IN THE SUPREME COURT OF THE STATE OF OREGON

MARTIN ALLEN JOHNSON, Petitioner-Respondent/ Cross-Appellant, Respondent on Review, v. JEFF PREMO, Superintendent Oregon State Penitentiary, Defendant-Appellant/ Cross-Respondent, Petitioner on Review.	Marion County Circuit Court No. 06C16178 Court of Appeals No. A154129 Supreme Court No. S064132

RESPONDENT ON REVIEW JOHNSON'S BRIEF ON THE MERITS

Review of the Decision of the Court of Appeals
on Appeal from a Judgment of the Circuit Court for Marion County
Honorable DON DICKEY, Sr. Judge

Affirmed by Written Opinion: March 30, 2016
Before: Devore, P.J., Flynn, J. (authored opinion), and Haselton, S.J.

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RESPONDENT ON REVIEW JOHNSON'S BRIEF ON THE MERITS

For purposes of clarity, this brief refers to respondent on review Martin Allen Johnson as "petitioner,"[1] and petitioner on review Jeff Premo (Superintendent of the Oregon State Penitentiary) as "the state."[2]

SUMMARY OF ARGUMENT

The Court of Appeals' opinion in this case should be affirmed because it correctly held that petitioner is entitled to post-conviction relief from his aggravated-murder convictions and resulting death sentence, on the ground that trial counsel provided constitutionally inadequate assistance by failing to investigate whether the victim had died of a drug overdose, rather than strangulation. *Johnson v. Premo*, 277 Or App 225, 227, 237-41, 370 P3d 553 (2016).

Specifically, there is evidence in the record to support the post-conviction court's finding that trial counsel knew before trial that the jury was "very unlikely" to accept counsel's wrong-venue defense—the only defense supported by their expert's opinion that the victim had drowned to death. Given counsel's awareness before trial of petitioner's history of providing drugs to young women to have sex with them, the amount of morphine found in the victim's body, and petitioner's description of how she died—along with the fact that this was a death-penalty prosecution—the Court of Appeals and the post-conviction court both correctly concluded that, in failing to consult with a

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[1] *See* ORAP 5.15 ("[i]n the body of a brief, parties shall not be referred to as appellant and respondent, but as they were designated in the proceedings below," except in domestic relations proceedings).

[2] *See Lichau v. Baldwin*, 333 Or 350, 39 P3d 851 (2002) (post-conviction appeal referring to respondent superintendent as "the state"); *Gorham v. Thompson*, 332 Or 560, 34 P3d 161 (2001) (same).

toxicologist to further explore the possibility of an overdose defense, counsel did not conduct a reasonable investigation nor make a reasonable evaluation of the likely costs and potential benefits of that defense. That, in turn, was a failure to exercise reasonable professional skill and judgment for purposes of petitioner's inadequate-assistance claim under the Oregon Constitution.

In arguing otherwise, the state contends that counsel made a reasonable tactical decision not to investigate an overdose defense because their expert told them the amount of morphine in the victim's blood was relatively low and unlikely to have materially affected her awareness, and because counsel believed an overdose defense would have required testimony from petitioner, whom the state asserts was uncooperative and had "serious credibility issues." The state's arguments are contrary to—or simply ignore—the post-conviction court's supported findings of fact, disregard the standard of review, and mischaracterize both the record and controlling substantive law.

First, contrary to the state's Question Presented, this case is not primarily about trial counsel's reliance on an expert opinion, but rather about the reasonableness of counsel's overall investigation in selecting a guilt-phase defense, of which reliance on an expert is but a single factor. In focusing mostly on the expert issue, the state largely ignores the numerous other factors on which the Court of Appeals correctly relied, as found by the post-conviction court and supported by evidence in the record. In rejecting the state's attempt below to rely on the expert issue as the controlling factor, the Court of Appeals correctly adhered to this court's long-standing precedent also rejecting the type of categorical rule the state advocates here.

Second, even on the expert issue it presents, the state's arguments are unsupported by the record and contrary to the post-conviction court's supported findings of fact. For example, though the defense expert told counsel before

trial that the victim's morphine level was relatively low and unlikely to have materially affected her awareness or ability to fend off an assailant, it is undisputed that counsel never asked any follow-up questions to explore what their expert believed would have been a fatal dose in someone of the victim's age and weight, and whether their expert could even answer that question. If they had, they would have learned either that the victim's morphine level was indeed within the fatal range—as petitioner proved in the post-conviction court—or that their expert could not answer that question, and they instead needed to consult someone with the appropriate expertise. Moreover, their expert's assessment of the victim's morphine level was offered in the context of his opinion that the victim had *drowned*. Because the most that opinion provided was a venue defense that the post-conviction court found—and the record supports—counsel *knew* before trial was very unlikely to succeed with the jury, that opinion did not justify counsel's failure to investigate a possible defense of morphine overdose on the basis of petitioner's story. Counsel also had reason to doubt the validity of their expert's opinion about the victim's morphine levels, where the expert had been sought out for his expertise on *drowning*, not toxicology, and counsel were aware their expert had prematurely settled on drowning as the cause of death before receiving and reviewing all the autopsy information and evidence.

Counsel's failure to investigate also cannot be justified by the deputy medical examiner's opinion that the victim had been strangled to death, where counsel's chosen strategy was to show that the victim had *not* been strangled. Moreover, the difference in the experts' opinions about the likely effect of the victim's level of morphine on her mental state and awareness—with the deputy medical examiner opining that it probably reduced her ability to resist an assault, and the defense expert opining that it probably had not—should have

prompted counsel to seek an opinion on that issue from someone with specific expertise in that area, such as a toxicologist. Moreover, this court has held that defense counsel's duty to investigate cannot be satisfied by relying on the prosecution's pretrial investigation, where the petitioner is able to present significant evidence in the post-conviction proceedings rebutting the prosecution's case, which a proper defense investigation would have uncovered. That is what occurred in this case.

Third, trial counsel's concerns that an overdose defense would have required testimony from petitioner describing specifically what happened, or that such defense would have opened the door to testimony from petitioner's friends and associates about their drug use, also were not objectively reasonable grounds for failing to investigate. It was foreseeable that petitioner's associates would be testifying on that issue anyway as part of the prosecution's own case-in-chief, and based on that evidence, an overdose defense could have been presented without petitioner ever taking the stand, as the Court of Appeals correctly held. The prosecution presented an abundance of prior-bad-act testimony that petitioner had previously drugged, incapacitated, and sexually assaulted multiple other young women, in support of its theory that he had done the same thing with the victim in this case. Because none of those women had died, counsel could have argued, without petitioner testifying, that petitioner had intended merely to do the same thing with the victim here—*i.e.*, drug and have sex with her, but not kill her—and therefore that her overdose death had been an accident. There was also evidence from which counsel could have argued that the victim here had willingly taken drugs and had sex with petitioner—as had many of the witnesses portrayed by the prosecution as petitioner's prior "victims"—further supporting a defense of accidental overdose without petitioner testifying. Alternatively, the record does not

support the state's contention that petitioner would have refused to testify in support of an overdose defense, as the Court of Appeals also correctly held, nor does the record show that he was refusing to cooperate with the investigation or presentation of such a defense.

Finally, though the state does not argue the question of prejudice in its brief in this court—choosing instead to rely on its prejudice arguments in its Court of Appeals' briefs—its Statement of Facts here mischaracterizes the post-conviction testimony of petitioner's experts on the cause of the victim's death. The state also fails to recite the evidence on the believability of that expert testimony consistently with the post-conviction court's supported factual findings and conclusions of law. Rather, in reciting those facts *contrary to* the post-conviction court's grant of post-conviction relief, the state appears to be attempting—improperly—to reargue on appeal the factual questions that it lost in the post-conviction court.

SUPPLEMENTAL STATEMENT OF FACTS

As noted, certain portions of the Statement of Facts in the state's brief mischaracterize the record or fail to recite the facts consistently with the post-conviction court's supported factual findings and legal conclusions, as required by the standard of review.

Under that standard, though this court "reviews post-conviction proceedings for errors of law," "[t]he post-conviction court's findings of historical fact are binding on this court if sufficient evidence in the record supports them." *Peiffer v. Hoyt*, 339 Or 649, 660, 125 P3d 734 (2005) (bracketed material added). "If the post-conviction court fails to make findings of fact on all the issues, and there is evidence from which such facts could be decided more than one way, [this court] will presume that the facts were decided in a manner consistent with the post-conviction court's conclusion of

law." *Id.* (*citing Ball v. Gladden*, 250 Or 485, 487, 443 P2d 621 (1968)). In this case, the state disregards that standard in the following respects.

I. The state does not recite the facts involving the post-conviction expert testimony on the cause of death consistently with the standard of review.

A. The post-conviction court made a binding credibility finding that there was "believable" expert testimony that the victim died of a morphine overdose.

First, the state does not acknowledge, much less address, the post-conviction court's explicit finding that "[t]here was *believable* qualified expert evidence offered in the PCR proceeding that the cause of death was morphine overdose[.]" (ER-82, *citing* post-conviction testimony of petitioner's experts, toxicologist Dr. Robert Julien and forensic pathologist Dr. Janice Ophoven; emphasis added). That is a credibility determination entitled to deference on appeal, the same as any other supported finding of fact. *See State v. Johnson*, 335 Or 511, 523, 73 P3d 282 (2003) ("unless the evidence in a case is such that the trial court as finder of fact could decide a particular factual question in only one way," an appellate court is "bound by a trial court's acceptance or rejection of evidence"); *see also Gable v. State*, 353 Or 750, 761-62, 305 P3d 85, *cert den* 134 S Ct 651 (2013) (it "is dispositive" that "the post-conviction court expressly, and repeatedly, found that petitioner was not a credible witness").

B. The state mischaracterizes the post-conviction testimony of petitioner's experts.

Second, in its Statement of Facts, the state mischaracterizes and wrongly attempts to downplay the strength of the post-conviction testimony of Drs. Julien and Ophoven, completely ignoring the post-conviction court's above-described binding credibility finding and again disregarding the standard of review. For example, the state asserts that the most these experts testified was "that the victim *could have* died of a morphine overdose" and that level of

morphine found in her blood "*can be fatal* to some individuals." (State's Brief on the Merits ("BOM") 14; emphasis added). According to the state, "all the experts could say was that the level of morphine in her system was 'consistent with fatality' under certain assumptions and that it could not be 'conclusively eliminated' as a possible cause of death." (State's BOM 14-15; emphasis added). That is factually incorrect.

Not only did toxicologist Dr. Julien testify that it *was* a fatal dose (6/18/12 Tr 345, 346-47, 348-49, 352-54, 364, 367-68, 377, 379-80), but, as the Court of Appeals correctly noted, he concluded in his report that "it was '*very likely* that [the victim] died as a result of morphine overdose.'" 277 Or App at 232 (*quoting* Ex 500 at 3; emphasis added). Additionally, as the Court of Appeals also correctly noted, forensic pathologist Dr. Ophoven testified that

> "I have *conclusive evidence of a morphine overdose*. I *do not have evidence* that she was [a]live in the water. I can't conclusively exclude it [*i.e.*, drowning], but *I would never say that was the cause of death*."

277 Or App at 233 (*quoting* Dr. Ophoven's post-conviction trial testimony, 6/20/12 Tr 880; emphasis, bracketed material added). The foregoing is among what the post-conviction court found to be "believable qualified expert evidence * * * that the cause of death was morphine overdose[.]" (ER-82). By mischaracterizing, downplaying, and otherwise ignoring that evidence, the state disregards the standard of review.

C. Both the deputy medical examiner and the prosecution at the criminal trial made the same assumption as petitioner's experts about the victim lacking a tolerance to opiates.

Third, the state asserts that both of petitioner's post-conviction experts "acknowledged that individuals have widely varying tolerance to morphine, depending on, among other things, how often they have been exposed to it in the past[,]" that both "could reach their conclusions only by assuming at the victim was 'opioid' naïve or at least not a regular user of drugs like heroin[,]"

but that "[p]etitioner had told his trial counsel that the victim was a 'polymorphic drug user' with prior opiate use." (State's BOM 14). However, as the state itself is forced to admit earlier in its Statement of Facts (State's BOM 3), the prosecution's own expert at the criminal trial, deputy medical examiner Dr. Nikolas Hartshorne, *also assumed* that the victim was "opioid naïve," based on the lack of evidence to the contrary. According to Dr. Hartshorne's testimony, the morphine level detected in the victim was "greater than six times the therapeutic amount that we normally see in individuals" being treated for a common injury, and instead is typically seen in people in emergency rooms who "were in car accidents, had their limbs chopped off—really, really bad injuries[.]" (Ex 1 at 2480-81). In characterizing that as a "significant amount" of morphine, and agreeing that made it "easier for [the victim] to die from strangulation[,]" Dr. Hartshorne testified that "this is with the level where *we are assuming she isn't a ten-year heroin addict*, *because you develop some tolerance to morphine after you take it and take it and take it*." (Ex 1 at 2481-82; emphasis added). Indeed, in cross-examining trial counsel's expert Dr. James Ferris at the criminal trial about the effect that level of morphine would have had on the victim, even *the prosecutor himself assumed* the victim was morphine intolerant—asking "[i]sn't it true that that level in a 15-year-old girl *with no tolerance* is sufficient to render her unconscious?" (Ex 1 at 3232; emphasis added). Therefore, the assumption of Drs. Julien and Ophoven about the victim lacking an opiate tolerance is *entirely consistent with* the prosecution's own evidence and argument on that point.

As for the state's assertion that petitioner told trial counsel about the victim allegedly being "a 'polymorphic drug user' with prior opiate use" (State's BOM 14), what petitioner actually told counsel—according to petitioner's deposition testimony cited by the state—is that the victim "used lots

of street drugs; LSD, Ecstasy, meth[,]" that "[s]he was a polymorphic drug user during the time I knew her[,]" and that he had "done OxyContin drugs before" with the victim "prior to this," and that "if you test her hair, it's going to show that she's done prior opiates[.]" (Ex 11 at 46-47). What the state does not disclose, however, is that after trying unsuccessfully to subpoena the victim's medical and juvenile records pretrial, counsel told the criminal trial court that "we have not been able to locate either witnesses, police reports, or other documents which relate specifically to the prior use of opiates by" the victim, and "[i]f such information should become known to the defense in the future, we will immediately bring that to the court's attention at that time." (Ex 27 [co-counsel Peters's file] at 1101 [4/2/01 letter to court]). Petitioner can locate no evidence in the criminal-trial record of counsel later presenting any information to the criminal trial court about the victim previously using heroin, morphine, or any type of opiate. To the extent petitioner's statements to trial counsel—about the victim having "done prior opiates," and having "done OxyContin drugs" with petitioner "prior to this"—is in conflict with counsel's representations to the criminal trial court about whether the victim had a history of heroin or opiate use, the post-conviction court is presumed to have resolved that evidentiary conflict consistently with its ultimate grant of relief—*i.e.*, by finding implicitly that the victim *did not* have a history of heroin or opiate use. *Peiffer*, 339 Or at 660; *Ball v. Gladden*, 250 Or at 487.

Indeed, after an *in camera* review of the victim's Department of Human Services' file—discussed in the Third Assignment of Error in petitioner's cross-appeal opening brief in the Court of Appeals (*see* Combined Answering/Cross-Opening Brief ("Pet Comb Br") 117-41)—the post-conviction court explicitly found "there is no mention of heroin or morphine in the records[.]" (Pet Comb Br, SER-9 [2/26/12 Letter Determination], ¶ 5(D)). If there were any evidence

that the victim in fact had a history of heroin or opiate abuse, the state certainly would have presented that in the post-conviction court. But it did not. Rather, on petitioner's claim of inadequate and ineffective assistance involving the victim's records—discussed in the Fourth Assignment of Error in petitioner's cross-appeal opening brief in the Court of Appeals (Pet Comb Br 141-63)—the state itself actually argued in the post-conviction court that "petitioner still has not produced credible evidence that the victim used 'heroin or some other opiate' other than the morphine that was found in her system after she was dead." (6/15/12 Defendant's Trial Memorandum/Response to Petitioner's Third Pre-Trial Memorandum, at 3).

Moreover, for purposes of identifying morphine as the cause of the victim's death, what matters is whether she had previously been a *regular enough abuser* of opiates to have developed a *tolerance*, which was, in turn, relevant to whether the high level of morphine found in her system at the time of death was enough to have killed her. At the post-conviction trial, Dr. Ophoven testified that her basis for concluding that the victim did not have a tolerance for opiates was the lack of any evidence or reports that she had used heroin "on a *regular* basis" or "that she ever *indulged* in opiates." (6/20/12 Tr 887-88, 897-98; emphasis added). According to Dr. Ophoven, "when you're talking about someone who's an addict, I mean, *it isn't that you just take it a few times. Being an addict is what grows your tolerance to the drug*. So there's no evidence that she would have been tolerant." (6/20/12 Tr 898; emphasis added). Similarly, Dr. Julien's opinion was that the level of morphine in the victim's body was sufficient to have stopped respiration and resulted in the death of a person who was "non-tolerant to opioid narcotics." (6/18/12 Tr 345, 346-47). (*See also*, again, Ex 1 at 2482: criminal-trial testimony of deputy medical examiner Dr. Hartshorne that "we are assuming [the victim] isn't a ten-

year heroin addict, because *you develop some tolerance to morphine after you take it and take it and take it*"; emphasis added).

But petitioner's statement to trial counsel on which the state here relies—that he had "done OxyContin drugs before" with the victim "prior to this," and that "she's done prior opiates" (Ex 11 at 46-47)—was simply not enough to have shown regular enough opiate abuse or indulgence by the victim, nor a resulting tolerance, to have undermined Dr. Julien and Dr. Ophoven's opinions on this issue. In other words, under the standard of review, petitioner's vague, general statement to counsel was not such that the post-conviction court was *required* to find the opinions of Dr. Julien and Dr. Ophoven *un*believable, and this court should reject the state's attempt to disregard the post-conviction court's finding to the contrary. *Johnson*, 335 Or at 523.

D. The post-conviction court implicitly rejected the portions of the post-conviction testimony of the state's expert that the state recites on appeal.

Fourth, the state continues to ignore the post-conviction court's explicit factual findings and the standard of review, in reciting the portions of the post-conviction trial testimony of its expert Dr. Stuart Rosenblum that contradicted Dr. Julien's cause-of-death opinion involving the victim's morphine levels. (State's BOM 15-16). Specifically, the state recites Dr. Stuart Rosenblum's testimony that the morphine level on which Dr. Julien relied was not "a 'reliable indicator' of whether a morphine dose was lethal," but rather is "'just a starting point'" because "the range of lethality is so broad" and "a lethal dose could be anywhere from a tenth of" that level "to ten times higher, because lethality is so dependent on factors ranging from allergic reaction to high tolerance." (State's BOM 15-16).

What the state fails to acknowledge, however, is how the post-conviction court relied on Dr. Rosenblum's *other* testimony *as supporting* its grant of post-

conviction relief—namely, Dr. Rosenblum's testimony "that the total morphine * * * 'could actually represent a lethal dose of morphine[,]'" that the victim "'lived for some time after ingesting morphine'" and that "'this was not an acute death[.]'" (6/22/12 Tr 1256, 1277, *quoted at* ER-82 to ER-83). In other words, in quoting those specific parts of Dr. Rosenblum's testimony in support of its prejudice ruling (ER-82 to ER-83), the post-conviction court explicitly found that *those* were the parts of Dr. Rosenblum's testimony it considered *believable* and that supported its ruling. Conversely, the post-conviction court also necessarily and implicitly found that the *other* parts of Dr. Rosenblum's testimony—including those on which the state relies here—were not convincing, or at least did not support the state's arguments. *See*, *again*, *Johnson*, 335 Or at 523 (an appellate court is "bound by a trial court's acceptance or rejection of evidence[,]" including "a trial court's 'finding' that a party's evidence is not sufficiently persuasive"); *Peiffer*, 339 Or at 660 ("If the post-conviction court fails to make findings of fact on all the issues, *and there is evidence from which such facts could be decided more than one way*, [the appellate court] will presume that the facts were decided in a manner consistent with the post-conviction court's conclusion of law.") (emphasis added). Again, because the record in this case is not such that the post-conviction court was *required* to find that those other parts of Dr. Rosenblum's testimony were believable, the post-conviction court's rejection of that testimony is binding on appeal, the same as any other supported factual finding. *Johnson*, 335 Or at 523.

Moreover, the state also does not discuss, nor even acknowledge, the post-conviction court's finding that Dr. Rosenblum had not been asked to provide the state with an opinion as to whether the victim had died of an overdose. (ER-82 to ER-83). There is evidence in the record to support that

finding, namely, Dr. Rosenblum's post-conviction trial testimony admitting that fact. (6/22/12 Tr 1274). That, in itself, provides sufficient reason for the post-conviction court to have questioned the credibility of the parts of Dr. Rosenblum's testimony on which the state now relies. As noted, such credibility findings are binding on appeal. *Gable*, 350 Or at 761-62; *Johnson*, 335 Or at 523.

E. The state's recitation of the medical examiner's testimony about his strangulation opinion also disregards the standard of review.

Fifth, the state again disregards the standard of review by reciting the criminal-trial testimony of deputy medical examiner Dr. Hartshorne about his basis for concluding the victim was strangled to death (State's BOM 3), without also reciting or otherwise disclosing Dr. Ophoven's post-conviction trial testimony that the reasons Dr. Hartshorne reached that conclusion did not, in Dr. Ophoven's opinion, demonstrate death by manual strangulation. (6/20/12 Tr 865-66, 868, 870, 874-80, 904-05, 911).[3] As noted, the post-conviction court found Dr. Ophoven's testimony to be among the "believable qualified expert evidence offered in the PCR proceeding that the cause of death was morphine overdose[.]" (ER-82).

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[3] Specifically, Dr. Ophoven testified that the hyoid bone in the victim's trachea area was not damaged, nor was her larynx, trachea lining, or surrounding tissues; the two dark spots on one of the victim's muscles were not bruises, but rather blood vessels with blood in them from the body being face down; the livor mortis or blanching or red blotches on the victim's face were from congestion, or the settling of blood, and showed she died face down; the marks on the surface of the victim's neck were from a necklace she had been wearing, and such marks can result from dragging or moving a body. (6/20/12 Tr 865-66, 868, 870, 874-80).

II. The state incorrectly implies that the Court of Appeals' opinion was based only on the expert issue.

Additionally, contrary to the implication of the state's factual description (State's BOM 17), the Court of Appeals' opinion in this case was not focused *only* on whether counsel were entitled to rely on their expert's opinion, but instead was based on the unique facts found by the post-conviction court and supported by the record.

Specifically, the state does not appear to dispute that, although the victim had "a significant amount of morphine in her system when she died[,]" the only legal defense supported by the opinion of counsel's expert Dr. Ferris—that the victim had drowned—was "wrong venue." 277 Or App at 229, 231 (internal quotation marks omitted). The Court of Appeals, however, held that evidence in the record supported the post-conviction court's findings that

- "an improper venue defense was 'unlikely in the extreme' because 'there was virtually little chance that any jury would acquit upon [p]etitioner's defense which acknowledged that [p]etitioner killed'" the victim (underscoring in original);
- "defense counsel 'had to know that it was very unlikely that a jury might acquit in such a circumstance, particularly if the jury had any reasonable basis for rejecting the 'defense'";
- "defense counsel knew that petitioner had a history of supplying women with drugs in order to engage in sexual activity with the women";
- "defense counsel knew about petitioner's belief that he found the victim dead in his home in Washington County, and that, if he were correct in that belief, the victim 'did not die by drowning because she was already
- dead'";
- and, as such, "defense 'counsel knew there was another factual defense which was at least plausible'"—*i.e.*, morphine overdose—but "'[c]ounsel made little if any effort to follow up on any possibility of that defense.'"

277 Or App at 237-38 (*quoting* post-conviction court's findings). The state does not appear to dispute that the post-conviction court made those findings, nor that there is evidence in the record to support them.

Based on those findings, the Court of Appeals held that "petitioner did not receive constitutionally adequate representation." 277 Or App at 238. Specifically, citing this court's precedent, the Court of Appeals held that "counsels' decision to rely on [their expert Dr.] Ferris's opinion and the venue defense was not a reasonable tactical decision deserving of deference[,]" because a tactical decision must be grounded on a reasonable investigation and involve a conscious choice by counsel stemming from an evaluation of potential costs, benefits, and other factors. 277 Or App at 238 (*citing Lichau v. Baldwin*, 333 Or 350, 360, 39 P3d 851 (2002), *Gorham v. Thompson*, 332 Or 560, 567, 34 P3d 161 (2001), and *Stevens v. State of Oregon*, 322 Or 101, 109, 902 P2d 1137 (1995)).

More specifically, on the basis of the post-conviction court's finding "that petitioner's counsel 'knew there was another factual defense which was at least plausible even if it was difficult under the circumstances to prove,' yet [counsel] 'made little if any effort to follow up on any possibility of that defense[,]'" the Court of Appeals determined that this case was materially similar to *Lichau v. Baldwin*. 277 Or App at 238-39 (bracketed material added). In *Lichau*, this court held that trial counsel rendered constitutionally inadequate representation in a prosecution for rape, sodomy, and sexual abuse, by relying on a prior attorney's investigation and on inconclusive material provided by the prosecution, rather than conducting his own investigation into an alibi defense claimed by his client. 333 Or at 352, 360-62. As in *Lichau*, the Court of Appeals reasoned, counsel's choice here "'to limit his investigation'" by not consulting a toxicologist "was not 'based on a reasonable evaluation of the likely costs and potential benefits' to petitioner.'" 277 Or App at 238-39 (*quoting Lichau*, 333 Or at 361, *which quoted Stevens*, 322 Or at 109). The Court of Appeals therefore affirmed the post-conviction court's ruling that

"petitioner's defense counsel did not make 'an informed choice after due diligence toward being well informed on potential defenses.'" 277 Or App at 239 (*quoting* post-conviction court's ruling).

As such, the Court of Appeals did not—contrary to the implication of the state's factual description of that court's opinion, and its arguments later in its brief—adopt a categorical rule that trial counsel must *always* seek a second or third expert's opinion. Rather, as the foregoing demonstrates, the Court of Appeals merely applied the principles of this court's duty-to-investigate cases to the specific, unique facts found by post-conviction court and supported by the record.

On the prejudice prong of the analysis,[4] the Court of Appeals held that counsel's deficient investigation had a tendency to affect the result of the guilt phase, because evidence in the record supported the post-conviction court's findings that Dr. Julien was available to testify at the time of petitioner's criminal trial and could have provided the "believable qualified expert evidence" that the victim had died from a morphine overdose and not from strangulation. 277 Or App at 240. That, in turn—the Court of Appeals correctly concluded—would have allowed trial counsel to argue that petitioner was not guilty of aggravated murder, but of a lesser-included offense that did not carry the death penalty, such as manslaughter, criminally negligent homicide, or felony murder not committed intentionally. *Id.*

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[4] In its Statement of Facts, the state does not describe the prejudice portion of the Court of Appeals' opinion. (*See* State's BOM 17). As noted, the state asserts that it is not arguing the issue of prejudice in its brief before this court, and instead relies on its Court of Appeals' briefs on that issue. (State's BOM 19 n 3).

ARGUMENT

I. The state's "expert advice" arguments do not justify reversing the Court of Appeals.

A. This case is not primarily about counsel's reliance on an expert, but rather about the reasonableness of counsel's investigation as a whole, of which their reliance on an expert is but one factor.

As a threshold matter, the state improperly frames the questions for this court too narrowly—*i.e.*, as whether trial counsel in this case were entitled to rely on the opinions of their retained expert and the state medical examiner in formulating a defense strategy, or whether they were constitutionally required to "shop around" for another expert in support of a different defense. (State's BOM 2, 18, 20). This case is not primarily about counsel's reliance on expert opinions, but about whether counsel conducted a constitutionally sufficient investigation, of which counsel's reliance an expert opinion is *only one factor*—as both the post-conviction court and the Court of Appeals both correctly recognized.

Specifically, as noted in petitioner's Supplemental Statement of Facts, the Court of Appeals here correctly held—on the basis of the post-conviction court's supported findings of fact—that, in a capital case, in the unusual situation where trial counsel know the only defense supported by their expert's opinion is worthless, and they have reasonable evidence of another possible defense, counsel have a duty to continue investigating, even if that means consulting another expert. 277 Or App at 237-39. In other words, the number of experts that should be consulted is a question of reasonableness under the circumstances of the particular case, and one expert is not the end all and be all of an investigation, if there is any substantial reason to doubt that expert's opinion. Here, there were such reasons—*i.e.*, the presence of morphine in the

victim's system and petitioner's account of how she died, among other reasons, discussed *infra*.

B. The state's arguments for adopting a categorical rule involving counsel's reliance on experts is contrary to Oregon law.

Moreover, as the Court of Appeals also correctly explained in rejecting the primary argument the state makes here,[5] this court "has emphasized that, in seeking to identify constitutionally adequate representation, '[t]he search for a single, succinctly-stated standard, objectively applicable to every case, is a fool's errand.'" 277 Or App at 239 (*quoting Krummacher v. Gierloff*, 290 Or 867, 874, 627 P2d 458 (1981)). According to this court in *Krummacher*,

> any statement of the standard of performance constitutionally required of counsel *must necessarily be general* and * * * a degree of subjectivity in application cannot be avoided. Criminal charges and trials *are so variable* that effective trial court advocacy involves not only the performance of specific tasks, but also the exercise of art and professional judgment. Any formulation of a standard must take into account the *remarkable variety* of effective advocacy displayed daily in our trial courts by competent lawyers of *differing* approach, style, personality, temperament, and strategic inclinations. Because cases, lawyers, judges and juries *vary*, because defendants and crimes *vary*, and because communities *vary*, the application of any standard, however stated, to individual cases necessarily involves a degree of subjectivity *and ad hoc judgment*. * * *

290 Or at 873-74 (emphases added). *Krummacher* also quoted—with apparent approval—the following observation on this issue from a law review article:

> "* * * This is probably one of those areas of the law, so rich in variables, in which *the courts wish to avoid imposing rigid rules* and probably could not devise a rigid list if they attempted to do so. The

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[5] *See* 277 Or App at 239 ("We * * * reject the state's suggestion that, as a matter of law, the failure to seek a third expert opinion on the cause of death cannot be constitutionally inadequate when two experts have already offered an opinion on that issue.").

> result *leaves maneuvering room for the courts* as they seek, in applying the standards, to *assess each claim in the totality of the circumstances*."

290 Or at 874 n 5 (*quoting* James A. Strazzella, *Ineffective Assistance of Counsel Claims: New Uses, New Problems*, 19 Ariz L Rev 443, 454 (1977)).

Since *Krummacher* in 1981, this court consistently has rejected any such categorical-rule approach to assessing claims of inadequate assistance of counsel, favoring instead an examination of the facts and circumstances of each individual case. As this court again explained in *Stevens v. State*,

> [t]here is no single, succinct, clearly defined standard for determining adequacy of counsel. *Krummacher*, 290 Or at 874. Rather, there merely are guidelines for the courts to use in the determination of each case. * * * We therefore must consider whether petitioner's trial counsel's investigation was legally and factually appropriate to this case.

322 Or at 108. That includes claims based on trial counsel's use of experts. *See Gorham*, 332 Or at 567-68 (considering trial counsel's prior investigation of expert witnesses in deciding whether lack of further investigation of expert witnesses met that standard, because "[t]he question in each case is whether trial counsel's investigation was legally and factually appropriate to the case").

In this case, the state's myopic focus on counsel's reliance on the opinions of their expert and the medical examiner—to the exclusion of almost all the other unique facts and circumstances as found by the post-conviction court, supported by evidence in the record, and relied on by the Court of Appeals—is inconsistent with 35 years of this court's above-described precedent. The state, however, does not even acknowledge such precedent—much less provide a legitimate reason for revisiting or overruling it—despite the Court of Appeals' explicit reliance on that precedent in rejecting the state's similar arguments below, as noted. *See* footnote 5, *supra*. *See also* 277 Or App at 237 (Court of Appeals' express acknowledgement of this court's admonition that, in determining whether counsel failed to exercise reasonable professional

skill and judgment, "the inquiry is necessarily *circumstance-specific*, *not categorical*"; *citing Pereida-Alba v. Coursey*, 356 Or 654, 673-74, 342 P3d 70 (2015), and *Montez v. Czerniak*, 355 Or 1, 322 P3d 487, *adh'd to as modified on recons* 355 Or 598, 330 P3d 595 (2014); emphasis added).

Indeed, even the out-of-jurisdiction cases the state cites (State's BOM 21-22) do not involve the imposition of any such categorical rule, despite the state's suggestion to the contrary. Rather, like the Court of Appeals' opinion here, the pertinent holding in each of those cases was based on the individual facts and circumstances.[6]

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[6] *See*, *e.g.*, *Poyner v. Murray*, 964 F2d 1404, 1420 (4th Cir), *cert den* 506 US 958 (1992) ("*We need not today set out a sweeping rule* regarding what degree of psychiatric investigation will suffice to satisfy the performance element of the *Strickland* standard; undoubtedly *that will vary with the facts of each case*.") (emphasis added). *See also Poyner,* 964 F2d at 1418-20 (relying on specific circumstances of counsel's performance in holding that "Poyner's counsel did not act in a professionally unreasonable manner"); *Marcrum v. Luebbers*, 509 F3d 489, 505-11 (8th Cir 2007), *cert den sub nom Marcrum v. Roper*, 555 US 1068 (2008) (same); *Crittenden v. Ayers*, 624 F3d 943, 964-66 and n 13 (9th Cir 2010) (same); *Lyons v. State*, 39 SW3d 32, 41 (Mo), *cert den* 534 US 976 (2001) (same); *State v. Cook*, 257 Neb 693, 601 NW2d 501, 506 (1999) (same); *Archuleta v. Galetka*, 267 P3d 232, 267-68 and n 11 (Utah 2011) (same); *In re Williams*, 101 A3d 151, 155-56 (Vt 2014) (same); *Darling v. State*, 966 So 2d 366, 377 (Fla 2007) (same).

Moreover, because none of the out-of-jurisdiction decisions cited by the state involved the unique facts of this case—*i.e.*, counsel going to trial in a capital case on a defense they know is very likely to fail, while doing little to investigate another, more promising defense based on other facts known to counsel—those cases are distinguishable.

C. Neither the record nor the law support the state's other arguments challenging the Court of Appeals' holding and analysis in this case.

1. Dr. Ferris's opinion did not justify counsel's failure to investigate an overdose defense.

The state's primary argument appears to be that counsel's failure to investigate or pursue an overdose defense was reasonable based on their expert Dr. Ferris telling them that the level of morphine found in the victim's blood was "relatively low" and "unlikely to have materially affected her level of awareness." (State's BOM 1-2, 18, 24, 27, 29; internal quotation marks omitted). To the extent counsel made a tactical decision not to investigate an overdose defense on the basis of Dr. Ferris's opinion, that does not end the matter. To receive deference, counsel's tactical decisions must be objectively reasonable, under both the state and federal constitutions. *See Stevens v. State*, 322 Or at 109 ("the fact that a lawyer has made a 'tactical decision' does not mean that the lawyer's choice meets the constitutional standard for adequate assistance of counsel"); *Wiggins v. Smith*, 539 US 510, 523-28, 123 S Ct 2527, 156 L Ed 2d 471 (2003) (reviewing purported tactical decision for objective reasonableness); *Strickland v. Washington*, 466 US 668, 691, 104 S Ct 2052, 80 L Ed 2d 674 (1984) ("counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary"). For the following reasons, it was not objectively reasonable for trial counsel to forego investigating or pursuing an overdose defense on the basis of Dr. Ferris's morphine opinion.

The state's argument to the contrary rests on the premise that, by opining that the victim's morphine level was unlikely to have materially affected her awareness or ability to fend off an assailant (Ex 3 at 1129), Dr. Ferris necessarily and implicitly told counsel that the victim had not died of a morphine overdose. But counsel had an obligation to explore that issue with

Dr. Ferris, particularly given the victim's toxicology report and petitioner's description of how she died. All counsel had to do was ask Dr. Ferris what quantity of morphine would be enough to kill a 15-year girl who weighed about 125 pounds.[7] Had they done so, they would have learned that morphine can kill at relatively low amounts and that the victim's level was squarely within the fatal range—as demonstrated by what the post-conviction court found to be petitioner's "believable qualified expert evidence offered in the PCR proceeding[.]" (ER-82; 6/18/12 Tr 345-49, 352-54, 364, 367-68, 377, 379-80). Or, counsel would have learned that Dr. Ferris could not answer that question, and they could have sought another expert. In other words, as part of their duty to conduct an objectively reasonable investigation, counsel had an obligation to explore such an obvious issue with their expert, and to ensure that Dr. Ferris was in fact an "expert" on this particular issue. Because counsel breached that duty, their reliance on Dr. Ferris's statements about the victim's morphine level was not objectively reasonable.

Moreover, Dr. Ferris's opinion about the victim's morphine level was not offered in isolation, but rather in the context of his *overall* opinion that she had died of drowning. (*See* Ex 3 at 1129). Counsel's reliance on *that* opinion, however, was itself objectively unreasonable, because the most it provided was a defense virtually guaranteed to fail, resulting in petitioner's conviction for aggravated murder. As the post-conviction court found, trial counsel's venue defense was a "relatively a wrongheaded position" that was "unlikely in the extreme," because there was "virtually little chance" the jury would accept a defense theory under which petitioner admitted murdering the

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[7] (*See* Ex 28A at 726-27, 762 [toxicology and autopsy reports in lead counsel Keith Walker's file, listing the victim's age and weight]).

victim but sought acquittal on the legal technicality that he was being prosecuted in the wrong county. (ER-79).

Co-counsel David Peters agreed, testifying in the post-conviction proceedings that Washington County juries tended to be very conservative and in favor of capital punishment, that he believed the venue defense was "weak[,]" that he "knew that the jury would be unlikely to acquit [petitioner] even if there was some evidence that perhaps [the victim] had actually died in Clatsop County[,]" and that he "didn't think it was a very appealing theory for a jury to simply say, oh, gosh, they got the wrong county. He actually killed her over there." (6/21/12 Tr 1081, 1091-92, 1180; Ex 124 at 6, 9). That evidence supports the post-conviction's finding that trial counsel "*had to know* that it was very unlikely that a jury might acquit in such a circumstance, particularly if the jury had any reasonable basis for rejecting the 'defense.'" (ER-80; emphasis added).[8]

The jury in this case had just such a "reasonable basis for rejecting" the venue defense—*i.e.*, the prosecution's reliance on the alternative venue provisions in ORS 131.325. That statute provides:

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[8] In concluding that counsel "had to know" their venue defense was very unlikely to succeed with the jury (ER-80), the post-conviction court made an explicit factual finding about counsel's subjective awareness—*i.e.*, counsel *were aware* before trial that their venue defense was very unlikely to succeed. That finding is binding on appeal because it is supported by evidence in the record—namely, the above-described post-conviction testimony of co-counsel Peters. *Peiffer*, 339 Or at 660. Alternatively, to the extent the "had to know" portion of the post-conviction court's ruling is a legal conclusion, that court is still presumed under the standard of review to have *implicitly found* that counsel *actually did know* the jury was unlikely to accept the venue defense, because such a finding is consistent with the court's legal conclusion and supported by evidence in the record—namely, Peters's testimony to that effect. *Ball v. Gladden*, 250 Or at 487.

> If an offense is committed within the state and it *cannot readily be determined* within which county the commission took place, or a statute that governs conduct outside the state is violated, trial may be held in *the county in which the defendant resides*, or if the defendant has no fixed residence in this state, in the county in which the defendant is apprehended *or to which the defendant is extradited*.

(Emphasis added). Based on that provision, the prosecution amended the indictment in this case about five weeks before trial[9] to allege—on each count of aggravated murder—that petitioner "resides in Washington County, Oregon[,] and did so at the time of the above described offense[,]" and that he was "extradited to Washington County, Oregon." (Ex 4 at 172-75).

Trial counsel were aware before trial of the evidence on which the jury could find venue proven on one of these alternative grounds. Lead counsel Keith Walker testified at his deposition that he had been appointed to represent petitioner when "[s]omeone called me from * * * the court in *Washington County*" and, at that time, the presiding judge told him that petitioner "had been arrested in Florida and was *being brought here*." (Ex 146 at 19-20, 21; emphasis added). As for petitioner's residence, co-counsel Peters attested in a declaration that "[t]he evidence was fairly strong that at all relevant times [petitioner] lived with his parents in Aloha"—*i.e.*, in Washington County—and although "we did explore the possibility that he actually resided at the house he owned on North Juneau in Portland[,] * * * none of the potential witnesses we contacted presented convincing evidence that supported residence in Multnomah County and as a result, that issue was not explored further." (Ex 124 at 7).[10] Indeed, even the state itself admits, in

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[9] The amended indictment is dated June 15, 2001. (Ex 4 at 175). *Voir dire* began on July 23, 2001. (Ex 1 at 1).

[10] As it turned out, at the guilt phase of the criminal trial, the jury heard ample evidence from which it could have found that petitioner resided in Washington County at the time of the victim's death (Ex 1 at 2797-98, 2968-70,

Footnote continued…

its brief in this court, that petitioner lived in Washington County at the pertinent time. (*See* State's BOM 5: "[p]etitioner ultimately was charged with aggravated murder in *Washington County, where he lived* with his mother"; State's BOM 12: at the criminal trial, "the state continued to argue—based largely on Dr. Hartshorne's testimony—that petitioner strangled the victim to death *at his home in Washington County*"; emphases added). Under those circumstances, counsel either knew or should have known before trial that—whatever chances their venue defense may have had before the indictment was amended—that defense was now virtually guaranteed to fail after the alternative venue allegations were added.

Specifically, the venue defense necessarily involved a battle of the experts over *how*, and thus *where*, the victim had died—with the state's deputy medical examiner Dr. Hartshorne testifying that it was by manual strangulation (*i.e.*, in Washington County), and trial counsel's expert Dr.

(…continued)
2974) and that he had been extradited from Florida to Washington County. (Ex 1 at 3018-20, 3037). The jury also received the following guilt-phase instruction on the alternative ways it could find venue.

> THE COURT: Venue is a material element of every crime, including aggravated murder. The State must prove venue beyond a reasonable doubt. Generally, the State would be required to prove beyond a reasonable doubt that the aggravated murder alleged in this case actually occurred in Washington County. *If, however, the death occurred within the state of Oregon, but you cannot readily determine within which particular county the crime took place, the State may then prove beyond a reasonable doubt that at the time of the crimes the defendant resided within Washington County. Or, if you cannot determine in which county he resided, then the State must prove beyond a reasonable doubt that he was extradited to Washington County*.

(Ex 1 at 3400-01; emphasis added).

Ferris testifying that it was by drowning (*i.e.*, in Clatsop County). (*See* ER-67, post-conviction court so finding). Thus, it was reasonably foreseeable that counsel's drowning defense would allow the jury simply to find that the location of the murder could not "readily be determined," and thereby more easily permit it to find venue in the county of petitioner's residence or extradition under ORS 131.325.

As such, because trial counsel *knew* it was "very unlikely" the jury would acquit petitioner on the basis of their drowning defense (ER-80), it was not objectively reasonable for them to rely on Dr. Ferris's opinion as justification for ignoring petitioner's statements about waking up to find the victim dead, and thereby foregoing investigation of a possible overdose defense. As the post-conviction court correctly concluded, "trial counsel cannot simply hide behind the expert's opinion because trial counsel knew there was another factual defense which was at least plausible even if it was difficult under the circumstances to prove[,]" but they "were specifically ignoring" the supporting "potential evidence" and "made little if any effort to follow up on any possibility of that defense." (ER-79 to ER-80).

Along those lines, it is ironic for the state to argue here that a defense attorney is as justified in relying on information from an expert as in relying on information from the client. (State's BOM 22). As the post-conviction court also found and the record supports, lead counsel Walker admitted that he deliberately avoided learning petitioner's version of events—and would not even talk to him about that—until he obtained an opinion from Dr. Ferris. (ER-80 n 15; Ex 146 at 21-22, 42). For that reason, it equally ironic for the state to suggest—erroneously—that the Court of Appeals' opinion requires defense counsel to shop around for an expert in support of some "predetermined conclusion." (State's BOM 18, 20-21). The only such

"predetermined conclusion" at issue in this case was the drowning/wrong-venue theory that Walker prematurely—and wrongly—latched onto before conducting a constitutionally sufficient investigation. In that sense, it was Walker who was "expert shopping," where he also admitted looking for a drowning expert even before receiving all the discovery from the prosecution. (Ex 146 at 23-26). According to Walker's own deposition testimony, the reason for contacting Dr. Ferris to begin with was his expertise on *drowning*. (Ex 146 at 24). Though the state asserts that "[c]ounsel is not required to pick a legal strategy first and then see if they can find evidence, including expert testimony, to support it" (State's BOM 23), that is precisely what Walker did here.

Similarly, there is also uncontested evidence in the record that Walker knew Dr. Ferris himself had prematurely latched onto a drowning theory after reviewing only the autopsy report and certain police reports—*i.e.*, before receiving all the relevant information on the victim's cause of death. According to Walker's deposition testimony, when they first met in person at the hospital in Vancouver, B.C., Dr. Ferris blurted out in the hallway, before even opening the door to his office, that "this victim drowned[.]" (Ex 146 at 24-25, 30; *see also* Ex 1 at 2276 [Walker reciting that incident for trial court]). At petitioner's criminal trial, the prosecution used that very incident to argue that Dr. Ferris had prematurely made up his mind before reviewing all the pertinent evidence—including microscopic slides of the victim's liver—suggesting that Dr. Ferris had been closed to any other possible cause of death and was therefore biased. (Ex 1 at 3241-42, 3384, 3390-91). Trial counsel reasonably should have entertained the same suspicion.

Though the post-conviction court found that, after finally reviewing those slides on the eve of trial—four to five days before he testified—Dr.

Ferris stuck to his drowning opinion (ER-77), the point is that counsel *knew* Dr. Ferris had prematurely latched onto that opinion before ever reviewing the slides, providing yet another reason that Dr. Ferris's opinion did not provide an objectively reasonable excuse for counsel's failure to investigate a possible overdose defense. As the state itself asserts in its brief, the medical examiner relied on those slides—which he described as showing a lack of significant bleeding from the laceration to the victim's liver—in support of his theory that the victim had already been dead at the time of that laceration, which could have resulted from being dropped from a great height like a bridge. (State's BOM 3, *citing* Ex 1 at 2474-77). At the post-conviction trial, petitioner's forensic pathologist expert Dr. Ophoven similarly testified that the injuries to the victim's liver and the back of her head were likely caused post-mortem (after death), and there was nothing to suggest they were related to the death itself. (6/20/12 Tr 865-66, 870-71).

For these reasons, the record simply does not support the state's repeated assertion that counsel had no reason to question the validity of Dr. Ferris's opinion. (State's BOM 17-18, 20, 22-23, 24). (*Compare* State's BOM 22, conceding that "it might be unreasonable for counsel not to inquire further * * * if counsel *knows the expert does not have the information* the expert needs to give accurate advice"; emphasis added).

2. The opinion of medical examiner Dr. Hartshorne also did not justify counsel's failure to investigate an overdose defense.

The state argues further that, in addition to Dr. Ferris's opinion, counsel also knew before trial that the state's medical examiner Dr. Hartshorne had identified manual strangulation as the cause of death, meaning he also did not believe the victim had died from a morphine overdose. (State's BOM 20, 24). What the state ignores, however, is not only that trial counsel's entire guilt-

phase strategy was to *challenge* Dr. Hartshorne's strangulation opinion with their own expert testimony that the victim had drowned,[11] but how counsel were also aware before trial of how Drs. Ferris and Hartshorne *differed* in their opinions about how the level of morphine found in the victim's blood would have affected her mental state. Specifically, in his opinion letter to lead counsel Walker—which was dated April 15, 2001, *i.e.*, more than three months before trial[12]—Dr. Ferris recited Dr. Hartshorne's belief that the victim "would have had a reduced ability to resist an assault because of morphine intoxication." (Ex 3 at 1126, 1129). It was in that same letter to counsel that Dr. Ferris opined—as noted—that the level of morphine detected in the victim's blood was "relatively low" and was "unlikely to have materially affected her level of awareness or her ability to fend off an assailant." (Ex 3 at 1129). That squarely presented—and significant—difference in opinion from two forensic pathologists, about the effect the level of morphine would have had on the victim, was yet another reason counsel should have consulted someone with more expertise on that subject, such as a toxicologist. That is particularly so where counsel either knew or should have know that the morphine opinion of each pathologist was likely to have been colored by their attachment to their own respective conclusions about the cause of death.

Moreover, this court has held that defense counsel cannot satisfy their constitutional duty to investigate merely by relying on the prosecution's investigation, where—as in this case—the petitioner is able to present in the

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[11] *See*, *e.g.*, *Alcala v. Woodford*, 334 F3d 862, 892 (9th Cir 2003) (trial counsel's reliance on prosecution's investigation was unreasonable where "[t]here is no question but that the prosecution's interests in this case conflicted with Alcala's").

[12] As noted, *voir dire* began on July 23, 2001. (Ex 1 at 1).

post-conviction court significant evidence rebutting the prosecution's case, which a proper defense investigation would have uncovered. For example, in *Stevens v. State*, this court held that trial counsel's investigation was constitutionally deficient, where he failed to seek out and interview a rape complainant's classmates and teachers—whose post-conviction trial testimony included valuable impeaching and motive evidence discrediting the complainant—and counsel instead "simply relied on the police report to identify the material witnesses." 322 Or at 105-06, 108-10. Similarly, in *Lichau v. Baldwin*, this court reached the same conclusion about counsel's pretrial investigation in a prosecution for rape, sodomy, and sexual abuse, where counsel "limited his investigation of documentary alibi evidence to seeking assistance from petitioner's former military lawyer, who ultimately gave none, and to reviewing material provided by the prosecution," but "did not seek any additional military documents" nor "attempt to contact possible alibi witnesses, aside from petitioner's parents." 333 Or at 352, 360-62. Conversely, the "petitioner was able to present the post-conviction court with what the state concedes is 'a substantial amount' of documentary and testimonial evidence in support of his alibi defense that [trial counsel] did not uncover." *Id.* at 362.

In this case, as in *Stevens* and *Lichau*, petitioner presented—as noted—what the post-conviction court found to be "believable qualified expert evidence offered in the PCR proceeding"—evidence that trial counsel could and should have discovered and presented to the jury—"that the cause of death was morphine overdose[.]" (ER-82; 6/18/12 Tr 345-49, 352-54, 364, 367-68, 377, 379-80).

For these reasons, Dr. Hartshorne's opinion—considered either alone or in conjunction with that of Dr. Ferris—did not justify counsel's failure to investigate an overdose defense.

3. It was not objectively reasonable for counsel to rely on a wrong-venue defense.

In an attempt to defend counsel's failure to investigate an overdose defense, the state argues that the wrong-venue defense "was the best guilt-phase defense trial counsel could present with *the information they had*" from Drs. Ferris and Hartshorne. (State's BOM 18, 27; emphasis added). But that is precisely the point. Because "the information they had" provided counsel with nothing more than a defense *they knew* the jury was "very unlikely" to accept (ER-80), that in itself was reason enough to keep investigating. In other words, based on "the information they had," counsel either knew or should have known they did not have a viable defense.

The state's additional argument—that, even after the prosecution amended the indictment to allege the alternative residence and extradition grounds for venue, venue remained a viable defense because it was "both legally and factually supportable" (State's BOM 28)—again disregards the post-conviction court's supported findings of fact. Specifically, whether the wrong venue defense had a theoretical possibility of succeeding—as the state appears to assert—cannot be addressed in a vacuum. The state's argument simply ignores not only, as the post-conviction court found and the record supports, that counsel *knew* their venue defense was very unlikely to succeed, but that they also knew they had *another* possible defense of accidental overdose—based on the presence of morphine in the victim's blood, coupled with petitioner's description of how she died—which would have been more palatable to a jury, but counsel still "'made little if any effort to follow up on the possibility of that defense.'" 277 Or App at 238-39 (*citing and quoting* ER-79 to ER-80). The record also supports the post-conviction court's finding that counsel had enough time to consult with a toxicologist—*i.e.*, five weeks between the amended indictment and the start of petitioner's criminal trial—and

that toxicologist Dr. Julien would have been available in 2001 to consult with and testify for counsel at that trial. (ER-81 to ER-82; 6/18/12 Tr 363). Based on those supported factual findings, pursuing the wrong-venue defense simply was not an objectively reasonable decision stemming from a reasonable evaluation of the likely costs and potential benefits to petitioner, especially after the alternative-venue provisions were pleaded in the amended indictment. As such, this is not—contrary to the state's suggestion—a case of wrongly judging counsel's tactical decision in hindsight merely because it "backfired" (State's BOM 24-25), where the post-conviction court found, and the evidence supports, that counsel *knew before trial* that their venue defense was "very unlikely" to succeed with the jury and that they had another possible and more viable defense that they failed to investigate.

Rather, it is the state—not the post-conviction court or the Court of Appeals—that improperly relies on hindsight, when it argues that "counsel's faith in the [venue] defense was not misplaced" because "the record shows that the jury did not reject it out of hand[,]" and instead "asked questions specifically related to the defense and deliberated for another hour before convicting petitioner." (State's BOM 28, *see also* 13; bracketed material added). It is well established that the reasonableness of counsel's performance must be assessed "from counsel's perspective *at the time*" of the act or omission in question. *Strickland*, 466 US at 689 (emphasis added); *Lichau*, 333 Or at 360 (same). Counsel's failure to investigate an overdose defense, and their decision to go to trial with a drowning/wrong-venue defense, obviously occurred long before the jury's guilt-phase deliberations.[13]

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[13] Alternatively, the record does not support the state's speculative suggestion that the jury's questions demonstrated it was treating the venue defense as viable. The jury had asked, "Please clarify that if we determine victim was killed in Clatsop County we cannot convict" and "Please clarify our

Footnote continued…

Additionally, in attempting to defend counsel's choice of the venue defense—and failure to investigate an overdose defense—as a presumptively reasonable strategic decision entitled to judicial deference (State's BOM 19, 27), the state ignores that such decisions are entitled to deference *only to the extent* they are supported by a reasonable investigation, or a reasonable decision making such investigation unnecessary. *Stevens*, 322 Or at 108 ("the exercise of reasonable professional skill and judgment generally requires an investigation that is legally and factually appropriate to the nature and complexity of the case"); *Krummacher*, 290 Or at 875 ("*if* counsel exercises reasonable professional skill and judgment, a reviewing court will not second-guess the lawyer in the name of the constitution") (emphasis added); *Strickland*, 466 US at 691. In this case, however, it is precisely *because* counsel failed to conduct a reasonable investigation—or make a reasonable decision rendering such investigation unnecessary—that their strategic decisions are *not* entitled to deference, as both the post-conviction court and Court of Appeals correctly concluded. Indeed, the state itself should be aware of this—based on its citation to *Hinton v. Alabama*, 571 US___, 134 S Ct 1081, 1089, 188 L Ed 2d 1 (2014),

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(…continued)
duty if all cannot agree on the location of death"—to which the trial court responded by playing a tape recording of the instructions. (Ex 1, at 3422-23). From those questions, it is just as likely the jury was simply trying to make sure it had the law straight. Indeed, the fact that the jury took *only another hour* to deliberate after receiving the trial court's response to those questions (Ex 1 at 3422-23), raises an inference that the jury *easily rejected* the venue defense simply by relying on the above-described evidence of petitioner's residence in and/or extradition to Washington County. Indeed, that is the inference the standard of review requires this court to draw, to the extent the jury's guilt-phase deliberations are even relevant to the reasonableness of counsel's pretrial investigation, which they are not. *Ball*, 250 Or at 487 (in absence of express factual findings, record should be construed on appeal consistently with trial court's legal conclusions).

which it quotes for the proposition that "'[t]he selection of an expert witness is a paradigmatic example of the type of strategic choice that, *when made after thorough investigation of the law and facts*, is virtually unchallengeable.'" (State's BOM 27; emphasis added). In other words, the state's strategic-decision/deference arguments merely beg the question before this court. Such circular logic, however, simply cannot overcome the post-conviction court's supported factual findings demonstrating the lack of a reasonable investigation in this case.

Similarly, in support of its contention that "there was no obviously better strategy for counsel to pursue" than wrong venue, the state asserts that "[t]he evidence that [petitioner] was present at and responsible for the victim's death was overwhelming." (State's BOM 29). To the extent, however, that the evidence of petitioner's guilt was "overwhelming" before trial, that was due to trial counsel's constitutionally inadequate investigation. As the Court of Appeals correctly recognized, consultation with and testimony from a toxicologist about a morphine overdose "would have allowed petitioner's defense counsel to argue that petitioner was guilty of a different [lesser] offense" that did "not implicate the death penalty"—such as manslaughter, criminally negligent homicide, or felony murder not committed intentionally. 277 Or App at 240 (bracketed material added). In other words, had counsel conducted a constitutionally adequate investigation, the evidence would not have been "overwhelming" that petitioner was guilty of aggravated murder and subject to the possibility of a death sentence. Along those lines, the state's characterization of the "accidental-overdose theory [as] based on little more than speculation" (State's BOM 30) again engages in the same circular logic. To the extent an overdose defense was based only on "speculation"—which it was not, in light of the victim's morphine level and petitioner's account of how

she died—that was due to counsel's failure to conduct a reasonable investigation.

The state also disregards the post-conviction court's supported factual findings in complaining about the Court of Appeals' conclusion that, "'at worst,' seeking a third opinion would have 'put[] the issue to rest'" (BOM 30-31, *quoting* 277 Or App at 238)—which actually quoted from the post-conviction court's analysis. (*See* ER-81). On that issue, the state asserts that

> if a second opinion was not enough to put the issue to rest, a third opinion would not have done so either. There will almost always be more experts who *could* be consulted, and there is no principled reason to stop at three rather than four, or five—or even a dozen.

(State's BOM 31; emphasis in original). But—as noted—the post-conviction court found, and the record supports, that toxicologist Dr. Julien would have been available to testify at petitioner's criminal trial in 2001. (ER-81 to ER-82; 6/18/12 Tr 363). In other words, contrary to the state's contention, neither the post-conviction court nor the Court of Appeals required counsel to consult with *a series* of experts, but only one—*i.e.*, a toxicologist. Had counsel done so, they would have discovered—according to the post-conviction court's supported factual finding—"believable qualified expert evidence * * * that the cause of death was morphine overdose[.]" (ER-82).

Moreover, the state's complaint about the Court of Appeals relying on the post-conviction court's finding about "putting the issue to rest" (ER-81) again focuses too narrowly on the expert issue, disregarding how that was only part of the basis for—and done in the context of—the Court of Appeals holding that trial counsel's choice "'to limit his investigation'" by not consulting a toxicologist "was not 'based on a reasonable evaluation of the likely costs and potential benefits' to petitioner.'" 277 Or App at 239 (*quoting Lichau*, 333 Or

at 361, *which quoted Stevens*, 322 Or at 109). As the post-conviction court correctly and succinctly explained,

> if the concept of "Death is Different" is to have real meaning, then selection of a defense with a very slim possibility of acquittal (admitting homicide in the process) before being reasonably certain that there are no available alternative defenses where something less than death may result, cannot be afforded deference as a reasonable trial tactic.

(ER-80 n 14; underlining in original).[14] In other words, counsel's failure to consult a toxicologist was not the lynchpin of either the Court of Appeals' holding or the post-conviction court's analysis, but rather only one basis for concluding that counsel did not conduct a constitutionally sufficient investigation.

Finally, noticeably absent from the state's arguments and analysis is any consideration of this being a *death-penalty* prosecution, warranting—if anything—*more diligence* from trial counsel when investigating possible defenses, as the post-conviction court correctly acknowledged. (ER-80 n 14). *See*, *e.g.*, *State v. Guzek*, 322 Or 245, 264, 906 P2d 272 (1995) ("We agree with the United States Supreme Court statement that '[d]eath is a punishment different from all other sanctions in kind rather than degree' so that 'there is a difference in the need for reliability in the determination that death is the appropriate punishment in a specific case.'") (*quoting Woodson v. North Carolina,* 428 US 280, 303-05, 96 S Ct 2978, 49 L Ed 2d 944 (1976)).

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[14] For that reason, this case is distinguishable from *Harrington v. Johnson*, 165 Or App 755, 765, 997 P2d 283, *rev den* 331 Or 334 (2000), which the state quotes in arguing that "petitioner's counsel 'made a reasonable selection among an array of unpromising choices.'" (State's BOM 31). As the post-conviction court correctly explained in response to the state's reliance on that same case below, *Harrington* "is different * * * in that trial counsel there had choices[,]" whereas "[h]ere, trial counsel *had not reasonably explored all potential choices* before he made the decision." (ER-80 n 14; emphasis added).

II. Counsel's belief that petitioner needed to testify to support an overdose defense did not justify the failure to investigate that defense.

There is also no merit to the state's attempt to justify counsel's failure to investigate an overdose defense based on Walker's belief that such a defense would have required testimony from petitioner, who—according to the state—was refusing to cooperate and had "serious credibility issues." (State's BOM 10, 18-19, 24, 29, 30).

A. An overdose defense would not have required petitioner to testify.

First, counsel's belief that petitioner needed to testify was not objectively reasonable. As the Court of Appeals correctly concluded, an overdose defense did not require petitioner's testimony, because

> counsel could have advanced a factual basis for the overdose defense simply from the evidence of morphine levels in the victim's body and potentially through the same evidence on which the state relied to establish petitioner's pattern of drugging women in order to sexually assault them.

277 Or App at 241. In other words, trial counsel could have argued—without petitioner testifying—that petitioner had intended merely to do with the victim what the prosecution's prior-act evidence showed he had done with other young women before, *i.e.*, drug her and have sex with her, *but not kill her*. *See* OEC 404(3) (prior-act evidence is admissible to prove motive, intent). More specifically, based on evidence showing that none of petitioner's prior alleged victims had died as a result of him drugging and sexually assaulting them, trial counsel could have argued on the basis of the prosecution's own evidence that petitioner had not intended to cause the victim's death, but rather that her fatal overdose had been *an accident*.

There was also other evidence from which counsel could have argued—and the jury could have found—that the victim *willingly* took drugs from

petitioner and *willingly* had sex with him on the night of her death.[15] As for the prosecution's above-described prior-act testimony, there was additional contextual evidence that the majority of the teen witnesses portrayed at trial as petitioner's other "victims"—some of whom knew the victim—also willingly had done drugs and/or alcohol on other occasions, sometimes with petitioner. (*See* Ex 1 at 2895-96, 2899, 2905-06, 2912-14, 2924, 2928-31, 2946-47; discussed at Pet Comb Br 42).

The state itself now admits that counsel indeed could have presented an overdose defense without petitioner testifying, by relying instead on his above-described history. (State's BOM 30). The state nonetheless argues, however, that "counsel recognized this approach was not likely to persuade the jury, at least without medical evidence to support it or a first-hand account of the events of the night the victim died[,]" and that such a strategic decision is—again—entitled to deference. (State's BOM 30). As noted, however, such strategic decisions are *not* entitled to deference in the absence of a reasonable investigation, or a reasonable decision that such investigation is not necessary. *Stevens*, 322 Or at 108; *Krummacher*, 290 Or at 875; *Strickland*, 466 US at 691.

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[15] Specifically, the state's medical examiner Dr. Hartshorne testified at the guilt phase that there were "no lacerations or bruises or tears" or other physical injury to the victim's vaginal area. (Ex 1 at 2484). Though some witnesses testified that the victim was a lesbian (Ex 1 at 2643, 2661, 2674, 2718, 2911, 2923), her mother testified that she was bisexual. (Ex 1 at 2639). Other witnesses testified that the victim used marijuana and drank alcohol, sometimes to the point of intoxication and passing out. (Ex 1 at 2627, 2649-50, 2663, 2669, 2677, 2743, 2946, 2986-88). Trial counsel also had additional information available to them showing the victim had a serious drug and alcohol problem, that her sexual orientation was not firmly established, that she was a frequent runaway, and that street kids like her would do anything for drugs. (*See* Ex 1 at 2241; Ex 3 at 1346; Ex 27 at 25, 86; Ex 127 at 1-2, 9-10, 12-13; Ex 145 at 23-24, 102-03, 107-08).

In this case, as also demonstrated, counsel did not conduct a reasonable investigation nor make such a reasonable decision, and if they had conducted a reasonable investigation, it would have produced the supporting medical evidence.

As for lacking a first-hand account to support an overdose defense, lead counsel Walker admitted at his deposition that this consideration did not enter into his thinking at the time. (Ex 146 at 78-79). This court has held that reviewing "courts may not indulge in *post hoc* rationalizations of trial counsel's decisions that contradict the evidence derived from their actions[.]" *Montez v. Czerniak*, 355 Or at 27. Alternatively, even if that were Walker's conscious choice at the time, his belief in the need for a first-hand account of the victim's death was not objectively reasonable. Based on (1) the prosecution's above-described prior-act evidence and argument, (2) other evidence that the victim and other young women had willingly taken drugs and/or had sex with petitioner in the past, and (3) expert testimony that morphine had caused the victim's death, it would have been far more reasonable to ask jurors to find that she died of an accidental drug overdose, rather than asking them to acquit on a legal technicality under the wrong-venue defense counsel actually presented—which also lacked any direct witnesses to petitioner dropping the victim from the bridge in Clatsop County, or to her being alive at the time.

B. Petitioner did not refuse to cooperate with the investigation or presentation of an overdose defense.

Second, as the Court of Appeals also correctly concluded, "[t]he record does not demonstrate that petitioner refused to testify under all circumstances, but rather that he declined to testify when the defense related to venue." 277 Or App at 241. Though the post-conviction court found that petitioner never told trial counsel "that his not taking the stand was anything but the right thing to do[,]" (ER-84) that was in the context of counsel pursuing *only a*

drowning/venue defense. (*See* ER-84: finding that "[p]etitioner agreed with the use of the [venue] defense and never argued that his not taking the stand was anything but the right thing to do"). That finding is consistent with the portion of petitioner's deposition testimony explaining that he could not have testified at the criminal trial about the victim dying of a drug overdose, because that would have been inconsistent with counsel's drowning defense, contradicted Dr. Ferris's opinion, and established venue for the prosecution. (Ex 144 at 46-49, 59-60). According to the record, the only defense petitioner "refused" to testify about involved co-counsel Peters's suggestion that petitioner had caused the victim's death in the "heat of the moment" during an argument or fight (6/21/12 Tr 1085-87; Ex 11 at 48)—which also would have been inconsistent with the facts as petitioner knew them.

As for petitioner's purported refusal to cooperate, the post-conviction court found, and the record supports, that petitioner freely discussed the circumstances of the victim's death with lead counsel Walker and the investigators, and it was only co-counsel Peters—who had later joined the defense team after prior co-counsel had resigned—with whom petitioner would not discuss what happened the night of the victim's death. (ER-80 to ER-81, n 15). At that point, however, it was *Peters* who refused to cooperate, by refusing simply to read his own investigator's reports, or to ask Walker or the investigators specifically what petitioner had said, when petitioner was not forthcoming. (ER-81 n 15; 6/21/12 Tr 1082-83, 1141, 1145-49, 1173-74). Under the described circumstances, that was an additional breach of the duty to investigate. As the post-conviction court correctly reasoned, Peters's

> [f]ailure to coordinate with Walker and read the investigative notes contributed to the failure to recognize and develop an interest in the Petitioner's version of the facts, which alternative reasonably would have led trial counsel to request another review of the toxicology and thereby

> provide a potential option to the *very* weak [venue] defense which was pursued.

(ER-81 n 15; emphasis in original; bracketed material added). In other words, because Walker obviously had blinded himself to the weaknesses of the venue defense, and—as noted—deliberately avoided learning petitioner's version of events until he obtained an opinion from Dr. Ferris (ER-80 n 15; Ex 146 at 21-22, 42), Peters had a duty to acquaint himself sufficiently with petitioner's version of events and convince Walker to investigate and pursue a more viable defense based on that version, as the post-conviction court correctly concluded. (ER-81 n 15).

C. Counsel knew before trial the jury would hear about petitioner's alleged "serious credibility issues," with or without his testimony or an overdose defense.

Third, as for what the state describes as petitioner's "serious credibility issues" (State's BOM 24), the record demonstrates that counsel already knew before trial that such "issues" would come up at the guilt phase in the prosecution's case-in-chief, even without petitioner's testimony or the presentation of an overdose defense. Specifically, lead counsel Walker testified that he believed an overdose defense would have required petitioner to testify—which Walker considered "fraught with risk[,]" that such a defense "could open us up to [petitioner's] use of drugs" and "other people he associated with in the use of drugs[,]" and that petitioner's friends and associates would have been "very damaging" as witnesses, because they had credibility issues and "could be shown to be unreliable or certainly not attractive." (Ex 146 at 53-55, 58, 77-78). But the criminal trial court already had ruled *before trial* under OEC 404(3) that the prosecution could call petitioner's friends, associates, and others as witnesses at the guilt phase of trial to describe petitioner's prior acts of drugging and sexually abusing teenagers and young women, for the express purpose of proving petitioner had done the same thing with the victim in this

case. (*See* Ex 1 at 2271-73, 2299-2304, 2328-64). Trial counsel were present at that hearing, which occurred May 4, 2001 (Ex 1 at 2265),[16] and they were aware of that ruling. (*See also* Ex 124 at 11: co-counsel Peters's declaration stating that "the court had ruled that almost all of [petitioner]'s 'bad acts' were going to be admitted"). As such, it was not objectively reasonable to forego investigating or presenting an overdose defense on the basis of Walker's concerns about petitioner's friends and associates having to testify, or about the jury learning of the drug-using lifestyle they shared with petitioner, where it was obvious this would happen anyway in the prosecution's case-in-chief.

As for calling petitioner as a witness, Walker initially conceded at his deposition that petitioner had "things that you look for * * * [in] a good witness"—he was "an attractive enough person," was "very bright" and "articulate," and "[y]ou could present him well." (Ex 146 at 77-78). Co-counsel Peters similarly thought petitioner "would come across as more quirky than evil, which [Peters] believed would make it harder for the jury to impose the death penalty."[17] (Ex 124 at 9). Walker, however, was also concerned that "there's just a lot of deficits, potential risk with [petitioner] as a witness"—specifically, he had a prior criminal conviction, "he ran and was gone for over a year[,]" and there was evidence that he was "clever," "tricky," and "manipulative"—namely, "[w]hen he was first called in to question, he gave a statement and Ed Bowman, the sheriff's deputy [*sic*: detective], left the room and [petitioner] erased his tape." (Ex 146 at 77-78).

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[16] (*See*, *again*, Ex 1 at 1, *voir dire* beginning July 23, 2001).

[17] Though Peters testified at the post-conviction trial that he was concerned petitioner "would come across as smug[,]" that was Peters's opinion about petitioner's demeanor during trial as *other witnesses testified* (6/21/12 Tr 1112-14), not about petitioner himself taking the stand.

But the jury already heard all that negative information at the guilt phase anyway, as part of the prosecution's case-in-chief, even though petitioner never testified. And counsel either knew or should have known before trial that such evidence would be admitted, due in part to their own venue defense. First, the jury learned that petitioner had a criminal history from his parole officer John Crocker, who was allowed testify at the guilt phase that petitioner was on parole at the time of the victim's death, that he was required as a condition of parole to keep Crocker apprised of his current residence, and that petitioner's residence was in Washington County. (Ex 1 at 2966-70). The criminal trial court ruled that Crocker's testimony was admissible for the purpose of establishing the alternative "residence" basis for venue under ORS 131.325. (Ex 1 at 2787-94). Second, the jury also heard in the guilt phase about petitioner fleeing the state, getting arrested in Florida about a year later, and being extradited back to Oregon. (Ex 1 at 2800-06, 3013-15, 3019). Not only had the trial court ruled pretrial that petitioner's flight was relevant as evidence of consciousness of guilt (Ex 1 at 2292-93), but trial counsel again either knew or should have known that such evidence would be admissible to establish an alternative "place of extradition" basis for venue under ORS 131.325. Third, the jury also heard guilt-phase testimony about petitioner erasing a portion of the recording of his taped statement when the detective left the interview room. (Ex 1 at 3009-13). In several pretrial memoranda of law in support of their motions to suppress other evidence, trial counsel recited that incident without ever arguing for its exclusion (Ex 3 at 42, 103-04, 1449; Ex 4 at 70), demonstrating their awareness before trial that the jury would hear of it.

For these reasons, what the state described as petitioner's "credibility issues" did not justify counsel's failure to investigate an overdose defense.

III. On the question of prejudice, petitioner relies on his Court of Appeal's brief and that court's correct resolution of that issue.

Because—as noted—the state presents no arguments in its brief in this court on the prejudice prong of the analysis, and instead relies on its Court of Appeals' briefs on that issue (State's BOM 19 n 3), petitioner similarly relies on the prejudice portion of his Court of Appeals' brief. (*See* Pet Comb Br 5-6, 47-72). Petitioner also relies on his Supplemental Statement of Facts in this brief, addressing the state's recitation of facts involving the post-conviction expert testimony on the cause of the victim's death, along with the Court of Appeals' analysis and holding on the issue of prejudice, also described therein.

CONCLUSION

For the above-described reasons, this court should affirm the decision of the Court of Appeals.

If, however, this court reverses the Court of Appeals, it should remand not only for that court to address petitioner's cross-appeal, but also the inadequate-assistance claims on which the post-conviction court granted petitioner relief under the Sixth and Fourteenth Amendments to the U.S. Constitution, because the Court of Appeals affirmed the post-conviction court only under Article I, section 11, of the Oregon Constitution. 277 Or App at 236, 241.

Respectfully submitted,

s/Daniel J. Casey

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NOTICE OF FILING AND PROOF OF SERVICE

I certify that I filed RESPONDENT ON REVIEW'S BRIEF ON THE MERITS on December 5, 2016 with the Appellate Court Administrator, Appellate Records Section, by using the court's electronic filing system. I further certify that I served RESPONDENT ON REVIEW'S BRIEF ON THE MERITS on December 5, 2016 on Benjamin Gutman, attorney for petitioner on review, by using the court's electronic filing system.

s/Daniel J. Casey

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CERTIFICATE OF COMPLIANCE WITH BRIEF LENGTH AND TYPE SIZE REQUIREMENTS

I certify that this brief complies with the word-count limitation in ORAP 5.05(2)(b)(i)(B) and ORAP 9.17(3)(c), allowing up to 14,000 words, and that the word count of this brief is 13,998 words. I further I certify that the size of the type in this brief is not smaller than 14 point for both the text of the brief and footnotes, as required by ORAP 5.05(4)(f).

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