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 No. 09C20407 CA A151817 SC S064185

BRIEF ON THE MERITS OF PETITIONER ON REVIEW ON REVIEW, BRIAN BELLEQUE, SUPERINTENDENT, OREGON STATE PENITENTIARY

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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PETITIONER'S BRIEF ON THE MERITS

STATEMENT OF THE CASE

Petitioner assaulted and killed an elderly man. After a jury convicted him of first-degree manslaughter, the state—relying on petitioner's history of violent crimes—sought a "dangerous offender" sentence. A court-appointed psychologist examined petitioner, reviewed his history, and diagnosed him with an antisocial personality disorder. Petitioner's counsel, who had extensive experience litigating dangerous-offender proceedings, reviewed the psychologist's report, identified several deficiencies in the diagnosis, and exposed those deficiencies in a cross-examination of the psychologist that the post-conviction court characterized as "excellent." The Court of Appeals nonetheless concluded that counsel was inadequate because he chose not to consult an independent expert before formulating his strategy.

This court should reverse that ruling because counsel's decision not to consult with an expert was reasonable under the circumstances. Counsel understood the anticipated testimony of the state's expert, counsel located the specific weaknesses of the expert's opinion, and counsel planned—and subsequently carried out—an effective cross-examination on those points. And by exposing the weaknesses in the state's case through cross-examination rather than with his own expert, counsel denied the prosecution the opportunity to

divert the jury's attention from the weaknesses in its own case to the weaknesses in the defense case. In those circumstances, counsel did not have to consult an expert before deciding that no expert was necessary.

Petitioner also failed to establish prejudice. In the context of a claim that trial counsel was deficient for failing to conduct investigation, a showing of prejudice requires two things. First, there must be a reasonable probability that competent counsel would have chosen to offer the evidence that trial counsel would have discovered. Second, the evidence, if offered, must have had a tendency to affect the result. Petitioner's claim fails at both steps.

The expert testimony that petitioner believes his counsel should have presented would have provided additional unflattering details about petitioner's past; in fact, it would filled in some of the gaps in the court-appointed expert's diagnosis, gaps which counsel had worked to expose on cross-examination. In addition, the expert would have offered little that counsel did not independently achieve on cross-examination, and the expert's report's account of petitioner's problems as a youth provided ample material for the prosecutor to challenge the expert's conclusions. For those reasons, petitioner did not show that a reasonable attorney would have offered an expert's opinion, or that it would have had a tendency to affect the result.

QUESTIONS PRESENTED AND PROPOSED RULES OF LAW

First Question Presented

When a defense attorney evaluates the anticipated testimony of an adverse expert witness, investigates the basis and validity of that expert's opinion, and decides that he or she can effectively impeach the expert's testimony through cross-examination, does counsel provide constitutionally deficient performance by pursuing that course of action without first consulting an independent expert?

First Proposed Rule of Law

No. A defense attorney can choose to limit the investigation on which a strategic decision is based if the decision to limit the investigation is reasonable under the particular facts and circumstances of the case. An attorney who knows the anticipated testimony of an adverse expert, and has conducted investigation necessary to understand the weaknesses of that expert's opinion, is constitutionally permitted to exercise his or her professional skill and judgment to limit further expert investigation, and to choose to proceed with cross-examination of the state's expert.

Second Question Presented

If counsel acts unreasonably by limiting his or her investigation of matters relating to expert testimony, what must a petitioner demonstrate to establish prejudice as a result of the limited investigation?

Second Proposed Rule of Law

To establish that the petitioner suffered prejudice from counsel's failure to conduct sufficient investigation, the petitioner must establish, first, that the new evidence established a reasonable probability that competent counsel would present it, and second, that the evidence had a tendency to affect the result of the prosecution.

STATEMENT OF HISTORICAL AND PROCEDURAL FACTS

A. Petitioner kills an elderly man by punching him in the head, and is convicted of first-degree manslaughter and second-degree assault.

In 2006, petitioner and his wife were drinking at a tavern when they began to quarrel, prompting petitioner to walk out the back door, which drew the attention of an elderly man in the tavern, the victim, who followed petitioner out the door. (Ex 3 at 134-36, 157). After the victim stepped outside, petitioner punched him in the head, causing him to fall. (Ex 3 at 157-59). Petitioner then walked back into the bar and told his wife to leave with him. (Ex 3 at 111). The two of them then left by the same door, walking past the wounded victim as they departed. (Ex 3 at 158). The victim suffered a massive head injury and died the next day. (Ex 3 at 232-39).

The state charged petitioner with first-degree manslaughter and second-degree assault. (Ex 1, Indictment; Ex 8). Following a trial, a jury convicted petitioner of both charges. (Ex 3 at 548).

B. Based on petitioner's criminal history, the state sought a dangerous offender sentence.

In light of petitioner's 28-year criminal history—including multiple convictions for felony assault, assault on a public safety officer, robbery, and theft—the state sought a "dangerous-offender" sentence under ORS 161.725[1] That statute allows the sentencing court to impose up to a 30-year sentence for a defendant who is being sentenced for a class A felony if he is "suffering from a severe personality disorder indicating a propensity toward crimes that seriously endanger the life or safety of another." ORS 161.725(1) (a).[2]

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[1] Specifically, petitioner's criminal history included: three 1978 incidents for which petitioner was convicted of fourth-degree assault, second-degree robbery, and second-degree assault; two 1986 second-degree assault convictions; 1997 convictions for aggravated first-degree theft, unlawful use of a vehicle, second-degree assault, and attempted assault on a public safety officer; and 2005 convictions for assault on a public safety officer and possession of a controlled substance, for which petitioner was on probation at the time he committed the first-degree manslaughter. (Ex 4 at 5-9).

[2] ORS 161.725 provides, in part:

> (1) Subject to the provisions of ORS 161.737, the maximum term of an indeterminate sentence of imprisonment for a dangerous offender is 30 years, if because of the dangerousness of the defendant an extended period of confined correctional treatment or custody is required for the protection of the public and one or more of the following grounds exist:
>
> (a) The defendant is being sentenced for a Class A felony and the defendant is suffering from a severe personality disorder indicating a propensity toward crimes that seriously endanger the life or safety of another.

The existence of a personality disorder is a lay concept for the jury, meaning that no expert diagnosis is required. *State v. Huntley*, 302 Or 418, 430, 730 P2d 1234 (1986) ("the essence of the dangerous offender classification is not one specific diagnosis, but any significant mental or emotional disorder or disturbance—a lay concept—and that the finding should be based on the judge's evaluation of all the information gathered, not exclusively on the clinical diagnosis"). Still, when a court finds "reason to believe that the defendant falls within ORS 161.725," the court must order "an examination by a psychiatrist or psychologist." ORS 161.735(1).

Under that statute, the sentencing court in petitioner's case ordered a psychologist, Dr. George Suckow, to evaluate petitioner before the sentencing hearing. ORS 161.735. Dr. Suckow submitted a report of his evaluation about six weeks before the hearing. (Ex 12, Dr. Suckow's report). He opined in that report that petitioner suffered from antisocial personality disorder, which involves "a pervasive pattern of disregard for, and violation of, the rights of others that begins in childhood or early adolescence and continues into adulthood." *Diagnostic and Statistical Manual of Mental Disorders* 645, 649 (4th ed 2000) ("DSM-IV"). (*See* Ex 12). Petitioner's counsel received the report before the sentencing hearing. (*See* Ex 8 at 25).

C. Trial counsel made a strategic choice to challenge Dr. Suckow's opinion by cross-examination rather than by calling his own expert.

At the time of petitioner's dangerous-offender hearing, trial counsel had previously handled about 20 such cases. (Ex 8 at 25). In some of those cases, he had retained and consulted experts to help him evaluate the opinions of the court-appointed experts. (Ex 8 at 25). He had learned, however, that he could sometimes make "better hay" with the state's evidence and witnesses rather than "confusing things by having my own expert." (Ex 8 at 27).

After reviewing Dr. Suckow's report in petitioner's case, counsel determined that an expert would not benefit the defense. (*See* Ex 8 at 35-37). Instead, he decided to challenge Dr. Suckow's opinion through cross-examination using the diagnostic criteria set forth in the DSM-IV. (Ex 4 at 30).[3] Counsel was familiar with the DSM-IV's diagnostic criteria for antisocial personality disorder, including the requirement that the psychologist identify evidence of a conduct disorder with onset before age 15. (*E.g.*, Ex 4 at 30, 38, 41). And counsel was, likewise, familiar with the diagnostic criteria for a conduct disorder. (*E.g.*, Ex 4 at 47-58).

Employing his knowledge of the DSM-IV, counsel cross-examined Dr. Suckow about the necessary criteria for a conduct disorder, ultimately

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[3] Exhibit 4 has two sets of page numbers. References in this brief are to the original, innermost set of numbers.

prompting the doctor to concede that he could not identify direct evidence that at least three of the behavioral criteria were met—including whether petitioner "often initiat[ed] physical fights," had "stolen items of nontrivial value," had "run away from home at least twice," and was "often truant from school." (Ex 4 at 48-58). *See* DSM-IV at 90 (listing examples of criteria, at least three of which are required for a conduct disorder diagnosis). The doctor admitted that he was relying only on "indirect evidence" of those criteria. (Ex 4 at 60).

In counsel's subsequent arguments to the sentencing jury, he highlighted the weaknesses of Dr. Suckow's opinion to argue that the state had not shown a severe personality disorder under ORS 161.725. (Ex 4 at 105-14). In response, the prosecutor minimized the importance of Dr. Suckow's opinion, reminding the jury—both in his initial and rebuttal closing arguments—that it did not need to find any particular diagnosis from an expert in order to find that petitioner suffered from a "severe personality disorder." (Ex 4 at 103, 115). Instead, the prosecutor emphasized the evidence of petitioner's extensive criminal history. (Ex 4 at 103-05).

The jury ultimately found that petitioner satisfied the criteria for imposing a dangerous offender sentence. (Ex 4 at 124-25). Equipped with the jury's findings, the sentencing court elected to impose a dangerous offender sentence, and imposed a minimum sentence of 260 months imprisonment. (Ex 2, criminal judgment).

D. The post-conviction court concluded that trial counsel was constitutionally inadequate by not consulting an independent expert, and the Court of Appeals agreed.

Eventually, petitioner sought post-conviction relief, alleging that his counsel was inadequate by not conducting an investigation "to support his decision not to obtain a defense psychological evaluation of petitioner to rebut testimony by" Dr. Suckow. (App Br, ER-5). "A defense psychologist," petitioner claimed, "would have provided testimony that petitioner does not meet the diagnostic criteria for an antisocial personality disorder and that petitioner did not suffer from [that] disorder." (App Br, ER-6).

In support of that claim, petitioner presented a report from Dr. Norvin Cooley, a clinical psychologist. After noting that petitioner could not be diagnosed with antisocial personality disorder without evidence of a conduct disorder before age 15, Dr. Cooley opined that petitioner did not suffer from antisocial personality disorder. (Ex 13 at 8-10). Cooley also said that petitioner's juvenile records indicated that he suffered from an adjustment disorder at age 12, and that his abusive mother may have been the source of his problems as a juvenile. (Ex 13 at 9).

But Dr. Cooley's report also included information that could have been harmful to the defense. Some of that information portrayed petitioner in a generally negative light as a child, by showing that he was angry, difficult to

control, impulsive, hostile, unstable, "seriously disturbed," and was likely to be "in conflict with authority indefinitely." (Ex 13 at 3, 4).

In addition, some of Cooley's information would have provided Dr. Suckow with evidence to support his diagnosis—evidence that, on cross-examination, counsel took pains to show that Dr. Suckow did not have. First, counsel forced Suckow to concede that he had no direct evidence that petitioner had initiated physical fights before age 15, yet Cooley's report states that petitioner had been expelled from school for fighting. (Ex 4 at 51; Ex 13 at 2). Second, counsel forced Suckow to concede that he had no evidence that petitioner as a youth had "stolen items of non-trivial value," yet Cooley's report states that petitioner stole two bicycles in a 24-hour period after running away from home. (Ex 4 at 53; Ex 13 at 2). Third, counsel forced Suckow to concede that he had no direct evidence that petitioner had run away from home multiple times, yet Cooley's report stated that petitioner had done just that. (Ex 4 at 46, 49, 54; Ex 13 at 2). Finally, counsel forced Suckow to concede that he had no direct evidence that petitioner was often truant from school beginning before age 13, yet Cooley's report indicated that petitioner had been suspended from school for truancy before going to St. Mary's School for Boys in July 1965, when he was 12 years old. (Ex 4 at 56; Ex 13 at 1, 3).

Ultimately, however, the post-conviction court concluded that trial counsel provided inadequate assistance by not consulting an expert witness like

Cooley. Although the court opined that trial counsel did an "excellent job" of cross-examining Suckow, the court still concluded that counsel should have consulted and called an expert. (App Br, ER 23). The court concluded that Dr. Cooley's testimony that petitioner had been diagnosed with an adjustment disorder rather than a conduct disorder would have helped petitioner. In the court's view, the adjustment disorder identified by a psychologist who evaluated petitioner as a youth would have precluded petitioner from being considered a dangerous offender, and would have allowed counsel to bring in details about petitioner's upbringing. (App Br, ER 23-24).

The superintendent appealed from the post-conviction court's judgment, but the Court of Appeals affirmed. *Richardson v. Belleque*, 277 Or App 615, 373 P3d 1113 (2016). The court acknowledged that petitioner's trial counsel made a strategic decision to challenge the state's expert through cross-examination, rather than with an expert of his own. *Id.* at 626-27. But the court concluded that counsel's decision to pursue that strategy was unreasonable because he made it without first consulting an expert. Counsel's choice to "limit his investigation in that way," the court stated, "was not based on a reasonable evaluation of the likely costs and potential benefits to petitioner." *Id.* at 627 (internal quotation mark and citation omitted). In other words, the court held that counsel "made his decision without due diligence towards being informed of other defense strategies." *Id.*

The court also held that petitioner suffered prejudice as a result. Despite counsel's "excellent job impeaching Suckow" on cross-examination, the court faulted that cross-examination for not eliciting evidence showing that petitioner had been diagnosed at age 12 with an adjustment disorder. *Id.* The court discounted the likely effect of the "not flattering" aspects of Cooley's testimony, concluding that the absence of his ultimate opinion tended to affect the result of the trial. *Id*. at 630.

Summary of Argument

Defense counsel need not exhaust every possible investigative avenue before settling on a strategy. That principle extends to consultation with experts. Although there will be cases where the only reasonable strategy is to consult an expert, counsel need not consult with or present experts in every case in which expert opinion might be useful. A competent attorney can decide that other strategies—such as a cross-examination—would be equally or more effective, and to focus his or her attention on that strategy. Moreover, that choice is presumed to have a sound strategic justification.

Here, counsel was not inadequate for failing to consult an expert before deciding to address the testimony of Dr. Suckow through cross-examination. Drawing from his expertise and experience in both personality disorder diagnoses and dangerous offender proceedings, counsel concluded that it would be more effective to expose the weaknesses in Suckow's diagnosis through

cross-examination rather than utilize an independent expert. Counsel had a thorough understanding of Suckow's opinion, understood its weaknesses, and planned and conducted an "excellent" cross-examination exposing those weaknesses. Counsel's decision to focus the jury's attention on the weaknesses in the state's case rather than calling his own expert—and thus expose that expert to risk of damaging cross-examination—was reasonable. Counsel did not render deficient performance in failing to consult an independent expert when he devised his strategy.

Moreover, even if counsel should have consulted an expert, petitioner failed to establish that he suffered prejudice. Before determining whether new evidence had a tendency to affect the verdict, a reviewing court must first determine whether it is reasonably probable that a competent attorney would have offered it. Here, it is not reasonably probable that a competent attorney would have presented the expert testimony from Dr. Cooley that petitioner proffered in the post-conviction court. Dr. Cooley would have revealed more damaging details about petitioner's antisocial behavior as a youth—thus plugging the holes in the testimony of the state's expert that trial counsel sought to emphasize—and the prosecutor on cross-examination would have been able to call Cooley's opinion into question.

Finally, even if it were reasonably probable that a competent attorney would have presented Dr. Cooley's testimony, that testimony did not have a

tendency to affect the result. Dr. Cooley's testimony would have done little challenge Dr. Suckow's diagnosis that counsel had not already achieved through cross-examination. And as noted, Dr. Cooley would have filled in some of the gaps in that diagnosis. More broadly, the jury did not need a particular diagnosis to find that petitioner met the criteria for a dangerous offender sentence. Petitioner's 30-year criminal history was replete with incidents of violent and antisocial behavior. Thus, the strong force of the prosecution's case would not have been appreciably reduced by Dr. Cooley's testimony.

ARGUMENT

The constitutional right to counsel includes the right to "adequate" or "effective" assistance of counsel.[4] *Krummacher v. Gierloff*, 290 Or 867, 872, 627 P2d 458 (1981); *Strickland v. Washington*, 466 US 668, 696, 104 S Ct 2052, 80 L Ed 2d 674 (1984). Although the state and constitutional standards are phrased slightly differently, they are "functionally equivalent." *Montez v. Czerniak*, 355 Or 1, 6, 322 P3d 487, *adh'd to as modified*, 355 Or 598 (2014). To succeed on a claim under either constitution, the petitioner must "prove that

[4] Article I, section 11, of the Oregon Constitution provides that "[i]n all criminal prosecutions, the accused shall have the right * * * to be heard by himself and counsel." Similarly, under the Sixth Amendment, "[i]n all criminal prosecutions, the accused shall enjoy the right * * * to have to the Assistance of Counsel for his defence."

his or her trial counsel [1] failed to exercise reasonable professional skill and judgment, and [2] that because of that failure, the petitioner suffered prejudice." *Pereida-Alba v. Coursey*, 356 Or 654, 661-62, 342 P3d 70 (2015). "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," with "every effort * * * be[ing] made to eliminate the distorting effects of hindsight." *Strickland*, 466 US at 689.[5]

Application of those principles in this case shows that petitioner did not establish either element necessary to his inadequate assistance claim.

A. Trial counsel reasonably chose to rely on cross-examination of the court-appointed expert and not consult an independent expert.

Neither the state nor federal constitutions require a defense attorney to exhaust every possible investigative avenue before settling on a strategy. Rather, "a particular decision not to investigate must be directly assessed for reasonableness in all of the circumstances, applying a heavy measure of deference to counsel's judgments." *Strickland*, 466 US at 691; *see also Gorham v. Thompson*, 332 Or 560, 567, 34 P3d 161 (2001) (recognizing that "the question in each case is whether trial counsel's investigation was legally

[5] Because the federal and state constitutional standards are functionally equivalent, the superintendent does not analyze them separately in this brief.

and factually appropriate to the case"). Counsel may reasonably "avoid activities that appear distractive from more important duties" and "balance limited resources in accord with effective trial tactics and strategies." *Harrington v. Richter*, 562 US 86, 107, 131 S Ct 770, 178 L Ed 2d 624 (2011)(quotation marks omitted). And counsel need not "expend time and energy uselessly or for negligible potential benefit." *Green v. Franke*, 357 Or 301, 312, 350 P3d 188 (2015).

With those standards in mind, a view of this case from counsel's perspective at the time—without the benefit of hindsight—demonstrates that petitioner's counsel did not perform deficiently by choosing not to consult with an expert. Counsel, based on extensive experience gained from approximately 20 prior dangerous-offender sentencing proceedings, knew about the availability of defense experts, but also knew that he can sometimes "make better hay" through cross-examination, rather than "confusing things with [his] own expert." (Ex 8 at 27). Based on that recognition, counsel did not consult an expert of his own; instead, using the DSM-IV diagnostic criteria as a means to challenge Dr. Suckow's diagnosis, counsel conducted a skillful cross-examination of the doctor. That cross-examination showed that counsel had an intimate knowledge and understanding of the criteria for antisocial personality disorder, in addition to the underlying requirement of a conduct disorder. And

using his knowledge, counsel forced Dr. Suckow to concede that he did not have any direct evidence of the criteria for the underlying disorder.

Counsel's approach was reasonable given its advantages. By using the DSM-IV instead of a defense expert, counsel was able to focus the jury's attention on the weaknesses of *the state's case*. If counsel called an expert of his own, that expert would have been subjected to cross-examination, potentially exposing weaknesses in *the defense case*. Counsel thus denied the prosecution the opportunity to divert the jury's attention from what may be perceived in weaknesses in its own case to the weaknesses in the defense case. That is a tried and true defense strategy. *See, e.g.*, *Richter*, 562 US at 109 ("To support a defense argument that the prosecution has not proved its case it is sometimes is better to try to cast pervasive suspicion than to strive to prove a certainty that exonerates."); *Gorham*, 332 Or at 568 (approving trial counsel's decision that "it would be a better strategy * * * not to subject defense experts to the prosecution's cross-examination"). Given counsel's informed strategy, he was entitled to focus his time and energy on that strategy, without consulting an expert after he had reasonably concluded that he did not need one.

The Court of Appeals, however, did not engage in any real evaluation of counsel's choice to limit his investigation regarding expert witnesses, much less apply the "strong presumption" that counsel's choice to limit his investigation was reasonable. The court did not address, for example, the facts that counsel

had a thorough understanding of the anticipated testimony of the state's expert, counsel understood the specific weaknesses of the expert's opinion under the DSM-IV, and counsel planned—and subsequently carried out—an "excellent" cross-examination on those points. That is, the Court of Appeals did not evaluate the reasonableness of counsel's strategy as a whole, and how counsel carried it out. Instead, the court held that counsel was inadequate because he chose that strategy "without knowing what a competing expert could provide the defense." *Richardson*, 277 Or App at 627.

But that holding conflicts with the core principle that the standards for evaluating the constitutionality of a trial attorney's performance are fact-specific and not subject to a set of rules. *Krummacher*, 290 Or at 873-74; *Strickland*, 466 US at 668. In *Krummacher*, for example, this court emphasized that a court "must take into account the remarkable variety of effective advocacy displayed daily in our trial courts by competent lawyers of differing approach, style, personality, temperament, and strategic inclinations." 290 Or at 873; *see also Richter*, 562 US at 89 ("Rare are the situations in which the 'wide latitude counsel must have in making tactical decisions' will be limited to any one technique or approach."). And that rationale extends to decisions about potential expert witnesses.

The United States Supreme Court has said that although "[c]riminal cases will arise where the only reasonable and available defense strategy requires

consultation with experts or introduction of expert evidence," that is not true in every case. *Id.* at 106. Some of the "countless" ways to provide effective assistance do not involve responding to a state's expert with an expert from the defense. *Id.* at 111. Cross-examination will often be sufficient—and may even be preferable—to "expose defects in an expert's presentation." *Id.*; *see also id.* at 108-09 (discussing the drawbacks of calling defense experts, including "shift[ing] attention to esoteric matters of forensic science, distract[ing] the jury from whether [a witness] was telling the truth, or transform[ing] the case into a battle of the experts"). "*Strickland*," the court emphasized, "does not enact Newton's third law for the presentation of evidence, requiring for every prosecution expert an equal and opposite expert from the defense." *Richter*, 562 US at 111.

The Court's decision in *Richter* is a good example. In that case, as in this one, counsel skillfully cross-examined the state's experts. He got one expert to concede "that his inferences were imprecise," and got another to acknowledge that she had not tested a blood sample for cross-contamination. *Id.* at 95. Recognizing the skill with which defense counsel "elicited concessions from the State's experts and was able to draw attention to weaknesses in their conclusions," the Court observed that "[i]t is difficult to establish ineffective assistance when counsel's overall performance indicates active and capable advocacy." *Id.* The same is true of counsel's "excellent" performance here.

To be sure, an attorney can fail to exercise reasonable professional skill and judgment by failing to consult an expert—such as when counsel has no knowledge or expertise about the field. In *Duncan v. Ornoski*, 528 F3d 1222 (9th Cir 2008), the court recognized that "it may not be necessary in every instance to consult with or present the testimony of an expert," but counsel there was inadequate for failing to consult one. 528 F3d at 1235-36. The expert testimony in that case (blood serology evidence) was "pivotal," yet counsel lacked expertise on the topic. Counsel "demonstrated his lack of expertise in serology at the outset of his cross-examination of the state's serology expert when he told him, 'You lost me.'" *Id.* at 1235. Further, counsel demonstrated that he "did not even know what serology was," questioning the state's serologist about hair evidence instead. *Id.* at 1235-36. That demonstrated that counsel "did not have the personal expertise in serology to make strategic decisions about how to handle the blood evidence on his own and he certainly was not qualified to undermine the State's case by simply cross-examining its experts without obtaining expert assistance himself." *Id.* at 1236.

That is not the situation here. Counsel was experienced and knowledgeable in the area of antisocial personality disorder diagnoses. Recognizing the speculative nature of Dr. Suckow's diagnosis, he reasonably chose to counter that evidence by cross-examination alone. He had studied the

topic before his cross-examination and asked probing and relevant questions of Dr. Suckow that called the diagnosis into question. Indeed, his cross-examination was so effective that the prosecutor made sure to emphasize to the jurors that they did not need to rely on Dr. Suckow's diagnosis to conclude that petitioner suffered from a personality disorder for purposes of the dangerous offender statute. *See Huntley*, 302 Or at 430.[6] Counsel's choice for cross-examination—"beyond any doubt the greatest legal engine ever invented for the discovery of truth"—was reasonable. *See Ford v. Wainright*, 477 US 399, 415, 106 S Ct 2595, 91 L Ed 2d 535 (1986) (quoting J. Wigmore, *Evidence*).

In sum, counsel conscientiously and knowledgeably prepared his defense, and he skillfully executed it. Even if, in this case, one reasonable choice might have been to consult an expert, trial counsel exercised reasonable professional skill and judgment in his choice.

B. Petitioner failed to prove that he suffered prejudice from counsel's decision not to consult an expert.

To establish prejudice, petitioner was required to demonstrate that trial counsel's error had a tendency to affect the jury's verdict. That standard is well

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[6] Regarding a personality disorder, the court instructed the jury to determine whether petitioner is "suffering from a severe personality disorder indicating a propensity toward crimes that seriously endanger the life or safety of anther, and that because of the dangerousness of [petitioner], an extended period of confined correctional treatment or custody is required for the protection of the public[.]" (Ex 4 at 3, 117).

established. "[W]here the effect of inadequate assistance of counsel on the outcome of a jury trial is at issue," under Article I, section 11, petitioner must demonstrate that counsel's allegedly deficient representation had a tendency to affect the outcome of the case. *Green v. Franke*, 357 Or 301, 322-23, 350 P3d 188 (2015) (stating that that standard requires "more than mere possibility, but less than probability"). Similarly, under the "functionally equivalent" Sixth Amendment standard, a petitioner "must demonstrate a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Montez*, 355 Or at 8 (internal quotation marks omitted).

Here, even assuming that petitioner was denied his constitutional right to counsel by his counsel's failure to consult an expert, petitioner failed to prove that he suffered prejudice as a result. As explained below, that inquiry is comprised of two prongs in claims alleging inadequate investigation.

1. When counsel has allegedly failed to conduct an adequate investigation, determination of whether a petitioner was prejudiced requires a two-step inquiry.

When a post-conviction petitioner's claim is that counsel failed to conduct an adequate investigation, the prejudice inquiry includes a preliminary step. Before addressing whether the evidence that counsel did not find had a tendency to affect the result of the prosecution, the court must first determine whether it is reasonably probable that a competent attorney would have presented the evidence. As the Ninth Circuit has explained, "with respect to

defective investigations, the test for prejudice is whether the noninvestigated evidence was powerful enough to establish [1] a probability that a reasonable attorney would decide to present it and [2] a probability that such presentation might undermine the jury verdict." *Mickey v. Ayers*, 606 F3d 1223, 1236-37 (9th Cir 2010), *cert den*, 132 S Ct 419 (2011).[7]

That principle reflects the Supreme Court's analysis in *Wiggins v. v. Smith*, 539 US 510, 535, 123 S Ct 2527, 156 L Ed 2d 471 (2003). In *Wiggins*, the Court, after concluding that counsel in a capital case was inadequate for failing to investigate Wiggins' social history in preparation for the penalty phase, then considered whether an objectively reasonable attorney would have presented the evidence. Although Wiggins' counsel testified in the state post-conviction hearing that the additional social history evidence would have conflicted with his chosen strategy, the Court found "there to be a reasonable probability that a competent attorney, aware of this history, would have introduced it at sentencing in an admissible form." *Wiggins*, 539 US at 535. That conclusion drew a dissent, in which Justice Scalia argued that "[i]t is

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[7] Sometimes this step appears in the performance prong of a court's analysis. For example, in *Richter*, the Supreme Court stated in its analysis of counsel's performance that "[e]ven if it had been apparent that expert testimony could support [the petitioner's] defense, it would be reasonable to conclude that a competent attorney might elect not to use it." 562 US at 108. But regardless of where this question is addressed in the analysis, a court reviewing a failure-to-investigate claim must consider it.

irrelevant whether a hypothetical 'reasonable attorney' might have introduced evidence of alleged sexual abuse * * *; Wiggins' attorney would *not* have done so," thus "[t]here is simply *nothing* to show that there is a 'reasonable probability' this evidence would have been introduced *in this case*." 539 US at 553-54 (Scalia, J., dissenting; emphasis in original).

Although this court has never squarely analyzed how the preliminary step in a failure-to-investigate case works, it has on one occasion assumed, like the dissent in *Wiggins*, that it requires a subjective, factual inquiry: whether, but for the evidence counsel failed to investigate, counsel's ultimate trial strategy would have been any different. In *Lichau v. v. Baldwin*, 333 Or 350, 39 P3d 851 (2002), this court addressed a claim that trial counsel was inadequate for failing to find alibi evidence. After noting that the prejudice inquiry in such a case "must proceed from the premise that the jury would have heard the alibi evidence that petitioner presented at the post-conviction hearing[,]" this court resolved it as a factual determination. Specifically, the court held that it was bound by the post-conviction court's factual finding that counsel would have pursued the defense and presented the undiscovered evidence to the jury. *Id.*

Notwithstanding the implicit assumption in *Lichau*, an objective reasonableness test is preferable for several reasons. A fact-based, subjective standard is difficult to apply when the factual issue is what counsel would have done in a hypothetical circumstance, not the historical facts of counsel's actual

performance. Plainly, a court should not ignore the historical facts of counsel's actual actions when evaluating whether counsel's performance was reasonable. *See Montez*, 355 Or at 504 ("courts may not indulge *post hoc* rationalizations of trial counsel's actions that contradict the evidence derived from their actions") (citing *Richter*, 562 US at 109). But that principle makes less sense when there are no historical facts. Instead, a factual determination of whether counsel would or would not have offered the new evidence is usually based on counsel's "hindsight" determination when asked, years later, what he or she might have done.

Resting this aspect of the prejudice inquiry on counsel's hindsight is problematic. Counsel in such circumstances is not necessarily an objective evaluator of what his or her own decision-making process would have been. On the one hand, counsel might be inclined to justify the failure to discover the new evidence by rationalizing that the new evidence would not have altered their chosen strategy in any event. Indeed, that might explain why the Court in *Wiggins* refused to apply a subjective test in that case. On the other hand, counsel might be tempted—with the benefit of hindsight and the knowledge that their chosen strategy failed—to second-guess themselves and thus conclude that they *would have* offered the evidence. *See Richter*, 562 US at 109 ("After an adverse verdict at trial even the most experienced counsel may find it difficult to resist asking whether a different strategy might have been better,

and, in the course of that reflection, to magnify their own responsibility for an unfavorable outcome."); *Krummacher*, 290 Or at 875 ("seldom does a lawyer walk away from a trial without thinking of something that might have been done differently or that he would have preferred to have avoided"). And those concerns are amplified when the court is necessarily relying on the judgment of an attorney already deemed to have failed to exercise reasonable judgment.

For those reasons, this court should adopt an objective inquiry for the preliminary prejudice question.[8]

2. It is not reasonably probable that a competent attorney would have presented Dr. Cooley's testimony.

Applying the preliminary step of the prejudice analysis here demonstrates that petitioner did not suffer prejudice. First, the risks of putting Dr. Cooley on the stand would have been substantial. Dr. Cooley's report revealed far more details about petitioner's behavioral and mental health problems as a youth. As noted above, Dr. Cooley's report included new information about petitioner's hostility, fighting, impulsivity, running away from home, suspensions from school, and poor general prognosis. That evidence would have buttressed the state's argument that petitioner had, from an early age, a propensity toward

[8] Even if the test were subjective, here, petitioner offered no evidence that counsel would have offered Dr. Cooley's testimony if he had consulted him.

crimes that endanger others. And it goes without saying that the state would have highlighted these details in any cross-examination of Dr. Cooley, and again at closing argument.

Second, and more troubling for the defense, a reasonable attorney would review Dr. Cooley's report and discover that his evidence would fill in several of the blanks in Dr. Suckow's diagnosis that counsel exposed on cross-examination. As discussed above, the report contained a trove of damaging material documenting the early onset of petitioner's aggressive and violent personality, supplementing Dr. Suckow's less-informed testimony about petitioner's behavioral problems as a youth. And as noted above, Cooley's report contained information confirming that petitioner *did* satisfy numerous criteria for a conduct-disorder diagnosis before the age of 15. Specifically, the report showed that petitioner: (1) was expelled from school for fighting (2) had committed theft (3) had run away from home multiple times and (4) had been truant from school before age 13.

Notwithstanding those risks, both the post-conviction court and the Court of Appeals emphasized that Dr. Cooley would have offered evidence that petitioner had been diagnosed with an adjustment disorder as a youth, rather than a conduct disorder. *Richardson*, 277 Or App at 624, 629. The Court of Appeals emphasized that, "[u]nlike a conduct disorder, an adjustment disorder does not typically persist when the significant stressor is removed" and, by

definition, "must resolve within 6 months of the termination of the stressor." *Id.* at 629. According to the Court of Appeals, the adjustment-disorder diagnosis would have cast additional doubt on Dr. Suckow's diagnosis of antisocial personality disorder, and helped establish that petitioner's behavioral problems were the result of that "significant stressor"—an "abusive household." *Id.* at 629-30.

But the court failed to consider what would be foremost in the mind of a competent attorney: how the prosecutor would handle Dr. Cooley on cross-examination. If Dr. Cooley had taken the stand and emphasized the adjustment disorder diagnosis, the prosecutor would have responded with other information in Dr. Cooley's report. For instance, the psychological evaluation relied on by Dr. Cooley for the childhood adjustment disorder diagnosis also noted that petitioner "would be in conflict with authority indefinitely." (Ex 13 at 3). A competent defense attorney would recognize, given petitioner's lifetime of conflict with authority since childhood, the accuracy of that grim prognosis. More specifically, reasonable counsel would recognize that a prosecutor would use it to cast doubt on the provisional adjustment disorder diagnosis, which in Cooley's own words, "by definition" means that the behavioral problems last only six months after the "stressor" is removed. *See* DSM-IV at 625-26 ("If the symptoms of Adjustment Disorder persist for more than 6 months after the stressor or its consequences have ceased, the diagnosis should be changed to

another mental disorder[.]"). After all, a prosecutor would surely point out that petitioner's aggressive and antisocial behavior had persisted for 40 years, not six months.[9]

For those reasons, it is not reasonably probable that a competent defense attorney, after consulting with Dr. Cooley, would have chosen to call him as a witness. *See Mickey*, 606 F3d at 1238 (counsel can reasonably choose not present evidence at trial if it is "not entirely persuasive," could be subject to "serious cross-examination," or "would expose the jury to the defendant's other crimes" or "damaging evidence."). In other words, a competent attorney would have recognized that Dr. Cooley was a quintessential "double-edged sword" as a witness, and would have been unlikely to call him to the stand.

3. Even if there is a reasonable probability that a competent attorney would have offered Dr. Cooley's testimony, it had no tendency to affect the result of the sentencing proceeding.

The second step in the prejudice analysis in a deficient investigation case requires the post-conviction court to consider whether the difference between

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[9] To the extent the Court of Appeals suggested that Cooley's evidence that petitioner had been abused as a child would have engendered the jury's sympathy, counsel had already presented evidence—through his cross-examination of Dr. Suckow—that both of petitioner's parents had physically abused him. (Ex 4 at 42-43). In particular, counsel highlighted that petitioner's mother had "used a stick to his head when he disobeyed," and his father was "also physically abusive toward him, using a stick or a belt, and was even more physical with his mother." (Ex 4 at 42-43).

the evidence that should have been presented and that which actually was presented is sufficient to have a tendency to affect" or "undermine confidence in" the outcome of the proceeding. *Krummacher*, 290 Or at 872; *Strickland*, 466 US at 694. Here, the evidence does not meet that standard.

As an initial matter, the diagnosis of some disorder under the DSM-IV was not necessary to the finding that petitioner was a dangerous offender. Rather, the personality disorder described in the dangerous offender statute is "any significant mental or emotional disorder or disturbance," and that is "a lay concept." *Huntley*, 302 Or at 430.

From a lay perspective, the evidence that petitioner had some sort of significant mental disorder or disturbance indicating a propensity toward life-endangering crimes was overwhelming. Petitioner had just been convicted of first-degree manslaughter after he assaulted and killed elderly man. His 30-year long criminal history was replete with similar incidents of violent and assaultive behavior. As the prosecutor emphasized to the jury, the only significant gaps in that history coincided with petitioner's major prison sentences. (Ex 4 at 104-05). Further, his history of violence was graphically illustrated for the jury by the multiple victims who testified at the hearing. For example, in the course of robbing a woman, petitioner punched her in the face and threatened her with a butcher knife. (Ex 4 at 69-71, 74-78). In another incident, he fled from police in a stolen truck, rammed two police vehicles and continued to physically resist

after his arrest. (Ex 4 at 81-83). In another, he assaulted a security deputy at a local jail because the deputy tried to collect his breakfast dishes. (Ex 4 at 84-87). And a year before the killing in this case, he ran at a police officer and in the ensuing struggle attempted to get ahold of the officer's gun. (Ex 4 at 89-90).

Moreover, Dr. Cooley's technical challenge to Dr. Suckow's diagnosis offered little new for the jury to consider. With petitioner's counsel's cross-examination of Dr. Suckow, he had already effectively pointed out the technical weaknesses in Dr. Suckow's diagnosis under the DSM-IV. In particular, counsel exposed Dr. Suckow's evidence in support of a juvenile conduct disorder as essentially speculative. (Ex 4 at 50-58). And he apparently succeeded in his examination, as the prosecutor backed away from it, telling the jury that it was unnecessary. Cooley's report disputing Dr. Suckow's diagnosis on similar grounds added little to what counsel had already accomplished in his cross-examination. As the Sixth Circuit has held, "the modest difference between the jury hearing the theory of defense through cross-examination and hearing it through the mouth of another expert" is not enough to establish prejudice under *Strickland*. *Tinsley v. Million*, 399 F3d 796, 806 (6th Cir 2005). Moreover, as discussed above, Cooley would have filled in numerous blanks in Dr. Suckow's otherwise speculative diagnosis.

In short, the strong force of the prosecution's case was not appreciably reduced by Dr. Cooley's report. Accordingly, even assuming that trial counsel lapsed by not consulting an expert like Dr. Cooley, any lapse was not "so serious as to deprive [petitioner] of a fair trial, a trial whose result is reliable." *Strickland*, 466 US at 687. Petitioner did not suffer prejudice.

CONCLUSION

This court should reverse the Court of Appeals' decision concluding that petitioner's trial counsel provided constitutionally inadequate and ineffective assistance.

Respectfully submitted,

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NOTICE OF FILING AND PROOF OF SERVICE

I certify that on October 6, 2016, I directed the original Petitioner's Brief on the Merits, Petitioner on Review, to be electronically filed with the Appellate Court Administrator, Appellate Records Section, and electronically served upon Jason L. Weber, attorney for respondent, by using the court's electronic filing system.

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 7,390 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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