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 CA A154129 SC S064132

BRIEF ON THE MERITS OF PETITIONER ON REVIEW, JEFF PREMO, SUPERINTENDENT, OREGON STATE PENITENTIARY

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

Opinion Filed: March 30, 2016
Before: DeVore, PJ, Flynn, J. and Haselton, SJ

Continued…..

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INTRODUCTION

After they were appointed to represent a client charged with strangling a girl whose body had washed up on the coast, petitioner's trial counsel did what most competent attorneys would do: they hired a forensic pathologist to determine the cause of death. The pathologist told them that the victim died of drowning, not strangulation. The pathologist also told them that although the victim had morphine in her blood, the level was "relatively low" and "unlikely to have materially affected her level of awareness." Based in part on that opinion, counsel did not further investigate the possibility that the victim died of a morphine overdose; they instead developed a theory of the defense centered around the argument that she had drowned.

That decision was well within the broad latitude defense attorneys have to make strategic choices about how to allocate their time, attention, and resources. Particularly when dealing with medical or scientific evidence, attorneys are entitled to rely on the opinions of qualified experts. Indeed, that is the whole point of hiring an expert in the first place. Attorneys need not seek second or third opinions on every issue, or even on key issues, before making strategic decisions about the direction of the investigation or the case.

Here, at the time petitioner's counsel decided to go with a drowning theory, it was reasonable for them to conclude—based on the opinion of a well-qualified expert—that further investigation of an overdose theory was not likely

to be fruitful and that a drowning theory offered the best chance of acquittal for their client. This court should reverse the contrary ruling of the Court of Appeals.

QUESTION PRESENTED AND PROPOSED RULE OF LAW

Question presented: When defense counsel hires a qualified expert to interpret scientific or medical evidence, may counsel rely on the expert's opinion in deciding how to shape the investigation and presentation of the defense?

Proposed rule: Yes. If a qualified expert indicates that the evidence does not support a possible defense theory, counsel need not devote more time, attention, or resources to investigating that theory. Counsel is not constitutionally required to seek a second or third opinion to see if another expert might give a different interpretation of the evidence.

STATEMENT OF HISTORICAL AND PROCEDURAL FACTS

A. The victim's body was discovered in the ocean, and petitioner was charged with her murder.

On the morning of February 24, 1998, a 15-year-old girl's body was found in the surf on a beach near Warrenton, in Clatsop County. (Ex 1, at 2431-32, 2446-47.)[1] Forensic pathologist and state medical examiner

[1] Citations to trial exhibits and transcripts are to the electronic page numbers.

Dr. Nikolas Hartshorne performed the autopsy on the victim. (Ex 1, at 2462-63; Ex 28A, at 761).

Although the victim was found in water, Dr. Hartshorne concluded that she died by manual strangulation. (Ex 1, at 2485; Ex 28A, at 761). He relied primarily on three pieces of medical evidence. First, the victim's face had petechiae—small red spots on the skin caused by bleeding—but only above the neck, suggesting that someone had squeezed the victim's neck and caused the fragile capillaries above the restriction to burst. (Ex 1 at 2465-70, 2503). Second, there were eight to ten fingertip-sized bruises on the side of the victim's neck. (Ex 1 at 2466). Third, there were hemorrhages deep in the muscles of the victim's neck. (Ex 1 at 2472-73). In Dr. Hartshorne's view, the hemorrhages indicated that someone had squeezed her neck hard with a "deep, throttling energy." (Ex 1, at 2472). He also noted a laceration to the victim's liver that he concluded occurred after she was dead but that suggested that her body had fallen from a significant height, like a bridge. (Ex 1, at 2474-77).

A toxicology examination revealed that the victim had 695 nanograms per milliliter of morphine in her blood. (Ex 28A, at 726). Dr. Hartshorne considered that to be a "significant level." (Ex 1 at 2479-81). Assuming the victim was not a drug addict who had developed a tolerance to opioids, that level would have lowered her respiratory rate and made her more susceptible to dying from strangulation. (Ex 1 at 2482-83; *see also* Ex 28A, at 818).

The police soon identified petitioner as a suspect in the victim's murder. *See State v. Johnson*, 340 Or 319, 321, 131 P3d 173, *cert den*, 540 US 1079 (2006). The victim had told people that she was going to "Marty's" house to play on his computer when she left home the day before her body was discovered, and investigators found petitioner's phone number in her bedroom. *Id.* One of the victim's friends told police that "Marty" "was an 'older guy' who always was 'hitting on' [the victim] and who sometimes provided [her] with drugs." *Id.*

Investigators learned that petitioner was on parole for federal drug crimes and that a police officer had stopped him at 1:54 a.m. on February 24th —four and a half hours before the victim's body was discovered—while driving along Highway 30 from Warrenton to Portland. *Id.* Later that same morning, using his home computer, petitioner checked the tide tables for the Astoria area. (Ex 1, at 2700). Forensic investigators matched a bloodstain on the hatchback of petitioner's car to the victim's DNA, and her vaginal cavity contained semen with DNA matching petitioner's. *Id.* at 322. Investigators also learned that petitioner "habitually preyed on underage girls, taking them to nightclubs, providing them with alcohol and drugs, engaging them in consensual sexual relations when possible and, most significantly, sexually abusing them while they were rendered unconscious by drugs that he had provided to them." *Id.*

Petitioner ultimately was charged with aggravated murder in Washington County, where he lived with his mother. *Id.* The state's theory was that petitioner strangled the victim to death while she was incapacitated by morphine that he had surreptitiously given her at his home in Washington County, and that he threw her dead body off a bridge in Astoria hoping that it would be washed out to sea. (Ex 1, 3328-55, 3382-96).

B. After consulting with an expert about the victim's cause of death, the defense team formulated a trial strategy.

Two experienced criminal-law practitioners, Keith Walker and David Peters, were appointed to defend petitioner against the murder charges. Lead counsel Walker began practicing law in 1971 and gained experience as a prosecuting attorney, including prosecuting several murder cases, before going into private practice. (Ex 146, at 9-14). Before representing petitioner, Walker had defended "four or five" aggravated murder cases and at least one non-aggravated murder case in Oregon. (Ex 146, at 16-19). Peters had worked for fifteen years as a deputy district attorney before going into private practice as a criminal defense attorney, had worked on several death-penalty prosecutions, and had extensive experience in prosecuting and defending serious crimes. (Ex 124, at 1-2; 6/21/12 Tr 18-22; Ex 146, at 70-71).

After receiving the police reports and medical examiner's report, Walker decided to hire a medical examiner in private practice to consult on the case.

(Ex 146, at 23). He asked several people for suggestions and ultimately chose Dr. James Ferris, a forensic pathologist. (Ex 146, at 23; *see also* Ex 28A, at 854, 856 (defense team rejected two other possible experts)). Dr. Ferris was a professor emeritus of forensic pathology at the University of British Columbia who had performed about 8,500 autopsies, including over 850 cases of homicides, and regularly consulted on criminal cases for both the prosecution and defense. (Ex 3, at 1131, 1144.) One reason that counsel chose Dr. Ferris was his experience with bodies that, like the victim's, were recovered from water; he had conducted several hundred such autopsies. (Ex 1, at 3090, 3154). Walker provided Dr. Ferris numerous documents to review, including the autopsy report and photographs. (Ex 3, at 1126-28). An investigator working for the defense specifically flagged for Dr. Ferris the victim's "extensive drug use history" and the presence of morphine in "significant quantities" at the time of the autopsy. (Ex 28A, at 887).

After his review, Dr. Ferris told defense counsel that Dr. Hartshorne's conclusion—that the victim died as a result of manual strangulation—was not supported by any definitive medical evidence. (Ex 3, at 1129). Although Dr. Hartshorne had relied on the petechiae as evidence of strangulation, Dr. Ferris believed that the petechiae could have been caused by the position of the body after death. (Ex 3, at 1128). If the victim had been fatally strangled, Dr. Ferris would have expected to see petechial hemorrhages primarily on the sclera of the

eyes, but none were found. (Ex 3, at 1128). And although he acknowledged the finger marks on the skin of the neck, he concluded that the deeper muscle bruises were not severe enough to suggest fatal manual strangulation. (Ex 3, at 1129).

Dr. Ferris told defense counsel that the victim more likely died of drowning. (Ex 3, at 1129; Ex 146, at 25, 30). There was sand and silt in the victim's upper airway, which Dr. Ferris stated was "strong presumptive evidence of drowning." (Ex 3, at 1129). And the weight of the victim's lungs was "extremely high," which he said is more typical of drowning than strangulation. (Ex 3, at 1129).

Dr. Ferris also advised defense counsel about how the drug evidence should be interpreted. Although Dr. Hartshorne had suggested that the level of morphine in the victim's blood could have left her more susceptible to being strangled, Dr. Ferris disputed that conclusion:

> Dr. Hartshorne has indicated that [the victim] would have had a reduced ability to resist an assault because of morphine intoxication. The toxicology report reveals a total morphine concentration of 695 nanograms per ml. This is [a] *relatively low level of morphine* in the blood and is unlikely to have materially affected her level of awareness or her ability to fend off an assailant.

(Ex 3, at 1129) (emphasis added). Dr. Ferris also stated that the absence of genital injuries was "reasonably presumptive evidence" that petitioner's sexual intercourse with the victim was consensual. (Ex 3, at 1129).

The information provided by Dr. Ferris suggested that the victim might have died *after* being thrown off the bridge in Astoria, in Clatsop County, rather than at petitioner's home in Washington County, where he had been indicted. Based on that information, Walker settled on a defense strategy that focused on venue. Under the law at the time of petitioner's criminal trial, the state bore the burden of proving venue beyond a reasonable doubt at trial. *See, e.g.*, *State v. Rose*, 117 Or App 270, 274, 843 P2d 1005 (1992); *see also State v. Mills*, 354 Or 350, 312 P3d 515 (2013) (overruling prior precedent). Defendants regularly had convictions reversed based on arguments that the state had failed to meet its burden of proof on venue. *See, e.g.*, *State v. Macnab*, 222 Or App 332, 194 P3d 164 (2008); *State v. Pierce*, 204 Or App 641, 131 P3d 776 (2006); *State v. Panek*, 141 Or App 22, 917 P2d 500 (1996); *State v. Tirado*, 118 Or App 294, 846 P2d 1201 (1993); *State v. Dillenburg*, 49 Or App 911, 621 P2d 1193 (1980).

In this case, the venue requirement meant that the state had to prove either (1) that the crime had occurred in Washington County; or (2) if it could not readily be determined which county it had occurred in, (a) that petitioner lived in Washington County or (b) if he had no fixed residence in the state, that he was apprehended in or extradited to Washington County. ORS 131.305(1), 131.325. As a practical matter, this meant that the state had to prove beyond a

reasonable doubt either that the victim died in Washington County or that it could not readily be determined where she died. *See Rose*, 117 Or App at 274.

The evidence that the victim had drowned in Clatsop County raised the possibility that the state might not be able to meet its burden of proof on venue. If the jury credited Dr. Ferris's opinion as to the cause of death over Dr. Hartshorne's, it would have to conclude that the place of death was readily ascertainable and in Clatsop County, not Washington County. And even if Dr. Ferris's opinion merely created reasonable doubt about the place of death and whether it could readily be ascertained, the jury would have to acquit.

Petitioner's counsel ultimately decided to make venue the centerpiece of their defense case. They settled on this defense theory primarily because Walker thought Dr. Ferris would make an effective witness:

> He was presentable. He had decades of experience. He—he certainly testified a great number of times. He had more expertise with drowning than many other medical examiners would have. He had an impressive resume.

(Ex 146, at 55).

Petitioners' counsel considered, but rejected, several other possible defense strategies. Among these were trying to argue that the victim died of an accidental morphine overdose, as petitioner had suggested to the defense team early on. (Ex 146, at 43, 55). Petitioner had told the defense team that he and the victim had taken drugs at his home, had sex, and gone to sleep; that when he

woke up he found the victim dead in his bed; and that he drove her body to Astoria and threw it off the bridge. (Ex 11, at 34-49; 146, at 43). But Walker rejected an accidental-overdose defense for two reasons. First, Dr. Ferris had advised him that the level of morphine in the victim's blood was "relatively low" and "unlikely to have materially affected her level of awareness," which meant that the medical evidence (as Walker understood it) did not corroborate petitioner's account. (Ex 146, at 56-58). Second, Walker believed that he could not have made an effective argument for an accidental overdose defense—that petitioner woke up, found the victim dead, and "just panicked" and disposed of the body—without testimony from petitioner himself. (Ex 146 at 58-79). And Walker thought that even if petitioner would be willing to testify, which was not clear, he would not be an effective witness. (Ex 146, at 77-78). Walker was concerned that the prosecution would be able to impeach petitioner with his prior federal drug conviction, and that having petitioner testify could "open us up to his use of drugs" and the "other people he associated with in the use of drugs." (Ex 146, at 77-78). Walker had found petitioner to be "not very helpful" when asked about these topics, and he was concerned that if they came up on cross-examination at trial he "didn't know where it would go." (Ex 146, at 40, 77). And the defense team knew that petitioner was facing separate charges of raping and sexually abusing girls in Multnomah and Clackamas Counties. (*See, e.g.*, Ex 27, at 146, 1111-12).

Co-counsel Peters also considered another possible strategy based on the state's evidence of death by strangulation: arguing that petitioner and the victim, after drinking and using drugs together, had some kind of sexual contact, the victim "became upset and physically aggressive," and that "in response to that attack [petitioner] ended up applying physical force to her in such a way that she ended up dying." (6/21/12 Tr 41). Peters believed that such a defense would be both consistent with the physical evidence and plausible, but once again it would have required petitioner to testify. (6/21/12 Tr 48, 146). Peters, who had focused on trying to develop a rapport with petitioner and to find out what had happened, considered him one of the most difficult clients he had ever had to deal with. (Ex 13, at 6). Petitioner's "profound lack of cooperation" with his counsel was "unprecedented," and he was "obsessed with pursuing frivolous issues that were not related to the case" and that distracted his lawyers from focusing on the important issues. (Ex 13, at 1, 6; *see also, e.g.*, Ex 27, at 1229-32). Petitioner refused to talk to Peters about what had actually happened the night of the victim's death, so Peters could not evaluate whether it would make sense to put him on the stand to support an accidental-strangulation theory. (Ex 124, at 4; 6/21/12 Tr 38).

C. Petitioner presented a venue defense at trial, but the jury convicted him.

At 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. (*See, e.g.*, Ex 1, at 3329-50). Walker vigorously cross-examined Dr. Hartshorne, at least in part based on the information Dr. Ferris had supplied. (Ex 1, at 2487-2511). The defense also presented Dr. Ferris's testimony that the victim had died of drowning. (Ex 1, at 3081-159).

In closing argument, in addition to explaining why Dr. Ferris' conclusion was correct, Walker told the jurors that, if they agreed that the victim drowned in Clatsop County, they must acquit petitioner of aggravated murder because venue did not lie in Washington County. (Ex 1, at 3356-81). Walker acknowledged that the jurors might view venue as a "loophole." (Ex 1, at 3359). But he discussed at length the importance of the rule of law and explained that proof of venue beyond a reasonable doubt was required by the Oregon Constitution. (Ex 1 at 3356-60). If the jurors found that the victim had died in Clatsop County, the Constitution required Clatsop County to "take responsibility." (Ex 1 at 3379-81).

The court instructed the jury about venue, emphasizing that the state bore the burden of proving beyond a reasonable doubt that the murder occurred in

Washington County, or that they could not reasonably determine where it occurred:

> 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).

About an hour before the jury reported that they had reached a verdict, they sought further instruction related to venue. Specifically, the jury asked the court to "clarify that if we determine victim was killed in Clatsop County we cannot convict" and what their duty was "if all cannot agree on the location of death." (Ex 1, at 3422-23). In response, the court replayed the taped jury instructions. (Ex 1, at 3423).

The jury ultimately convicted petitioner of eight counts of aggravated murder and voted for the death sentence. (Ex 33, at 5-17). This court affirmed the convictions and the sentence. *State v. Johnson*, 340 Or 319, 321, 131 P3d 173, *cert den*, 540 US 1079 (2006).

D. The post-conviction court granted relief, finding that trial counsel was inadequate for not seeking a third opinion on the cause of death.

Petitioner sought post-conviction relief on numerous grounds. (ER 1-61; 9/13/11 Tr 122-33). Among other claims, petitioner asserted that his trial counsel had been constitutionally inadequate for not consulting with a toxicologist about whether the victim died of a drug overdose and not pursuing an accidental-overdose theory at trial. (ER 27).

To support that argument, petitioner presented two expert witnesses—Dr. Robert Julien, a retired clinical anesthesiologist, and Dr. Janice Ophoven, a forensic pathologist—who opined that the victim could have died of a morphine overdose, at least if she was "non-tolerant to opioid narcotics." (6/18/12 Tr 18, 24; 6/20/12 Tr 64, 76). According to these new witnesses, the level of morphine in the victim's blood—695 nanograms per liter—can be fatal to some individuals. (6/18/12 Tr 31; 6/20/12 Tr 102). But both 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. (6/18/12 Tr 51; 6/20/12 Tr 93; *see also* Ex 501, at 7). Petitioner had told his trial counsel that the victim was a "polymorphic drug user" with prior opiate use (Ex 11, at 46-47), but the new experts could reach their conclusions only by assuming that the victim was "opioid naïve" or at least not a regular user of drugs like heroin. (6/18/12 Tr 50-52; 6/20/12 Tr 76, 94, 103). Ultimately, 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. (6/18/12 Tr 46-47; 6/20/12 Tr 74, 94-96; Ex 501, at 6-7).

Petitioner also called Dr. Ferris to testify that, having read the reports from petitioner's new experts, he now believed that the victim died of a morphine overdose rather than drowning.[2] (6/18/12 Tr 128-30). Dr. Ferris acknowledged that his new opinion was "entirely dependent" on Dr. Julien's conclusion that the level of morphine in the victim's blood was fatal and that he had no way to evaluate whether Dr. Julien's conclusion was correct. (6/18/12 Tr 139-40).

The superintendent presented testimony from Dr. Stuart Rosenblum, a board-certified anesthesiologist who regularly works with morphine in his pain-management practice. (6/22/12 Tr 17-19, 53-54). When asked whether 0.7 milligrams per liter (or 700 nanograms per milliliter) of total morphine, an amount cited in Dr. Julien's report, was a "reliable indicator" of whether a morphine dose was lethal, Dr. Rosenblum said that the number is "just a starting point" because the range of lethality is so broad. (6/22/12 Tr 49-51).

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[2] The post-conviction court expressly discredited Dr. Ferris's testimony at the post-conviction hearing (ER 74, 78), but it is mentioned here for the sake of completeness.

He explained that a lethal dose could be anywhere from a tenth of the number cited above to ten times higher, because lethality is so dependent on factors ranging from allergic reaction to high tolerance. (6/22/12 Tr 49-51, 60-61). Dr. Rosenblum testified that many of his patients have "levels that are substantially higher than that and truly you wouldn't be able to discern that they're on any medications at all, so their function is fully intact." (6/22/12 Tr 51).

The post-conviction court agreed with the superintendent that, based on the evidence that trial counsel had at the time, they had no real choice but to pursue the venue defense, since both the state's medical examiner (Dr. Hartshorne) and their own forensic pathologist (Dr. Ferris) agreed that the victim had not died of an overdose:

> [F]rom the perspective of trial counsel at the time, if they relied on the existing experts, there was no possible defense for Petitioner beyond the unlikely defense which was pursued. From the available experts, an alternative option did not exist.

(ER 70).

But the court concluded that trial counsel were nonetheless constitutionally required to seek a *third* expert opinion from a toxicologist to determine whether the victim had died from an overdose. (ER 79-81). According to the court, counsel should have recognized that the venue defense was unlikely to persuade a jury and that it was possible that another expert could be found who would contradict Dr. Ferris's opinion about drowning and

support an accidental-overdose theory instead. (ER 79-81). The court therefore vacated petitioner's conviction and ordered that he be retried. (ER 93-94).

The superintendent appealed, and the Court of Appeals affirmed for essentially the same reasons given by the post-conviction court. 277 Or App at 237-39. The court held that trial counsel were inadequate because "seeking an additional opinion from a toxicologist to explore petitioner's description of the death would, at worst, have created the possibility of either putting the issue to rest or alternatively finding that there was another expert who would have given trial counsel another option as a defense." *Id.* at 237-38 (quoting the post-conviction court; quotation marks, brackets, and elipsis in original omitted). While it agreed that "there is no categorical constitutional requirement that an attorney seek out a third expert opinion," it held that "constitutionally competent counsel" would have done so here. *Id.* at 239.

This court granted the superindendent's petition for review.

SUMMARY OF ARGUMENT

When the choice of trial strategy turns in part on the meaning of scientific or medical evidence, counsel is entitled to rely on the advice of a qualified expert who has evaluated the evidence. If that expert's interpretation of the evidence does not support a possible strategy, counsel may rule out that strategy. At least when counsel has no reason to believe that the expert is incompetent, misinformed about the relevant facts, or uncertain about the

interpretation of the evidence, counsel does not have to seek a second or third opinion before relying on the expert's advice.

Here, trial counsel were entitled to rely on Dr. Ferris's opinion about the ultimate cause of the victim's death and his interpretation of the level of morphine in the victim's blood. Dr. Ferris gave a detailed explanation of his opinion that the victim had drowned, and counsel had no reason to believe that he was unqualified to interpret her morphine levels, misinformed about the relevant facts, or uncertain about his interpretation. When he told them that 695 nanograms per milliliter was a "relatively low" level of morphine that was unlikely to have affected the victim's awareness, they were entitled to conclude that the medical evidence would not support an argument that the victim died of a morphine overdose. They had no reason to think that another expert would give them a different interpretation of the evidence, and the Constitution did not require them to shop around until they found someone willing to give such an opinion.

The post-conviction court correctly recognized that the venue defense, however risky it might have been, was the best guilt-phase defense that trial counsel could present with the information they had. They had a strong witness in Dr. Ferris, and petitioner's refusal to cooperate left them with little confidence in any approach based on a theory of accidental death. At the very least, it was a reasonable strategic decision to focus on a venue argument, which

had a solid legal and factual basis and would not require them to put petitioner on the witness stand.

ARGUMENT

A criminal defendant has the right to be represented by competent counsel. Although the federal and state constitutional standards are formulated slightly differently, they are "functionally equivalent." *Montez v. Czerniak*, 355 Or 1, 6, 322 P3d 487 (2014). To obtain post-conviction relief on a claim of inadequate assistance of trial counsel, a petitioner must prove that (1) trial counsel failed to exercise reasonable professional skill and judgment, and (2) he suffered prejudice as a result. *Trujillo v. Maass*, 312 Or 431, 435, 822 P2d 703 (1991).[3] "Judicial scrutiny of counsel's performance must be highly deferential" and a court "must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." *Strickland v. Washington*, 466 US 668, 689, 104 S Ct 2052, 80 L Ed 2d 674 (1984).

[3] This brief addresses only whether counsel exercised reasonable professional judgment; the superintendent relies on his Court of Appeals briefs for a discussion of prejudice. *See* ORAP 9.20(4). Because the federal and state constitutional standards are functionally equivalent, the superintendent does not analyze them separately in this brief.

A. Trial counsel did not have to seek a third expert opinion on the cause of death before deciding on a defense strategy.

At the time they decided to focus on a venue defense, petitioner's trial counsel had the opinions of two forensic pathologists on the cause of the victim's death: Dr. Hartshorne concluded that it was manual strangulation, and Dr. Ferris concluded that it was drowning. Neither one suggested that it could have been a morphine overdose. On the contrary, Dr. Ferris—the expert they had hired to advise them on the cause of death—affirmatively told counsel that the level of morphine in the victim's blood was "relatively low" and "unlikely to have materially affected her level of awareness." (Ex 3 at 1129). The question in this case is whether counsel could rely on these experts' opinions in formulating their defense strategy, or whether the Constitution required them to shop around for an additional expert who would be willing to support a different cause of death, like morphine overdose. As explained below, Dr. Ferris was a well-qualified expert who examined all the available evidence and gave counsel an unequivocal opinion about the significance of the level of morphine in the victim's blood. Counsel were entitled to rely on that opinion in formulating their strategy.

No defense lawyer has unlimited time, resources, attention, or energy to devote to a case. In most cases, there are "any number of hypothetical experts—specialists in psychiatry, psychology, ballistics, fingerprints, tire

treads, physiology, or numerous other disciplines and subdisciplines—whose insight might possibly [be] useful." *Harrington v. Richter*, 562 US 86, 107, 131 S Ct 770, 178 L Ed 2d 624 (2011). All lawyers have to make strategic decisions about which avenues to pursue, and how far to pursue them, before formulating a trial plan. They are entitled to "avoid activities that appear distractive from more important duties" and "balance limited resources in accord with effective trial tactics and strategies." *Id.* (quotations marks omitted). They need not "expend time and energy uselessly or for negligible potential benefit." *Green v. Franke*, 357 Or 301, 312, 350 P3d 188 (2015).

One legitimate reason for counsel not to pursue a possible avenue of investigation, especially with respect to medical or scientific evidence, is that their expert advisor has given them information that suggests the investigation will be unfruitful. "Attorneys are entitled to rely on the opinions of properly selected, adequately informed, and well-qualified experts." *Crittenden v. Ayers*, 624 F3d 943, 966 (9th Cir 2010). Any other rule "would defeat the whole aim of having experts participate in the investigation." *Id.*

Although this court has not had occasion to confront the question, other courts around the country have uniformly held that defense attorneys need not "shop" for an expert willing to give a predetermined conclusion. *E.g.*, *Poyner v. Murray*, 964 F2d 1404, 1419 (4th Cir 1992); *Marcrum v. Luebbers*, 509 F3d 489, 511 (8th Cir 2007); *Lyons v. State*, 39 SW3d 32, 41 (Mo 2001); *State v.*

Cook, 601 NW2d 501, 506 (Neb 1999). As these cases recognize, once an expert has given counsel an unequivocal opinion about a medical or scientific fact, trial counsel—who likely do not have their own expertise in that field—generally will have no reason to think that another expert would opine differently. *Cook*, 601 NW2d at 506; *see also Archuleta v. Galetka*, 267 P3d 232, 268 (Utah 2011) ("[I]t is reasonable for counsel to rely on the judgment and recommendations of qualified experts with expertise beyond counsel's knowledge."). Of course, it might be unreasonable for counsel not to inquire further if counsel has reason to doubt the expert's competence, if the expert advises counsel to talk to someone else, or if counsel knows that the expert does not have the information the expert needs to give accurate advice. *See, e.g.*, *Marcrum*, 509 F3d at 505. But when the expert appears to be qualified and adequately informed, counsel "cannot be criticized for accepting that person's opinion." *In re Williams*, 101 A3d 151, 156 (Vt 2014); *see also Darling v. State*, 966 So 2d 366, 377 (Fla 2007).

Relying on information provided by a qualified expert to shape the investigation and development of the case is no different than relying on information provided by the defendant himself. "[W]hen a defendant has given counsel reason to believe that pursuing certain investigations would be fruitless or even harmful, counsel's failure to pursue those investigations may not later be challenged as unreasonable." *Strickland*, 466 US at 691. Similarly, when an

expert has given counsel reason to believe that pursuing certain investigations would be fruitless, counsel are well within their bounds of professional competence to forgo those investigations.

The whole point of seeking an expert's advice is to help the defense team understand the evidence so that they can plan a legal strategy based on the known facts. Counsel is not required to pick a legal strategy first and then see if they can find evidence, including expert testimony, to support it. It is entirely reasonable for counsel to investigate the facts first and then settle on a strategy.

That is what the defense did here. Petitioner's trial counsel selected an exceptionally qualified forensic pathologist with more than thirty years' experience to advise them on what the autopsy results indicated about the victim's cause of death. Dr. Ferris had performed more than 8,000 autopsies, hundreds of which involved homicide victims or bodies found in the water, and regularly consulted on criminal cases for both the prosecution and defense. (Ex 3, at 1131, 1144.) As one of petitioner's new post-conviction witnesses (Dr. Ophoven) testified, someone with Dr. Ferris's credentials was exactly the kind of forensic pathologist that one would choose to review a case like this, where the body had been recovered from water. (6/20/12 Tr 113-14). And counsel ensured that Dr. Ferris was fully informed about the facts of the case by providing him with a long list of materials, including the autopsy report and photographs. (Ex 1 at 3098-99; Ex 3 at 1126-27).

Thus, when Dr. Ferris told petitioner's counsel unequivocally that the victim had a "relatively low" level of morphine in her blood that was "unlikely to have materially affected her level of awareness," it was reasonable for them to determine that it would be fruitless to investigate an overdose theory further. Although petitioner had given them a version of the facts consistent with an overdose theory, counsel were entitled to conclude that the medical evidence did not support the story that their client—who they recognized had serious credibility issues—told them. Counsel would have known that Dr. Ferris's conclusion that the morphine level was not fatal was consistent with that of the state's expert, Dr. Hartshorne, who determined that the cause of death was strangulation. There is no evidence that Dr. Ferris or anyone else told counsel at the time that they needed to consult with a toxicologist, that Dr. Ferris was not competent to render the unequivocal opinion he gave, or even that morphine levels were difficult to interpret and highly variable.

Although Dr. Ferris *later* expressed some of those views—most notably, in post-conviction testimony that the court expressly found not credible (6/18/12 Tr 125-28; ER 74, 78)—this court "evaluate[s] a lawyer's conduct from the lawyer's perspective at the time, without the distorting effects of hindsight." *Lichau v. Baldwain*, 333 Or 250, 360, 39 P3d 851 (2002). Strategic decisions will sometimes backfire; an investigative avenue that appeared unpromising at the time will turn out to have held helpful evidence. But a post-

conviction proceeding is not a forum for second-guessing these strategic decisions. "Adequacy of assistance of counsel * * * allows for tactical choices that backfire, because, by their nature, trials often involve risk." *Krummacher v. Gierloff*, 290 Or 867, 875, 627 P2d 458 (1981); *see also Howell v. Gladden*, 247 Or 138, 142, 427 P2d 978 (1967) (a post-conviction proceeding is "not intended to provide a second trial of every criminal case in which a disappointed convict, with a new lawyer, a new theory, and new ideas about trial strategy, might think the first trial (and appeal) was not properly conducted by his counsel"). Here, at the time they decided what investigative avenues to pursue and what defense to present at trial, petitioner's counsel did not have any of the later-developed evidence suggesting that Dr. Ferris was overstating his conclusions. They can hardly be faulted, let alone found incompetent, for failing to predict those later developments.

If Dr. Ferris was not the right kind of expert to interpret the toxicological data, counsel reasonably could have expected that he would say so and tell them who else—for example, a toxicologist—they needed to consult. They did not have to cross-examine him about his qualifications and the basis for his scientific conclusions before accepting his advice. "If an attorney has the burden of reviewing the trustworthiness of a qualified expert's conclusion before the attorney is entitled to make decisions based on that conclusion, the

role of the expert becomes superfluous." *Hendricks v. Calderon,* 70 F3d 1032, 1038-39 (9th Cir 1995), *cert den*, 517 US 1111 (1996).

Counsel wanted to determine what the medical evidence suggested about the cause of death, and they hired a cause-of-death expert to advise them. Forensic pathologists perform autopsies to determine cause of death. 40 Am Jur Trials 501 § 6 (1990). "Autopsy reports typically * * * have two parts: '(1) the objective forensic autopsy with its findings including toxicological tests, special tests, microscopic examination, etc., and (2) the interpretations of the forensic pathologist including cause and manner of death.'" *People v. Dungo*, 147 Cal Rptr 527, 539, 286 P3d 442, 452 (2012) (Werdeger, J., concurring) (quoting Nat. Assn. of Medical Examiners, Forensic Autopsy Performance Standards, Standard H31, p. 25 (2005, as amended, Aug. 11, 2011)). And as a part of performing autopsies and determining cause of death, forensic pathologists routinely request and interpret toxicology reports. *See* Nat'l Ass'n of Medical Examiners, *Forensic Autopsy Performance Standards* 16 (2006), *available at* https://www.mtf.org/pdf/name_standards_2006.pdf (last visited September 25, 2016). Counsel had no reason to think that they needed to consult separately with a toxicologist, even if they knew what the field of toxicology covered, just as they would have had no reason to think they needed to hire a cardiologist to explore whether the victim died of a heart attack.

In sum, once they received Dr. Ferris's report, it was reasonable for petitioner's trial counsel to rule out further investigation of an overdose theory. And even if that were a close question, their decision would be entitled to a "heavy measure of deference." *Strickland*, 466 US at 691. The decision to forgo further investigation after hiring a qualified expert who gives an unequivocal opinion is exactly the sort of fully informed strategic choice that is "virtually unchallengeable" in a post-conviction proceeding. *Id.* at 690; *see also Hinton v. Alabama*, __ US __, 134 S Ct 1081, 1089, 188 L Ed 2d 1 (2014) ("The 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.") (brackets and quotation marks in original omitted).

B. Based on the information they had at the time, trial counsel reasonably pursued a trial strategy based on drowning as the cause of death.

The post-conviction court found that, based on the information provided by Drs. Hartshorne and Ferris, petitioner's trial counsel had "no other reasonable possibility as a defense" other than the venue defense they settled on. (ER 69). That finding is correct. As counsel recognized, Dr. Ferris was a "presentable" witness with an "impressive resume" who enabled them to argue that the victim died by drowning—not, as the state asserted, by strangulation. (Ex 146, at 55). And because all the evidence suggested that the victim entered

the water in Clatsop County, if the jury believed Dr. Ferris's opinion that the victim drowned it would have had to conclude that venue was improper in Washington County, where the prosecution was brought.

That remained a viable defense even after the state amended the indictment to rely on the "alternative" venue provision for cases where the place of the crime cannot readily be determined. (Ex 1, at 1489; Ex 33, at 1-4). To invoke that provision—before this court clarified the rules governing venue in *Mills*—the state would have had to prove beyond a reasonable doubt *that it could not be readily determined where the victim died*. ORS 131.325; *Rose*, 117 Or App at 274. But Dr. Ferris's testimony allowed the defense to argue that the place of death *was* readily determinable, and that it was in Clatsop County. If the jury had harbored reasonable doubt on this point, it could not have convicted defendant.

The post-conviction court nonetheless regarded a venue defense as "relatively a wrongheaded position to take to a jury" because it was based on a technicality. (ER 79). But whatever its drawbacks, a venue defense was—under the law at the time of the trial—both legally and factually supportable. And although it ultimately did not succeed, counsel's faith in the defense was not misplaced; the record shows that the jury did not reject it out of hand. As noted earlier, the jury asked questions specifically related to the defense and deliberated for another hour before convicting petitioner. (Ex 1, at 3422-23).

More importantly, there was no obviously better strategy for counsel to pursue. The evidence that defendant was present at and responsible for the victim's death was overwhelming. *See generally Johnson*, 340 Or at 321-22. Counsel considered arguing that the death was the result of an accidental overdose or accidental strangulation. (Ex 146, at 43, 55; 6/21/12 Tr 41). But counsel reasonably believed, based on Dr. Ferris's advice, that the medical evidence did not support an overdose theory. They also reasonably concluded that it would be difficult to present any accidental-death theory effectively without having petitioner testify. (*See, e.g.*, Ex 146 at 77-79). Counsel had concerns about putting petitioner on the stand and letting the prosecution impeach his testimony. (Ex 146, at 77-78). That concern was understandable in view of petitioner's "profound lack of cooperation" with their efforts to determine what had happened between the victim and him, and to develop a theory of the case that was consistent with the evidence. (Ex 13, at 1; *see also* Ex 13, at 4; Ex 124, at 4). And petitioner had not indicated that he wanted, or even was willing, to testify at trial. (Ex 13, at 4; Ex 146, at 78). Counsel were not required to "browbeat" him into testifying. *Knowles v. Mirzayance*, 556 US 111, 125, 129 S Ct 1411, 173 L Ed 2d 251 (2009). Indeed, it would have been poor strategy to do so when they knew that the medical evidence did not support his version of events.

In theory, counsel gamely could have presented an accidental-overdose theory even without petitioner's testimony—arguing, for example, that petitioner had been drugging and raping girls for two decades but had never murdered any of them, so the death must have been an accident. (*Cf.* Ex 13, at 2-3 (describing the information counsel had about petitioner's past misconduct)). But counsel recognized that this approach was not likely to persuade the jury, at least without medical evidence to support it or a firsthand account of the events of the night the victim died. More importantly, the question of which approach to adopt—a factually supportable but legalistic venue argument or an accidental-overdose theory based on little more than speculation—was a strategic decision that counsel were entitled to make. That decision is entitled to a strong presumption of reasonableness even if with the benefit of hindsight a different decision might seem preferable. *See Strickland*, 466 US at 689.

Finally, even if the venue argument seemed weak, that did not mean that counsel were constitutionally required to keep pursuing unlikely investigative leads until they found "another defense as an option to consider," as the post-conviction court held. (ER 81). When representing a client against whom there is overwhelming evidence of guilt, as here, there is no reason for counsel to assume that they will find a winning defense if only they look long and hard enough. The Court of Appeals reasoned that "at worst," seeking a third opinion

would have "put[] the issue to rest." 277 Or App at 238 (brackets in original omitted). But 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. Without the "distorting effects of hindsight," *Montez*, 355 Or at 7, lawyers can have no way of knowing whether there is some expert available who would give an opinion that is more favorable to their client.

From their perspective at the time, petitioner's counsel "made a reasonable selection among an array of unpromising choices." *Harrington v. Johnson*, 165 Or App 755 (2000). They had a client whose story (to the extent he was willing to talk to them about it at all) did not match the opinion of either the medical examiner or their own, well-qualified defense expert. And the opinion of their expert gave them a solid factual argument to challenge the state's proof of venue, without which the jury would have to acquit. In those circumstances, counsel's strategic decision to focus on venue fell within "the wide range of reasonable professional assistance." *Strickland*, 466 US at 689.

CONCLUSION

This court should reverse the decision of the Court of Appeals and remand for that court to consider the issues raised in petitioner's cross-appeal.

Respectfully submitted,

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BG2:slc/7749292-v1

NOTICE OF FILING AND PROOF OF SERVICE

I certify that on October 4, 2016, I directed the original Brief on the Merits of Petitioner on Review to be electronically filed with the Appellate Court Administrator, Appellate Records Section, and electronically served upon Daniel J. Casey, attorney for respondent, by using the court's electronic filing system.

I further certify that on October 4, 2016, I directed the Brief on the Merits of Petitioner on Review to be served upon Robert L. Huggins, Jr., attorney for respondent on review, by mailing two copies, postage prepaid, to:

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CERTIFICATE OF COMPLIANCE WITH ORAP 5.05(2)(d)

I certify that (1) this brief complies with the word-count limitation in ORAP 5.05(2)(b) and (2) the word-count of this brief (as described in ORAP 5.05(2)(a)) is 7,569 words. I further 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(2)(b).

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