IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

RICHARD PICKETT,

Petitioner,

v.

RICK COURSEY, Superintendent,
Eastern Oregon Correctional Institution,

Respondent.

Case No. 2:15-cv-02394-SB

OPINION AND ORDER

BECKERMAN, U.S. Magistrate Judge.

Petitioner Richard Pickett ("Pickett"), an individual in custody at the Eastern Oregon Correctional Institution, filed a petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254. For the reasons set forth below, this Court denies Pickett's habeas petition and grants a certificate of appealability on ground one, subpart six, and ground two, subpart one.

BACKGROUND

On July 29, 2008, Micah Persons, a special agent at the Oregon Department of Justice ("DOJ"), executed a search warrant at Pickett's home for the purpose of locating evidence pertaining to the depiction of children engaged in sexually explicit conduct. Resp't Exs. (ECF No. 22), Ex. 104 at 63-64, 70; Pet'r's Br. in Supp. (ECF No. 38), Ex. A; see OR. REV. STAT.

§ 163.665(3) (defining sexually explicit conduct). Persons was assisted by Ben Hicks, a DOJ special agent, Jonathan Farrester, a Madras Police detective, and several other police officers. Resp't Ex. 104 at 17-18, 64-65, 96. During the search, Persons spoke to Pickett outside of his home. Id. at 65-68. Pickett admitted to Persons that he had received images of child pornography on his computer and had discussed sexual fantasies online, including a sexual relationship with his stepdaughter "C," but denied ever touching C in a sexual manner. Id. at 66-70. Officers subsequently seized journals and letters written by C that revealed she had been sexually abused by Pickett. Id. at 19-20, 58, 70-72, 97-99. Persons and Farrester transported Pickett to the police station for further questioning. Id. at 72. Pickett admitted to sexually abusing C, stating that she had coerced him into having a sexual relationship when she was eight years old. Id. at 75-76, 79. Pickett detailed the sexual abuse at length, stating that it happened about three times a month over the course of nine years. Id. at 76-79. He also admitted taking pictures of C that were sexual in nature. Id. at 78. Hicks found nine images on Pickett's computer depicting children engaged in sexually explicit conduct. Id. at 27-28, 31-33.

Detective Farrester contacted C at her school and transported her to the Department of Human Services where she was interviewed by Christina Spitz. Id. at 85, 97-98. During the interview, C revealed that Pickett had put his penis in her mouth, touched her buttock, vagina, and breasts, and put his mouth on her vagina and breasts. Id. at 90-91. On August 26, 2008, physician assistant Jill Hartley interviewed C at the KIDS Center. Resp't Ex. 105 at 69, 72-79. C again revealed details of the sexual abuse but refused to identify her abuser. Id. at 76-80. Hartley diagnosed child sexual abuse, but she did not find physical evidence of abuse. Id. at 82-83, 86.

On December 17, 2008, a grand jury returned a sixty-count indictment charging Pickett with sodomizing and sexually abusing C, taking sexually explicit photographs of her, and downloading child pornography on his computer. Resp't Ex. 102 at 1-29. Prior to trial, defense counsel moved to suppress C's letters and journals, Pickett's statements to police, and police interviews of C and her mother. Resp't Ex. 103 at 16-17, Ex. 133. After a hearing, the trial court denied the motion. Resp't Ex. 103 at 154-58, Ex. 135.

Pickett's two-day bench trial commenced on July 13, 2009. Resp't Ex. 104 at 1, 5, Ex. 105 at 1. At the time of trial, C was eighteen years old. Resp't Ex. 106 at 4. C testified consistently with her prior interviews and identified Pickett as her abuser. Id. at 12-22. She estimated that Pickett sexually abused her a minimum of three times per month from age eight to fourteen. Id. at 15-16, 20, 27-28. The prosecution presented the testimony of the law enforcement officials involved in the search of Pickett's home and to whom Pickett admitted the abuse, and the mental health providers who interviewed C and diagnosed child sexual abuse. Resp't Exs. 104-06. Pickett did not testify in his defense.

The trial judge convicted Pickett of five counts of Sodomy in the First Degree, ten counts of Sexual Abuse in the First Degree, nine counts of Encouraging Child Sexual Abuse in the First Degree, nine counts of Encouraging Sexual Abuse in the Second Degree, and two counts of Using a Child in a Display of Sexually Explicit Conduct. Resp't Ex 101 at 7-32. The judge imposed a sentence totaling 460 months. Id.

Pickett filed a direct appeal arguing that the trial court committed plain error under State v. Southard, 347 Or. 127 (2009), when it admitted Hartley's diagnosis of child sexual abuse, without corroborating physical evidence of abuse, in violation of Oregon Rule of Evidence 403

("Rule 403").[1] Resp't Ex. 107 at 7, 10-12. The Oregon Court of Appeals affirmed Pickett's conviction, holding that although the admission of the diagnosis was plain error under Southard, the testimony "did not likely affect the court's verdict" because the uncontroverted evidence showed that Pickett sexually abused C. State v. Pickett, 246 Or. App. 62, 64-66 (2012). The Oregon Supreme Court denied review. State v. Pickett, 351 Or. 541 (2012).

Pickett sought state post-conviction relief ("PCR") alleging that trial and appellate counsel rendered ineffective assistance of counsel ("IAC"). Resp't Ex. 113. The PCR court denied relief, holding that Pickett failed to demonstrate "any error on the part of trial or appellate counsel" and failed to show that if an error occurred "that any different outcome was even possible, yet alone likely." Resp't Ex. 154 at 2. Pickett appealed and filed a counseled and supplemental pro se brief. Resp't Exs. 155, 156. The Oregon Court of Appeals affirmed without opinion and the Oregon Supreme Court denied review. Pickett v. Coursey, 271 Or. App. 862, rev. denied, 358 Or. 70 (2015).

In the instant proceeding, Pickett raises multiple claims of ineffective assistance of trial and appellate counsel, and one claim of trial court error. Pet'r's Habeas Pet. (ECF No. 2) at 4-6. In his supporting memoranda, Pickett addresses only two grounds. First, Pickett argues that trial counsel rendered ineffective assistance when she failed to object to Hartley's diagnosis of child sexual abuse in the absence of corroborating physical evidence of abuse. Pet'r's Br. in Supp. at 1, 13-26. Second, Pickett argues that appellate counsel provided ineffective assistance when she failed to challenge the trial court's denial of Pickett's motion to suppress. Id. at 1, 26-35.

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[1] Rule 403 provides that "evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay or needless presentation of cumulative evidence." OR. REV. STAT. § 40.160.

LEGAL STANDARDS

Pursuant to 28 U.S.C. § 2254(d), a federal court shall not grant a petition for writ of habeas corpus filed by an individual in state custody, 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).

DISCUSSION

Respondent urges the Court to deny habeas relief because Pickett procedurally defaulted all of his claims except ground one, subpart six, by failing fairly to present them on appeal from the denial of post-conviction relief. Resp't Resp. (ECF No. 20) at 1-2, 8-13. Additionally, Respondent argues that (1) Pickett waived all grounds for relief that were not addressed in his supporting memoranda, (2) the state court's denial of his claim that trial counsel was ineffective for failing to object to Hartley's diagnosis is correct and entitled to deference, and (3) the PCR court's denial of his claim that appellate counsel was ineffective for failing to assign error to the trial court's denial of Pickett's motion to suppress is correct and entitled to deference. Id. at 1-2, 13-19; Resp't Reply (ECF No. 51) at 1.

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I. UNARGUED GROUNDS FOR RELIEF

Pickett's habeas petition includes twenty-one grounds of ineffective assistance of trial and appellate counsel and one trial court error. Pet'r's Habeas Pet. at 4-6. This Court has reviewed Pickett's unargued grounds and concludes that he has failed to sustain his burden of proving that habeas relief is warranted. Accordingly, the Court denies habeas relief on those grounds. See Mayes v. Premo, 766 F.3d 949, 957 (9th Cir. 2014) (holding that a petitioner bears the burden of proving his claims under § 2254(d)(1) and (2)); Davis v. Woodford, 384 F.3d 628, 638 (9th Cir. 2004) (same).

II. THE MERITS

A. Ineffective Assistance of Trial Counsel

At the time of Pickett's trial, a medical diagnosis of child sexual abuse was admissible despite the absence of corroborating physical evidence of abuse. Jackson v. Franke, 364 Or. 312, 317 (2019) (citing State v. Trager, 158 Or. App. 399 (1999)); Umberger v. Czerniak, 232 Or. App. 563, 564 (2009). Shortly after Pickett's trial, however, the Oregon Supreme Court held in Southard that, in the absence of some physical evidence of abuse, a diagnosis of child sexual abuse is inadmissible under Rule 403 because its probative value is substantially outweighed by the risk of prejudice. 347 Or. at 140-42.

In Southard, the parties agreed that a diagnosis of child sexual abuse is scientific evidence. Id. at 132. Hence, the expert testimony was admissible under Oregon law only if it met three criteria: "It must be relevant, OEC 401; it must possess sufficient indicia of scientific validity and be helpful to the jury, OEC 702, and its prejudicial effect must not outweigh its probative value, OEC 403." Id. at 133, 139. The Southard Court did not address whether the diagnosis also violated the judicially created rule prohibiting a witness from vouching for the

credibility of another witness. State v. Black, 364 Or. 579, 587, 592-95 (2019) (summarizing Southard and explaining that "whether testimony violates the vouching rule is distinct from a determination of whether that testimony is permitted by the Oregon Evidence Code").

Although Southard was issued after Pickett's trial, he argues that "[a]ny reasonable attorney would have objected [to the admission of Hartley's diagnosis of sexual abuse] in light of (1) the existing Oregon Supreme Court case law, (2) the standard of practice among the criminal defense bar at the time, and, particularly, (3) the timing of Mr. Pickett's trial, as the trial occurred after the Oregon Supreme Court had taken up the issue of the admissibility of a medical diagnosis of sexual abuse, heard argument on the question, and was due to release a decision addressing the issue." Pet'r's Br. in Supp. at 13 (emphasis in original).

Pickett relies on Oregon Supreme Court cases beginning with State v. Brown, 297 Or. 404 (1984) (holding that scientific evidence is inadmissible under Rule 403 if it is unduly prejudicial) to illustrate that "[t]he holding in Southard was merely an application of long-standing principles from Oregon Supreme Court cases dating back to the early 1980s." Pet'r's Br. in Supp. at 14-17; Pet'r's Sur-Reply (ECF No. 63) at 1-7. Pickett argues that pre-Southard Oregon Court of Appeals cases holding that a diagnosis of sexual abuse was admissible despite the absence of physical evidence ignored the Oregon Supreme Court's "admonitions in the 1990s and 2000s" that "one witness may not testify about the credibility of another, and Brown's test for [admitting] scientific evidence, including the 403 balancing test." Pet'r's Br. in Supp. at 16; Pet'r's Sur-Reply at 4-6.

Pickett also relies on the affidavits of several attorneys to support his assertion that "the Oregon criminal defense bar had viewed this issue as 'promising' at least a decade before Southard, and, as such, the norm was to raise the issue until Oregon's highest court took up and

issued a decision on the subject." Pet'r's Br. in Supp. at 16, 18-20; Pet'r's Sur-Reply at 2-4.[2] In this regard, Pickett notes that the Oregon Supreme Court recently stated that its decision to grant review in Southard was "not unexpected" given the "tension" between the Oregon Court of Appeals decision in Trager and several Oregon Supreme Court cases "holding that medical experts were not permitted to vouch for a person who asserted that the defendant had sexually abused them."[3] Pet'r's Notice of Suppl. Authority (ECF No. 75) at 2.

In Strickland v. Washington, 466 U.S. 668, 687-88, 694 (1987), the Supreme Court held that in order to prevail on a Sixth Amendment IAC claim, a habeas petitioner must prove (1) that counsel's performance fell below an objective standard of reasonableness, and (2) there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. Failing to object to inadmissible evidence may constitute deficient performance under the first prong of Strickland if it is reasonable to conclude that the trial court would have granted the objection or its decision to overrule the objection would have been overturned on state court appeal. Gresser v. Franke, 628 F. App'x 960, 962 (9th Cir. 2015); Flournoy v. Small, 681 F.3d 1000, 1005-06 (9th Cir. 2012). Proof that defense counsel had "nothing to lose" in raising an objection does not suffice. Knowles v. Mirzayance, 556 U.S. 111, 122-23 (2009).

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

[2] Pickett relies on the attorney affidavits filed in Saunders v. Nooth, No. 2:15-cv-00048-YY and Williams v. Nooth, No. 3:10-cv-00070-ST. Pet'r's Br. in Supp. at 16, 20.

[3] In Trager, the Oregon Court of Appeals held that a diagnosis of sexual abuse is not scientific evidence subject to the foundational requirements set forth in Brown, 297 Or. at 417. Trager, 158 Or. App. at 405. The court held that the trial court properly admitted the diagnosis "without suggesting that physical evidence was a necessary precondition." Jackson, 364 Or. at 329 (summarizing Trager decision).

within the wide range of reasonable professional assistance.'" Id. at 124 (quoting Strickland, 466 U.S. at 689); Richter, 562 U.S. at 104. Every effort must be made to eliminate the distorting effects of hindsight and to evaluate the conduct from counsel's perspective at the time. Strickland, 466 U.S. at 689. When this Court applies the highly deferential review of counsel's performance required by Strickland, through the deferential lens of § 2254(d), this Court's review is "doubly deferential." Cullen v. Pinholster, 563 U.S. 170, 190 (2011); Richter, 562 U.S. at 105.

In order to prove prejudice based on an attorney's failure to object to trial testimony, a petitioner must demonstrate that, but for counsel's failure to make the objection, there is a reasonable probability that the result of the trial would have been different. Flournoy, 681 F.3d at 1005-06. When evaluating prejudice, this Court considers "the totality of the evidence" before the jury and "the question is whether there is a reasonable probability that, absent the errors, the factfinder would have had a reasonable doubt respecting guilt." Strickland, 466 U.S. at 695. "The likelihood of a different result must be substantial, not just conceivable." Richter, 562 U.S. at 112.

The Ninth Circuit has rejected claims that trial, appellate, and post-conviction counsel were ineffective for failing to anticipate the decision in Southard, reasoning that Oregon Court of Appeals decisions prior to Southard permitted the admission of a diagnosis of sexual abuse despite the absence of corroborating physical evidence. See Hall v. Myrick, 740 F. App'x 599, 599-600 (9th Cir. 2018), petition for cert. docketed (U.S. May 16, 2019) (No. 18-9297) (holding that trial counsel was not ineffective for failing to object to a sexual abuse diagnosis "[b]ecause before Southard decisions of the Oregon Court of Appeals allowed the admission of the testimony"); Leonard v. Oregon, 714 F. App'x 801, 802 (9th Cir. 2018) (holding that trial

counsel was not ineffective for failing to object to the admission of a diagnosis of sexual abuse because Oregon law was unsettled prior to Southard); Mesta v. Myrick, No. 17-35801, 2019 WL 2337468, at *1-2 (9th Cir. June 3, 2019) (holding that appellate counsel was not ineffective because he "could have determined that an improper vouching challenge against the medical diagnosis—which counsel raised—was more likely to succeed than a Rule 403 challenge, and thereby winnowed out a Rule 403 challenge"); White v. Nooth, 770 F. App'x 412, 413 (9th Cir. 2019) (holding that PCR counsel could reasonably have determined that the petitioner's IAC claim "had little likelihood of success and winnowed it out in favor of those more likely to prevail"); Williams v. Nooth, 606 F. App'x 380, 381 (9th Cir. 2015) (holding that PCR counsel was not ineffective for failing to allege appellate counsel was ineffective for failing to pursue a Southard-type claim). In so holding, the Ninth Circuit relied on two Oregon Court of Appeals cases, State v. Sanchez-Cruz, 177 Or. App. 332 (2001) and State v. Wilson, 121 Or. App. 460 (1993).[4] Hall, 740 F. App'x at 599; Mesta, 2019 WL 2337468, at *1; White, 770 F. App'x at 413.

The Ninth Circuit recently considered the import of attorney affidavits submitted to prove that the prevailing professional norm at the time of the petitioner's trial was to object to the admission of a diagnosis of sexual abuse in the absence of corroborating physical evidence. The Ninth Circuit rejected the petitioner's IAC claim, explaining that "such '[p]revailing norms of

[4] In Sanchez-Cruz, there was physical evidence of sexual abuse. 177 Or. App. at 336. The Oregon Court of Appeals held that the diagnosis of sexual abuse is scientific evidence and its admission was not unduly prejudicial under Rule 403 because "[t]he reasons that such testimony would be persuasive to a jury are related to its power to establish a material fact . . . not to its power to appeal to preferences of the jury not related to material facts." Id. at 341, 345. In Wilson, there was no physical evidence of abuse. 121 Or. App. at 462. The issue presented was whether the diagnosis of sexual abuse constituted improper vouching. Id. at 462-63. The court held that the diagnosis was not a direct comment on the child's credibility, but rather an opinion as to the proper medical diagnosis. Id. at 465-66.

practice . . . are guides to determining what is reasonable, but they are only guides." White, 770 F. App'x at 413, n. 2 (quoting Strickland, 466 U.S. at 688) (emphasis in original). Indeed, "[t]he question is whether an attorney's representation amounted to incompetence under 'prevailing professional norms,' not whether it deviated from best practices or most common custom." Richter, 562 U.S. at 105 (emphasis added).

In light of the foregoing cases, this Court concludes that trial counsel's failure to object to Hartley's diagnosis of sexual abuse did not fall below an objective standard of reasonableness because at the time of trial the testimony was admissible under Trager, Sanchez-Cruz, and Wilson.[5] It is well settled that Strickland does not require trial counsel to be clairvoyant or to make a meritless objection. Lowry v. Lewis, 21 F.3d 344, 346 (9th Cir. 1994). Like the Ninth Circuit, this Court is not persuaded that the Oregon Court of Appeals' decisions holding that a diagnosis of sexual abuse, without corroborating physical evidence, was admissible were so inconsistent with pre-Southard Oregon Supreme Court cases that trial counsel's failure to anticipate Southard fell below an objective standard of reasonableness. See Hall, 740 F. App'x at 599-60 (holding trial counsel was not ineffective for failing to anticipate Southard); cf. Mesta v. Franke, 261 Or. App. 759, 781 (2014) (opining that Southard "represented a substantial departure from previous law").

[5] Pickett argues that the Oregon Court of Appeals "simply got it wrong" and urges this Court to consider State v. Marrington, 335 Or. 555, 561-64 (2003) (holding that a psychologist's testimony that delayed reporting is a predominant feature in a child's disclosure of sexual abuse is "behavioral" scientific evidence) and State v. Leahy, 190 Or. App. 147, 152-53 (2003) (holding that a state trooper's testimony that he believed the child victim constituted improper vouching). Pet'r's Sur-Reply at 4. However, neither Marrington nor Leahy address the admissibility of a sexual abuse diagnosis, discuss the holdings in Trager, Sanchez-Cruz, or Wilson, or otherwise provide any indication that such testimony would be inadmissible on the grounds that eventually prevailed in Southard.

Further, even if the prevailing professional norm at the time of Pickett's trial was to object to the admission of this type of diagnosis, the prevailing professional norm is merely a guide and Pickett has failed to demonstrate that trial counsel's failure to object constituted incompetence under that professional norm given the admissibility of the testimony at the time of trial. Richter, 562 U.S. at 105. The fact that trial counsel may have had "nothing to lose" in raising an objection under Rule 403 does not mean he was ineffective for failing to do so.

Additionally, this Court is not persuaded that a different conclusion is warranted because the Oregon Supreme Court had granted review and heard oral argument in Southard at the time of Pickett's trial. It is only in hindsight that this Court could conclude that trial counsel should have raised a Rule 403 objection in anticipation of the holding in Southard. See Mesta, 261 Or. App. at 781 & n. 6 (holding that although the Oregon Supreme Court's grant of review "indicated that Rule 403 might be considered, there was nothing to particularly indicate that the court was going to decide the case on that issue, let alone decide it in a manner favorable to petitioner"); Mesta, 2019 WL 2337468, at *1-2 (rejecting the petitioner's assertion that appellate counsel was ineffective for failing to raise Southard-type claim after the Oregon Supreme Court issued a press release indicating that it would consider the admissibility of the diagnosis on both Rule 403 and improper vouching grounds).[6]

[6] The Oregon Supreme Court's recent statement in Jackson, 364 Or. at 329, that its grant of review in Southard was not "unexpected" given the "tension" between Trager and its decisions on improper vouching, does not warrant the conclusion that trial counsel was constitutionally deficient for failing to anticipate that a Rule 403 objection ultimately would prevail. See State v. Lupoli, 348 Or. 346, 361-62 (2010) (distinguishing between a Rule 403 objection to a diagnosis of sexual abuse and an improper vouching objection to the expert's explanatory statements); State v. Chandler, 360 Or. 323, 337-38 (2016) (discussing Southard and holding that a vouching objection is not sufficient to alert a trial court that the party also seeks to have the court engage in a Rule 403 balancing analysis). This Court agrees with Respondent's assertion that the "tension" noted by the Oregon Supreme Court is not inconsistent with the

Pickett has also failed to demonstrate that, but for trial counsel's failure to object to Hartley's diagnosis, there is a reasonable probability that the result of the trial would have been different. On the contrary, the evidence of Pickett's guilt was overwhelming. At trial, C testified to years of sexual abuse inflicted by Pickett. Her testimony was compelling, undisputed at trial, and was consistent with her pre-trial interviews, journal entries, and letters. Persons' testimony that Pickett admitted to sexually abusing C beginning at the age of eight was undisputed. In light of the overwhelming evidence against Pickett, there is no reasonable probability that had counsel raised an objection the result of the trial would have been different.

In so holding, this Court rejects Pickett's assertion that the prejudice prong of Strickland is satisfied by showing that "[b]ut for the more burdensome plain error review standard—a standard of review that only applied because counsel failed to preserve the issue—Mr. Pickett would have [prevailed on appeal and] been granted a new trial at which the diagnosis testimony could not be admitted." Pet'r's Sur-Reply at 9. Although a showing that the denial of an objection would have been overturned on appeal is relevant to whether trial counsel's conduct fell below an objective standard of reasonableness, it does not constitute prejudice under the second prong of Strickland. Rather, when the alleged deficiency is trial counsel's failure to object to trial testimony, a petitioner must demonstrate there is a reasonable probability that, but for trial counsel's error, the result of the trial would have been different. Strickland, 466 U.S. at 695 (holding that the relevant question is "whether there is a reasonable probability that, absent the errors, the factfinder would have had a reasonable doubt respecting guilt"); Flournoy, 681 F.3d at 1005-06 (considering evidence presented at trial to hold that trial counsel's failure to object did not cause prejudice); cf. Brewer v. Taylor, No. 2:14-cv-00925-AC, 2017 WL 1160573,

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Oregon Court of Appeals' conclusion that Southard represents a substantial departure from previous law. Resp't Reply (ECF No. 79) at 4.

at *2 (D. Or. Mar. 28, 2017) (holding that when the claimed deficiency is trial counsel's failure to preserve an issue for appeal, the prejudice inquiry is whether there is a reasonable probability of a more favorable outcome on appeal); Burdge v. Belleque, 290 F. App'x 73, 79 (9th Cir. 2008) (holding that trial counsel's failure to raise an objection at sentencing caused prejudice because there was a reasonable probability that the petitioner "would have benefitted from the Oregon Court of Appeals' [new] decision, or his own case would have been the one in which the Oregon Court of Appeals considered the proper interpretation" of the sentencing statute).

In sum, under the doubly-deferential standard of § 2254(d)(1), this Court concludes that the state court's rejection of Pickett's ineffective assistance of trial counsel claim is neither contrary to nor an unreasonable application of clearly established law. See 28 U.S.C. § 2254(d)(1). Accordingly, habeas relief is not warranted.

B. Ineffective Assistance of Appellate Counsel

In his state PCR proceeding, Pickett alleged that appellate counsel was ineffective for failing to "file an appeal concerning the denial of the motion to suppress the objects at issue that violated the scope [of] the warrant." Resp't Ex. 113 at 5, 18-19. The PCR court denied relief, opining that Pickett had not shown any error on the part of appellate counsel, or "that any different outcome was even possible, let alone likely." Resp't Ex. 154 at 2. Appellate counsel filed an appeal assigning error to Pickett's claim that trial counsel was ineffective for failing to object to Hartley's diagnosis. Resp't Ex. 155. Pickett filed a supplemental pro se brief in which he alleged that the PCR court erred "when it fail[ed] to offer relief on viable ineffective assistance of appellate counsel claims that were all properly raised and argued." Resp't Ex. 156 at 5. Pickett cited to the Sixth and Fourteenth Amendments and the Supreme Court's holding in Strickland. Id. at 6, 8. Under the heading "Preservation of Error," Pickett identified his three

claims of ineffective assistance of appellate counsel, including "PCR Claim No. 2: Failed to Raise Issue with Motion to Suppress Issue." Id. at 8. Pickett "relie[d] on the arguments made throughout the PCR Record." Id.

1. Procedural Default

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). "[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 v. Ryan, 740 F.3d 1302, 1317 (9th Cir. 2014). A claim that was not, and can no longer be, presented fairly in state court is procedurally defaulted. *O'Sullivan v.* Boerckel, 526 U.S. 838, 848 (1999).

Respondent argues that Pickett procedurally defaulted his ineffective assistance of appellate counsel claim by failing to provide any legal argument whatsoever and instead relying on the arguments made throughout the PCR record. Resp't Reply at 10-11. Respondent contends that "[b]ecause petitioner failed to identify the items of evidence that he believes the trial court should have suppressed, he failed to articulate a sufficient factual basis to allow the Oregon Court of Appeals to evaluate his claim." Resp't Sur-Sur-Reply (ECF No. 69) at 10-12. Pickett responds that he fairly presented his IAC claim to the state appellate courts by identifying its legal basis (the Sixth and Fourteenth Amendments and Strickland), its factual basis (the failure to

pursue the motion to suppress on appeal), and by incorporating the arguments made in his PCR petition that was attached as an excerpt of record by appellate counsel. Pet'r's Sur-Reply at 15, Pet'r's Resp. to Sur-Sur Reply (ECF No. 73) at 7. Pickett argues that this Court should extend the holding in Farmer v. Baldwin, 346 Or. 67 (2009) to conclude that the incorporation of his arguments made in his PCR petition constituted a fair presentation of his claim.

In Farmer, the Oregon Supreme Court held that a criminal defendant may incorporate his PCR petition, that was attached to his Balfour brief, into his petition for review to the supreme court. Id. at 74, 80.[7] In so holding, the court relied on the language of OR. R. APP. P. 5.90(1)(b)(i) providing that "[t]he client shall attempt to state the claim and any argument in support of the claim as nearly as practicable in proper appellate form." Id. at 76. The court opined that the rule "does not require exact compliance with the forms and rules of appellate briefing that lawyers observe." 346 Or. at 77-78. Pickett argues that Farmer is equally applicable to a supplemental pro se brief governed by OR. R. APP. P. 5.92(2), providing that "[t]he client shall attempt to prepare a supplemental pro se brief as nearly as practicable in proper appellate brief form." This Court agrees.

In Gladwell v. DeCamp, No. 3:10-cv-00061-BR, 2012 WL 5182804, at *5-6 (D. Or. Oct. 16, 2012), the Court extended the reasoning in Farmer to a petitioner's supplemental pro se brief. The Court reasoned that the concerns addressed by Farmer also apply to pro se supplemental briefs:

> In Farmer, the Oregon Supreme Court focused on the following language from Or. R. App. P. 5.90(1)(b)(i) regarding the contents of a Balfour brief's Section B: '[t]he client shall attempt to state the claim and any argument in support of the claim as nearly as

[7] A "Balfour brief" refers to the procedure adopted in State v. Balfour, 311 Or. 434, 451-52 (1991), for appointed counsel to follow when a criminal defendant seeks to pursue an appeal that counsel believes is frivolous.

> practicable in proper appellate brief form.' Farmer, 205 P.3d at 877. Based on the 'key terms' of 'attempt' and 'as nearly as practicable,' the Oregon Supreme Court concluded that the rule set forth a 'relaxed standard' regarding presentation of claims, and perfect compliance with the rules of appellate procedure was not required to present a claim for review.
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> The Oregon appellate rule governing Pro Se Supplemental Briefs contains terms identical to Rule 5.90 governing Section B of a Balfour brief. Rule 5.92[2] provides: '[t]he client shall attempt to prepare a supplemental pro se brief as nearly as practicable in proper appellant brief form.' Or. R. App. P. 5.92[2]. Thus, this Court concludes the same fundamental concern that drove the Oregon Supreme Court in Farmer to recognize a relaxed standard and permit incorporation by reference in a Balfour Section B exists when a Pro Se Supplemental Brief is filed under Or. R. App. P. 5.92.

Gladwell, 2012 WL 5182804, at *5; see also McLain v. Blacketter, No. 03-08-cv-01440-KI, 2011 WL 4478483, at *5 (D. Or. Sept. 26, 2011) (holding that the petitioner fairly presented his federal claims in his pro se petition for review by stating he was raising all IAC claims and relying on the arguments raised to the Oregon Court of Appeals); Mitchell v. Nooth, No. 3:08-cv-00331-HU, 2010 WL 3491520, at *4 (D. Or. Aug. 3, 2010) (same).

This Court finds the reasoning in Gladwell persuasive given the similarity in language between OR. R. APP. P. 5.90(1)(b)(i) and OR. R. APP. P. 5.92(2), and the U.S. Supreme Court's admonition that the exhaustion requirement is not intended to be a procedural "trap" for the "unwary" pro se litigant. Slack v. McDaniel, 529 U.S. 473, 487 (2000). Although other judges in this district have refused to extend Farmer to a supplemental pro se appellate brief, the facts in those cases provided additional reasons for concluding that the petitioners did not fairly present their claims. See Donoghue v. Nooth, No. 2:11-cv-01046-SI, 2013 WL 5272809, at *5-6 (D. Or. Sept. 13, 2013) (concluding that the petitioner's federal claims were barred by the Court of Appeals' invocation of an independent and adequate state rule and declining to extend Farmer to a non-Balfour brief that asked the court to "fully review all issues of cumulative errors"), *aff'd*

588 F. App'x 599, 600-01 (9th Cir. 2014) (holding that Farmer "does not allow a non-Balfour pro se brief to incorporate any type of document a litigant may think helpful at any stage in an appeal"); Williams v. Nooth, No. 3:10-cv-00070-ST, 2013 WL 1703596, at *4 (D. Or. Mar. 21, 2013), adopted 2013 WL 1703616 (D. Or. Apr. 15, 2013) (holding that the petitioner did not fairly present his federal claim in his petition for review because it raised state law claims only, did not incorporate any federal claims, and simply stated that the issues "are well presented" in the appellate briefs); Frazier v. Hill, No. 3:05-cv-1416-ST, 2011 WL 740912, at *3-4 (D. Or. Feb. 22, 2011) (holding that the petitioner did not fairly present all claims in his PCR petition "through the general statement in his supplemental pro se brief asking the court to 'fully review all issues for cumulative errors, which may amount to ineffective assistance of counsel'" and because "multi-level" incorporation goes beyond Farmer); Williams v. Belleque, No. 3:03-cv-01678-JO, 2010 WL 3603781, at *5 (D. Or. Sept. 13, 2010) (holding that the petitioner's IAC claims were not fairly presented as discrete claims and rejecting that petitioner's reliance on Farmer because it is limited to Balfour briefs).

In this case, in contrast, Pickett identified the deficiency in appellate counsel's performance (the failure to assign error to the trial court's denial of his motion to suppress) and the federal basis of his claim (the Sixth and Fourteenth Amendments and Strickland). Although Pickett did not identify the evidence he sought to suppress, he incorporated by reference his PCR petition alleging that appellate counsel was ineffective for failing to challenge the illegal search and seizure of "the diary, journal, and letters." Resp't Ex. 113 at 18-19. Under these circumstances, this Court concludes that Pickett fairly alerted the state court to the presence of his federal claim.

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2. The Merits

Law enforcement officials searched Pickett's home for the purpose of locating "[a]ny and all evidence" of the crimes of Encouraging Child Sexual Abuse in the First and Second Degree, including books, letters, and other correspondence that pertained to developing, exchanging, possessing, or distributing visual depictions of minors engaged in sexually explicit conduct. Resp't Ex. 104 at 63-64; Pet'r's Br. in Supp., Ex. A at 3-4.[8] Pickett moved the trial court to suppress C's journals and letters because, although they may have contained evidence of sexual abuse, the handwritten documents were not child pornography and therefore were beyond the scope of the warrant. Resp't Ex. 133 at 6-7. Pickett argued that "[a]fter the officers located the documents in question and determined the documents were not visual depictions of child sexual conduct, the officers were required to leave the items without further scrutiny." Id. at 7.

The prosecution argued that the warrant authorized a search of all evidence of the crimes of Encouraging Child Sexual Abuse in the First and Second Degree and that "it is obvious that letters written by [a] child living in the home of the defendant would reasonably contain evidence for these crimes." Resp't Ex. 134 at 4. The prosecution explained that the crimes require proof that a defendant was "aware that the creation of the sexually explicit images involved child abuse" and argued that "[t]he letters in question certainly document the defendant['s] knowledge of child abuse." Id. at 4-5. Additionally, the prosecution explained that

[8] A person commits the crime of Encouraging Child Sexual Abuse in the First Degree if he (a) knowingly develops, duplicates, publishes, prints, disseminates, or sells a visual recording of sexually explicit conduct involving a child; and (b) knows or is aware of and consciously disregards the fact that creation of the visual recording of sexually explicit conduct involved child abuse. OR. REV. STAT. § 163.684(1). A person commits the crime of Encouraging Child Sexual Abuse in the Second Degree if he (a) knowingly possesses or controls a visual recording of sexually explicit conduct involving a child for the purpose of arousing or satisfying the sexual desires of the person or another person; and (b) knows or is aware of and consciously disregards the fact that the conduct constitutes child abuse. OR. REV. STAT. § 163.686(1).

Encouraging Child Sexual Abuse in the Second Degree requires proof that the "defendant possesses certain images for the purpose of satisfying his sexual desires or another person," which a child's journal and letters also could document. Id. at 5 (emphasis added). Special Agent Persons explained the potential relevance of a minor's journal or letters to child pornography crimes:

> [W]e've been involved in numerous situations where there are letters or stories detailing a suspect's involvement in the, in the production of child pornography, in the dissemination and the saving. We've had numerous cases where we find child pornography in the bedrooms of [minors], the child sexual offenders will typically use material like that to entice or induce or to make this child feel that it's okay that this type of behavior is happening to them.
>
> So[,] we would by all means go in and look at written documents that explain, have suspects that have, that have written letters to children, explained it to them that 'I take those pictures of you because I love you. I do these things to you become I love you.'
>
> So absolutely, we would look and, in that child's diary, at letters that are written, to try and identify how is this, when is this person possessing, how is this person possessing, how is this person producing.

Resp't Ex. 103 at 65-66.

The trial court denied Pickett's motion to suppress, holding that the officers' search and seizure of C's journals and letters did not exceed the scope of the warrant. Id. at 149, 154-55. The trial court held that "[i]t was reasonable for the officers to look in the letters and diary for evidence related to the listed crimes in the search warrant" and that the officers "immediately saw evidence of Child Abuse" when they opened the journal. Id. at 150. In Pickett's subsequent PCR proceeding, Pickett argued that appellate counsel was ineffective for failing to pursue the suppression issue on appeal. Resp't Ex. 113 at 5. Pickett offered as an exhibit a letter from his

appellate counsel explaining that she did not believe that Pickett had a privacy interest in C's journals and letters. Resp't Ex. 117 at 2. The PCR court denied relief.

In the instant proceeding, Pickett contends that appellate counsel rendered ineffective assistance by failing to appeal the trial court's denial of Pickett's motion to suppress because the search exceeded the scope of the warrant. Pet'r's Br. in Supp. at 26-27. Pickett emphasizes that the search warrant was for evidence of child pornography crimes only and authorized officers to read only documents about producing or transferring pornography. Id. at 28-29; Pet'r's Sur-Reply at 12. Pickett argues that "[e]ven if the search warrant allowed for officers to open up the diary and letters to see if child pornography or electronic storage devices were hidden inside, the officers exceeded the scope of the warrant when they went on to read the entirety of the documents." Pet'r's Br. in Supp. at 29; Pet'r's Sur-Reply at 13-14. Pickett argues that "[a] reasonable appellate attorney would have . . . attacked the admission of the most incriminating evidence against Mr. Pickett: the letters and the diary, and evidence derivative of them, Mr. Pickett's statements to law enforcement, and C's interview with officers." Pet'r's Br. in Supp. at 32-33.

Strickland's two-prong test applies to claims of ineffective assistance of appellate counsel. Smith v. Robbins, 528 U.S. 259, 285 (2000). In order to prevail, a petitioner must demonstrate that (1) appellate counsel was objectively unreasonable in failing to raise the assignment of error on appeal; and (2) there is a reasonable probability that, but for appellate counsel's error, the petitioner would have prevailed on appeal. Id. Under this standard, "appellate counsel . . . need not (and should not) raise every nonfrivolous claim, but rather may select from among them in order to maximize the likelihood of success on appeal." Id. at 288 (citing Jones v. Barnes, 463 U.S. 745, 752-53 (1985)); Davila v. Davis, 137 S. Ct. 2058, 2067 (2017)). Hence,

incompetence is difficult to prove, and generally only when the omitted issues are "clearly stronger" than those presented, will the presumption of effective assistance of counsel be overcome. Smith, 528 U.S. at 288.

This Court concludes that appellate counsel was not objectively unreasonable for failing to raise the suppression issue on appeal. Reasonable appellate counsel could have chosen to raise the Southard issue only, despite being unpreserved, in order to maximize the likelihood of success on appeal. Smith, 528 U.S. at 288; Davila, 137 S. Ct. at 2067. The suppression issue was not "clearly stronger" because the content of C's journal and letters documenting sexual abuse was relevant to the crimes of Encouraging Sexual Abuse in the First and Second Degree. Further, as demonstrated by the parties' briefing in the instant proceeding, the strength of the suppression issue was further diminished by questions of whether Pickett had a privacy interest in the contents of C's journal and letters, whether the plain-view doctrine justified the officers' decision to read the journal and letters, and whether the trial court's factual finding that the incriminating nature of the journal and letters was immediately apparent would be binding on appeal. Accordingly, this Court concludes that Pickett has failed to demonstrate that appellate counsel's failure to pursue the suppression issue on appeal fell below an objective standard of reasonableness, or that there is a reasonable probability that, but for this omission, Pickett would have prevailed on appeal. Habeas relief therefore is not warranted.

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CONCLUSION

Based on the foregoing, this Court DENIES Pickett's Habeas Corpus Petition (ECF No. 2), with prejudice. The Court GRANTS a certificate of appealability on ground one, subpart six, and ground two, subpart one.

IT IS SO ORDERED.

DATED this 26th day of September, 2019.

STACIE F. BECKERMAN
United States Magistrate Judge