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

REPLY BRIEF OF PETITIONER ON REVIEW 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

DANIEL J. CASEY #952277
Attorney at Law
6723 SE 16th Ave
PO Box 82818
Portland, OR 97282-0818
Telephone: (503) 774-3283
Email: djcpdx@msn.com

Attorney for Respondent on Review

ROBERT L. HUGGINS, JR. #824458
Scott & Huggins Law Offices
1549 SE Ladd Avenue
PO Box 82818
Portland, OR 97214
Telephone: (503) 473-8958
Email: bob@scotthugginslaw.com

Attorney for Respondent on Review

Continued…..

JEFFREY ERWIN ELLIS #102990
Oregon Capital Resource Center
621 SW Morrison
Suite 1025
Portland, OR 97205
Telephone: (503) 222-9830
Email: jeffreyerwinellis@gmail.com

Attorneys for *Amicus Curiae*

ELLEN F. ROSENBLUM #753239
Attorney General
BENJAMIN GUTMAN #160599
Solicitor General
1162 Court St. NE
Salem, Oregon 97301-4096
Telephone: (503) 378-4402
Email:
benjamin.gutman@doj.state.or.us

Attorneys for Petitioner on Review

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REPLY BRIEF OF PETITIONER ON REVIEW

Petitioner argues that his trial counsel were constitutionally inadequate because—after talking to Dr. Ferris—they settled on a defense strategy based on venue rather than continuing to investigate the possibility that the victim died of a morphine overdose. At bottom, this argument rests on the assertion that his trial counsel should have doubted Dr. Ferris's interpretation of the medical evidence because it was not helpful enough to their client's case. That assertion misunderstands the role that experts play in shaping a criminal defense attorney's investigation. It also incorrectly requires an attorney to follow a single rigid approach to defending a case, even though there are a "remarkable variety" of approaches that are constitutionally adequate. *Krummacher v. Gierloff*, 290 Or 867, 873, 627 P2d 458 (1981); *see also Strickland v. Washington*, 466 US 668, 689, 104 S Ct 2052, 80 L Ed 2d 674 (1984) ("There are countless ways to provide effective assistance in any given case. Even the best criminal defense attorneys would not defend a particular client in the same way.").

As explained below, this appeal can be resolved by applying two uncontroversial legal principles to undisputed facts. First, criminal defense attorneys are entitled to avoid wasting time on investigative avenues that they reasonably believe are unlikely to be fruitful. When Dr. Ferris—a highly

credentialed expert in determining cause of death—told trial counsel that the level of morphine in the victim's blood was "relatively low" and "unlikely to have materially affected her level of awareness," they reasonably concluded that further investigation would not likely yield medical evidence that she died of an overdose. And as the post-conviction court concluded, without that evidence the venue defense was a reasonable strategy to pursue.

Second, criminal defense attorneys are entitled to investigate the facts first and then pick a legal theory that fits those fact, rather than picking a legal theory and then trying to find supporting facts. Thus, after trial counsel reasonably determined that the medical evidence supported drowning rather than an overdose as the cause of death, counsel were entitled to choose a defense strategy that best made use of that information—here, a venue defense. Because that defense was legally and factually sound, counsel did not have to keep pursuing what reasonably appeared to be a pointless investigation with the hope that some other, stronger defense would present itself.

Those principles should be enough to determine that petitioner received adequate assistance of counsel, and therefore to resolve this appeal. The factual disputes that petitioner's brief highlights are irrelevant to the question whether trial counsel reasonably decided not to consult additional experts in the circumstances they faced here. There thus is no need for this court to address them.

A. Trial counsel were entitled to rely on expert advice in deciding what avenues of investigation to pursue.

Because lawyers rarely have the time or resources to pursue every possible investigative avenue, defense attorneys are entitled to make reasonable predictions about which avenues are likely to be helpful in the overall context of the case and which are likely to be distracting or of negligible benefit. *Harrington v. Richter*, 562 US 86, 107, 131 S Ct 770, 178 L Ed 2d 624 (2011); *Green v. Franke*, 357 Or 301, 312, 350 P3d 188 (2015). Decisions about the direction and scope of an investigation—like any strategic decisions a defense lawyer makes—are entitled to a "strong presumption" of reasonableness. *Strickland*, 466 US at 689.

Here, counsel consulted with Dr. Ferris, who told petitioner's trial counsel that the medical evidence pointed to drowning, not a morphine overdose, as the cause of death. Based on that confident and unequivocal expert advice, it was objectively reasonable for counsel to conclude that the medical evidence would not support an overdose theory, and so it would be of little benefit to continue that line of investigation. Dr. Ferris—a highly qualified expert in determining cause of death, and in particular determining cause of death in bodies recovered from water—gave them no reason to think that any other experts would give them a different interpretation of the morphine levels. Although petitioner may be right that "the number of experts

that should be consulted is a question of reasonableness under the circumstances of the particular case," Pet Br 17, in the circumstances *here* counsel had no reason to think that seeking another expert opinion about the morphine levels would be useful rather than a waste of time.

Thus, petitioner misses the point when he argues that the issue is whether counsel conducted an adequate investigation, as opposed to whether they could rely on Dr. Ferris's conclusions. Pet Br 17. The investigation was adequate precisely because counsel reasonably *could* rely on Dr. Ferris's conclusions about the medical evidence. *See Montez v. Czerniak*, 355 Or 1, 20, 322 P3d 487 (2014) ("Petitioner's counsel acted reasonably in relying upon qualified experts to assist in determining whether, in conjunction with showing petitioner's longstanding and severe psychological problems, they also could argue that he suffered from organic brain damage.").

For those reasons, this case is unlike *Lichau v. Baldwin*, 333 Or 350, 39 P3d 851 (2002). In *Lichau*, the defense lawyer withdrew an alibi defense after the prosecutor threatened to introduce evidence contradicting it, but without having reviewed any of that evidence or investigating whether other evidence might support the defense. *Id.* at 353-54. This court rejected the argument that, in the circumstances, the lawyer reasonably could have presumed that further investigation of the alibi would be fruitless. *Id.* at 362. Here, by contrast, trial counsel conducted a reasonable investigation into the cause of death with a

highly qualified expert. And from that investigation, they reasonably concluded that further investigation of an overdose theory would be fruitless.

Contrary to petitioner's argument (Pet Br 22), counsel did not first have to conduct their own independent investigation into the basis for, and strength of, Dr. Ferris's conclusions. "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, 116 S Ct 1335, 134 L Ed 2d 485 (1996). As long as counsel reasonably selected Dr. Ferris, counsel was entitled to rely on him in determining which avenues to pursue.

And counsel's decision to select Dr. Ferris *was* reasonable. Petitioner faults counsel for seeking out a "drowning expert." Pet Br 27. But Dr. Ferris was not an expert only in drowning; he was, more generally, an expert in determining the cause of death for bodies that—like the victim's—had been recovered from water (Ex 1, at 3153-54). It was reasonable to consult with someone who had that particular expertise. He also had written a chapter of a textbook on death by asphyxiation, including strangulation, so he was well positioned to review Dr. Hartshorne's conclusions (Ex 1, at 3090). Dr. Ferris had been recommended by another capital defense lawyer as having "outstanding credentials and excellent delivery at trial." (Ex 29, at 92; *see also*

Ex 146, at 23). There is no evidence supporting petitioner's assertion that "counsel either knew or should have known that that the morphine opinion of each pathologist was likely colored by their attachment to their own respective conclusions about the cause of death." Pet Br 29. There also is no evidence that Dr. Ferris "prematurely latched onto a drowning theory" or, more importantly, that counsel would have had any reason to think that he had done so. Counsel reasonably relied on *Dr. Ferris* to determine how much evidence he needed to draw a conclusion. As the post-conviction court stated, if it were true that Dr. Ferris "came to a conclusion without first reviewing the evidence," the fault would lie with Dr. Ferris—not counsel. (ER 78). Because it was reasonable for counsel to rely on Dr. Ferris's interpretation of the medical evidence, it was also reasonable for them to conclude that it would be pointless to continue investigating whether that evidence supported an overdose theory.

B. Trial counsel were entitled to evaluate the medical evidence before choosing a theory of the defense, rather than vice-versa.

Petitioner seems to believe that the only permissible way for a defense attorney to choose a theory of the defense is *first* to decide which theory would be best for the client and *then* to see if the attorney can find an expert opinion needed to support that theory. Thus, petitioner argues, his trial counsel's reliance on Dr. Ferris's conclusions was "objectively unreasonable, *because* the most it provided was a defense virtually guaranteed to fail." Pet Br 22

(emphasis added). In other words, according to petitioner, his counsel should have first decided that an overdose theory was preferable to a drowning theory, rejected any expert advice about the medical evidence that was inconsistent with that approach, and kept searching until they found someone willing to lend support to their preferred approach.

But even if that is one of the "remarkable variety" of permissible approaches that a defense attorney can take, *Krummacher*, 290 Or at 873, it is not the only one, much less the one that the constitution requires. Another reasonable approach is what petitioner's counsel did here: *first* hire an expert to interpret the medical evidence and *then* choose the defense theory that best fits that evidence. An attorney reasonably can conclude that a facts-first approach is more likely to develop a theory that can withstand the cross-examination that inevitably will occur at trial.

Thus, it was not unreasonable for counsel to rely on Dr. Ferris's conclusions merely because they pointed towards a venue defense. Rather, the question that counsel faced was this: if the medical evidence supported a claim that the victim drowned rather than being strangled, what was the best defense strategy for trial? In those circumstances, counsel reasonably concluded that the best strategy was one based on venue. As the post-conviction court concluded, that was the only plausible guilt-phase defense to present based on

the totality of the information they had. (ER 69). Petitioner does not dispute that conclusion.

The analysis of counsel's performance does not change merely because petitioner's counsel recognized that it might be difficult to persuade a jury to accept a venue defense. The venue argument was legally sound, and Dr. Ferris's testimony gave trial counsel a strong factual basis for presenting it to the jury. Although the post-conviction court considered the defense not to have "great statistical promise" and not to be the type of argument any lawyer "would *like* to rely upon," the court agreed that was "possible" that it could have prevailed, and that it remained a viable defense *even after* the prosecution amended the indictment to add the alternative basis for venue if the place of death could not readily be determined. (ER 68-69, 72) (emphasis added). In any event, contrary to petitioner's assertions (*see, e.g.*, Pet Br 23), the post-conviction court's evaluation of the pluses and minuses of the venue defense was not a factual finding; it was at most a legal conclusion about the strength of an argument that this court is free to decide for itself.

Petitioner's argument assumes that, when a criminal defense lawyer sees no strong guilt-phase defense in a capital murder case, the lawyer's duty is to keep pursuing the investigation until some strong defense presents itself. That is not what the constitution requires, nor should it. In any particular case, there simply may not be a strong defense to guilt. *Cf. Benson v. Gladden*, 242 Or

132, 149, 407 P2d 634 (1965), *cert den*, 384 US 908, 86 S Ct 1345, 16 L Ed 2d 360 (1966) ("even the most qualified and resourceful defense counsel cannot guarantee acquittal of the guilty"). A defense lawyer who spends time and resources pursuing unlikely investigative leads is necessarily *not* spending that time on tasks that may be much more important to the overall defense strategy, such as preparing the case for mitigation at the penalty phase. Decisions about how to allocate these efforts in developing the case are difficult, and they are entitled to the same strong presumption of reasonableness that all difficult strategic decisions receive.[1]

Like petitioner, *amicus curiae* Oregon Criminal Defense Lawyers Association (OCDLA) makes the mistake of assuming that there is a single formula defense lawyers must follow to provide adequate assistance of counsel. OCDLA argues that in capital cases, counsel is required to investigate and present a "unified defense theory." OCDLA Br 2. That may well be one good strategy, but defense attorneys are entitled to exercise their professional judgment as to whether it is the best strategy in a particular case. *See Harrington*, 562 US at 106 ("Rare are the situations in which the wide latitude counsel must have in making tactical decisions will be limited to any one

[1] Petitioner's assertion that death is different does not add to the analysis. Pet Br 36. Petitioner cites no case holding that the standard of counsel's performance at the *guilt* phase of an aggravated-murder trial depends on whether the district attorney has opted to seek the death penalty.

technique or approach.") (quotation marks omitted). A unified defense theory is not constitutionally required:

> The Constitution does not require an integrated strategy any more than it requires an attorney to strive for a not guilty verdict in the guilt phase or orient the entire case around mitigating the crime. The choice to pursue a particular strategy in one phase at the cost of lowering the likelihood of success in the other phase is a tactical decision for which there is no correct answer, but only second guesses.

Hendricks, 70 F3d at 1041; *see also Flamer v. Delaware*, 68 F3d 710, 729 (3d Cir 1995) ("It seems quite obvious that a defense attorney's performance need not be based on some grand overarching theory in order to meet constitutional requirements."), *cert den*, 516 US 1088, 116 S Ct 807, 133 L Ed 2d 754 (1996).

C. Petitioner's and OCDLA's other arguments are irrelevant or incorrect.

Much of petitioner's brief is devoted to arguing about various factual issues that are irrelevant to the performance issue in dispute. The superintendent stands by the opening brief's characterization of the evidence. But because these disputes have no bearing on the legal issues argued in the briefs to this court, there is no need to go through each of petitioner's assertions one by one.

For example, petitioner chides the superintendent for not noting the post-conviction court's statement that there was "believable" expert testimony proffered in the post-conviction proceeding supporting an overdose theory. Pet Br 6. The opening brief did not assert to the contrary; it merely pointed out the

ways in which this testimony was tentative and conditional. Superintendent's Br 14-15. But in any event, the post-conviction court's conclusion that there was believable evidence supporting an overdose theory does not advance petitioner's arguments. "Believable" means only that the testimony *could* be credited by a fact-finder, not that it was compelling, strong, unrebuttable, or even likely to be believed. The opening brief pointed out some of the ways in which the expert testimony was vulnerable to cross-examination and unlikely to help petitioner, but that in no way contradicts the court's assertion that it cleared the low threshold of believability.

Regardless, the performance issue does not turn on whether petitioner proffered believable new evidence in the post-conviction proceeding. Trial counsel's performance must be assessed based on the information they had available at the time of their actions—not new evidence developed years later.

The arguments that OCDLA advances reflect its misunderstanding of the record. Contrary to OCDLA's contention, the amendment of the indictment did not "eliminate any realistic possibility" of a venue defense (OCDLA Br 1); as the post-conviction court concluded, it remained "possible" both legally and factually. (ER 72). Trial counsel did not "fail[] to conduct any investigation" to determine whether an overdose theory was viable (OCDLA Br 2); they consulted with Dr. Ferris, who gave them reason to believe that it was not. It is flat-out wrong to assert that "we know that the morphine caused the victim's

tragic death." OCDLA Br 10. The post-conviction court made no such finding; even considering of the new evidence submitted in the post-conviction proceeding, the record as a whole still supports the prosecution's original theory that petitioner strangled the victim to death. And it is hard to see why OCDLA thinks that an unsuccessful overdose theory "would have set the stage for a credible penalty phase presentation." OCDLA Br 11. If the jury nonetheless concluded that petitioner had intentionally murdered the victim (whether by strangling her or by deliberately causing her to overdose on drugs), the overdose theory hardly would have helped in mitigation.

Similarly, OCDLA is mistaken in relying on the testimony of the "legal expert" petitioner presented in the post-conviction proceeding. OCDLA Br 7-9. As the post-conviction court noted, that witness had, in fact, served as counsel to petitioner during the post-conviction case and so could not be regarded as a credible source of unbiased testimony. (ER 85 n 21). Thus, even if it were appropriate to rely on a legal expert in a post-conviction proceeding—and it is not, as the issues are ones that the court is well-equipped to decide on its own[2]—the court should disregard the testimony presented here.

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[2] "[Q]uestions of law are for the court and not a proper subject for expert testimony to the jury." Laird C. Kirkpatrick, *Oregon Evidence* 418 (3d ed 1996); *see also Olson v. Coats*, 78 Or App 368, 370-71 (1986) (witness may not testify whether a construction sign complied with legal standards, because the question calls for a mixed legal and factual conclusion); *Lytle v. Jordan*, 22 P3d

Footnote continued…

Finally, this court should decline petitioner's request that, if it rejects his claim of inadequate assistance of counsel under Article I, section 11, it nonetheless remand for consideration of the same claim under the Sixth Amendment. Pet Br 44. The federal and state constitutional standards are "functionally equivalent." *Montez*, 355 Or at 6. If this court rules against petitioner on the state claim, he cannot get relief on the federal claim either.

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,

ELLEN F. ROSENBLUM
Attorney General

/s/ Benjamin Gutman

BENJAMIN GUTMAN #160599
Solicitor General
benjamin.gutman@doj.state.or.us
Attorneys for Petitioner on Review
Jeff Premo, Superintendent,
Oregon State Penitentiary

(…continued)
666, 679-80 (NM 2001) (it is "superfluous for expert witnesses to advise a court, whether it is the district court or an appellate court, about the proper application of existing law to the established historical facts and about the ultimate issue of trial counsel's effectiveness").

NOTICE OF FILING AND PROOF OF SERVICE

I certify that on December 19, 2016, I directed the original Reply Brief 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 on review, and Jeffrey E. Ellis, attorney for *amicus curiae*, by using the court's electronic filing system.

I further certify that on December 19, 2016, I directed the Reply Brief of Petitioner on Review to be served upon Robert L. Huggins, attorney for respondent on review, by mailing two copies, postage prepaid, in an envelope addressed to:

Robert L. Huggins, Jr.
Scott & Huggins Law Offices
1549 SE Ladd Avenue
Portland, OR 97214

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 3,114 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).

/s/ Benjamin Gutman

BENJAMIN GUTMAN #160599
Solicitor General
benjamin.gutman@doj.state.or.us

Attorneys for Petitioner on Review
Jeff Premo, Superintendent,
Oregon State Penitentiary

BG2:slc