.state.or.us

6:17-cv-01978-IM Notice will not be electronically mailed to:

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3d22d0651eae930d578f5adfbe128624db7d1c630e7c34329aa73802ba00e2d6445f00
cc3c82ff5a33f625813296a179e119a68de63ad9145ade19a8cc2e1247]]

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

HUGO F. MARQUEZ,

Petitioner,

v.

BRANDON KELLY,

Respondent.

Case No. 6:17-cv-01978-IM

OPINION AND ORDER

IMMERGUT, District Judge.

Petitioner Hugo F. Marquez ("Marquez"), an inmate at the Oregon State Penitentiary, brings this habeas corpus proceeding pursuant to 28 U.S.C. § 2254, challenging the legality of his 2009 state convictions. Respondent urges the Court to deny habeas relief because (1) all but three of Marquez's claims are procedurally defaulted, and (2) the state court's rejection of the remaining claims is not objectively unreasonable. For the reasons set forth below, this Court DENIES Marquez's Habeas Petition (ECF No. 2) as to grounds one and three and holds ground two in abeyance pending the U.S. Supreme Court's decision in *Ramos v. Louisiana*, No. 18-5925.

BACKGROUND

On December 15, 2008, a grand jury returned an indictment charging Marquez with sexual abuse in the first degree (counts one, three, five, and seven), unlawful sexual penetration in the first degree (counts four, six, and eight), unlawful sexual penetration in the second degree (count two), criminal mistreatment in the first degree (count nine), assault in the third degree (count ten), and rape in the first degree (counts eleven and twelve). Resp't Exs. (ECF No. 30), Ex. 102.[1] The charges arose out of Marquez's sexual abuse of "TA," the twelve-year-old daughter of family friends.

I. The Trial

Marquez lived with his fiancé Aracely Ibarra-Chacon ("Ibarra-Chacon") and her three children "JA," "DA," and "CA." Resp't Ex. 107 at 182. They were former neighbors and good friends with TA, her sister "KA," and their mother "Wendy A." *Id.* at 28-29. The children often played together at Marquez's home and it was common for Marquez to be the only parent supervising the children. *Id.* at 29-34, 182-83, 191. TA and KA spent the night "many times." *Id.* at 183.

On November 29, 2008, TA and her family visited Marquez and Ibarra-Chacon. *Id.* at 35, 154, 183. Marquez and Wendy's fiancé played a drinking game and became intoxicated. *Id.* at 36-37, 40-41, 192-93, 199-200. Marquez convinced Wendy to permit TA and KA to spend the night. *Id.* at 37-38. After Wendy and her fiancé left for the evening, Ibarra-Chacon saw Marquez kiss TA on the lips. *Id.* at 183-85. Later that evening, Ibarra-Chacon saw Marquez sitting next to TA in the living room rubbing her breast and appearing to move his hand toward a blanket

[1] The state dismissed counts two, nine, and ten prior to trial. Resp't Exs. 106 at 2-4, 139.

covering her legs. *Id.* at 187-89. Ibarra-Chacon testified that she yelled at Marquez and he stood up and said "Oh, I'm so stupid for doing that." *Id.* at 190.

Ibarra-Chacon testified that she telephoned Wendy to come get her girls and Marquez left in his car. *Id.* at 48-49, 190; Resp't Ex. 108 at 30. When Wendy arrived, she took TA into a back bedroom and questioned her about what had happened. Resp't Ex. 107 at 41, 49-51. Wendy testified that TA did not want to talk about it, but when she asked TA how many times this had happened, she replied "[e]very time I come over." *Id.* at 41. Wendy called the police and reported the abuse. *Id.* at 35, 42-43. TA was examined at Legacy Emanuel Medical Center that evening. Resp't Ex. 121 at 6. According to the hospital report, TA told the examining physician that a friend's father touched her "pee pee" and her "boob." *Id.* TA stated that "her clothes were on" and she "denied penetration and being touched by anything other than his finger." *Id.*

Portland police officers found Marquez asleep in his car at his workplace. Resp't Ex. 106 at 111-12. Tigard Police Detective Kary Duncan ("Duncan") questioned Marquez at the Tigard police station. *Id.* at 111-12. Duncan testified that Marquez initially stated that he did not remember kissing or touching TA, but later admitted to kissing TA, squeezing her breast, and touching her leg. *Id.* at 121-28, 145-46, 149-50. He denied touching TA at any other time. *Id.* at 128, 146-47. Duncan testified that Marquez was remorseful and at the conclusion of the interview he asked her to shoot him in the head. *Id.* at 128-30, 147-49.

On December 2, 2008, TA was evaluated at Child Abuse Response Evaluation Services "CARES" by Deborah Munson ("Munson"), a pediatric nurse practitioner, and Kimberly Goldstien ("Goldstien"), a licensed clinical social worker. Resp't Ex. 106 at 135; Resp't Ex. 107 at 49-50. Munson spoke to Wendy during "intake" and conducted a physical examination of TA. Resp't Ex. 107 at 50. Munson found no physical signs of sexual abuse. *Id.* at 83. Goldstien

subsequently interviewed TA. *Id.* at 75. The interview was videotaped and Munson observed the interview from a separate room through a one-way mirror. *Id.* 75-76. TA disclosed that Marquez put his fingers in her vagina at least five to ten times. Resp't Ex. 121 at 14.

A few days later, Wendy learned that TA had taken a pregnancy test at school. Resp't Ex. 107 at 43-46. Wendy testified that she questioned TA and, after some urging, she disclosed that Marquez had sex with her. *Id.* at 45-46, 54-55, 173. Wendy called CARES the next day and requested that TA undergo a full physical examination. *Id.* On December 9, 2008, Munson and Goldstien met with TA for a second time at CARES. TA disclosed that Marquez had sex with her twice and that she had been worried she might be pregnant. Resp't Ex. 107 at 92-94, Resp't Ex. 122 at 3-4.

TA testified at trial about the foregoing incidents. TA testified that Marquez kissed her on the lips, squeezed her breast, and put his hand on her upper thigh on November 29, 2008. Resp't Ex. 107 at 155-59. On at least three occasions Marquez put his finger in her vagina. *Id.* at 160-64. TA testified that Marquez put his penis in her vagina once in Marquez's bedroom and once in the boys' bedroom. *Id.* at 164-66. Marquez told her not to tell and she did not disclose the abuse because she didn't want to lose her friends and she was afraid people would think she was "bad." *Id.* at 167-68, 179. Ibarra-Chacon's sons testified that they saw Marquez take TA into a room by herself more than once. Resp't Ex. 107 at 138-39, 144-46.

Marquez testified in his own defense. He admitted kissing TA and touching her breast on November 29, 2008. Resp't Ex. 108 at 17, 19, 23-25. Marquez testified that he was drunk, and he described the incident as a waking nightmare. *Id.* at 15-17, 25-28. Marquez testified that he hallucinated seeing a "big, bald white man." *Id.* at 26. He denied touching TA before the

November incident. *Id.* at 21-23, 36-37. At the conclusion of Marquez's testimony, the defense rested. *Id.* at 37.

The jury returned a guilty verdict on all counts. Resp't Ex. 101 at 4, Resp't Ex. 138; Pet'r's Mem. in Supp. (ECF No. 49), Ex. A. The jury's verdict was unanimous as to the sexual abuse and sexual penetration charges, and 11-1 on the rape charges. Resp't Ex. 108 at 108-09. The trial judge imposed 75-month sentences on each count of sexual abuse, with ten years of post-prison supervision minus time served, and 300-month sentences on each count of sexual penetration and rape, with lifetime post-prison supervision. Resp't Ex. 109 at 35-38; Pet'r's Mem. in Supp., Ex. A at 2. All sentences were ordered to be served concurrently.

II. Direct and Collateral Review

Marquez filed a direct appeal challenging his conviction and sentence. Appellate counsel filed an opening brief alleging that the trial court's imposition of a 300-month sentence and lifetime post-prison supervision violates the Oregon and U.S. Constitutions, and that the trial court's instruction to the jury that it could find Marquez guilty by a non-unanimous verdict violates the Sixth and Fourteenth Amendments to the U.S. Constitution. Resp't Ex. 110.

Marquez filed a *pro se* supplemental appellate brief alleging that (1) the trial court's imposition of lifetime post-prison supervision "minus time served" is an unlawful indeterminate sentence, (2) the trial court violated his right to confront witnesses by sustaining the prosecution's objection to a question posed to Ibarra-Chacon, and (3) the trial court violated his right to due process by overruling defense counsel's objection to a question posed to Ibarra-Chacon. Resp't Ex. 111 at 2-6. The Oregon Court of Appeals affirmed without opinion. *State v. Marquez*, 245 Or. App. 165 (2011). Marquez sought review by the Oregon Supreme Court on the same grounds. Resp't Ex. 113. The Oregon Supreme Court denied review. 351 Or. 541 (2012).

Marquez next sought state post-conviction relief ("PCR") alleging multiple grounds of ineffective assistance of trial and appellate counsel, including that trial counsel rendered ineffective assistance of counsel ("IAC") by failing "to object to [the] CARES tape being accepted into evidence without being able to question the interviewer as a violation of Petitioner's confrontation rights." Resp't Ex. 117 at 3.

At the PCR proceeding, Marquez's defense counsel attested that "[o]ne of the theories of the defense was that the trained questioning by CARES contrasted with the untrained and unreliable questioning by the victim's mother had tainted the alleged victim's recollection." Resp't Ex. 145 at 1-2. Additionally, he attested that he raised an objection to the admission of the CARES tapes within a reasonable time of learning that the prosecution was not calling Goldstien as a witness and, in any event, he did not believe that Goldstien would have been a favorable witness. *Id.* at 2. The PCR court denied relief on the basis that Marquez failed to demonstrate that he received ineffective assistance of trial or appellate counsel. The PCR court reasoned that Goldstien's testimony might not have been favorable and, in any event, Marquez failed to demonstrate by a preponderance of the evidence that counsel's failure to object affected the outcome of the trial. Resp't Ex. 147 at 14-20.

Marquez appealed the denial of post-conviction relief. Appellate counsel assigned error to (1) the PCR court's denial of Marquez's IAC claim based on counsel's failure to timely object to the admission of the CARES tapes, (2) the PCR court's application of a preponderance of the evidence standard, and (3) the PCR court's failure to issue a sufficiently detailed decision. Resp't Ex. 149. Marquez filed a *pro se* supplemental brief assigning error to PCR counsel's deficient performance. Resp't Ex. 150 at 4. Marquez argued in the alternative that the "PCR court erred when it "failed to grant him relief based [on] his claims of ineffective assistance of *trial*

counsel," and that he "seeks to assert any claims not presented in his opening brief for federal exhaustion purposes." *Id.* at 8 (emphasis added). Marquez alleged that "[h]e also asserts each of these claims under the federal constitution to the best of his ability given the limited space allowed." *Id.* The Oregon Court of Appeals affirmed the denial of post-conviction relief. *Marquez v. Premo*, 275 Or. App. 1023 (2015).

Appellate counsel filed a petition for review in the Oregon Supreme Court seeking review on the basis that (1) the PCR court's written judgment was not sufficiently detailed as required by state law, (2) the PCR court erred by applying a preponderance of the evidence standard, and (3) defense counsel was ineffective by failing to timely object to the admission of the CARES tapes. Pet'r's Exs. (ECF No. 58), Ex. 2002 at 11-12. Marquez filed a *pro se* supplemental petition, seeking review on grounds related to PCR counsel's performance and the use of a security device at trial. Resp't Ex. 156 at 6-7. The Oregon Supreme Court denied review. 301 Or. 885 (2017).

In the instant proceeding, Marquez alleges that (1) he received ineffective assistance of trial and appellate counsel in multiple particulars, (2) the trial court erred by failing to instruct the jury that its verdict must be unanimous, and (3) the trial court committed several additional errors at trial and sentencing that violated his right to due process. Pet'r's Pet. at 19-21.

DISCUSSION

I. Procedurally Defaulted Claims

Generally, a state prisoner must exhaust all available state court remedies either on direct appeal or through collateral proceedings before a federal court may consider granting habeas corpus relief. 28 U.S.C. § 2254(b)(1); *Dickens v. Ryan*, 740 F.3d 1302, 1317 (9th Cir. 2014). "[A] petitioner satisfies the exhaustion requirement by fairly presenting the federal claim to the

appropriate state courts . . . in the manner required by the state courts, thereby afford[ing] the state courts a meaningful opportunity to consider allegations of legal error." *Casey v. Moore*, 386 F.3d 896, 915-16 (9th Cir. 2004) (internal quotation omitted); *Baldwin v. Reese*, 541 U.S. 27, 29 (2004). A fair presentation requires the petitioner to reference both the specific federal constitutional guarantee at issue and the facts that support his claim. *Dickens*, 740 F.3d at 1317 (*quoting Gray v. Netherland*, 518 U.S. 152, 162-63 (1996)). The presentation of a federal claim "for the first and only time in a procedural context in which its merits will not be considered unless there are special and important reasons" for doing so does not satisfy the exhaustion requirement. *Castille v. Peoples*, 489 U.S. 346, 351 (1989); *Casey*, 386 F.3d at 917.

A claim that was not, and can no longer be, fairly presented in state court is procedurally defaulted. *O'Sullivan v. Boerckel*, 526 U.S. 838, 848 (1999); *Smith v. Baldwin*, 510 F.3d 1127, 1139 (9th Cir. 2007). A state prisoner is barred from raising procedurally defaulted claims in federal court unless he "can demonstrate cause for the default and actual prejudice as a result of the alleged violation of federal law or demonstrate that failure to consider the claims will result in a fundamental miscarriage of justice." *Coleman v. Thompson*, 501 U.S. 722, 750 (1991); *Smith*, 510 F.3d at 1139.

A. Ground One, Subparts B through D

Marquez alleges in ground one, subparts B through D, that the trial court violated his right to due process by (1) overruling defense counsel's "relevance objection" to a question posed to Ibarra-Chacon, (2) imposing a sentence of lifetime post-prison supervision "minus time served," and (3) sustaining the prosecution's "speculation objection" to a question posed to Ibarra-Chacon. Marquez raised those grounds in his *pro se* supplemental brief on direct appeal and in his petition for review. *See* Resp't Exs. 111 & 113.

However, Marquez procedurally defaulted the grounds because he did not preserve them for appeal by raising them at trial as required by OR. R. APP. P. 5.45(1) (providing that the court of appeals will not review a claim of error unless it was preserved in the trial court but may in its discretion consider plain error). Resp't Resp. (ECF No. 28) at 7. He therefore presented ground one, subparts B through D to the Oregon appellate courts "for the first and only time in a procedural context in which [the] merits [would] not be considered unless there [were] special and important reasons" for doing so. *See Castille*, 489 U.S. at 351; *see also State v. Nordholm*, 293 Or. App. 369, 374 (2018) (holding that plain error review is reserved for rare and exceptional cases). Marquez does not contend otherwise, nor does he argue that his procedural default should be excused based on a showing of cause and prejudice or to prevent a fundamental miscarriage of justice. Accordingly, habeas relief is precluded as to ground one, subparts B through D.

B. Ground Three, subparts A and C-N, and Ground Four

In Marquez's third ground for relief, he alleges that trial counsel was constitutionally ineffective. The ground contains fourteen subparts. In ground four, he alleges ineffective assistance of appellate counsel with three subparts. Respondent argues that, with the exception of ground three, subpart B, Marquez procedurally defaulted his available state remedies by failing to raise the claims on appeal from the denial of PCR relief. Marquez does not contend otherwise.

This Court agrees that Marquez procedurally defaulted his ineffective assistance of trial counsel claims, with the exception of ground three, subpart B, by failing to raise them in his counseled and *pro se* supplemental petitions for review to the Oregon Supreme Court on appeal from the denial of post-conviction relief. Because the time for seeking review by the Oregon Supreme Court has expired, the claims are procedurally defaulted. Marquez does not contend

that his procedural default should be excused based on a showing of cause and prejudice or to prevent a fundamental miscarriage of justice. Accordingly, habeas relief is precluded as to ground three, subparts A and C-N.

Marquez also failed to raise his ineffective assistance of *appellate* counsel claims on appeal from the denial of post-conviction relief. Marquez does not argue otherwise, and he has not demonstrated that his procedural default should be excused. Accordingly, habeas relief is precluded as to ground four.

II. The Merits

Pursuant to 28 U.S.C. § 2254(d), a district court shall not grant a petition for writ of habeas corpus filed by a state prisoner, with respect to any claim that was adjudicated on the merits in state court, unless the adjudication resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established federal law, or resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented. *Harrington v. Richter*, 562 U.S. 86, 100 (2011). A state court unreasonably applies clearly established federal law under § 2254(d)(1), if its decision is so lacking in justification that there is an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement. *Id.*; *Woods v. Sinclair*, 764 F.3d 1109, 1121 (9th Cir. 2014).

"For relief to be available under § 2254(d)(2), the state court's factual determination must have been 'not merely wrong' but '*objectively* unreasonable.'" *Pearce v. Nooth*, 743 F. App'x 804, 806 (9th Cir. 2018) (quoting *Hibbler v. Benefetti*, 693 F.3d 1140, 1146 (9th Cir. 2012)) (emphasis in original). When determining whether a state court's decision is based on an unreasonable determination of the facts, this Court must accord the state court decision substantial deference. *Brumfield v. Cain*, 135 S. Ct. 2269, 2277 (2015). This deference, however,

"'does not imply abandonment or abdication of judicial review' and 'does not by definition preclude relief.'" *Pearce*, 743 F. App'x at 806 (quoting *Miller-El v. Cockrell*, 537 U.S. 322, 340 (2003)).

A. Ineffective Assistance of Counsel (Ground Three, Subpart B)

In *Strickland v. Washington*, 466 U.S. 668, 687-88, 694 (1987), the Supreme Court held that in order to prevail on an IAC claim, a habeas petitioner must prove that counsel's performance fell below an objective standard of reasonableness, and there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. When considering an IAC claim, this Court's scrutiny of counsel's performance is highly deferential, and the Court "'must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance.'" *Knowles v. Mirzayance*, 556 U.S. 111, 124 (2009) (*quoting Strickland*, 466 U.S. at 689); *Richter*, 562 U.S. at 104.

To satisfy the prejudice prong of *Strickland*, a petitioner "must demonstrate '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.'" *Richter*, 562 U.S. at 104 (*quoting Strickland*, 466 U.S. at 694); *Hernandez v. Chappell*, 923 F.3d 544, 551 (9th Cir. 2019). To make this assessment, this Court must "compare the evidence that actually was presented to the jury with the evidence that might have been presented to the jury had counsel acted differently." *Hernandez*, 923 F.3d at 551 (internal quotations omitted). "[A] verdict or conclusion only weakly supported by the record is more

likely to have been affected by errors than one with overwhelming record support." *Strickland*, 466 U.S. at 696.[2]

Marquez contends that trial counsel was ineffective for failing to timely object to the admission of the CARES tapes on the ground that the state did not intend to call Goldstien to testify, "leading to the playing of the tapes for the jury without any opportunity to cross examine Goldstein [sic] about her interview techniques and the complainant's changing accusations against Mr. Marquez, all to Mr. Marquez's prejudice." Pet'r's Br. in Supp. (ECF No. 49) at 2. Marquez argues that TA's statements concerning the sexual abuse changed over time and that the opportunity to cross examine Goldstien "would have been of great value." *Id.* at 5.

According to Marquez, if Goldstien had been called as a witness, she "would have had to admit familiarity with the CARES' interviewing rules, she would have had to acknowledge that biased, leading questioning increases the risk that a young sex abuse victim will embellish, and she would have had to admit that between the first CARES interview (when TA denied any penetration) and the second CARES interview (when TA claimed Marquez digitally penetrated and raped her) TA had been subjected to the kind of biased and leading questioning the CARES interviewing rules were designed to avoid." Pet'r's Supp. Br. (ECF No. 63) at 2. Marquez concludes that habeas relief is warranted under § 2254(d)(2) because the PCR court's decision is based on two unreasonable determinations of fact:

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[2] This Court may address the prejudice prong of *Strickland* without first deciding if counsel's performance was deficient because the petitioner must establish both deficient performance and prejudice to be entitled to habeas relief. *Villafuerte v. Stewart*, 111 F.3d 616, 630 (9th Cir. 1997); *Gentry v. Sinclair*, 705 F.3d 884, 889 (9th Cir. 2013) (holding that the failure to meet either *Strickland* prong is fatal to a claim and there is no requirement that a court address both prongs).

> 1. The first unreasonable factual determination is the implicit acceptance of defense counsel's assertion that he did not know that the state didn't intend to call Goldstien when he initially failed to object to the introduction of the tapes; and
>
> 2. While the post-conviction court's ultimate decision is that the failure to object didn't prejudice Marquez, that conclusion is also an unreasonable determination of the facts, since it rests on trial counsel's false premise and is unsupported in the record.

Pet'r's Br. in Supp. at 12-13.[3]

The state record reflects that the CARES tapes were admitted into evidence, without objection, at the conclusion of Detective Duncan's direct testimony. Resp't Ex. 106 at 137. Defense counsel did not raise an objection to the admission of the tapes until the state expressed its intent to play the tapes for the jury the following day. Resp't Ex. 107 at 11-12. The trial court denied defense counsel's belated objection to the evidence as follows:

> MR. HUSEBY: I -- Your Honor, I would make an objection to the CARES tape being -- being played on -- on these grounds.
>
> THE COURT: Wait a minute, it's already -- it's already been received into evidence, hasn't it?
>
> MR. BARTON: It has.
>
> MR. HUSEBY: It has. Well, okay, I -- I would be object[ing] to it being played on the grounds, and I think – and I wasn't entirely sure . . . who the State was intending on calling, but

[3] Marquez also argues that the PCR court's decision is contrary to *Strickland v. Washington*, 466 U.S. 668, 687-88, 694 (1987) because the PCR court used a preponderance of the evidence standard. Pet'r's Br. in Supp. at 14-15. A fair reading of the PCR decision is that the court applied a preponderance standard to the underlying facts, not to its application of *Strickland*. *See Mariano-Santos v. Blacketter*, 266 F. App'x 593, 594 (9th Cir. 2008) (distinguishing between a PCR court's application of the preponderance standard to underlying facts and its application of *Strickland*); *Bletson v. Belleque*, No. 3:09-cv-01057-BR, 2012 WL 4324915, *12, n. 1 (D. Or. Sept. 19, 2012) (collecting district court cases rejecting the argument that the PCR court applied a preponderance of the evidence standard in its application of *Strickland*).

> it's my belief that Kimberly, I think it's Goldstein [sic], who is the interviewer in this case, I think there's probably going to be testimony that it's because of this interview, and how well it was done, and -- the training that they received, that the jury should trust this interview as -- as being reliable.
>
> I believe my client has a right to confront that witness, Kimberly Goldstein [sic], and -- and without her -- her presence at the trial I do not think that the CARES tape, in which she is asking questions, and -- and doing things which I imagine Deborah Munson [is] going to describe . . . are acceptable . . . and good for interviewing children. Without her presence at the trial I think it . . . violates my client's confrontation right.
>
> THE COURT: Okay. And, Mr. Barton, do you want to make a record?
>
> MR. BARTON: The evidence has already been received, the defense did not object. The State has a right to play evidence for the jury that's already been received. It does not violate any confrontation rights. I'll lay a foundation that indicates that the people at CARES work as a team, that Deborah Munson was present when the tape was made, she's appeared also to authenticate what was present in the tape, and can certainly do that.
>
> And she can talk about the things that have already – and I want to refer back to the record our pretrial discussion about CARES, and about the – the reasons [why] that we're calling Deborah Munson to testify, we already had that discussion before the trial.
>
> So, I think for all those reasons that I've already mentioned earlier, and for what I just mentioned now, certainly we can play the CARES tapes, it's already in evidence.
>
> THE COURT: Okay. The defendant's motion is denied on that issue.

Resp't Ex. 107 at 12-13. At the conclusion of Munson's testimony, defense counsel unsuccessfully renewed his objection. *Id.* at 150.

At the state PCR proceeding, defense counsel explained that he did not raise a timely objection to the CARES tapes because when the tapes were admitted he believed that the State planned to call Goldstien as a witness. Resp't Ex. 145 at 2. He also opined that Goldstien's

testimony might not have been helpful to this defense. *Id.* The PCR court denied Marquez's IAC claim, concluding that Marquez failed to demonstrate that he was prejudiced by counsel's omission. The PCR court reasoned:

> I guess the interviewer could have been cross-examined. Defense counsel again in the affidavit 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't Ex. 147 at 14-15.

This Court agrees with Marquez's assertion that there are multiple references in the state court record indicating that defense counsel was forewarned (prior to the admission of the CARES tapes) that the state did not intend to call Goldstien as a witness. *See* Resp't Ex. 137 (witness list omitting Goldstien as a witness); Resp't Ex. 106 at 27 (omitting Goldstien from the list of potential witnesses read during *voir dire*); Resp't Ex. 106 at 91 (prosecution's opening statement omitting Goldstien from list of witnesses the state intends to call). However, this Court rejects Marquez's assertion that the PCR court "implicitly" accepted Huseby's attestation to the contrary. Rather, the PCR court clearly premised its decision on the prejudice prong of *Strickland*, *i.e.*, that Marquez did not demonstrate that he suffered prejudice as a result of counsel's failure to make a timely objection.

Similarly, this Court rejects Marquez's assertion that the PCR court's conclusion that he failed to demonstrate he suffered prejudice "rests on trial counsel's false premise and is unsupported by the record." On the contrary, there was overwhelming evidence in the state record to support the PCR court's decision. Although TA's disclosures 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, 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 Ibarra-Chacon 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 Ibarra-Chacon's sons testified they saw him go into a room alone with TA on at least two occasions.

Further, Marquez's description of his hallucination during the sexual abuse was unsupported by any psychological testimony to lend it credence. His testimony that he was drunk was contradicted by Detective Duncan's testimony that he did not seem impaired when she interviewed him. A reasonable juror could conclude that Marquez's grave remorse and his request that Duncan "put a bullet in his head" is indicative of his guilt. At bottom, Marquez's assertion that he suffered prejudice is premised on double speculation, *i.e.*, that there is a reasonable probability that a timely objection based on confrontation grounds would have been granted, and that Goldstien's testimony would have been helpful to the defense and resulted in a different outcome. *See Lopez v. Ryan*, 678 F.3d 1131, 1138 (9th Cir. 2012) (rejecting petitioner's argument as a "double layer of hypothetical speculation").

Based on the foregoing, this Court concludes that Marquez has failed to demonstrate that the state court's rejection of his IAC claim is contrary to, or an unreasonable application of clearly established federal law, or that it is based on an unreasonable determination of the facts based on the evidence presented. See 28 U.S.C. § 2254(d)(1) & (2). The Court therefore denies habeas relief on ground three, subpart B.

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B. Constitutionality of Sentence (Ground One, Subpart A)

Pursuant to OR. REV. STAT. § 137.700(2)(b)(D) and (F), a court must impose a mandatory determinate 300-month sentence for the crimes of rape in the first degree and sexual penetration in the first degree. Marquez argues that "[t]he penalty mandated by ORS 137.700(2)(b)(D) and (F) when applied to first-time offenders is disproportionate to the offenses of . . . rape and unlawful sexual penetration of a child under 12 years of age." Pet'r's Br. in Supp. at 8. In support of his argument, Marquez notes that the 300-month sentence exceeds the sentences specified in Oregon for manslaughter in the first degree, attempted aggravated murder, and conspiracy or solicitation to commit aggravated murder. *Id.* at 9.

A sentence for a term of years that is grossly disproportionate to the crime violates the Eighth Amendment. *Lockyer v. Andrade*, 538 U.S. 63, 72 (2003). The Supreme Court has recognized that the precise contours of the "gross disproportionality principle" are "unclear, [and] applicable only in the 'exceedingly rare' and 'extreme' case." *Lockyer*, 538 U.S. at 73, 77; *Graham v. Florida*, 560 U.S. 48, 60 (2010). When determining whether a sentence is grossly disproportionate, this Court considers the gravity of the offense and the severity of the sentence. *Graham*, 560 U.S. at 60; *Taylor v. Myles*, 747 F. App'x 601, 601 (9th Cir. 2019); *see Dixie v. Harrington*, 756 F. App'x 750, 751 (9th Cir. 2019) (explaining that a habeas court need not "perform intra-jurisdictional and inter-jurisdictional" comparison analyses of sentences absent an inference of gross disproportionality).

Marquez was convicted of raping TA on two occasions when she was under the age of twelve and three instances of sexual penetration in the first degree. Marquez's crimes were committed against a young and vulnerable victim trust in his care. Based on the gravity of Marquez's conduct (taking into account that he is a first-time offender), he has not made a

threshold showing of disproportionality. This Court rejects Marquez's assertion that his 300-month sentence is the functional equivalent of a death sentence. *See Coker v. Georgia*, 433 U.S. 584, 592 (1977) (holding that death sentence for the rape of an adult woman violates the Eighth Amendment). Accordingly, the state court's rejection of his Eighth Amendment claim is neither contrary to, nor an unreasonable application, of clearly established federal law.[4]

C. Non-Unanimous Verdict (Ground Two)

In his second ground for relief, Marquez alleges that the trial judge's refusal to instruct the jury that it must return a unanimous verdict violated his right to proof beyond a reasonable doubt guaranteed by the Sixth and Fourteenth Amendments. Marquez argues that this Court should order a new trial or, in the alternative stay consideration of this ground pending the U.S. Supreme Court's decision in *Ramos v. Louisiana*, No. 18-5925. This Court grants Marquez's request to stay consideration of this ground pending the Supreme Court's decision in *Ramos*.

CONCLUSION

Based on the foregoing, this Court DENIES Marquez's Habeas Petition (ECF No. 2) as to grounds one and three, with prejudice. Ground two is held in abeyance pending the Supreme Court's decision in *Ramos*. Marquez shall advise the Court when the Supreme Court issues its

[4] Judges of this Court have rejected similar claims that a 300-month sentence for the first degree rape or sodomy of a child violates the Eighth Amendment. *See Galindo v. Cain*, No. 2:17-cv-00105-MO, 2019 WL 2746722, at *6 (D. Or. July 1, 2019) (holding that 300-month sentence for first degree sodomy of a four-year-old girl did not violate clearly established federal law), *appeal docketed*, No. 19-35560 (9th Cir. July 2, 2019); *Spradlin v. Nooth*, No. 2:15-cv-00118-SU, 2017 WL 2532229, at *7 (D. Or. Mar. 6, 2017) (holding that 300-month sentence for the first degree rape and sodomy of eight-year-old girl does not violate clearly established federal law), *report and recommendation adopted*, 2017 WL 2531942 (June 8, 2017); *Seaton v. Nooth*, No. 2:14-CV-00183-ST, 2015 WL 7731428, at *6-7 (D. Or. Sept. 30, 2015) (holding that 300-month sentence for the rape and sexual assault of a twelve-year-old girl did not violate clearly established federal law), *report and recommendation adopted*, 2015 WL 7722406 (D. Or. Nov. 30, 2015).

decision. Marquez's request for an evidentiary hearing is DENIED because the record in this case is sufficiently developed to resolve the issues before the Court.

IT IS SO ORDERED.

DATED this 6th day of March, 2020.

KARIN J. IMMERGUT
United States District Judge

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

HUGO F. MARQUEZ, Petitioner, v. **BRANDON KELLY,** Respondent.	Case No. 6:17-cv-01978-IM **JUDGMENT**

Based on this Court's Opinion and Order, ECF No. 64, and subsequent Order, ECF No. 82, IT IS ORDERED AND ADJUDGED that Petitioner's habeas petition pursuant to 28 U.S.C. § 2254 is DENIED, and this proceeding is DISMISSED, with prejudice. Further, Petitioner has not made a substantial showing of the denial of a constitutional right, and therefore this Court DENIES a Certificate of Appealability. *See* 28 U.S.C. § 2253(c)(2).

IT IS SO ORDERED.

DATED this 7th day of July, 2021.

Karin J. Immergut
United States District Judge

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UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

HUGO F. MARQUEZ, Petitioner, vs. BRANDON KELLY, Defendant.	No. 6:17-CV-01978-IM NOTICE OF APPEAL

(a) Notice is given to the United States Court of Appeals for the Ninth Circuit that petitioner Hugo F. Marquez appeals from the following:

_____ Conviction only [Fed R Crim P 32(b)];

_____ Conviction and sentence;

_____ Sentence only (18 USC 3742);

✓_____ Order (Specify title, nature and date of entry of the order appealed from): Order denying Petition for Writ of Habeas Corpus Pursuant to 28 U.S.C. §2254 entered on July 7, 2021.

(b) Sentence imposed: 300 months.

(c) Bail status: Petitioner Marquez is currently serving the sentence imposed in this case at the Oregon State Pentitentiary.

Respectfully submitted August 4, 2021

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UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

HUGO F. MARQUEZ, Petitioner/Appellant, vs. BRANDON KELLY, Defendant/Appellee.	No. 21-35630 OR District Court No. 6:17-CV-01978-IM APPELLANT'S MOTION FOR A CERTIFICATE OF APPEALABILITY

Comes now petitioner/appellant Hugo F. Marquez, by and through counsel James F. Halley, and moves for a certificate of appealability pursuant to FRAP 22, Circuit Rule 22-1(d) and 28 U.S.C. §2253(c). As explained below, the court should issue a certificate of appealability on one of the issues Marquez raised in his 2254 petition in the district court, specifically, whether trial counsel was ineffective for failing to timely object to the introduction of two CARES interview tapes on the grounds that

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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 to cross examine Ms. Goldstien about her interview techniques and the complainant's changing accusations against Mr. Marquez, all to Mr. Marquez's prejudice.

A. Timeliness Of This Motion For A Certificate Of Appealability.

When the district court denies a COA in full, a motion for a certificate of appealability may be filed in the Circuit Court within 35 days of the filing of a notice of appeal. Circuit Rule 22-1(d). Here, the District Court issued an opinion and order on March 6, 2020 denying Marquez's claims one and three, and holding his second claim challenging a non-unanimous verdict in abeyance pending the U.S. Supreme Court's decision in *Ramos v. Louisiana*. After the Supreme Court decided *Ramos v. Louisiana*, __ U.S. __, 140 S.Ct. 1390, 206 L.Ed.2d 583 (2020) (non-unanimous jury verdicts violate the 6th and 14th Amendments jury trial right) and then *Edwards v. Vannoy*, __ U.S. __, 141 S.Ct. 1547, 209 L.Ed.2d 651 (2021) (*Ramos* not retroactive on habeas review), the district court issued on order on July 7, 2021 denying Marquez's petition in full, and denying a certificate of appealability. ECF 82.

Marquez filed a timely notice of appeal on August 4, 2021. This motion for a certificate of appealability is timely because it is being filed on September 8, 2021, the 35th day after August 4, 2021.

B. Charges, Convictions and Sentences.

In December 2008, the state accused petitioner Hugo Fabian Marquez (Marquez) of sexual offenses against TA. The indictment charged four counts of sexual

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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). 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, and sentences of 300 months on the unlawful sexual penetration convictions in counts 4, 6, and 8 (pursuant to ORS 137.700(2)(F)), and sentences of 300 months on the rape 1 convictions in counts 11 and 12 (pursuant to ORS 137.700(2)(D). All sentences are concurrent.

C. The Investigation.

The course of the investigation reveals the escalating nature of the allegations against Marquez. At first, it was just an allegation of touching over clothing. Several days later, it was digital penetration. A week after that, it was intercourse.

The investigation began on the night of November 29, 2008. At the time, Marquez lived with Aracely Ibarra-Chacon and her three children, JA (age 11), DA (age 7), and CA (age 3) in a small two bedroom house in Tigard, Oregon. For about three years, Marquez and Ibarra-Chacon had been friends with Wendy A., her significant other Derrick A., and Wendy's two girls TA (age 12) and KA (age 5). Wendy lived across the street for a period of time, and the children would often play in the Ibarra-

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Chacon home, and frequently spent the night there. Even after Wendy's family moved to Vancouver, the families would get together and the children would have sleepovers. Sometimes, when Ibarra-Chacon worked, Marquez would be the sole adult in the home when the five children played. Resp. Ex. 107 at pp. 28:15 – 35:5, testimony of Wendy A.[1]

On November 29, 2008, Wendy's family visited from Vancouver for dinner. Marquez and Derrick played a drinking game, taking shots of tequila, and the children played among themselves. Before Wendy and Derrick left, Ibarra-Chacon saw Marquez give TA a kiss on the lips, which she described as a "peck". She thought that was weird and told Marquez never to do so again. After dinner, Wendy and Derrick left, and Wendy's daughters remained to spend the night. Resp. Ex. 107 at pp. 35:19 – 38:24 (testimony of Wendy A.) and Ex. 107 at pp. 182:10 - 186:16 (testimony of Ibarra-Chacon).

Ibarra-Chacon asked Marquez to make sure the windows and doors were locked as they went to bed. Marquez got up to do so, but took longer than Ibarra-Chacon expected, so she got up to see what was taking so long. When she came into the living room where the children were watching a movie, she saw Marquez with his hand on TA's breast, and the other on the floor near her leg. Ibarra-Chacon testified that she yelled at Marquez, telling him to get out of the house, and that he stood up and said "Oh, I'm so stupid for doing that". Resp. Ex. 107 at 190. He grabbed a blanket and drove from the Tigard home to the office where he worked near the Portland Airport.

[1] The citations in this motion for a certificate of appealability are to the transcripts and exhibits filed in the District Court.

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Ibarra-Chacon called Wendy, who drove back down from Vancouver. Ex. 107 at pp. 186:17 – 190:18.

When Wendy arrived at Ibarra-Chacon's house, she spoke with TA alone in a bedroom. Resp. Ex. 107, Tr. Vol. 4 at 41:5 – 41:22. According to Wendy, TA said that Marquez had touched her that night, and had been doing so every time she came over for as long as she could remember. *Id*. During an examination at Legacy Emanuel Medical Center that night, TA reported that Marquez had touched her on her "pee-pee" and "boob" many times, always when both of them were clothed, and denied any penetration. Resp. Ex. 121 at p. 4 (under seal).

The Portland police found Marquez asleep in his car at his workplace. Resp. Ex. 106 at 111 – 12. Tigard Police Detective Kary Duncan (Duncan) questioned Marquez at the Tigard police station. *Id.* at 111-12. Duncan testified that Marquez initially stated that he did not remember kissing or touching TA, but later admitted to kissing TA, squeezing her breast, and touching her leg. *Id.* at 121-28, 145-46, 149-50. He denied touching TA at any other time. *Id.* at 128, 146-47. Duncan testified that Marquez was remorseful and at the conclusion of the interview he asked her to shoot him in the head. *Id.* at 128-30, 147-49.

TA's accusations then grew over time. When questioned at CARES by Kimberly Goldstien, LCSW on December 2, 2008, she said that Marquez had put his fingers inside her vagina on 5 – 10 occasions since the summer when she was ten years old (2007). *Id*. at 10 and 12. However, the CARES medical examination did not disclose any physical evidence of sexual abuse. *Id*. at 9 and 15; see also Resp. Ex. 107, Tr. Vol.

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4 at p. 78:24 - 83:10 (testimony of CARES employee Deborah Munson, PNP).

On December 8, 2008, when witnesses gathered for the grand jury, Ibarra-Chacon told Wendy that her sons had said that TA had told them she might be pregnant. Wendy then spoke with TA, who said that Marquez had had sex with her. Resp. Ex. 107 at 43:24 – 47:12 (Testimony of Wendy A.). In a second CARES interview by Kimberly Goldstien, LCSW on December 9, 2008, TA said that Marquez had sex with her twice, both in August 2008. Ex. 122.

D. Counsel's Failure to Timely Object to Playing the CARES Interview Tapes Without An Opportunity To Cross Examine The Interviewer Kimberly Goldstien, LCSW.

When the state offered the CARES tapes, defense counsel knew that the state did not intend to call interviewer Kimberly Goldstien, yet still failed to object.

The litigation over evidence from CARES began with a defense motion *in limine* to exclude any testimony of a medical diagnosis of child abuse. Resp. Ex. 131. 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. Resp. Ex. 106 at 9:21 – 12:5. The court denied the motion *in limine*. *Id*. at 16:3 - 18:6. At the time, the defense had the two CARES reports (Resp. Exs. 121 and 122), 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 did not intend to call Goldstien – the state's witness list included Munson, but not Goldstien (Resp. Ex. 137), and before *voir dire* the trial judge recited the names of all of the anticipated witnesses, which included Munson but

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not Goldstien. Resp. Ex. 106 at 27:5 – 27:13.

At the conclusion of Officer Duncan's testimony, who authenticated videotapes of Goldstien's two CARES interviews (trial exhibits 11 and 12), the state offered them. Defense counsel did not object, and the court received them. Resp. Ex. 106 at p. 137:2 – 137:11. It wasn't until the state sought to play the tapes the next day that defense counsel objected, 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. Resp. Ex. 107 at pp. 12:3 – 13:3. The state argued that the exhibit had already been admitted, and that the defense could cross examine Munson. The court overruled the objection. *Id*. at 13:4 – 13:24.

The state played the videotapes at the end of Munson's direct examination (*id*. at pp. 92:10 and 96:8), and the defense cross examination did not go well. *Id*. at pp. 97:13 – 127:32. 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." *Id*. at 97:23 – 97:24. 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". *Id*. at 98:24 – 98:25. 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,

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> 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.'

Resp. Ex. 107 at p. 150:9 – 150:15.

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

E. Trial Counsel's Improbable Declaration.

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. Resp. Ex. 117 at p. 3:17 – 3:19. In response, the state offered and relied on trial counsel's declaration, which read in part:

> 2. At the time the CARES tape was received into evidence, I believed the state planned on calling the CARES interviewer. I made a timely objection within a reasonable period of time after learning the State's actual intention. Based on my previous experience, as well as my observations of the trial court during arguments, I have no reason to believe that the court would have ruled differently if I had made the objection sooner. Moreover, any objection was one I was not entirely sure I wanted the court to grant. If the court had forced the CARES interviewer to testify, she would not have been a favorable witness to the defense. My hope was that the objection, once over ruled, would provide Mr. Marquez with appeal issues.

Resp. Ex. 145, at p. 2:6 – 2:13.

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.

F. Exhaustion.

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Marquez exhausted this ineffective assistance claim. He raised the issue in his state post-conviction petition, and it appears in his opening brief on appeal. Resp. Ex. 149 at pp. 2 and 16 – 26. The Court of Appeals did not address the issue (Resp. Ex. 152), and it appears in Marquez's petition for review, which the Supreme Court denied. Resp. Ex. 154. The District Court did not find it among a number of procedurally defaulted claims (Opinion and Order dated March 6, 2020 at pp. 7 – 10, ECF 64) and addressed it on the merits.

G. Marquez's Argument In the District Court.

Marquez argued that the PCR trial court's determination that trial counsel's decision not to timely object didn't prejudice Marquez rested on two unreasonable factual determinations, and applied the wrong legal standard. Petitioner Marquez's Memorandum In Support Of Habeas Petition; Request For A Hearing at pp. 12 – 15, ECF 49.

Neither the Oregon Court of Appeals or the Oregon Supreme Court addressed whether trial counsel was ineffective for failing to timely object to introduction of the CARES tape, so the post-conviction trial court's determination is the last reasoned decision on the issue and becomes the focus. *Ylst v. Nunnemaker*, 501 U.S. 797, 111 S.Ct. 2590, 115 L.Ed.2d 706 (1991), *Curiel v. Miller*, 830 F.3d 864, 870 (9th Cir. 2016) (en banc).

A court may grant a habeas petition if the challenged state court proceedings "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." 28 U.S.C. §2254(d)(2).

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The first unreasonable factual determination is the implicit acceptance of defense counsel's assertion that he did not know that the state didn't intend to call Goldstien when he initially failed to object to the introduction of the tapes. Resp. Ex. 145 at 2:6 – 2:13 Trial Counsel's Declaration ("[a]t the time that the CARES tape was received into evidence, I believed that the state planned on call[ing] the CARES interviewer").

The failure to timely object occurred when the state offered the tapes at the end of the first witness's testimony. Resp. Ex. 106 at p. 137:2 – 137:11. For two reasons, defense counsel must have known at that time that the state didn't plan to call Goldstien. First, the state produced a witness list that included Munson, but not Goldstien (Resp. Ex. 137). Second, when the court read the names of prospective witnesses before *voir dire*, it identified Munson, but not Goldstien. Concluding that counsel didn't know that the state didn't intend to call Goldstien in these circumstances is contrary to the plain record and is unreasonable.

The Sixth and Fourteenth Amendments to the United States Constitution require that all criminal defendants receive effective assistance of trial counsel. *Strickland v. Washington*, 466 US 668, 687, 104 S Ct 2052, 80 L Ed 2d 674 (1984). A post-conviction petitioner must prove that counsel's performance "fell below an objective standard of reasonableness" to establish ineffective assistance. *Id*. Under the Sixth Amendment, a counsel's ineffectiveness prejudices a petitioner if 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 a probability "sufficient to undermine confidence in the outcome." *Id*. at 694.

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Here, a reasonably competent Oregon criminal defense lawyer would know in 2009 that introduction of a recorded CARES interrogation in circumstances where the complainant interrogatee does not testify violates *Crawford v. Washington*, 541 US 36, 124 S Ct 1354, 158 L Ed 2d 177 (2004). *State v. Norby*, 218 Or. App. 609, 180 P.3d 752 (2008) (introduction of CARES examiner's testimony, without the complainant's testimony, violated *Crawford* confrontation rights); and *State v. Pitt*, 209 Or. App. 270, 147 P.3d 940 (2006) (same). Similarly, a reasonably competent lawyer would recognize the importance of insisting on cross examination of the interrogator.

The post-conviction trial court's ultimate decision that the failure to object didn't prejudice Marquez is also an unreasonable determination of the facts, since it rests on trial counsel's false premise and is unsupported in the record. 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

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counsel at every turn.

Courts may not indulge in *post hoc* rationalizations of trial counsel's decisions that contradict the evidence derived from their actions. *Harrington v. Richter*, 562 US at __, 131 S Ct at 790, 178 L Ed 2d 624 2011); see also *Wiggins v. Smith*, 539 US 510, 526-27, 123 S Ct 2527, 156 L Ed 2d 471(2003) ("[T]he 'strategic decision' the state courts and respondents all invoke to justify counsel's limited pursuit of mitigating evidence resembles more a *post-hoc* rationalization of counsel's conduct than an accurate description of their deliberations…."). Here, the post-conviction trial court reached an unreasonable determination of fact on whether the failure to object to the CARES tape without interrogator Goldstien prejudiced Marquez. The failure to cross examine her 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, at least on those counts, probably would have been different if the defense had been able to cross examine Goldstien.

Finally, since the post-conviction trial court imposed a "preponderance of the evidence" standard on Marquez, its decision is contrary to clearly established federal law. With regard to the Sixth Amendment prejudice standard, the US Supreme Court has expressly stated that a state court errs if it denies an ineffective assistance of counsel claim because a petitioner does not prove prejudice by a "preponderance of evidence." *Williams v. Taylor*, 529 US 362, 405-06, 120 S Ct 1495, 146 L Ed 2d 389 (2000). Rather, the petitioner need only demonstrate a reasonable probability that the result would have been different. *Id.* at 405-06 (O'Connor concurring.)

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G. The District Court Decision Rejecting Marquez's Ineffective Assistance Claim.

The District Court's decision rejecting Marquez's ineffective assistance claim appears at pp. 10 – 16 of its Opinion and Order dated March 6, 2020. ECF 64. The District Court accepted that trial counsel was on notice that the state did not intend to call Goldstien when he failed to object to introduction of the CARES tapes, noting that trial counsel

> was forewarned (prior to admission of the CARES tape) that the state did not intend to call Goldstien as a witness. *See* Resp't Ex. 137 (witness list omitting Goldstien as a witness); Resp't Ex. 106 at 27 (omitting Goldstien from the list of potential witnesses during *voir dire*); Resp't Ex. 106 at 91 (prosecution opening statement omitting Goldstien as a witness).

Opinion and Order dated March 6, 2020 at p. 15, ECF 64.

The District Court concluded defense counsel's attempts to show when cross examining TA's mother Wendy that she tainted TA's recollection paled in comparison to: TA's distress when Ibarra-Chacon witnessed the abuse; evidence that TA's final disclosure was prompted by discovery of a pregnancy test; and evidence of Marquez's time alone with TA while caring for her and the other children. The court went on to remark that it was speculation to conclude there was a reasonable probability that the trial court would have granted a timely objection to the CARES tape without Goldstien's testimony, or to conclude that Goldstien's testimony would have been helpful. Opinion and Order of March 6, 2020 at 15 – 16, ECF 64.

The District Court mistakenly focused on evidence from which a jury might find Marquez guilty – in essence requiring Marquez to show by a preponderance of the evidence that the result would have been different if trial counsel had objected, rather

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than a reasonable probability. TA's distress when Ibarra-Chacon witnessed kissing and touching, Marquez's opportunity to abuse TA while caring for her and the other children, and his obvious remorse during police interrogation are all just as consistent with abuse without penetration as they are with penetration. It certainly isn't speculation to conclude that the trial court would have required the state to call Goldstien – the defense had every right to insist that the state prove the circumstances of the CARES disclosures. Finally, Goldstien would have had to admit the reasons why CARES interviews are conducted pursuant to careful protocols – to avoid the sort of incremental embellishment epitomized by TA's disclosures, which grew from touching, to penetration, to intercourse.

H. Conclusion.

Certainly, "jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000); see also 28 U.S.C. § 2253(c)(2); *Gonzalez v. Thaler*, 565 U.S. 134, 140-41 (2012). Accordingly, it should grant a certificate of appealability and hear this case.

Date: September 8, 2021

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FILED

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

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

HUGO F. MARQUEZ, Petitioner-Appellant, v. BRANDON KELLY, Respondent-Appellee.	No. 21-35630 D.C. No. 6:17-cv-01978-IM District of Oregon, Eugene ORDER

Before: SILVERMAN and CHRISTEN, Circuit Judges.

The request for a certificate of appealability (Docket Entry No. 2) is denied because appellant has not shown that "jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000); *see also* 28 U.S.C. § 2253(c)(2); *Gonzalez v. Thaler*, 565 U.S. 134, 140-41 (2012); *Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003).

Any pending motions are denied as moot.

DENIED.

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UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

HUGO F. MARQUEZ, Petitioner/Appellant, vs. BRANDON KELLY, Defendant/Appellee.	No. 21-35630 OR District Court No. 6:17-CV-01978-IM APPELLANT'S MOTION FOR RECONSIDERATION OF APPELLANT'S MOTION FOR A CERTIFICATE OF APPEALABILITY

Petitioner/appellant Hugo F. Marquez moves for reconsideration of his motion for a certificate of appealability pursuant to FRAP 27 and Circuit Rule 27-10.

Marquez offers as an additional reason for granting his motion for a certificate of appealability that the District Court's denial of his motion for an order pursuant to Sup. Ct. Rule 5(c) directing Respondent Kelly to furnish a missing portion of the trial record, or for an order under Sup. Ct. Rule 6 allowing discovery so that Marquez could

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subpoena the missing item, unfairly handicapped Marquez in making a necessary argument regarding prejudice.

This is an appeal from an order denying a 2254 petition which challenged Marquez's conviction and 300 month sentence in a state court sex offense prosecution. Marquez filed a motion for a certificate of appealability with this Court on September 8, 2021, and the Court denied that motion on January 31, 2022. ECF 2 and 3. On petitioner's motion, the court extended the time for filing motion for reconsideration to April 29, 2022. ECF 4 and 5.

Marquez seeks a certificate of appealability on one of the issues he raised in his 2254 petition, specifically, whether trial counsel was ineffective for failing to timely object to the introduction of two CARES interview tapes on the grounds that the state did not intend to call the CARES examiner to testify, leading to the playing of the tapes for the jury without any opportunity to cross examine the CARES examiner about interview techniques and the complainant's changing accusations against Mr. Marquez, all to Mr. Marquez's prejudice. Marquez contends that he was prejudiced by trial counsel's failure because the CARES examiner could have been examined on the importance of neutral examination of a sex offense accuser, particularly in light of his accuser's expanding story.

Petitioner's motion for a certificate of appealability sets out the procedural history of the state court prosecution and trial, trial counsel's failure to timely object to the introduction of the CARES tape without authenticating testimony from the CARES examiner, and trial counsel's improbable declaration stating reasons for that failure to

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object. (ECF 2, at ¶¶ B, C, D and E). It also reviews Marquez's argument in the District Court as to how that failure prejudiced him, and sets forth reasons why the District Court erred. *Id.*at ¶¶ F and G.

The District Court agreed that trial counsel knew enough to raise a timely objection, but rested its denial of Marquez's petition on a finding that the state PCR trial court properly found that Marquez had failed to show that his trial counsel's failure to object prejudiced him. District Court Opinion and Order, ECF 64 at pp. 15 - 16.

By this motion for reconsideration, Marquez wishes to make one additional argument regarding the District Court's no prejudice finding, specifically that the District Court erred when it denied Marquez's efforts to obtain a copy of the CARES tapes or transcripts. Respondent Kelly did not make the CARES tapes, or a transcript of them, part of the record before the District Court, so Marquez moved in the alternative for an order pursuant to Sup. Ct. Habeas Rule 5(c) directing Respondent Kelly to do so, or to permit discovery pursuant to Sup. Ct. Rule 6 allowing Marquez to serve a subpoena *deuces tecum* calling for production of the CARES tapes. District Court ECF 54 (motion), 56 (opposition) and 60 (reply). Marquez contended in his motion that he was handicapped in making the necessary prejudice showing by the absence of the CARES tape and transcript. The District Court denied the motion. ECF 62.

Marquez contends that it is inherently unfair to deny a habeas petitioner access to information needed to show prejudice on the one hand (as the District Court did here when it denied his motion to supplement the record or for discovery), and then on the other to deny relief on the grounds prejudice has not been shown (as the District Court

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did here when it denied his petition). For that reason, this Court should reconsider the motion for a certificate of appealability and grant it.

Date: April 29, 2022

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UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED

MAY 25 2022

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

HUGO F. MARQUEZ, Petitioner-Appellant, v. BRANDON KELLY, Respondent-Appellee.	No. 21-35630 D.C. No. 6:17-cv-01978-IM District of Oregon, Eugene ORDER

Before: RAWLINSON and NGUYEN, Circuit Judges.

Appellant's motion for reconsideration (Docket Entry No. 6) is denied. *See* 9th Cir. R. 27-10.

No further filings will be entertained in this closed case.