No. _____

IN THE
Supreme Court of the United States

RYAN LAWRENCE ANTHONY,
Petitioner,

v.

GARRETT LANEY,
Superintendent, Oregon State Correctional Institution,
Respondent.

Appendix

NOT FOR PUBLICATION

FILED

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UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

RYAN LAWRENCE ANTHONY, Petitioner-Appellant, v. GARRETT LANEY, Respondent-Appellee.	No. 23-35030 D.C. No. 6:20-cv-00511-JE MEMORANDUM*

Appeal from the United States District Court
for the District of Oregon
Michael H. Simon, District Judge, Presiding

Argued and Submitted December 4, 2023
Portland, Oregon

Before: BERZON, NGUYEN, and MILLER, Circuit Judges.
Partial Concurrence and Partial Dissent by Judge BERZON.

In 2007, following a jury trial in Oregon state court, Ryan Lawrence Anthony was convicted of the 1980 robbery and murders of Ottilia and Casper Volk. He was sentenced to multiple terms of life imprisonment. After unsuccessfully pursuing a direct appeal and an application for post-conviction relief in state court, Anthony filed a petition for a writ of habeas corpus. The

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

district court denied the petition, and Anthony now appeals. We have jurisdiction under 28 U.S.C. §§ 1291 and 2253(a), and we affirm.

We review the district court's judgment de novo. *Panah v. Chappell*, 935 F.3d 657, 663 (9th Cir. 2019). Federal habeas review of a state-court conviction is limited by the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), Pub. L. No. 104-132, 110 Stat. 1214. Under AEDPA, when a claim has been "adjudicated on the merits in State court proceedings," a federal court may grant relief only if the state court's decision "was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States," or "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).

AEDPA prescribes a "highly deferential standard for evaluating state-court rulings," *Lindh v. Murphy*, 521 U.S. 320, 333 n.7 (1997), requiring a petitioner to "show far more than that the state court's decision was 'merely wrong' or 'even clear error,'" *Shinn v. Kayer*, 592 U.S. 111, 118 (2020) (per curiam) (quoting *Virginia v. LeBlanc*, 582 U.S. 91, 94 (2017) (per curiam)). To obtain relief, a petitioner "must show that the state court's decision [was] so obviously wrong that its error lies 'beyond any possibility for fairminded disagreement.'" *Id.* (quoting

Harrington v. Richter, 562 U.S. 86, 103 (2011)); *see Gibbs v. Covello*, 996 F.3d 596, 603 (9th Cir. 2021).

1. Anthony argues that his counsel on direct appeal was constitutionally ineffective because counsel did not appeal the state trial court's denial of his motion to dismiss the indictment based on a 27-year preindictment delay. The state post-conviction court rejected that claim. Under AEDPA, "the question is not whether counsel's actions were reasonable," but rather "whether there is any reasonable argument that counsel satisfied *Strickland*'s deferential standard." *Harrington*, 562 U.S. at 105; *see Strickland v. Washington*, 466 U.S. 668, 689 (1984).

We are unable to say that there is no reasonable argument that counsel satisfied *Strickland*. At the time of Anthony's appeal, Oregon courts required a showing of intentional misconduct to establish a due process violation based on preindictment delay. *See State v. Williams*, 125 P.3d 93, 96 (Or. 2005). Although Oregon later adopted a more permissive standard, even that standard requires a defendant to "show that . . . the government culpably caused the delay." *State v. Stokes*, 350 Or. 44, 64 (2011). Anthony challenges the trial court's finding that the delay was not caused by negligence on the part of the state, but we disagree that the finding was objectively unreasonable. The state post-conviction court

reasonably concluded that "[a]ppellate counsel made a reasonable decision to not raise the issue on appeal" because it had a low likelihood of success.

2. At trial, the court prevented Anthony from presenting testimony from William Jackson that a third party, Gary Smith, had confessed to the murders. Anthony argues that the exclusion of Smith's out-of-court statements violated his due-process rights under *Chambers v. Mississippi*, 410 U.S. 284 (1973). In *Chambers*, a defendant charged with murder presented the testimony of a third party, McDonald, who had signed a confession in which he admitted to killing the victim. *Id.* at 287–88. When McDonald repudiated his confession, Chambers sought to present the testimony of three witnesses to whom McDonald had admitted the crime. *Id.* at 288–89. The trial court refused, relying on "a Mississippi common-law rule that a party may not impeach his own witness." *Id.* at 295. The Supreme Court held that the trial court violated the Due Process Clause because a "hearsay rule may not be applied mechanistically to defeat the ends of justice." *Id.* at 302. The Court explained that "[t]he hearsay statements . . . were originally made and subsequently offered at trial under circumstances that provided considerable assurance of their reliability" because, among other things, each one was "made spontaneously to a close acquaintance shortly after the murder had occurred" and was "corroborated by some other evidence in the case." *Id.* at 300.

Here, the state post-conviction court did not "mechanistically" apply a hearsay rule. *Chambers*, 410 U.S. at 302. Rather, it applied a rule under which statements against penal interest may be introduced if "corroborating circumstances clearly indicate the trustworthiness of the statement," *State v. Anthony*, 270 P.3d 360, 361 (Or. App. 2012) (quoting *State v. Cazares-Mendez*, 256 P.3d 104, 108 (Or. 2011)), and it determined, based on its examination of the record, that Smith was "singularly untrustworthy," *id.* In reaching that conclusion, the court emphasized that Smith's testimony was "disjointed and evasive," that "his supposed 'confession' to Jackson . . . was far from detailed," and that "nothing in the circumstantial evidence that defendant cites to bolster the theory that Smith was the perpetrator, and hence that Smith's 'confession' was trustworthy, prove[s] anything of the sort." *Id.* at 361–62.

Without necessarily endorsing all of the state court's reasoning, we have no difficulty concluding that the court did not unreasonably apply *Chambers*. Although repeated, Smith's supposed confession was indeed "far from detailed." *Anthony*, 270 P.3d at 362. On one occasion, he said simply that he "did a job in Lake Oswego," and on another, that "[m]e and Atherton did that one" while riding motorcycles. Anthony emphasizes that some witnesses saw motorcycles parked near the victims' house and that others saw two men near (although not at) the house on the night of the murders. That is a far cry from the level of corroboration

that was present in *Chambers*, which included testimony "that McDonald was seen with a gun immediately after the shooting"; evidence "of [McDonald's] prior ownership of a .22-caliber revolver," the weapon used in the shooting; and, most critically, "the testimony of an eyewitness to the shooting" who identified McDonald as the shooter. 410 U.S. at 300. Whether or not we would reach the same result on de novo review, we cannot say that the state court's application of *Chambers* was "so obviously wrong that its error lies 'beyond any possibility for fairminded disagreement.'" *Shinn*, 592 U.S. at 118 (quoting *Harrington*, 562 U.S. at 103).

AFFIRMED.

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U.S. COURT OF APPEALS

Anthony v. Laney, No. 23-35030

BERZON, Circuit Judge, concurring in part and dissenting in part:

I concur in the majority's decision on the question of preindictment delay. I write separately because, unlike the majority, I would hold that excluding evidence of Gary Smith's confessions violated Ryan Lawrence Anthony's constitutional right to present a defense. I therefore dissent.

Our constitution guarantees criminal defendants "the right to a fair opportunity to defend against the State's accusations." *Chambers v. Mississippi*, 410 U.S. 284, 294 (1973); *see also Gable v. Williams*, 49 F.4th 1315, 1329 (9th Cir. 2022). "Few rights are more fundamental than that of an accused to present witnesses in his own defense." *Chambers*, 410 U.S. at 302. *Chambers* held that excluding evidence of a third party's confessions and precluding the defendant from cross-examining the third party can deprive the defendant of a fair trial. *Id*. at 300–02. The Supreme Court explained in *Chambers* that the hearsay confessions the defendant was precluded from introducing "were originally made and subsequently offered at trial under circumstances that provided considerable assurance of their reliability" because (1) the confessions were made "spontaneously to a close acquaintance shortly after the murder"; (2) the confessions were "corroborated by some other evidence in the case"; and (3) "each confession [] was in a very real sense self-incriminatory and unquestionably

against interest." *Id*. at 300–01. Thus, where the state court rejects defense evidence that has "persuasive assurances of trustworthiness" and is "critical" to the defense, excluding the evidence on hearsay grounds unconstitutionally deprives the defendant of a fair trial. *Id*. at 302.

Anthony was precluded from introducing the testimony of William Jackson, a former close criminal associate of Smith's, who told police that Smith confessed to the murders on two occasions. In my view, the state court's reasons for rejecting Anthony's *Chambers* claim were inconsistent with or unreasonably misapplied *Chambers* and also reflected an unreasonable determination of the facts. *See* 28 U.S.C. § 2254(d) ("AEDPA"). Evidence of Smith's confessions was undoubtedly critical to Anthony's defense, and the confessions were sufficiently corroborated. I therefore conclude that Anthony's constitutional right to present a complete defense was violated.

1. In affirming the exclusion of the evidence, the Oregon Court of Appeals unreasonably relied on the fact that at the time of the 2007 pre-trial hearing, Smith "was a self-confessed serial killer, serving five consecutive life sentences," as a reason to exclude testimony about Smith's confessions. *State v. Anthony*, 247 Or. App. 582, 585–86 (2012). When Smith first confessed to Jackson in 1980, he was not in custody nor was he a convicted killer.

Further, the fact that Smith was a "self-confessed serial killer" made his

earlier confessions *more* credible, not less. Smith was a serial killer active in the same geographic area during the relevant time; he committed multiple random home invasion burglary-murders that summer in the Portland and southern Washington areas, some of which involved elderly victims. In some instances, Smith stabbed his victims to death. That Smith was committing similar crimes in the same area during the same time period as the murders with which Anthony was charged significantly tended to corroborate Smith's confession. The state court's elision of this central factor in evaluating whether Smith's confession was sufficiently reliable was an unreasonable application of *Chambers*, as well as an unreasonable determination of the facts. *See* 28 U.S.C. § 2254(d).

Moreover, a third party suspect who has confessed to murder will always, by definition, be a "confessed [] killer." *Anthony*, 247 Or. App. at 585. If the fact that someone is a confessed killer makes their statements "singularly untrustworthy," then no *Chambers* claim could ever succeed. For example, the hearsay murder confessions at issue in *Chambers*, *Gable*, and *Cudjo v. Ayers*, 698 F.3d 752 (9th Cir. 2012), were all made by confessed murderers, yet their confessions were deemed reliable enough that they should have been presented to a jury. *See Chambers*, 410 U.S. at 288–89, 302–03; *Gable*, 49 F.4th at 1327, 1330; *Cudjo*, 698 F.3d at 756, 766-68.

2. In addition to failing to recognize the significantly corroborative value of

the fact that Smith was a serial killer who was committing similar crimes during the relevant time period, the Oregon Court of Appeals did not recognize that his confessions were corroborated in several other key respects. For example, the state court did not acknowledge that Smith confessed on more than one occasion. The state court decision refers only to one "confession," in the singular, *Anthony*, 247 Or. App. at 585–86, but Smith confessed at least twice: once days after the murder, and a second time nine months later. Although multiple confessions are not required for a *Chambers* claim to succeed, *see, e.g.*, *Cudjo*, 698 F.3d at 756, the "number of independent confessions . . . provide[s] additional corroboration for each," *Chambers*, 410 U.S. at 300.

In addition, the state court did not take into account that Smith's first confession – that he committed the murders with a man named Keith Atherton – was made in Atherton's presence. Rather than deny Smith's statement at the time it was made, Atherton responded by "ask[ing] him to be quiet." Atherton's failure to deny Smith's statement tended to corroborate the confession.

The state court also did not consider that when Smith first confessed, days after the murder, he had money on him, which was what prompted Jackson to ask him where he got the money from. The evidence that the victims' wallets were both empty tends to corroborate Smith's confession.

Further, Smith's second confession indicated that he was riding his

motorcycle at the time he and Atherton came upon the victims' house and committed the murders. This detail is consistent with evidence that on the day of the murders as well as the day afterward, witnesses saw two motorcycles parked across the street from the victims' residence. One of the motorcycles had a similar color, engine size, and front panel to Smith's motorcycle.[1] Although the state court noted that two motorcycles were seen near the victims' residence, the court failed to acknowledge that this evidence provided corroboration of Smith's second confession, or that the witness reports indicated that one of the motorcycles shared similar characteristics to Smith's. *See Anthony*, 247 Or. App. at 585–86.[2]

Smith's admission that he and Atherton committed the murders was also consistent with eyewitness testimony that on the night of the murders, around 10:20 pm, *two* men, conspicuously dressed in black hooded coats on a warm summer night, were in the Safeway parking lot directly across from the victims' residence, walking toward their house. Although the state court acknowledged this testimony, the court did not acknowledge that the sighting of two men headed toward the victims' house matched Smith's account that he committed the murder with Atherton.

3. The state court also erred in rejecting Jackson's testimony about Smith's

[1] Smith used his motorcycle as transportation in at least one other home invasion burglary-murder the same summer.

[2] Anthony did not own a motorcycle at the time.

confessions based on Smith's lack of credibility as a witness at the 2007 pretrial hearing. *See Anthony*, 247 Or. App. at 585–86. Smith's quality as a witness in 2007 was not pertinent. It was Jackson whose testimony Anthony sought to admit, and Jackson's testimony concerned statements Smith had made more than two decades earlier. Further, Smith's availability as a witness weighed in favor of admitting Jackson's testimony. If Smith were called to the stand, the jury could evaluate for itself whether it believed Smith's later disavowal of his confessions; if Smith's testimony was "disjointed and evasive," *Anthony*, 247 Or. App. at 585, that could, if anything, undermine the credibility of his recantation.

The state court's reliance on Smith's lack of credibility as a live witness was contrary to *Chambers*, which makes clear that it is the *jury*'s role to evaluate the credibility of witnesses. 410 U.S. at 301. *Chambers* explained that the hearsay rule excludes out-of-court statements because "they are usually not made under oath or other circumstances that impress the speaker with the solemnity of his statements; the declarant's word is not subject to cross-examination; and he is not available in order that his demeanor and credibility may be assessed by the jury." 410 U.S. at 298. But where, as here and as in *Chambers*, the individual who allegedly confessed *is* available as a witness, the individual may be examined under oath and "his demeanor and responses weighed by the jury." *Id.* at 301. *See also Cudjo*, 698 F.3d at 763 ("Supreme Court precedent makes clear that questions

of credibility are for the jury to decide."); *id*. at 768 n.6 ("the Supreme Court requires credibility questions be left to the jury").

* * *

I do not address prejudice in detail because the majority does not reach the issue. In my view, the question is quite close, given the strength of the prosecution's case. But AEDPA deference is inapplicable to the prejudice question because the state court did not conduct a harmless error analysis. *See Cudjo*, 698 F.3d at 768. Evidence that a serial killer who was later convicted of other, similar murders in the same vicinity in the same time frame twice confessed to the murders at issue here may well have raised a reasonable doubt as to Anthony's innocence. On balance, I am inclined to harbor a "grave doubt" as to whether the exclusion of the evidence was likely to have substantially influenced the jury's verdict. *Kotteakos v. United States*, 328 U.S. 750, 765 (1946); *see Brecht v. Abrahamson*, 507 U.S. 619, 623, 637-38 (1993).

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

RYAN LAWRENCE ANTHONY, Petitioner, v. **GARRETT LANEY**, Respondent.	Case No. 6:20-cv-511-JE **JUDGMENT**

Michael H. Simon, District Judge.

Based on this Court's ORDER adopting the Findings and Recommendation of the U.S. Magistrate Judge,

IT IS ADJUDGED that this case is DISMISSED with prejudice. The Court, however, GRANTS a Certificate of Appealability on Petitioner's due process claims based on the exclusion of out-of-court statements and on ineffective assistance of appellate counsel for failing to appeal preindictment delay.

DATED this 13th day of December, 2022.

/s/ *Michael H. Simon*
Michael H. Simon
United States District Judge

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

RYAN LAWRENCE ANTHONY, Petitioner, v. **GARRETT LANEY**, Respondent.	Case No. 6:20-cv-511-JE **ORDER**

Michael H. Simon, District Judge.

United States Magistrate Judge John Jelderks issued a Findings and Recommendation (F&R) in this case on September 20, 2022. Judge Jelderks recommended that this Court deny Petitioner's Petition for Writ of Habeas Corpus, dismiss this case with prejudice but granting a Certificate of Appealability on Petitioner's claims of due process claim violation based on the exclusion of out-of-court statements and ineffective assistance of counsel based on the failure to appeal preindictment delay.

Under the Federal Magistrates Act (Act), the Court may "accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate." 28 U.S.C. § 636(b)(1). If a party objects to a magistrate judge's findings and recommendations, "the court

shall make a de novo determination of those portions of the report or specified proposed findings or recommendations to which objection is made." *Id.*; Fed. R. Civ. P. 72(b)(3). For those portions of a magistrate judge's findings and recommendations to which neither party has objected, the Act does not prescribe any standard of review. *See Thomas v. Arn*, 474 U.S. 140, 152 (1985) ("There is no indication that Congress, in enacting [the Act], intended to require a district judge to review a magistrate's report to which no objections are filed."); *United States. v. Reyna-Tapia*, 328 F.3d 1114, 1121 (9th Cir. 2003) (en banc) (holding that the court must review de novo magistrate judge's findings and recommendations if objection is made, "but not otherwise"). Although absent objections no review is required, the Act "does not preclude further review by the district judge[] sua sponte . . . under a de novo or any other standard." *Thomas*, 474 U.S. at 154. Indeed, the Advisory Committee Notes to Fed. R. Civ. P. 72(b) recommend that "[w]hen no timely objection is filed," the Court review the magistrate judge's recommendations for "clear error on the face of the record."

Petitioner Ryan Lawrence Anthony (Anthony) timely filed an objection to the F&R, raising several allegations of error. ECF 74. Anthony first objects to the F&R's analysis on Anthony's claim that due process required that Anthony be allowed to present evidence of third-party guilt at trial. Anthony primarily relies on the recent Ninth Circuit decision in *Gable v. Williams*, 49 F.4th 1415 (2022), issued after the F&R. In *Gable*, the Ninth Circuit concluded that exclusion of a third-party confession deprived the petitioner of due process. *Id.* at 1329-31. This conclusion, however, was based on three critical facts not found in Anthony's case. First, in *Gable*, the state court's "purely mechanistic and technical" application of evidentiary rules did not "address the substance or reliability of [the third party] confessions." *Id.* at 1330. Second, the third party's confessions in *Gable* had the "strong indicia of reliability" of "confess[ing] within

months of the murder, multiple times, in several forms, to nearly unimpeachable witnesses and his family, with no apparent ulterior motive, and clearly against his penal interest." *Id.* Third, in *Gable*, the "confessions were corroborated by other evidence, including non-public facts about the murder that only a participant to the crime would know." *Id.*

Here, as discussed in the F&R (although not in the context of addressing *Gable*, which had not yet been issued), the state appellate court did not engage in a mechanistic and technical application of evidentiary rules but discussed in depth why the confessions were inadmissible. Additionally, as described in the F&R, the confessions at issue here do not have comparable indicia of reliability as found in *Gable*, or in other cases in which third-party confessions have supported due process claims. Finally, Anthony's purported corroborating evidence is speculative and nowhere near the level of corroboration at issue in *Gable*. Thus, Anthony's objections relying on *Gable* are unavailing. The Court has reviewed Anthony's other objections to the F&R's due process analysis and considered the issue *de novo* and adopts these portions of the F&R.

Anthony also challenges the F&R's conclusion that Anthony's appellate counsel was not ineffective for failing to appeal the prosecution's allegedly unconstitutional 27-year delay in bringing the indictment. As the F&R discusses, the state post-conviction relief (PCR) court addressed this issue under both Oregon's standard at the time of Anthony's direct appeal, which required intentional delay, as well as Oregon's subsequent standard requiring only negligence. The PCR court found that Anthony failed to prove culpable delay under either standard and thus Anthony's counsel was not ineffective for failing to appeal the preindictment delay. After analyzing the delay and counsel's performance, the F&R concluded that this was not an

unreasonable application of clearly established federal law. The Court has reviewed this issue *de novo* and adopts these portions of the F&R.

For those portions of the F&R to which neither party has objected, this Court follows the recommendation of the Advisory Committee and reviews those matters for clear error on the face of the record. No such error is apparent. The Court thus adopts those portions of the F&R.

CONCLUSION

The Court ADOPTS the Findings and Recommendation. ECF 70. The Court DENIES Petitioner's Petition for Writ of Habeas Corpus, ECF 2, and DISMISSES this case with prejudice. The Court, however, GRANTS a Certificate of Appealability on the issues of whether Petitioner's due process rights were violated by the trial court's exclusion of out-of-court statements relating to potential third-party guilt and whether appellate counsel was constitutionally ineffective for failing to appeal based on preindictment delay.

IT IS SO ORDERED.

DATED this 13th day of December, 2022.

/s/ *Michael H. Simon*
Michael H. Simon
United States District Judge

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

RYAN LAWRENCE ANTHONY,

Petitioner,

v.

GARRETT LANEY,

Respondent.

Case No. 2:20-cv-00511-JE

FINDINGS AND RECOMMENDATION

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JELDERKS, Magistrate Judge.

Petitioner brings this habeas corpus case pursuant to 28 U.S.C. § 2254 challenging the legality of his Clackamas County convictions dated September 7, 2007. For the reasons that follow, the Petition for Writ of Habeas Corpus (#2) should be denied.

BACKGROUND

A portion of the factual background for this case is taken from the Umatilla County Circuit Court's General Judgment in Petitioner's post-conviction relief ("PCR") action:

> Casper Volk was an upholsterer and Ottilia, his wife, was a seamstress. After they retired, they continued to work/volunteer at the family furniture store. At the time of their deaths, Casper was 83 and Ottilia was 78. They were in good health. They were very security-conscious and very frugal. They always turned lights off when they were not needed. They kept the front door locked, and did not open the door to strangers. They did not have a checking account, and used cash for purchases. Various family members knew that Mr. Volk usually carried $200-400 in cash in his wallet.
>
> Maggie McNeeley lived a couple blocks from her parents (the Volks) and she picked them up every weekday and took them to work. Maggie's daughter Diane (petitioner's then ex-wife) lived near her parents (Maggie and Roy McNeeley) and grandparents (the Volks). At various times Diane and petitioner stored and repaired vehicles at the Volks' - old Cadillacs and a Volkswagen. One time petitioner and Mr. Volk worked on a car together. Ann Hutchinson, Maggie's sister, had frequent contact with their parents and she never saw petitioner in their home.

Maggie McNeeley went to her parents' house on Monday morning July 28, 1980, about 9:00am, to take them to work. When her parents did not answer the door she noticed that it was unlocked, which was unusual. She entered and found a pool of blood. She then discovered her mother stabbed to death, face down with big holes in her back. She then located her father - also stabbed to death. His body was bloody and twisted. She called her brother, and then called 911.

The house was otherwise neat and orderly. There was no sign of a forced entry. No furniture was obviously moved. Nothing apparently was taken. Ottilia's purse was on the buffet in the dining room. The wallet inside it was empty but there was about $400 cash hidden in other places in the purse. The back door was locked. The windows in both bedrooms were open about 18-24 inches.

It was general knowledge within the family that the Volks had a strongbox full of cash. Maggie's sister knew the box was in the heat register. After the murders, the strongbox was in the register, with over $7,500 in cash still inside. It was closed, but unlocked. The police noticed that the buffet table had been moved slightly and a pendulum clock atop the table was stopped at 10:30. When the table was moved back, the clock was jarred and it began ticking again.

A forensic scientist examined the crime scene. He opined that the bodies were dragged to the places they were found, Casper Volk in the living room and Ottilia Volk in a bedroom. It appeared that Casper Volk's body had lain at its final location for a period, and then the body had been partly turned, giving access to his back pocket and wallet. The wallet was empty. There were indistinct footprints in the bloody drag marks. The expert opined that during a stabbing, a stabber could cut himself on the hand when the knife struck bone in a victim and the

knife slipped. This kind of cut is typically on the palm of the hand or on the fingers between the joints. The cut is typically sharp and clean and would bleed if large enough to require a stitch. A "hilt" abrasion is also common in this scenario. Forensic scientist Dr. Brady testified that he saw no evidence of such an injury to petitioner, and noted that the medical examiner's report contained no indication of one. Although an abrasion was noted above the cut, towards the upper portion of the thumb, petitioner's treating physician was unable to characterize either the cut or the abrasion as being the result of a knife-slip injury. The expert collected evidence, including a yellow/gold towel with blood on the dinette table, a pillowcase with blood that was in a closed top dresser drawer, and gray pants with blood on the front that were hanging in a closet.

The bodies had no defensive injuries, so apparently the victims did not fight the assailant. Casper Volk's body had a large stab wound in the back. He had a total of five stab wounds. Ottilia was stabbed eight times, four times in the front and four times in the back. The thirteen wounds were probably caused by the same weapon, a fairly large knife with a single-edged blade about an inch or an inch and a half wide. Some of the wounds were six or seven inches deep and would have hit bone on both victims. The Volks probably died around 10:00 p.m. on Saturday, July 26.

There were 21 fingerprints collected in the house and 8 have never been identified. No prints of petitioner's were found. DNA analysis was not yet available at the time of the murders.

Petitioner and Diane McNeeley met in late 1975, married in 1976 and later divorced in 1978, but they continued to have an "on and off" relationship. She was living with her parents in Lake Oswego when their son Travis

was born in March 1980. Diane and petitioner had conflict because he had girlfriends. Nevertheless, petitioner visited his children regularly. On Saturday, July 26, Diane had planned to go out with petitioner, but she could not get a babysitter for Kelly (age 3) and Travis (age 4 months) so she stayed home. She and petitioner spoke many times during the day. He called her between 10 and 20 times in the evening, and they argued about his girlfriends. They spoke about 9:30 p.m. and made plans to meet the next day at Washington Square with their children. He called again and woke her up about 1:00 a.m. Several of the calls that evening were collect.

On Sunday, July 27, she and the children met petitioner at Washington Square about 3:00 p.m. As soon as they met, petitioner took Travis, who was in a carrier/car seat. Diane did not see his hands. When they got to his parents' home in Hillsboro, petitioner put Travis down, changed his clothes, and went out to work on his pickup. Sometime later, he came back in the house with a cut on his right hand, covered with grease. His mother took him to the hospital. When he returned, his hand was bandaged.

The physician and nurse who treated petitioner that Sunday at the hospital reported that he had a cut on his hand that was clean, sharp, and superficial. It appeared to be fresh. It was about three-quarters of an inch, at the base of the thumb. There was a superficial abrasion next to the laceration. It occurred sometime from 15 minutes to 24 hours before petitioner went to the hospital at about 5:00 p.m. The cut would have bled. The wound was consistent with a cut from a knife and was not consistent with a puncture wound. The abrasion was consistent with an injury from the hilt of a knife. Petitioner told a friend that he had cut himself on the suspension spring on his pickup.

Petitioner was a suspect and was interviewed by police but not charged. On October 13, 1980, petitioner called Detective Salle and they met in a restaurant. Petitioner told Salle that he should investigate someone named Mike Lee. Petitioner then told Salle that on the night of the murders he had been riding the bus and as it went near the Volks' house, he got off and went to check on their welfare. The door to their house was ajar and the TV was on. He went in and discovered the Volk's bodies. He did not notify anyone. He moved the bodies so that Maggie McNeeley would not see them when she came to pick them up for work on Monday.

He acknowledged that he stepped in blood puddles and left footprints, which he tried to wipe out. He said he threw away the shoes he had been wearing that night. On October 15, 1980 petitioner and Salle met again at another restaurant. They spoke in Salle's car. During the conversation, petitioner drew a diagram of the scene as he remembered it. He said he had wiped the blood with a gold towel and he also wiped fingerprints with the same towel. He then left this towel on the kitchen table. When Salle seized the diagram, petitioner became agitated. Salle told petitioner that he was responsible for the murders. Petitioner became enraged, and screamed and stated that he did not kill them. Salle told him to calm down, and he did so. Salle met with Petitioner again on May 8, 198[1] and May 12, 1981. The police made no further efforts to contact petitioner until 2006. Detective John Harrington re-opened the case in 2004 after a call from Maggie McNeeley.

In 2005, cuttings from the yellow/gold towel, the white pillowcase, and the front pocket area of the gray pants from the bedroom were sent to the crime lab and tested for DNA in April 2006. The gray pants had both victims' blood on them. Two spots on the towel and

> eight spots on the pillowcase had the DNA of an initially unknown male. The spots were later compared to a sample of petitioner's DNA and they matched. Two expert witnesses opined that the DNA on the towel and the pillowcase was from petitioner's blood. After the DNA match, Harrington went to petitioner's home and arrested him.

Respondent's Exhibit 141, pp. 1-4.

At trial, Petitioner sought to introduce evidence that another person, Gary Allen Smith, had confessed to murdering the Volks. Smith was serving multiple life sentences for committing five different murders. One of his accomplices, William Perry Jackson, was also serving multiple life sentences stemming from the same murder spree.

In 1982, Jackson and Smith were both incarcerated in Lewis County, Washington. During that time, Jackson advised authorities that he had information on the Volks' murders. Detective Dave Tomlinson interviewed Jackson, who recalled three conversations he had with Smith:

> That first conversation Mr. Jackson said that he had heard on the news about the Volk homicide, so he asked Smith about that. And that was – he thinks that was shortly after the – the murder. And the reason Jackson asked Smith is because Mr. Smith had some money. And Smith – Mr. Jackson said that Mr. Smith said that he did a job in Lake Oswego. And then Mr. Jackson asked Smith – Smith was it the people out in Lake Oswego, and Smith replied, "Me and Atherton."
>
> * * *

> The second – the second and third occasion, according to Mr. Jackson, both occurred at the penitentiary where they were – they were both in jail. And Mr. Jackson thinks the second conversation occurred about nine months after he had been arrested, and they were discussing crimes. And, excuse me, Mr. Jackson asked Smith about the . . . old people in Lake Oswego, and Mr. Jackson said Mr. Smith replied, "Me and Atherton did that one." And Mr. Smith said that they'd been out -- they were out cruising on his scooter.
>
> * * *
>
> The third conversation Mr. Jackson believes was in, I believe, December 1981. He was in the infirmary in the penitentiary, and Mr. Smith visited him. And Mr. Jackson said he'd received a letter, a typed letter, asking [Jackson] to confess to the Volk homicide and that also with a picture of the Volks included. And Smith said no one could prove it. And that was about all Mr. Jackson could remember about that conversation.

Trial Transcript, pp. 382-84.[1]

The defense subpoenaed Jackson to testify during a pretrial hearing in an attempt to have Smith's purported confessions introduced at trial. Jackson had initially told authorities within three or four weeks of the Volk murders that Smith had denied any involvement in that crime. *Id* at 121, 307-08. During the pretrial hearing 27 years later, however, Jackson testified that to the best of his recollection, Smith had made the three statements to him described above. However, he also testified

[1] The reference to the Trial Transcript pages refers to the pagination in the bottom right corner of each page.

that Smith had "made several statements to me. Several. And . . . figuring out what Gary says is true and not true is like – almost it's virtually impossible." *Id* at 294. He stated that at the time of his 1982 interview, he believed Smith had been telling the truth, but "I don't believe so anymore." *Id.* He further provided:

> Because I never received all the – the full deal on – on even – or even understanding this person. I mean, now that I've known him, and I've known him for years, this guy would brag and boast about virtually anything if he thought you wanted to hear it. The guy is an idiot.

Id at 295.

Smith also testified at the pretrial hearing. He denied having any involvement in, or familiarity with, the Volk murders. *Id* at 261-63.

Two additional eyewitness accounts are pertinent to this factual Background. On the day after the Volks' murder, David Jorling walked past the Volks' home at 10:30 p.m. and saw an unidentified man standing in the doorway.[2] He also stated that there were two newer motorcycles parked across the street from the Volks' home.[3] *Id* at 2040-45. At the time, Smith was known to ride a Honda motorcycle. *Id* at 289, 383.

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[2] Police showed Jorling a photo array containing Petitioner's picture, but Jorling was unable to identify him as the person he had seen in the Volks' doorway. Trial Transcript, pp. 1667-68.

[3] Police reports indicated that two other witnesses stated that there were two motorcycles parked near the Volks' home on the day the murder took place. Trial Transcript, pp. 177-78, 531.

Violet Eilertson lived near the Volks' home and, on the night of the murder, saw two men walking in the parking lot of a nearby Safeway grocery store. She noticed that, despite the warm weather, the men were wearing long trench coats and were walking briskly. *Id* at 721-23. When she learned that the Volks had been murdered, she reported what she had seen in the Safeway parking lot.

Defense counsel, who had already submitted at least one memorandum on the issue, argued in favor of admitting Smith's out-of-court statements. In doing so, counsel relied not only upon the Oregon Evidence Code, but also the federal Due Process Clause:

> Availability should not be a test regarding the admissibility of statement[s] against penal interest, and we have told the Court why we think that to be true, and that's of constitutional magnitude. That's a fundamental due process concept, and we've pointed that out to the Court. And we've [cited] the federal case law regarding that question, Chambers v. Mississippi, 410 U.S. 284, 1973.
>
> * * *
>
> So having said that then, my first position, judge, is this: The hearsay about which we're speaking, the statement against penal interest when offered by defendant, as we are in this case, is firmly rooted and requires no additional test of reliability. If the Court finds that in fact it is not a firmly rooted exception and does require a showing of reliability, we, through the presentation to this Court of the evidence that we have

> provided, have demonstrated the reliability of Mr. Jackson in relation to his acting as a vehicle to introduce the declarant's statement.
>
> Thirdly, we take the position, as a matter of constitutional law as we have described it in our memorandum, that availability of the declarant is not a prong which must be present to permit admissibility. And even if it were, then the declarant's denial that he made the statements is in fact a demonstration that he is unavailable and, therefore we admit that prong.
>
> Those were the fundamental concepts that we pointed out to the Court in our memorandum. We've pointed out others, but I think those are critically important things for this Court to keep in mind as the Court is at least analyzing our positions.
>
> * * *
>
> And then I would argue in addition to that, if the Court for some reason determines that the statement against penal interest exception does not apply and that the residual exception does not apply, then I would advocate that as a matter of due process under the Chambers case and the other cases which we've cited, the statements against penal interest are so important to our defense of this case that they would be admissible under the residual exception and the constitutional rebuttal concepts which I articulated for the Court.

Id at 520-23.

After discussing the issues with the attorneys at some length, the trial court issued a ruling that spanned more than 20 pages in which it concluded that Smith's alleged out-of-court statements were inadmissible. *Id* at 548-569. The trial court

found that Smith was available to testify. *Id* at 556-57. It also noted that, according to Jackson, Smith "denied that he had had any involvement in the Volk murder here when Jackson purportedly asked him about that near in time to those events back in 1980." *Id* at 559-60. With respect to the due process inquiry, the trial judge found that: (1) it was not clear that Smith had actually made the statements attributed to him; (2) to the extent he made the statements to Jackson, at least the first conversation described by Jackson in the midst of the duo's serial-killing crime spree was not of such a nature that a reasonable person would not have made it for fear of exposing himself to criminal liability; and (3) there were no corroborating circumstances that indicated the trustworthiness of the out-of-court statements. *Id* at 558-69. The judge specifically concluded:

> And clearly, Mr. Jackson, given his multiple statements about these events and the lack of clarity about those statements certainly would not raise this evidence in his recounting of this evidence to a level that would meet any kind of reliability test associated with the kind of due process claim analyzed in the U.S. Supreme Court Chambers opinion.
>
> Now, also that's further given – further a problem for the defense in that Mr. Jackson as he testifies now about these events, indicates, you know, very clearly that he has no confidence in the statements – to the extent any were made, which he is again not very clear on – but to the extent that Mr. Smith made any statements to him, he is not at all confident that those statements were

> true; that in fact, as he indicated, "That guy would brag about everything; he's an idiot," and that "you couldn't believe in fact what he said." He being Smith.
>
> * * *
>
> And so I again, would find that to be entirely unsupportable as a basis for a due process claim that this evidence would become admissible, ala Chambers.

Id at 564-66. The trial court also determined that Jorling's statements about seeing motorcycles outside of the Volk residence and Eilertson's testimony concerning the two suspicious looking individuals at the Safeway were of very little value and did not corroborate Smith's purported out-of-court statements. *Id* at 568-69, 763-64.

The jury convicted Petitioner on all counts (four counts of Aggravated Murder and two counts of Felony Murder), and the trial court sentenced him to multiple life sentences with the possibility of parole after the service of a total consecutive minimum sentence of 40 years. Petitioner took a direct appeal where, relevant to this habeas corpus case, he argued that the trial court erred when it prohibited him from offering Smith's out-of-court statements for the jury's consideration. Respondent's Exhibit 103. The Oregon Court of Appeals affirmed the trial court's decision in a written opinion. Respondent's Exhibit 106.

Petitioner next petitioned the Oregon Supreme Court for review. The Oregon Supreme Court ultimately allowed review, vacated the appellate decision, and remanded the case to the Oregon Court of Appeals for reconsideration in light of its decision in *State v. Cazares-Mendez*, 350 Or. 491 (2011).[4] Upon remand, the Oregon Court of Appeals determined that its original opinion should have focused on the trustworthiness of Smith's statements. It concluded:

> The declarant was singularly untrustworthy. He was a self-confessed serial killer, serving five consecutive life sentences, whose testimony was, in the words of defendant's own appellate counsel, "disjointed and evasive." When asked how many murders he had been convicted of, he replied, "It's difficult for me to testify, not having records before me to recall that[.]" He testified in court that he had no involvement in the Lake Oswego murders for which defendant was on trial. His supposed "confession" to Jackson – "Me and [another person, not defendant] did that one," – was far from detailed, and was itself contradicted by his subsequent denials as to, among others, Jackson. Further, as we noted in our first opinion, nothing in the circumstantial evidence that defendant cites to bolster the theory that Smith was the perpetrator, and hence that Smith's "confession" was trustworthy, prove anything of the sort. In sum, applying the analysis that the Supreme Court mandates in *Cazares-Mendez*, we reach the same conclusion we reached in our first opinion. The Court did

[4] In *Cazares-Mendez*, the Oregon Supreme Court determined that the trial court had violated defendants' federal due process rights when it refused to allow them to present hearsay evidence from four separate and available witnesses that another person had confessed to the stabbing resulting in the victim's death. 350 Or. at 516.

> not deny defendant due process of law by excluding hearsay evidence of Smith's confession.

Respondent's Exhibit 111, p. 2. The Oregon Supreme Court denied Petitioner's subsequent Petition for Review. Respondent's Exhibit 113.

Petitioner next filed a PCR Petition in Umatilla County where, among other claims, he alleged that his direct appellate attorney was ineffective when she elected not to pursue a claim that the trial court erred when it denied Petitioner's motion to dismiss for pre-indictment delay. Respondent's Exhibit 119, p. 14. The PCR court denied relief on this claim, the Oregon Court of Appeals affirmed that decision without issuing a written opinion, and the Oregon Supreme Court denied review. Respondent's Exhibits 141, 145, 146.

Petitioner filed his *pro se* Petition for Writ of Habeas Corpus in this 28 U.S.C. § 2254 habeas corpus case on March 26, 2020. The Petition presents five grounds for relief with many sub-claims. After reviewing the record, this Court appointed counsel to represent Petitioner. With the assistance of appointed counsel, Petitioner argues two claims: (1) the trial court's refusal to admit Smith's alleged out-of-court statements violated Petitioner's right to due process; and (2) direct appellate counsel was constitutionally ineffective when she declined to appeal the trial court's denial of Petitioner's motion to dismiss based upon pre-indictment delay spanning 27 years. Respondent asks the Court to deny relief on the Petition because: (1) Petitioner failed to fairly present most of the

claims within his *pro se* Petition to Oregon's state courts, leaving those claims procedurally defaulted and ineligible for review on their merits; (2) Oregon's state court decisions denying relief on Petitioner's properly preserved claims were neither contrary to, nor unreasonable applications of, clearly established federal law; and (3) Petitioner's claims lack merit.

DISCUSSION

I. Standard of Review

An application for a writ of habeas corpus shall not be granted unless adjudication of the claim in state court resulted in a decision that was: (1) "contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States;" or (2) "based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d). A state court decision is "contrary to . . . clearly established precedent if the state court applies a rule that contradicts the governing law set forth in [the Supreme Court's] cases" or "if the state court confronts a set of facts that are materially indistinguishable from a decision of [the Supreme] Court and nevertheless arrives at a result different from [that] precedent." *Williams v. Taylor*, 529 U.S. 362, 405-06 (2000).

Under the "unreasonable application" clause of § 2254(d)(1), a federal habeas court may grant relief "if the state court identifies the correct governing legal principle from [the Supreme Court's] decisions but unreasonably applies

that principle to the facts of the prisoner's case." *Id* at 413. The "unreasonable application" clause requires the state court decision to be more than incorrect or erroneous. *Id* at 410. Twenty-eight U.S.C. § 2254(d) "preserves authority to issue the writ in cases where there is no possibility fairminded jurists could disagree that the state court's decision conflicts with [the Supreme] Court's precedents. It goes no farther." *Harrington v. Richter*, 562 U.S. 86, 102 (2011).

Twenty-eight U.S.C. § 2254(d)(2) allows a petitioner to "challenge the substance of the state court's findings and attempt to show that those findings were not supported by substantial evidence in the state court record." *Hibbler v. Benedetti*, 693 F.3d 1140, 1146 (9th Cir. 2012). A state court renders an unreasonable determination of the facts if it "plainly misapprehends or misstates the record in making its findings or where the state court has before it, yet apparently ignores, evidence that supports petitioner's claim." *Andrew v. Davis*, 944 F.3d 1092, 1107 (9th Cir. 2019) (internal quotations omitted). A federal habeas court cannot overturn a state court decision on factual grounds "unless objectively unreasonable in light of the evidence presented in the state-court proceeding." *Miller-El v. Cockrell*, 537 U.S. 322, 340 (2003). This is a "'daunting standard—one that will be satisfied in relatively few cases,' especially because we must be 'particularly deferential to our state-court colleagues.'" *Hernandez v. Holland*, 750 F.3d 843, 857 (9th Cir. 2014) (quoting *Taylor v. Maddox*, 366 F.3d 992, 1000 (9th Cir. 2004)).

II. Unargued Claims

As discussed above, with the assistance of appointed counsel Petitioner elects to provide briefing on his due process claim pertaining to the admissibility of Smith's out-of-court statements as well as his claim that direct appellate counsel was ineffective when she failed to appeal the trial court's denial of his motion to dismiss based upon pre-indictment delay. Petitioner does not argue the merits of his remaining claims, nor does he address any of Respondent's arguments as to why relief on these claims should be denied. As such, Petitioner has not carried his burden of proof with respect to these unargued claims. *See Silva v. Woodford*, 279 F.3d 825, 835 (9th Cir. 2002) (Petitioner bears the burden of proving his claims). Even if Petitioner had briefed the merits of these claims, the Court has examined them based upon the existing record and determined that they do not entitle him to relief.[5]

III. Refusal to Admit Smith's Out-of-Court Statements

Petitioner alleges that the trial court violated his right to due process when it refused to allow him to present Smith's out-of-court statements. "Few rights are more fundamental than that of an accused to present witnesses in his own defense." *Chambers v. Mississippi*, 410 U.S. 284, 302 (1973). "It is clearly established federal law, as determined by the Supreme

[5] Petitioner also requests an evidentiary hearing in his *pro se* Petition, but does not advocate for any such hearing in his supporting memorandum. To the extent Petitioner still wishes to pursue an evidentiary hearing, the record in this case is sufficiently developed to resolve the issues before the Court. *See Rhoades v. Henry*, 638 F.3d 1027, 1041 (9th Cir. 2011); *Gandarela v. Johnson*, 286 F.3d 1080, 1087 (9th Cir. 2002).

Court, that when a hearsay statement bears persuasive assurances of trustworthiness and is critical to the defense, the exclusion of that statement may rise to the level of a due process violation." *Chia v. Cambra*, 360 F.3d 997, 1003 (9th Cir. 2004) (citing *Chambers* 410 U.S. at 302).

In *Chambers*, the Supreme Court addressed a situation where the trial court had refused to allow a criminal defendant to offer an out-of-court confession by a third party pertaining to the murder of a police officer. The trial court had flatly refused to admit the evidence due to Mississippi's "voucher" rule, which strictly prevented parties from impeaching their own witnesses. The Supreme Court noted that the "'voucher' rule has been condemned as archaic, irrational, and potentially destructive to the truth-gathering process. . . ." *Id* at 296 n.8.

The *Chambers* Court held that a state may not apply an evidentiary rule "mechanistically to defeat the ends of justice." 410 U.S. at 302. Instead, it concluded that due process required courts to assess the reliability of the out-of-court confession when determining whether to admit the evidence. In *Chambers*, the Supreme Court considered four factors to assess the reliability of the out-of-court confession: (1) whether the confession was made spontaneously to a close acquaintance shortly after the crime occurred; (2) whether the confession was against the penal interest of the declarant; (3) whether the confession was corroborated by other evidence; and (4) whether the prosecution had an adequate opportunity to cross-examine the

declarant. *Id* at 300-01. Weighing these factors, the Supreme Court concluded that the exclusion of this critical evidence denied Mr. Chambers "a trial in accord with traditional and fundamental standards of due process." *Id* at 302.

Petitioner asserts that Smith's three statements to Jackson were against his penal interests, that his initial admission was made very close in time to the killings, and that there was corroboration insofar as: (1) Smith participated in many random and brutal murders in the Portland metro area during the year that the Volks were murdered; (2) Smith's crime spree was characterized by home invasion robberies committed within several blocks of a major thoroughfare; (3) multiple eyewitnesses placed motorcycles parked near the Volks' home on the day of the murder as well as the night after the murder; and (4) Smith, not Petitioner, owned and rode a motorcycle during that time. Petitioner maintains that Smith's confession was critical to the defense where Petitioner had admitted that he discovered the Volks' dead bodies, moved them, and not reported the murders.

As detailed in the Background of this Findings and Recommendation, the Oregon Court of Appeals found Smith's confession to lack indicia of reliability, finding him to be "singularly untrustworthy," evasive, and to have provided conflicting statements on the issue of the Volk murders including his testimony at the pretrial hearing that he had nothing to do with them. Respondent's Exhibit 111, p. 2. Petitioner argues that this analysis was an unreasonable

application of *Chambers* and an unreasonable determination of the facts because it relied in part on the fact that Smith was a convicted serial killer when, in fact, when Smith made his first statement to Jackson, he was a free man and had not been charged with any of the murders. He also contends that it was unreasonable to conclude that nothing in the circumstantial evidence established the trustworthiness of Smith's statements. Petitioner's arguments are unavailing.

As an initial matter, unlike *Chambers*, the Oregon Court of Appeals did not mechanistically apply a state evidentiary law to exclude Smith's out of-court statements without regard to their trustworthiness. Instead, it carefully examined all circumstances surrounding the statements and determined that they did not bear indicia of reliability necessitating their admission. Petitioner contends that, contrary to the Oregon Court of Appeals' decision, there were sufficient indicia of reliability as to Smith's out-of-court statements to require their introduction to satisfy due process. This is not the case.

Smith made three statements to Jackson. The first statement wherein Petitioner allegedly said that he and Atherton had "done a job in Lake Oswego" was not a confession to the Volk's murder. It is even more dubious when one considers that Atherton was not charged in any of the murders Smith and Jackson participated in, and Smith indicated that Atherton would never have participated in a crime like that. Trial Transcript, p. 262 ("Atherton would

not have done anything like that. He wasn't even associate[d] with us.").[6]

Smith's second statement occurred while he and Jackson were both incarcerated at the Oregon State Penitentiary. According to Jackson, he asked Smith about the "old people in Lake Oswego" to which Smith responded, "Me and Atherton did that one." This statement did not specifically identify the Volks, provided no details so as to be corroborative or indicative that Smith knew any particulars of the crime, and was not close in time to the crime where Smith allegedly made the statement nine months after the Volk murders. In addition, Smith again purportedly referred to a crime he claims to have committed with Atherton, a person he described as having no part of the group that participated in the murder spree.

Smith's final conversation with Jackson also occurred at the Oregon State Penitentiary. At that time, Jackson was in the infirmary where Smith came to visit him. Jackson reported to Smith that he had received a letter containing a picture of the Volks asking him to confess his participation in the murders. According to Jackson, Smith simply replied that the authorities wouldn't be able to convict Jackson of that crime. As with the first two statements, this, too, is not tantamount to a confession.

Putting aside the factual finding that Smith's statements did not constitute confessions, one of the *Chambers* factors the

[6] As the trial judge found, there was evidence that "Smith and Atherton were involved in this assault/robbery situation which might well have been the job that was mentioned." Trial Transcript, p. 561.

Oregon Court of Appeals did not address is whether the statements were against Smith's penal interests. Smith and Jackson were co-conspirators in serial killings in Oregon and Washington by the time Petitioner made his first statement to Jackson about "the job in Lake Oswego." Given this unusual and disturbing dynamic, it is difficult to see how Smith could perceive any "confession" to Jackson as being against his penal interest.

In addition, unlike *Chambers*, Smith never provided a sworn statement confessing to the crime and none of his statements was spontaneous. *See Chambers*, 410 U.S. at 287. Moreover, Jackson not only initially claimed that Smith had denied any involvement in the Volk murders, but later testified at Petitioner's pretrial hearing that he no longer believed Smith was credible, labeling his former accomplice as an "idiot" and "habitual liar" who would "brag about anything." *Id* at 292, 295, 304. In all of these respects, Petitioner's case stands in stark contrast to cases like *Chambers* in which highly-corroborated third-party out-of-court confessions have been mechanistically excluded from trial with no due consideration as to their reliability.

The remaining corroborative evidence Petitioner points to is circumstantial and speculative. The fact that Smith murdered several people in Oregon and Washington during the time the Volks were also murdered lends very little to the inquiry. The same can be said of the witness accounts of two motorcycles parked across the street from the Volks' home on the day of, and the day after, the murders. As the trial court recognized,

"there's nothing about that circumstance which adds very much to the calculus here" and was no evidence that "the one motorcycle attributable or associated with Mr. Smith is somehow so distinctive as to suggest that the appearance as recounted of the motorcycle that was at the scene the following day after the murders somehow could be identified or tied." *Id* at 568. Eilertson's recollection of two, unidentifiable men in trench coats at a Safeway whom she thought looked suspicious is also of very limited value.

In summary, the out-of-court statements Petitioner attributes to Smith were not tantamount to confessions to the Volk murders. Even if the statements could be construed to be confessions, the circumstances surrounding their utterance and the lack of other corroborating evidence fail to establish their trustworthiness. For all of the same reasons, Smith's statements were not crucial to the defense. Accordingly, due process did not require their admission at trial and the Oregon Court of Appeals' decision did not unreasonably apply Supreme Court precedent to this case, nor did it rely upon an unreasonable determination of the facts.

IV. Ineffective Assistance of Appellate Counsel

In his remaining claim, Petitioner alleges that his direct appellate attorney was ineffective for failing to appeal the allegedly unconstitutional pretrial delay that spanned 27 years. The Court uses the general two-part test established by the Supreme Court to determine whether Petitioner received ineffective assistance of counsel. *Knowles v. Mirzayance*, 556

U.S. 111, 122-23 (2009). First, Petitioner must show that his counsel's performance fell below an objective standard of reasonableness. *Strickland v. Washington*, 466 U.S. 668, 686-87 (1984). Due to the difficulties in evaluating counsel's performance, courts must indulge a strong presumption that the conduct falls within the "wide range of reasonable professional assistance." *Id* at 689.

Second, Petitioner must show that his attorney's performance resulted in prejudice. The appropriate test for prejudice is whether Petitioner can show "that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id* at 694. In proving prejudice with respect to the performance of appellate counsel, a petitioner must demonstrate a reasonable probability that but for appellate counsel's failure, "he would have prevailed on his appeal." *Smith v. Robbins*, 528 U.S. 259, 285-286 (2000). "The likelihood of a different result must be substantial, not just conceivable." *Richter*, 562 U.S. 86, 112 (2011) (citing *Strickland,* 466 U.S. at 693). When *Strickland's* general standard is combined with the standard of review governing 28 U.S.C. § 2254 habeas corpus cases, the result is a "doubly deferential judicial review." *Mirzayance*, 556 U.S. at 122.

At the time of Petitioner's direct appeal, Oregon's state courts used the U.S. Supreme Court's intentional delay standard set forth in *United States v. Marion*, 404. U.S. 307 (1972). *State v. Heyer,* 16 Or. App. 22 (1973). The *Marion* standard

provides that due process protections apply if the prosecution intentionally injects pre-indictment delay to gain a tactical advantage, and the defendant is able to establish substantial prejudice. *Marion*, 404 U.S. at 324. Under this governing standard, appellate counsel filed Petitioner's Appellant's Brief on November 18, 2008 omitting the issue of pretrial delay. The Oregon Court of Appeals issued its decision in his case on April 14, 2010.

Almost one year later, on March 10, 2011, the Oregon Supreme Court adopted a different, "minority test," set forth in *United States v. Lovasco*, 431 U.S. 783 (1977). It concluded that in order to demonstrate a due process violation for pre-indictment delay, a defendant must show that the prosecution culpably caused the delay, that the delay actually prejudiced the defendant, and courts must then weigh the prosecution's reason for the delay against the prejudicial impact upon the defendant to determine if due process is satisfied. *Oregon v. Stokes*, 350 Or. 44, 57 (2011). The essential difference between the *Marion* test and the *Lovasco* test is that the former requires a defendant to affirmatively show that the prosecution intentionally delayed the indictment so as to secure a tactical advantage, whereas the latter does not require such a showing and, instead, requires only balancing of the reasons for the prosecution's delay with the resulting prejudice to the defense.

The PCR court examined Petitioner's case under both standards:

> Petitioner failed to prove that his appellate attorney was ineffective for failing to raise the trial court[']s denial of Petitioner's motion to dismiss for pre-trial delay. The issue was fully litigated in the trial court and the trial court found that the state did not delay prosecution to gain a tactical advantage or that, even using a negligence standard, there was no culpability on the state's part. The trial court further found that the Petitioner failed to show actual non-speculative prejudice from the delay. There was evidence in the record to support these findings. Appellate counsel made a reasonable decision to not raise the issue on appeal.
>
> Petitioner also failed to prove prejudice. Petitioner has not proven that failing to raise the issue on appeal had a tendency to affect the outcome. There was no showing that there was any likelihood of success if the issue were raised on appeal.

Respondent's Exhibit 141, p. 7.

Petitioner argues that the PCR court employed the wrong legal standard by requiring him to show that the prosecution intentionally delayed the indictment in order to secure a tactical advantage. However, at the time appellate counsel filed the Appellant's Brief, the standard in Oregon was the *Marion* standard. This remained true through the time that the Oregon Court of Appeals issued its decision in Petitioner's case. Nevertheless, the PCR court specifically found that even using a negligence standard, there was no culpability on the State's part.

Petitioner also takes issue with the PCR court's conclusion that he could not establish prejudice, claiming he had seven

potentially significant witnesses he could not call at trial because they passed away during the 27-year delay in filing the indictment. In addition, he asserts that three other fact witnesses could not recall the underlying events by the time the State prosecuted his case. Petitioner further argues that not only were these witnesses no longer available to the defense due to the passage of time, but the DNA evidence established virtually nothing of significance because he had already admitted in October of 1980 that he had been at the crime scene, moved the Volks' bodies, and cleaned up their blood with a towel that he left at the scene.

While Petitioner had admitted being at the Volks' home in the aftermath of the crime, the DNA evidence was significant because it showed Petitioner's blood at the scene, not just traces of other DNA. Due to technological limitations, it was not possible for authorities to discover that information until breakthroughs in DNA technology and federal funding for the Oregon Crime Lab in 2004 made it possible for it to utilize more sensitive equipment to test old, degraded DNA evidence from 1980.

In preparing Petitioner's appeal, appellate counsel was confronted with a record that showed that the trial court held an in-depth two-day hearing on the motion to dismiss for pre-indictment delay at which it carefully considered the issue. The record would have also revealed not only that the State routinely checked with the Oregon Crime Lab and took a trip to FBI Headquarters in Quantico, Virginia, to see if it could find

a way to mine its available evidence so as to identify a perpetrator, but also moved quickly once it was able to have the DNA evidence accurately tested. Appellate counsel faced this daunting record at a time when she would have to establish that the prosecution intentionally delayed bringing charges for 27 years for the purpose of gaining a tactical advantage. "*Strickland* does not mandate prescience" such that counsel was not required to anticipate that the Oregon Supreme Court would, in the future, adopt a more lenient standard. *Sophanthavong v. Palmateer*, 378 F.3d 859, 870 (9th Cir. 2004) (citing *Strickland*, 466 U.S. at 690); *see also Lowry v. Lewis*, 21 F.3d 344, 346 (9th Cir. 1994) (lawyers not required to anticipate decisions, and conduct must be evaluated at the time of that conduct).

In light of this record, appellate counsel was not ineffective when she made the strategic decision not to raise the pre-indictment delay issue, and Petitioner has not established that the result of his appeal would have been different even if she had. Accordingly, the PCR court's decision was not unreasonable in its application of clearly established federal law or its factual determinations. Habeas corpus relief should therefore be denied.

RECOMMENDATION

For the reasons identified above, the Petition for Writ of Habeas Corpus (#2) should be denied and a judgment should be entered dismissing this case with prejudice. The Court should grant a Certificate of Appealability as to the due process and

ineffective assistance of counsel claims Petitioner argues in this case.

SCHEDULING ORDER

This Findings and Recommendation will be referred to a district judge. Objections, if any, are due within 17 days. If no objections are filed, then the Findings and Recommendation will go under advisement on that date.

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

September 20,2022
DATE

/s/ John Jelderks
John Jelderks
United States Magistrate Judge

FILED

MAY 9 2024

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

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

RYAN LAWRENCE ANTHONY, Petitioner-Appellant, v. GARRETT LANEY, Respondent-Appellee.	No. 23-35030 D.C. No. 6:20-cv-00511-JE District of Oregon, Eugene ORDER

Before: BERZON, NGUYEN, and MILLER, Circuit Judges.

The majority of the panel has voted to deny appellant's petition for rehearing. Judge Nguyen and Judge Miller have voted to deny the petition for rehearing. Judge Berzon has voted to grant the petition for rehearing.

Judge Nguyen and Judge Miller have voted to deny the petition for rehearing en banc, and Judge Berzon so recommends. The full court has been advised of the petition for rehearing en banc, and no judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

The petition for rehearing and rehearing en banc is DENIED.

247 Or.App. 582
Court of Appeals of Oregon.

STATE of Oregon, Plaintiff–Respondent,
v.
Ryan Lawrence ANTHONY, Defendant–Appellant.

CR0700610; A136945.
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Submitted on Remand Nov. 3, 2011.
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Decided Jan. 5, 2012.

Synopsis

Background: Defendant was convicted in the Circuit Court, Clackamas County, Steven L. Maurer, J., of aggravated murder. Defendant appealed. The Court of Appeals, 234 Or.App. 659, 228 P.3d 1222, affirmed. The Supreme Court allowed review, vacated judgment of conviction, and remanded for reconsideration in light of *State v. Cazares–Mendez/Reyes–Sanchez*.

On remand, the Court of Appeals, Schuman, P.J., held that witness' testimony that witness' cellmate had told witness that he and another person, and not defendant, had committed murders did not come within exception to rule against hearsay for statements against penal interest.

Affirmed.

Attorneys and Law Firms

****360** Laura Graser for appellant.

John R. Kroger, Attorney General, Jerome Lidz, Solicitor General, Janet A. Metcalf, Assistant Attorney General, and Jennifer S. Lloyd, Attorney–in–Charge, Criminal Appeals, for respondent.

Before SCHUMAN, Presiding Judge, and WOLLHEIM, Judge, and NAKAMOTO, Judge.

Opinion

SCHUMAN, P.J.

***584** This case comes to us on remand from the Supreme Court with instructions to reconsider our first decision, *State v. Anthony,* 234 Or.App. 659, 228 P.3d 1222 (2010), in light of *State v. Cazares–Mendez/Reyes–Sanchez,* 350 Or. 491, 256 P.3d 104 (2011). In *Anthony,* we relied on our decision in *State v.* ****361** *Cazares–Mendez,* 233 Or.App. 310, 227 P.3d 172 (2010) (*Cazares–Mendez I*); the Supreme Court subsequently took review of *Cazares–Mendez I* and, although it affirmed our decision in that case, it employed different reasoning. Our task, then, is to apply that reasoning here. We affirm.

In 2007, defendant was charged with the aggravated murders of an elderly couple in Lake Oswego. The murders had occurred 27 years earlier, in 1980. At a pretrial hearing, the court ruled that the defense could not introduce testimony from a man named Jackson to the effect that a third man, Smith, had told him (Jackson) that he (Smith) was the perpetrator of the murders for which defendant was on trial. Jackson and Smith had been cellmates. Defendant was subsequently convicted. On appeal, he assigned error to the court's ruling prohibiting the hearsay evidence of Smith's confessions. In affirming the trial court's decision, we wrote:

> "[D]efendant argues that the court erred in excluding a hearsay statement from a third party allegedly confessing to the crime for which defendant was convicted. Defendant relies on OEC 804(3)(c). That provision allows admission of such statements if (1) the declarant is unavailable, (2) the statement is so inculpatory that a reasonable person in the position of the declarant would not have made the statement unless it was true, *and* (3) corroborating circumstances clearly establish that the statement is trustworthy. *State v. Schutte,* 146 Or.App. 97, 101, 932 P.2d 77 (1997). We reject without discussion defendant's argument that, because the witness's testimony was evasive, he was unavailable for purposes of OEC 804(3)(c). [Thus, ordinarily, the hearsay statement would be inadmissible, because the declarant was available.]
>
> "Nonetheless, in a recent case, we held that, where 'the corroboration/' trustworthiness' requirement for admission of statements against penal interest' is met, exclusion as ***585** hearsay evidence of a confession merely because the confessing witness is not 'unavailable' can, in some circumstances, violate the Due Process Clause of the Fourteenth Amendment to the United States Constitution. [*Cazares–Mendez I,* 233 Or.App. at 323, 227 P.3d 172]. * * * Although we held in *Cazares–Mendez* [*I*] that the circumstances there were sufficiently clear to establish the

trustworthiness of the hearsay confession so as to justify a due process inquiry, we reach a different conclusion here.

"In brief, the corroboration in *Cazares–Mendez* [*I*] consisted of *multiple* witnesses who had heard *detailed* confessions that 'related *particulars* that were *peculiar* to' the crime that defendant allegedly committed. *Id.* at 326 [227 P.3d 172] (emphasis added). Here, the 'corroboration' consisted of the following details: an uninvolved witness saw an unidentified man in the doorway of the victims' house on the night after the murder; the same witness saw two motorcycles outside the victims' home, and the witness who confessed owned a motorcycle; and a different witness saw 'two ominous-looking men' walking toward the victims' home on the night of the murder. That evidence is a far cry from what the defendant presented in *Cazares–Mendez* [*I*]. In light of the circumstances presented, the trial court did not err in excluding the hearsay confession in this case."

Anthony, 234 Or.App. at 663–64, 228 P.3d 1222 (emphasis in original).

In its opinion in *Cazares–Mendez,* the Supreme Court clarified certain aspects of the rule that a statement against penal interest is admissible, even if the declarant is available, if "corroborating circumstances clearly indicate the trustworthiness of the statement." 350 Or. at 506, 256 P.3d 104 (quoting OEC 804(3)(c)). The proper focus of the trustworthiness inquiry, the court held, is not the trustworthiness of the witness, but of the declarant. *Id.* at 506–11, 256 P.3d 104. Thus, our focus in our original opinion in *Anthony* on the circumstances that defendant introduced in order to demonstrate that the witness's hearsay testimony was trustworthy was misplaced; the proper focus was on the declarant himself.

The declarant was singularly untrustworthy. He was a self-confessed serial killer, serving five consecutive life sentences, ****362** whose testimony was, in the words of defendant's own appellate counsel, "disjointed and evasive." When asked how many murders he had been convicted of, he replied, "It's ***586** difficult for me to testify, not having records before me to recall that[.]" He testified in court that he had no involvement in the Lake Oswego murders for which defendant was on trial. His supposed "confession" to Jackson —"Me and [another person, not defendant] did that one,"— was far from detailed, and was itself contradicted by his subsequent denials to, among others, Jackson. Further, as we noted in our first opinion, nothing in the circumstantial evidence that defendant cites to bolster the theory that Smith was the perpetrator, and hence that Smith's "confession" was trustworthy, prove anything of the sort. In sum, applying the analysis that the Supreme Court mandates in *Cazares–Mendez,* we reach the same conclusion we reached in our first opinion. The court did not deny defendant due process of law by excluding hearsay evidence of Smith's confession.

Affirmed.

All Citations

247 Or.App. 582, 270 P.3d 360