IN THE SUPREME COURT OF THE STATE OF OREGON

CHARLES EDWARD RICHARDSON, Petitioner-Respondent, Cross-Appellant Respondent on Review, v. BRIAN BELLEQUE, Superintendent, Oregon State Penitentiary, Defendant-Appellant, Cross-Respondent Petitioner on Review.	Marion County Circuit Court Case No. 09C20407 CA A151817 SC S064185

BRIEF ON THE MERITS OF RESPONDENT ON REVIEW

Review of the Decision of the Court of Appeals
on Appeal from a Judgment
of the District Court for Marion County
Honorable Linda L. Bergman, Judge

Opinion Filed: April 20, 2016
Author of Opinion: Egan, J.
Before, Armstrong, P.J., Nakamoto, J., and Egan, J.

Continued….

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BRIEF ON THE MERITS OF RESPONDENT ON REVIEW

STATEMENT OF THE CASE

This is a state's[1] appeal from a post-conviction judgment granting petitioner a new dangerous offender sentencing hearing. To sentence a criminal defendant as a dangerous offender, a fact finder must decide whether the defendant suffers from a "severe personality disorder" as that phrase is defined in the extant *Diagnostic and Statistics Manual of Mental Disorder* (hereinafter DSM). Here, that is the *DSM-IV-TR*.[2] By law a dangerous offender sentencing hearing requires the testimony of at least one expert witness, either a psychiatrist or psychologist, to aid the trier of fact in deciding whether the defendant suffers from a severe personality disorder as defined in the *DSM-IV-TR*.

In this case, the post-conviction trial court found that trial counsel knew that the state's expert (Suckow) had concluded that petitioner suffered from a severe personality disorder and that the state intended to offer that opinion at petitioner's dangerous offender sentencing hearing. Counsel had reason to believe that the

[1] In post-conviction proceedings this court refers to the defendant as "'the state' to avoid confusion with the defendant and defense counsel in the underlying criminal trial." *Pereida-Alba v. Coursey*, 356 Or 654, 656 n 1, 342 P3d 70 (2015).

[2] The revised fourth edition of the *Diagnostic and Statistical Manual of Mental Disorders* was the version relied upon at petitioner's trial. Ex 3 at 20.

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state's expert witness's opinion was erroneous because there was an absence of factual evidence supporting petitioner's diagnosis under the *DSM-IV-TR*. Without conducting an investigation into the factual basis for that opinion and without conferring with his own expert, counsel made a strategic decision to rely solely on his cross-examination of the state's expert witness using the *DSM-IV-TR*.

The post-conviction trial court concluded that given the facts of this case, trial counsel's strategic decision was not reasonable. The court concluded that petitioner was prejudiced because an adequate investigation would have revealed substantive factual evidence showing that petitioner does not meet the criteria for a severe personality disorder in the *DSM-IV-TR*. Accordingly, the post-conviction court concluded that the outcome of the proceedings could likely have been different if trial counsel had conducted an adequate investigation and granted petitioner a new dangerous offender sentencing hearing.

The state appealed. Relying primarily on the post-conviction court's binding factual findings, the Court of Appeals affirmed the trial court's judgment in a written opinion. *Richardson v. Belleque*, 277 Or App 615, 627-30, 373 P3d 1113 (2016). The state petitioned for review and this court granted review to decide when an attorney's investigation should include conferral with an expert witness.

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Pursuant to ORAP 5.77, petitioner adopts the Oregon Criminal Defense Lawyers Association's *amicus curiae* brief in its entirety.

Questions Presented and Proposed Rules of Law

First Question Presented:

When should a criminal defense attorney's investigation include conferring with an expert witness?

First Proposed Rule of Law:

Whether a criminal defense attorney's investigation should include conferring with an expert witness will always necessarily depend on the facts of the specific case. In general, counsel's decision not to investigate must be based on a reasonable evaluation of the likely costs and potential benefits of investigating. When deciding whether an investigation should include conferring with an expert, the non-exhaustive factors that should be considered include (1) whether the issue is the type that expressly requires expert testimony, or if not required, whether expert testimony may aid the trier of fact in reaching its decision; (2) whether the state has retained an expert and if so whether the state's expert's opinion is adverse; (3) whether the issue that the expert is testifying about is fundamental to the criminal defendant's case; and (4) whether the attorney can

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rebut the state's expert's opinion by offering substantive and contradictory evidence.

Second Question Presented:

When deciding whether a post-conviction petitioner is prejudiced should a court add an additional "probability" prong to its existing test?

Second Proposed Rule of Law:

No, "it is inappropriate to use a 'probability' standard for assessing prejudice." *Green v. Franke*, 357 Or 301, 322, 350 P3d 188 (2015). Instead, because a failure to investigate can affect the outcome of the proceedings in a myriad of ways, a court asks simply whether trial counsel's acts or omissions *could have tended to affect* the outcome of the proceedings. *Id.* at 322-23.

Summary of Argument

1. A criminal defendant has a right to adequate assistance of counsel under Article I, section 11, of the Oregon Constitution and the effective assistance of counsel under the Sixth Amendment to the United States Constitution. The state and federal standards for assessing counsel's performance are functionally equivalent. To prevail on a post-conviction claim of ineffective assistance of counsel under either the Oregon or United States Constitutions, a court must conclude that (1) trial counsel failed to exercise reasonable professional skill and

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judgment and (2) that the petitioner was prejudiced as a result. When deciding whether an attorney's strategic decision not to investigate was reasonable, this court asks whether the decision was "based on a reasonable evaluation of the likely costs and potential benefits of pursuing an investigation." *Stevens v. State of Oregon*, 322 Or 101, 109, 902 P2d 1137 (1995).

Here, the sole purpose of petitioner's dangerous offender hearing was for a jury to decide whether he suffers from a "severe personality disorder" as that phrase is defined in the *DSM-IV-TR.* Trial counsel knew that the state's expert would testify that petitioner met that definition and that there was an absence of factual evidence supporting the expert's conclusion. Without investigating the facts underlying the state's expert's diagnosis and without conferring with his own expert, trial counsel decided to rely solely on cross-examination of the state's expert using the DSM. Trial counsel failed to understand the fundamental difference between impeaching a witness with a treatise and offering contradictory substantive evidence that a jury could choose to rely upon when making its decision. Thus, trial counsel's strategic decision not to investigate was not reasonable given the facts of this case because it was not "based on a reasonable evaluation of the likely costs and potential benefits of pursuing an investigation." *Stevens*, 322 Or at 109.

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2. When deciding whether a post-conviction petitioner is prejudiced this court asks whether "trial counsel's acts or omissions '*could have tended to affect*' the outcome of the case." *Green*, 357 Or at 322-23 (citation omitted). That standard is intentionally general in order to capture the many ways that an inadequate investigation of the law and facts can impact the outcome of trial proceedings, which by their very nature are dynamic.

Here, if trial counsel had adequately investigated he would have discovered that petitioner does not in fact meet the definition for a severe personality disorder under the *DSM-IV-TR*'s diagnostic criteria. That is because that diagnostic criteria requires evidence of a conduct disorder prior to the age of 15. ATT-1 (*DSM-IV-TR*'s diagnostic criteria). If trial counsel had investigated by conferring with an expert witness, he would have learned that petitioner had been evaluated prior to the age of 15 and that he was diagnosed with an adjustment disorder, not a conduct disorder. Accordingly, as the post-conviction trial court correctly found, petitioner cannot be accurately diagnosed with a severe personality disorder as that term is defined in the *DSM-IV-TR.*

That evidence could have impacted the outcome of petitioner's dangerous offender hearing in a myriad of ways. The state's expert may have changed his opinion given the new information. The parties may have plea bargained for an

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appropriate sentence given the conflicting expert opinions. Or, as the Court of Appeals found, if the parties had proceeded to a hearing, the jury may have chosen to believe an expert called by petitioner rather than choosing to believe the state's expert. For any of these reasons petitioner was prejudiced because trial counsel's acts or omissions could have tended to affect the outcome of the proceedings.

Statement of Historical and Procedural Facts[3]

I. Standard of Review

"In reviewing the decision of the post-conviction court" this court is "bound by its findings of historic facts that are supported by evidence in the record." *Lichau v. Baldwin*, 333 Or 350, 359, 39 P3d 851 (2002) (citing *Ball v. Gladden*, 250 Or 485, 487, 443 P2d 621 (1968). Additionally, "'if findings are not made on all such facts, and there is evidence from which such facts could be decided more than one way, we will presume that the facts were decided in a manner consistent with the [post-conviction court's] ultimate conclusion * * *.'" *Lichau*, 333 Or at 359 (*quoting Ball*, 250 Or at 487; brackets in original).

II. Summary of Factual and Procedural Background

The Court of Appeals summarized the "Factual and Procedural Background" of this case in its written opinion consistently with the standard of review. ER-17.

[3] Because the state's summary of facts does not adhere to the standard of review, petitioner restates the standard of review and summarizes the facts consistently with the post-conviction trial court's binding factual findings.

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That portion of the Court of Appeals opinion is attached at ER-17-25. Petitioner summarizes some additional facts that may aid this court in deciding this case and sets out the express factual findings made by the post-conviction trial court.

A. Summary of the *DSM-IV-TR* criteria for a diagnosis of a personality disorder.

To diagnose a person with an antisocial personality disorder the *DSM-IV-TR* requires, *inter alia*, that "[t]here is evidence of a conduct disorder * * * with onset before age 15 years." *DSM-IV-TR* at 706, subsection C. The diagnostic criteria for Antisocial Personality Disorder is attached at ATT-1.

"'Conduct disorder' involves

> "'a repetitive and persistent pattern of behavior in which the basic rights of others or major age-appropriate societal norms or rules are violated. The specific behaviors characteristic of Conduct Disorder fall into one of four categories: aggression to people and animals, destruction of property, deceitfulness or theft, or serious violation of rules.' DSM-IV-TR at 702.'"

ER-31.

B. Summary of petitioner's claim for relief and the factual evidence offered in support of that claim.

Petitioner filed a timely post-conviction petition in which he alleged, *inter alia*, that "[d]efense counsel failed to conduct an investigation" including failing to confer with an expert witness when preparing for petitioner's dangerous offender sentencing hearing. ER-1-2 (claim 5 in the Amended Petition).

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In support of this claim, petitioner offered the opinion of Dr. Cooley. Ex 13 (excerpts attached at ER-3-6). Cooley's report provided in part, "[i]t is indeed the fact that one of the criteria for an antisocial personality diagnosis is that the individual demonstrate a conduct disorder before the age of 15. There is a reason for that criterion." ER-5. He explained, "[i]t is important to be certain that the underpinnings of the noted antisocial behavior are antisocial in nature, not due to some other psychological or psychiatric issue. ER-5. There are other psychological, social, and familial issues which can create behaviors that, on the surface, appear antisocial when in fact they are due to impinging issues." ER-5.

Unlike Suckow, Cooley's evaluation of petitioner included obtaining petitioner's medical records from St. Mary's. ER-3. Petitioner's St. Mary's records revealed that he had actually been evaluated by a psychiatrist before he was 15 years of age and that he was diagnosed with an "adjustment disorder, not a conduct disorder." ER-5. Based on that historical fact, Cooley concluded that it was "not possible" to diagnose petitioner with an antisocial personality disorder. ER-6. Cooley explained:

> "At the time of [petitioner's] trial, I, and numerous other psychologists in the state of Oregon would have been available as experts who could have been hired by the defense. Such an expert would have been qualified to evaluate and diagnose whether or not [petitioner] suffers from a personality disorder, specifically an antisocial personality disorder.

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> "That expert, as part of conducting such an evaluation, would have obtained and reviewed historical records such as those that I had available to me as I reviewed [petitioner's] case.
>
> "That expert would have testified about the diagnostic criteria utilized by the diagnostic and statistical manual to diagnose an antisocial personality disorder. The expert could furthermore have testified that Dr. Suckow made the diagnosis of antisocial personality disorder without reviewing critical background records. Furthermore, the expert could have testified that if Dr. Suckow had reviewed those records, he would not have been able to diagnose [petitioner] as suffering from an antisocial personality disorder. The expert would have testified that a dangerous offender designation is reserved for those who meet the criteria of a severe personality disorder which indicates a propensity toward crimes that seriously endanger the life and safety of others, that the personality disorder generally referred to by that statute is an antisocial personality disorder, and that it was not possible based on the available data to conclude that [petitioner] demonstrates the symptoms and behaviors consistent with the diagnosis of antisocial personality disorder."

ER-5-6.

C. Summary of the post-conviction trial court's express factual findings.

The post-conviction court accepted Cooley's expert opinion that petitioner does not in fact suffer from a severe personality disorder. ER-7-9 (transcript of post-conviction court's findings); ER-13-14 (post-conviction judgment); *see also* ER-25 (Court of Appeals typed quotation of post-conviction judgment).[4] The court

[4] Because it is easier to read the typed version of the post-conviction judgment quoted by the Court of Appeals in its opinion, hereinafter petitioner cites to the Court of Appeals opinion rather than the handwritten post-conviction judgment.

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expressly found that because she believed Cooley's opinion, "we're not in dangerous offender territory anymore." ER-8. The post-conviction trial court made the following factual finding on the record:

> "I spent a lot of time on this case, * * * I am going to be sending this case back for resentencing. And I'll make some detailed findings, but the bottom line is I think defense counsel did an excellent job with Dr. Suckow on cross and got as much as he could get, and it was really quite a bit, showing that Suckow's diagnosis had some gaps in it, although the doctor still held with the same diagnosis even after he was impeached.
>
> "But what he couldn't get on cross is that bottom line that says this behavior is explained through a totally different diagnosis that would throw out the possibility of dangerous offender. So if all of that behavior could be explained with an adjustment reactive disorder, we're not in dangerous offender territory anymore.
>
> "I agree that Dr. Cooley had a number of facts that were not flattering to the petitioner. No surprise, those things were basically – the idea was in through Suckow. But all of those facts could then have been explained by an alternative diagnosis. And you can't get there on cross.
>
> "So despite the very good job I think the attorney did in cross, it still left a hole that he could have filled by having his own expert. I think that was an inadequacy and I think this case needs to be resentenced."

ER-7-9.

Similarly, in the post-conviction judgment the court found that the jury made a factual finding that petitioner suffered from a severe personality disorder "largely based on [the state's] expert Dr. Suckow." ER-25. "Suckow found that

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[petitioner] had a personality disorder (written report says severe) which requires an underlying diagnosis of conduct disorder which in turn requires onset before age 15. [Suckow] did not have [petitioner's] juvenile records from St. Mary's that contain a diagnosis of adjustment reactive disorder not conduct disorder." ER-25.

Trial counsel "did not consult with or call an expert" witness before deciding to rely solely on cross-examination of the state's expert at petitioner's dangerous offender sentencing hearing. ER-25. "This court agrees with [trial counsel] that an expert witness is not always required." ER-25. Because trial counsel had not conferred with or retained an expert witness of his own, trial counsel "was unable by cross, to bring in the key issue of the prior diagnosis of adjustment disorder – a diagnosis that would disqualify" petitioner from receiving a dangerous offender sentence. ER-25.

If trial counsel had conferred with and called his own expert witness, "Dr. Cooley would have added facts that were not flattering to [petitioner] but that could have explained the [adjustment] disorder diagnosis." ER-25. "That diagnosis would also allow [trial counsel] to bring in details of [petitioner's] upbringing that were relevant and unknown to Suckow. That diagnosis might well lead a court to impose a maximum guideline sentence but would not have, if believed by the jury, have allowed a [dangerous offender] sentence." ER-25.

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The state appealed and the Court of Appeals affirmed the trial court's judgment based on the binding factual findings made by the post-conviction trial court. ER-28-32. As relevant here, the state never asked the post-conviction trial court, or the Court of Appeals, to apply a three-step test like the test the state is now asking this court to adopt. As such, both the Court of Appeals and the trial court applied the "two step" test that Oregon courts have historically applied in post-conviction proceedings. ER-26.

Argument

I. A court shall grant post-conviction relief if it finds that (1) trial counsel failed to exercise reasonable professional skill and judgment and (2) that the failure could have tended to affect the outcome of the proceedings.

In Oregon, post-conviction relief "shall be granted by the court when" a petitioner establishes that his conviction was obtained in violation of his constitutional rights under either the state or federal constitutions. ORS 138.530(1)(a). A criminal defendant has a constitutional right to adequate counsel under Article I, section 11, of the Oregon Constitution and to the effective counsel under the Sixth Amendment to the United States Constitution. *Montez v. Czerniak*, 355 Or 1, 6, 322 P3d 487 (2014); (citing *Strickland*, 466 US 668, 686, 104 S Ct 2052, 80 L Ed 2d 674 (1984) for Sixth Amendment requirement that counsel must be "effective"). The tests under the state and federal constitutions are "functionally

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equivalent."[5] *Montez*, 355 Or at 6. To prevail on a claim of ineffective assistance of counsel a petitioner must show that (1) trial counsel failed to exercise reasonably professional skill and judgment and (2) that he suffered prejudice as a result. *Montez*, 355 Or at 7; *Strickland*, 466 US at 687-88.

With regard to the first question, a court asks whether "trial counsel's performance 'fell below an objective standard of reasonableness.'" *Montez*, 355 Or at 7 (quoting *Strickland*, 466 US at 688). For trial counsel's investigation to be reasonable, "counsel must investigate the facts and prepare himself on the law to the extent appropriate to the nature and complexity of the case so that he is equipped to advise his client, exercise professional judgment and represent the defendant in an informed manner." *Krummacher v. Gierloff*, 290 Or 867, 875, 627 P2d 458 (1981). When deciding whether a strategic decision not to investigate was reasonable this court asks whether the decision was "based on a reasonable evaluation of the likely costs and potential benefits of pursuing the investigation." *Stevens*, 322 Or at 109.

With regard to the second prong, a petitioner establishes prejudice if he shows that "trial counsel's acts or omissions '*could have tended to affect*' the

[5] Because this court has held that the state standard for "adequate counsel" and the federal standard for "effective counsel" are functionally equivalent, petitioner uses those phrases interchangeably to refer to both standards and does not analyze the standards separately in this brief.

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outcome of the case." *Green*, 357 Or at 323 (quoting *Lichau*, 333 Or at 365; emphasis in *Green*). As previously noted that standard is functionally equivalent to the Sixth Amendment standard for prejudice. *Montez*, 355 Or at 6-7; *Strickland*, 466 US at 694 (a petitioner is prejudiced if an objective person would lack "confidence in the outcome" of the proceedings). This standard acknowledges that "many different factors can affect the outcome" of the proceedings. *Green*, 357 Or at 322.

A. Whether a lawyer's investigation should include conferring with an expert necessarily depends on the facts of that case.

In this case, the parties agree that the post-conviction court made a factual finding that trial counsel considered[6] conferring with an expert witness before making a strategic decision to rely solely on cross-examination of the state's expert witness at petitioner's dangerous offender sentencing hearing. SBOM at 7 (citing Ex 8 at 25, 27). Thus, the question before this court is whether that strategic decision was reasonable under the circumstances of this case. The two cases that come closest to the circumstances of this case are *Stevens* and *Gorham v.*

[6] Because trial counsel made a conscious choice to forgo conferring with an expert witness, this court does not apply the test that it announced in *Montez* and reiterated in *Perieda-Alba* for the more "complex" situation where trial counsel fails to consider an issue before making a strategic decision. *Perieda-Alba*, 356 Or at 674 (setting out non-exhaustive factors that should be applied when trial counsel fails to consider an issue before making a strategic decision).

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Thompson, 332 Or 560, 34 P3d 161 (2001) – *Stevens* addressed when an attorney's tactical decision not to investigate is unreasonable, and *Gorham* applied that rule to an attorney's decision not to call expert witnesses.

In *Gorham* the petitioner alleged that his attorney "had failed to exercise reasonable professional skill and judgment in failing to present expert opinion evidence on credibility and impeachment matters." 332 Or at 564. The claim related to the petitioner's third trial,[7] which was held approximately seven months after the second trial. *Id.* at 563. In the second trial, trial counsel had presented testimony from two expert witnesses. *Id.* However, in the third trial, counsel made a tactical decision not to call any experts and Gorham was convicted. *Id.* at 564.

At the post-conviction trial the state offered evidence that after the second trial, counsel had "talked to one of the jurors" and learned, *inter alia*, that "the prosecution's cross-examination had discredited [the expert witnesses'] testimony." *Id.* at 563. Accordingly, trial counsel "decided that it would be 'a better tactic at the third trial not to call expert witnesses, subjecting them to cross-examination by the prosecutor.'" *Id.* at 564.

[7] The first and second trials ended in mistrials. *Id.* at 562-63.

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In deciding the case, this court restated its general rule from *Krummacher* as modified in *Stevens* that "tactical decisions must be grounded on a reasonable investigation. The question in each case is whether trial counsel's investigation was legally and factually appropriate to the case." 332 Or at 567 (internal citations omitted). It then applied that rule to the trial court's binding factual findings and held that trial counsel's decision not to call experts was reasonable under the circumstances. *Id.* at 568.

Importantly, this court distinguished the facts in *Gorham* from those in *Stevens*, where the lawyer made "a tactical decision about how to conduct a trial without ever having undertaken any investigation on which to ground that decision." *Id.* at 568. This court explained that unlike the attorney in *Stevens*, the trial attorney in *Gorham* had conducted an adequate investigation by conferring with the relevant experts *before* making a tactical decision not to call them to testify in the third trial. *Id.* at 568-69. Accordingly, this court held that trial counsel's decision not to call an expert was reasonable because the "decision not to present expert testimony at the third trial was grounded on his investigation and use of experts at petitioner's second trial." *Id.* at 569.

In summary, this court's jurisprudence recognizes that whether a criminal defense attorney's strategic decision was reasonable will always necessarily

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depend on the "nature and complexity of the case." *Krummacher*, 290 Or at 875. When the case boils down to a single issue, like the credibility of one witness, a trial attorney must balance his decision to rely solely on cross-examination of that witness with the "likely costs and potential benefits" of pursing an investigation. *Stevens*, 322 Or at 109. The failure to call an expert witness will not be ineffective if the decision is based on a reasonable investigation into those costs and benefits. *Gorham*, 332 Or at 568-69.

Petitioner submits that when an attorney is deciding whether his investigation should include a conferral with an expert witness, he should consider the following factors in his cost-benefit analysis: (1) whether the issue is the type that expressly requires expert testimony, or if not required, whether expert testimony may aid the trier of fact in reaching its decision; (2) whether the state has retained an expert and if so whether the state's expert's opinion is adverse; (3) whether the issue that the expert is testifying about is fundamental to the criminal defendant's case; and (4) whether the attorney can rebut the state's expert's opinion by offering substantive and contradictory evidence.

B. Trial counsel's decision not to investigate by conferring with an expert was not based on a reasonable evaluation of the likely costs and potential benefits of pursuing the investigation.

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This case is most like *Stevens* because both cases boiled down to the credibility of a single witness. In *Stevens* that witness was the complainant; here, it was the state's expert, Suckow. Similarly, in both cases trial counsel made a strategic decision without first conducting an appropriate investigation into the law and facts. Further, in both cases trial counsel's strategic decision not to investigate "was not a choice that was based on a reasonable evaluation of the likely costs and potential benefits of pursuing the investigation." 322 Or at 109. An attorney exercising reasonable professional skill and judgment would have understood the following law and facts before making a decision to rely solely on cross-examination of the state's expert.

1. The issue of whether a person suffers from a "severe personality disorder" requires expert witness testimony, both because the statute itself requires at least one expert witness's testimony and because an expert's testimony would aid the trier of fact.

The dangerous offender sentencing scheme expressly requires the testimony of at least one expert witness. ORS 161.735(1).[8] Similarly, OEC 702[9] permits[10]

[8] That statute provides:

> "Upon motion of the district attorney, and if, in the opinion of the court, there is reason to believe that the defendant falls within ORS 161.725, *the court shall order* a presentence investigation and *an examination by a psychiatrist or psychologist*. The court may appoint *one or more qualified psychiatrists or psychologists to examine the defendant* in the local correctional facility."

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the testimony of an expert witness if the testimony "will assist the trier of fact to understand the evidence or to determine a fact in issue." As this court held in *State v. Huntley*, 302 Or 418, 435, 730 P2d 1234 (1986), expert opinion testimony is appropriate in dangerous offender hearings to aid the trier of fact in deciding whether a criminal defendant meets the definition of someone suffering from a severe personality disorder as that term is defined in the extant DSM. Of course, as is true with all expert opinions in this state, the "the trier of fact is not bound by any expert's opinion." *Id.* at 435. That is, the trier of fact is free to accept or reject the opinion of the expert(s) that testify.

(Emphasis added.)

[9] That rule provides:

> "If scientific, technical or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training or education may testify thereto in the form of an opinion or otherwise."

[10] Although this court has never expressly decided the issue, it is possible that expert testimony is *required* when a fact finder is asked to decide whether a person meets the criteria contained in the *DSM-IV-TR*. *See* Laird C. Kirkpatrick, *Oregon Evidence* § 702.03[2], Art VII (5th ed 2007) (explaining "When Expert Testimony is Required"); *State v. Agee*, 358 Or 325, 341, 364 P3d 971 (2015) (noting that both sides relied on expert witness testimony during the sentencing phase in a capital case to aid the jury in deciding whether the defendant suffered from an "intellectual disability" as that term is defined in the *DSM-IV-TR*).

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Thus, under the specific facts and circumstances of this case, an attorney exercising reasonable professional skill and judgment would have understood that an expert opinion would aid the trier of fact in deciding a complex issue like whether a person meets the diagnostic criteria contained in the *DSM-IV-TR*. Further, the attorney would have understood that such testimony was not only permitted by law but was mandated by the legislature in all dangerous offender sentencing hearings.

2. Trial counsel knew that the state had retained an expert witness and he knew that the expert's testimony was both adverse and was potentially erroneous.

In the present case, trial counsel knew that the state intended to introduce a report from an expert witness, Suckow, that diagnosed petitioner with a severe antisocial personality disorder. Ex 9;[11] Ex 12 (Suckow's report). Trial counsel knew that under the *DSM-IV-TR*'s criteria, a person cannot be diagnosed with an antisocial personality disorder unless he or she has been diagnosed with a "conduct disorder" prior to the age of 15. Ex 4 at 38 (sentencing hearing). Trial counsel also knew that petitioner had spent time at St. Mary's, a juvenile facility in Oregon, and that neither he nor Suckow had obtained those records. ER-29. As evidenced by trial counsel's cross-examination, he knew that Suckow did not have any

[11] State's June 30, 2006, notice that it was seeking a dangerous offender sentence.

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evidence that petitioner had been diagnosed with a conduct disorder prior to the age of 15. Ex 4 at 38-62. Accordingly, trial counsel knew that Suckow's diagnosis was potentially erroneous or at best was based on mere speculation.

3. The issue of whether petitioner suffered from a severe personality disorder was fundamental to petitioner's dangerous offender sentencing hearing.

By law a court cannot impose a dangerous offender sentence pursuant to ORS 161.725 unless a fact finder concludes that the criminal defendant suffers from a "severe personality disorder" as defined in the extant DSM. *State v. Nickell*, 302 Or 439, 443, 730 P2d 1246 (1986) ("[I]f a person is only psychotic and does not in addition suffer from a *severe personality disorder* accompanied by a propensity to commit future criminal acts, the fact that the psychotic offender might be terribly dangerous would not bring him within this statute."); *Huntley*, 302 Or at 438 (holding that in order to impose a dangerous offender sentence there must be a factual "finding" based on the extant DSM that, *inter alia*, "the defendant is suffering from a severe personality disorder indicating a propensity toward criminal activity").

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4.Trial counsel could not rebut the state's expert's opinion by offering substantive and contradictory evidence through cross-examination.

OEC 706[12] permits the use of a treatise to cross-examine an expert witness, but expressly prohibits the fact finder from considering the treatise as "substantive evidence." The rule provides in relevant part that "[s]tatements contained in a treatise, periodical or pamphlet established as a reliable authority may be used for purposes of impeachment but may not be introduced as substantive evidence." OEC 706. Accordingly, an attorney exercising reasonable professional skill and judgment would have understood that the jury could not consider the *DSM-IV-TR* as substantive evidence when deciding whether petitioner suffered from a severe personality disorder. Put another way, without petitioner's own expert the only value the *DSM-IV-TR* provided was to impeach Suckow's credibility. As the post-

[12] That rule provides:

> "Upon cross-examination, an expert witness may be questioned concerning statements contained in a published treatise, periodical or pamphlet on a subject of history, medicine or other science or art if the treatise, periodical or pamphlet is established as a reliable authority. A treatise, periodical or pamphlet may be established as a reliable authority by the testimony or admission of the witness, by other expert testimony or by judicial notice. Statements contained in a treatise, periodical or pamphlet established as a reliable authority may be used for purposes of impeachment *but may not be introduced as substantive evidence.*"

(Emphasis added).

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conviction court and Court of Appeals correctly concluded, an attorney exercising reasonable professional skill and judgment would have understood the fundamental difference between impeaching a witness's credibility and offering substantive contradictory evidence from an expert. ER-29-30.

Given the specific circumstances of this case set out above, trial counsel's decision not to confer with an expert witness before deciding to rely solely on cross-examination was not reasonable. Trial counsel testified that he made a strategic decision not to consult an expert psychologist because he "did not think there was any benefit to actually hir[ing] someone to do an evaluation" and he "didn't think it was going to get [the defense] any help at all." *Richardson*, 277 Or App at 622, 627; Ex 8 (trial counsel's deposition) at 37. Instead, trial counsel thought that as a general rule he can "'make better hay' through cross-examination, rather than 'confusing things with [his] own expert.'" SBOM at 16 (citing Ex 8 at 27). Thus, trial counsel's decision was not based on an evaluation of the likely costs and potential benefits of conferring with an expert in petitioner's case. Trial counsel's decision failed to understand the significant difference between impeaching the state's expert with a treatise on cross-examination and offering contradictory substantive evidence from his own expert. That is precisely what the

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post-conviction trial court and Court of Appeals correctly concluded, and this court should affirm those decisions.

To be sure, because dangerous offender sentencing hearings expressly require expert testimony, and because expert testimony can aid the trier of fact in determining whether a person meets the criteria contained in the extant DSM, it will be the rare case where an adequate investigation in preparing for a dangerous offender hearing will not include conferring with an expert witness. However, dangerous offender sentencing hearings where the state is seeking a 30-year sentence are rare. Similarly, it will be the rare case when a petitioner is able to show that he was prejudiced by trial counsel's failure to confer with an expert. Even so, there will still be cases where conferral with an expert is not required and where cross-examination with a treatise is appropriate.

For example, in *Huntley*, the state's expert's opinion was favorable – the expert concluded that Huntley did not suffer from a severe personality disorder. 302 Or at 435. Under those circumstances, a reasonable investigation will not necessarily require conferral with an expert because the state's expert's opinion is not adverse. Similarly, an attorney could reasonably conclude that relying solely on cross-examination is appropriate if he investigates the facts and learns that the state's expert's opinion is correct because it is supported by historical facts. In that

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hypothetical, it would be reasonable to rely solely on cross-examination with the DSM. However, when as here an attorney knows that the state's expert's opinion is both adverse and is potentially erroneous, an attorney exercising reasonable professional skill and judgment would investigate by conferring with his own expert before deciding to rely solely on cross-examination.

C. Trial counsel's deficient performance could have tended to affect the outcome of the proceedings in a myriad of ways.

A petitioner establishes prejudice if he shows that "trial counsel's acts or omissions '*could have tended to affect*' the outcome of the case." *Green*, 357 Or at 323 (quoting *Lichau*, 333 Or at 365; emphasis in *Green*). That standard is "functionally equivalent" to the Sixth Amendment standard for prejudice. *Montez*, 355 Or at 6-7; *Strickland*, 466 US at 694 (a petitioner is prejudiced if an objective person would lack "confidence in the outcome" of the proceedings). The standard acknowledges that "many different factors can affect the outcome" of the proceedings. *Green*, 357 Or at 322.

Here, if trial counsel had investigated by conferring with an expert witness he would have learned that Suckow's opinion was factually erroneous. Suckow's opinion that petitioner suffered from a severe personality disorder was based on an incorrect premise unsupported by evidence. Specifically, that petitioner suffered from a "conduct disorder" prior to the age of 15. Suckow reached his erroneous

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opinion because he failed to obtain petitioner's St. Mary's records. ER-29. As the post-conviction trial court found, those records reveal that petitioner was evaluated by a psychiatrist prior to the age of 15. That evaluation diagnosed petitioner with an "adjustment disorder" rather than a "conduct disorder." ER-5; ER-29-32. As a result, Suckow did not have evidence to support his finding that petitioner had a severe personality disorder. ER-5; ER-29-32.

That information could have tended to affect the outcome of petitioner's dangerous offender sentencing hearing in a myriad of ways. For example, first, if Suckow had been provided with petitioner's St. Mary's records and a report from an expert like Cooley, he could have changed his professional opinion in light of the historic factual evidence that directly contradicted his ultimate conclusion. Second, the state could have decided not to pursue a dangerous offender sentence given the new information. Third, even if Suckow maintained his opinion, in light of the new information, the parties may have reached an agreement on an appropriate sentence given the conflicting expert opinions. Fourth, the parties may have proceeded to a hearing and offered conflicting expert opinions and the jury could have chosen to believe an opinion like Cooley's over Suckow's. That is the scenario that the Court of Appeals correctly examined in its opinion. ER-29-32.

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Fifth, the trial court may have chosen[13] not to impose the maximum 30-year dangerous offender sentence, even if the jury had made the necessary fact findings. For any of these reasons, trial counsel's failure to confer with an expert "*could have tended to affect*" the outcome of proceedings. *Green*, 357 Or at 323. Thus, the post-conviction trial court and the Court of Appeals correctly concluded that petitioner was prejudiced.

II. The state's argument is unpreserved, has previously been rejected by this court, and the state has not met its burden to show that this court should abandon is prior precedent.

The state is asking this court to add a third prong to the functionally equivalent two-part tests that this court and the United States Supreme Court have consistently applied in post-conviction proceedings for over 30 years. *Green*, 357 Or at 321 (noting that with regard to the prejudice prong, "[t]his court first used the phrase 'tendency to affect the result of the prosecution' more than 30 years ago in *Krummacher*"). Specifically, the state asks this court to add a "probability" prong

[13] A trial court has discretion whether to impose a dangerous offender sentence even if the jury makes the requisite factual findings. ORS 161.735(6) ("the court may sentence the defendant as a dangerous offender.").

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to the prejudice test[14] when assessing trial counsel's performance in post-conviction proceedings. SBOM at 2, 4, 22-24, 29.

A. The state did not preserve its argument.

The state did not present its argument to the post-conviction trial court or the Court of Appeals. As such, the issue is not preserved for appellate review. ORAP 5.45(1); *State v. Wyatt*, 331 Or 335, 341, 15 P3d 22 (2000). To adequately preserve an issue, "a party must provide the trial court with an explanation of his or her objection that is specific enough to ensure that the court can identify its alleged error with enough clarity to permit it to consider and correct the error immediately, if correction is warranted." *Id.* "[T]he primary purposes of the preservation rule are to allow the trial court to consider a contention and correct any error, to allow the opposing party an opportunity to respond to a contention, and to foster a full development of the record." *State v. Clemente-Perez*, 357 Or 745, 752, 359 P3d 232 (2015).

In the present case, the primary purposes of the preservation rule were not served. The state never presented its argument at the trial court. If the argument had been presented the record likely would have developed differently. Petitioner's deposition of trial counsel may have been entirely different. Ex 8. He

[14] Alternatively, the state noted that this court could add the third prong when deciding whether trial counsel's performance was adequate. SBOM at 23 n 7.

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may have asked additional questions of trial counsel in order to respond to the state's argument. For example, petitioner likely would have questioned trial counsel to determine whether he would have used petitioner's St. Mary's records on cross-examination if he had obtained them. Similarly, he likely would have questioned counsel regarding whether he would have offered a report like Cooley's if he had obtained one. Petitioner may also have questioned trial counsel to determine whether he could have changed his strategic decision to rely solely on cross-examination of Suckow if he had obtained petitioner's St. Mary's records and conferred with an expert like Cooley.

Further, petitioner may have retained an expert criminal defense attorney witness who could have addressed whether a reasonable trial attorney in Lane County at the time of petitioner's dangerous offender sentencing trial would have submitted petitioner's St. Mary's records and Cooley's report. Because the issue was not preserved this court should not reach it.

B. This court has already expressly rejected the use of a "probability" test when deciding whether a petitioner is prejudiced.

The state's attempt to add a "probability" prong to the prejudice test is a transparent attempt to re-litigate an issue that this court already expressly rejected last year in *Green*. In *Green*, "[t]he post-conviction [trial] court used the probability-based formulation of the prejudice standard for which the state

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advocates when it concluded that, if counsel had requested a limiting instruction, the result 'would' not have been different." 357 Or at 321. The state urged this court to apply the probability test when deciding whether the petitioner was prejudiced. *Id.* This court expressly rejected that invitation, holding "where the effect of inadequate assistance of counsel on the outcome of a jury trial is at issue, *it is inappropriate to use a 'probability' standard for assessing prejudice*." *Id.* at 322 (emphasis added). This court explained that "[i]nstead, because many different factors can affect the outcome of a jury trial, * * * the issue is whether trial counsel's acts or omissions '*could have tended to affect*' the outcome of the case." *Id.* at 322-323 (emphasis in original).

In addition, the fact that the state and federal standards are "functionally equivalent" serves the dual function of judicial efficiency and avoids the significant collateral consequences that would likely result if this court were to adopt the state's three-part test. Those consequences are addressed in the brief of *amicus curiae* at 10-13.

C. The state has not explained why this court should abandon its prior precedent.

Over the 30 years since announcing[15] the two-part test in *Krummacher*, this court has developed a body of case law applying that test to a myriad of fact

[15] Previously this court had applied a "farce and mockery of justice" test when assessing defense counsel's performance. *Krummacher*, 290 Or at 870.

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patterns. *See, e.g., Stevens*, 322 Or at 108 (applying test when assessing trial counsel's strategic decision not to investigate potential impeachment witnesses); *Gorham*, 332 Or at 567 (applying standard to trial counsel's strategic decision not to call an expert witness); *Lichau*, 333 Or at 360 (applying standard to trial counsel's decision not to investigate an alibi defense); *Green*, 357 Or at 311 (applying standard to trial counsel's decision not to request a lesser-included jury instruction). Here, the state has failed to meet its burden to show why this court should not continue to apply that same test to the facts in the present case. *Farmers Ins. Co. v. Mowry*, 350 Or 686, 704, 261 P3d 1 (2011) ("The proponent of overturning precedent bears the burden of demonstrating why prior case law should be abandoned.").

Similarly, the state has not explained why this court should abandon its rule that it is trial counsel's actual performance in a specific case that is evaluated, as opposed to the general competence of the attorney. *Krummacher*, 290 Or at 872. In *Krummacher* this court explained that its inquiry must "focus on the adequacy of the attorney's performance rather than upon the general competency of the lawyer." *Id.* That is so because "[l]awyers, like other professionals, are not all equally skillful, but the least of us can sometimes rise to a challenge and the best of us can blunder. *Id.* Thus, this court reviews the specific performance of the

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attorney and not their general competence. *Id.* However, the state asks this court to rely on trial counsel's "expertise" and "experience" with dangerous offender sentencing hearings generally, instead of focusing on counsel's specific performance given the unique facts of this case. SBOM at 1, 12, 16, 20.

Further, the state has failed to explain why this court should abandon longstanding precedent requiring that a court review trial counsel's strategic decisions *at the time they were made* rather than relying on the "distorting effects of hindsight." *Strickland*, 466 US at 689; *Montez*, 355 Or at 7. The state asks this court to view trial counsel's decision not to confer with an expert, which was made months before the sentencing hearing, in light of trial counsel's actual performance on cross-examination at the sentencing hearing. *See, e.g.*, SBOM at 1-3. However, that narrow analysis ignores the "many different" ways that trial counsel's failure to investigate could have "had a tendency to affect" the outcome of the proceedings. *Green*, 357 Or at 322-23. As explained above there are many different ways trial counsel's failure to investigate could have changed the outcome of this case. Section I-C *supra*. No one knows what strategy trial counsel would have pursued if he had conducted an adequate investigation by conferring with an expert like Cooley and obtained petitioner's St. Mary's records.

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One possibility is that instead of cross-examining Suckow using the DSM as he did, counsel may have only asked Suckow a single question – whether he had obtained and reviewed petitioner's St. Mary's records before reaching his conclusion that petitioner suffered from a severe personality disorder. Then, trial counsel could have called his own expert, like Cooley, who would have explained why Suckow's opinion was based on an incomplete investigation of the historical facts and thus was erroneous. While it is impossible to know now what strategy trial counsel would have pursued if he had conducted an adequate investigation, it is entirely possible that he may not have continued down the same path that he did. Accordingly, this court should evaluate trial counsel's decision *at the time it was made* without the distorting effects of hindsight and affirm judgment in this case.

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CONCLUSION

For the foregoing reasons, this court should affirm the decision of the post-conviction trial court judgment and should remand to the Lane County Circuit Court for a new dangerous offender sentencing hearing.

DATED December 8, 2016.

Respectfully Submitted,

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

Brief Length

I certify that (1) this brief complies with the word-count limitation in ORAP 5.05(2)(b) and (2) that the word count of this brief (as described in ORAP 5.05(2)(a)) is 7,841 words.

Type Size

I certify that the size of the type in this brief is not smaller than 14 point font for both the text of the brief and footnotes as required by ORAP 5.05(4)(f).

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NOTICE OF FILING AND PROOF OF SERVICE

I certify that I directed the original Brief on the Merits of Petitioner on Review to be filed with the Appellate Court Administrator, Appellate Courts Records section, 1163 State Street, Salem, OR 97301.

I further certify that, upon receipt of the confirmation email stating that the document has been accepted by the eFiling system, this Brief on the Merits of Petitioner on Review will be eServed pursuant to ORAP 16.45 (regarding electronic service on registered eFilers) on Patrick M. Ebbett, #970513, attorney for Defendant-Appellant.

DATED December 8, 2016.

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