IN THE SUPREME COURT OF THE STATE OF OREGON

BRIAN BELLEQUE
Defendant-Appellant,
Petitioner on Review,
v.
CHARLES EDWARD RICHARDSON,
Petitioner-Respondent,
Respondent on Review.

Marion County Circuit Court
09C20407

Court of Appeals
A151817

S064185

BRIEF ON THE MERITS OF *AMICUS CURIAE* OREGON CRIMINAL DEFENSE LAWYERS ASSOCIATION

Review of the Decision of the Court of Appeals
on Appeal from the Judgment of the Circuit Court for Marion County
Honorable Linda Bergman, Senior Judge

Opinion filed: April 20, 2016
Author of Opinion: Egan, Judge
Concurring Judges: Haddock, Chief Judge, Nakamoto, *vice, pro tempore*

(Counsel listed on inside cover) December 10, 2016

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases Cited

Constitutional Provisions

Statutes and Rules

Other Authorities

BRIEF ON THE MERITS OF AMICUS CURIAE OREGON CRIMINAL DEFENSE LAWYERS ASSOCIATION

INTRODUCTION AND STATEMENT OF INTEREST

The Oregon Criminal Defense Lawyers Association represents the interests of criminal defense practitioners and professionals who assist those practitioners in representing citizens accused of crimes. It includes members who represent clients in civil post-conviction proceedings.

OCDLA has an interest in the question presented because this post-conviction case presents the question whether the court should add a second layer to the prejudice test in cases challenging the adequacy of counsel's representation. This court's decision regarding the prejudice test will significantly impact Oregon post-conviction practice.

QUESTION PRESENTED AND PROPOSED RULE OF LAW

Second Question Presented: Whether this court should continue to adhere to "the standards for determining the adequacy of legal counsel under the state constitution [that] are functionally equivalent to those for determining the effectiveness of counsel under the federal constitution." *Montez v. Czerniak*, 355 Or 1, 6-7, 322 P3d 487, *adh'd to as modified*, 355 Or 598 (2014).

Answer and Proposed Rule of Law: Yes. Under Article I, Section 11 of the Oregon Constitution, the two-part test for determining the adequacy of legal counsel is: (1) "whether petitioner demonstrated by a preponderance of

the evidence that [counsel] failed to exercise reasonable professional skill and judgment;" and if so, (2) "whether trial counsel's acts or omissions '*could have tended to affect* ' the outcome of the case." *Green v. Franke*, 357 Or 301, 312 (2105) (quoting *Montez*, 355 Or at 7), 323 (quoting *Lichau v. Baldwin*, 333 Or 350, 365, 39 P3d 851 (2002) (emphasis by court). The court should adhere to this standard and decline to adopt the state's suggestion to insert an additional requirement into the prejudice component; namely a requirement that "the new evidence established a reasonable probability that competent counsel would present it" before determining whether the evidence "had a tendency to affect the result of the prosecution." State's Br. at 4.

SUMMARY OF ARGUMENT

In its second proposed rule of law, the state asks the court to transform the prejudice determination under the Oregon Constitution from a one-step into a two-step process. The court should reject the state's invitation.

The proposed rule is a Trojan horse. It is a disguised attempt by the state to re-hash its argument in *Green v. Franke*, in which it unsuccessfully advocated for a probability-based formulation of the prejudice standard. It provides an overly restrictive method for determining prejudice by analyzing

a static record rather than considering how competent counsel would handle the case if properly investigated. And it would create a tension between the Oregon standard for prejudice and the federal standard, thereby requiring separate federal analysis of the prejudice question in every case and risking adverse treatment by the federal courts in habeas corpus cases.

ARGUMENT ADDRESSING SECOND QUESTION

A. The state's argument for a probability-based formulation of the prejudice standard is a Trojan horse.

This court recently addressed the prejudice standard for inadequate representation under the Oregon Constitution in *Green v. Franke, supra*. *Green* involved trial counsel's failure to request a limiting instruction. 357 Or at 303. With respect to any prejudice caused by counsel's failure to seek the instruction, the post-conviction court stated: "I don't think it would have changed anything at all. Clearly, I think that was a proper instruction. Again, I don't think the--the result would have been any different." *Id*. at 310. Thus, it "concluded that petitioner could not prevail on that claim because he had failed to establish prejudice." *Id*.

The Court of Appeals reversed the post-conviction trial court and "held that trial counsel's deficient performance had a tendency to affect the outcome of the case and, therefore, petitioner had suffered prejudice." *Id*. at 311. This court granted the state's petition for review "to consider the

recurring issues of what a post-conviction petitioner must show to establish inadequate performance of counsel and what a petitioner must prove to establish that counsel's inadequate performance prejudiced the petitioner's case." *Id*. at 303.

The state argued that the Court of Appeals applied the wrong legal standard for prejudice. *Id*. at 321. It argued that, "[r]ather than evaluating what likelihood a limiting instruction *would* have had on the jury's verdict, the Court of Appeals evaluated what likelihood it *could* have had." (Emphasis in original.) *Id*. The state argued that the post-conviction trial court had gotten it right when it denied relief based on "the probability-based formulation of the prejudice standard" advocated by the state. *Id*.

This court soundly rejected the state's position. It held that the post-conviction trial court was "mistaken" when it "used the probability-based formulation of the prejudice standard advocated by the state," namely, "what likelihood a limiting instruction *would* have had on the jury's verdict." *Id*. This court explained that in trial settings, as opposed to guilty plea challenges, "it is inappropriate to use a 'probabilty' standard for determining prejudice." *Id*. at 322. Instead, "the tendency to affect the outcome standard demands more than mere possibility, but less than probability." *Id.* In this Court's words, "the issue is whether trial counsel's acts or omissions '*could*

have tended to affect ' the outcome of the case." *Id*. (quoting *Lichau v. Baldwin*, 333 Or 350, 365, 39 P3d 851 (2002) (emphasis by court).

The state now makes the same argument this court expressly rejected in *Green*, but it does so indirectly by asking the court to require a separate "reasonable probability" test in addition to the "less than probability standard" articulated in *Green*. Specifically it asks the court to require that a post-conviction petitioner "establish[] a reasonable probability that competent counsel would present" new evidence at trial, evidence that the petitioner introduced in the post-conviction proceedings. State's Br. at 4.

Requiring proof of a reasonable probability as part of the prejudice determination would fly in the face of the *Green* standard. This court specifically said in *Green* that "the tendency to affect the outcome standard demands more than mere possibility, but less than probability." 303 Or at 322. The court should recognize the state's argument for what it is, a second attempt to inject a probability requirement into the prejudice test, and reject it outright.

B. The state's proposed test provides an overly restrictive method for determining prejudice by analyzing a static record rather than considering how competent counsel would have handled the case had the case been properly investigated.

Adoption of the state's test would unduly hamper the analysis of the post-conviction courts by limiting how they could make the prejudice determination. This case presents an excellent example.

According to the state, there is no prejudice here because introduction of the evidence discovered during post-conviction counsel's investigation would undercut trial counsel's cross-examination of the expert witness. State's Br at 10, 26-27. That might be true if prejudice is determined by simply holding one set of evidence up against another. But that is not how it works in the fluid world of trial practice.

Here, if trial counsel had adequately investigated, he would have obtained the petitioner's juvenile mental health records. They would have disclosed that the petitioner "suffered from an adjustment disorder." *Richardson v. Belleque*, 277 Or App 615,623, 373 P3d 1113 (2016). Counsel would have also consulted his own expert, which would have provided him with: an opinion critical of the state's expert for failing to obtain and review the petitioner's mental health records; mitigation evidence concerning the mistreatment of the petitioner by his mother; and an expert

rebuttal by defense expert Dr. Cooley of the state's expert's ultimate opinion that petitioner suffered from antisocial personality disorder. *Id*. at 623-24.

The state argues that the use of a defense expert opinion by Dr. Cooley would have undercut trial counsel's cross-examination, so the failure to present it would not have prejudiced the outcome of the dangerous offender determination. State's Br. at 28-29. The state's argument defies the reality of what *could* have happened at petitioner's sentencing proceeding.

Competent counsel armed with the new evidence would not do as the state suggests; *i.e*., conduct a cross-examination and then undercut it with his own evidence. Rather, he would either go forward with a much-improved cross-examination and no expert, or tailor his cross-examination to complement the expert testimony.

Counsel could decide that because the juvenile records provide powerful evidence that Dr. Suckow did not conduct a thorough examination, he could use them to undercut Suckow's antisocial personality diagnosis, both by showing that Suckow was not thorough and that his diagnosis conflicted with an earlier diagnosis of an adjustment disorder. Moreover, armed with the earlier diagnosis of an adjustment disorder, he could attack Dr. Suckow's testimony that petitioner was "considered [to have suffered

from] a conduct disorder before the age of 15," with hard evidence. *Id*. at 619.[1]

Trial counsel challenged Dr. Suckow's lack of evidence showing that petitioner suffered from a conduct disorder before age 15, but Suckow bobbed and weaved around it by citing "indirect evidence" of a conduct disorder. *Id*. The cross-examination *could* have been deadly if counsel had possessed the juvenile records with the adjustment disorder diagnosis and confronted Dr. Suckow with them. Thus, competent counsel might have decided to use the juvenile records provided by Dr. Cooley and believed that he could destroy Dr. Suckow's diagnosis without calling Dr. Cooley. Such a strategic decision, made after full investigation, would be entitled to deference.

Or defense counsel armed with the juvenile records and Dr. Cooley's conclusions may well have decided to scale down his cross-examination of Suckow and focus his attack on Suckow through Dr. Cooley. Instead of trying to attack Suckow directly with the juvenile records, he could simply ask Suckow whether he obtained and reviewed those records. Suckow would be forced to admit that he had not.

[1] Diagnosis of a conduct disorder before age 15 is one of the criteria for an antisocial personality disorder diagnosis outlined in the Diagnostic and Statistical Manual of Mental Disorders (4th ed Text Revision 2000) (DSM-IV-TR), the edition relied upon during Dr. Suckow's testimony. *Id*. at 620.

Then counsel could call Dr. Cooley, who would testify that the records were necessary to obtain a complete picture of the petitioner's psychological background. He could testify that those records disclosed a critical fact not discovered by Dr. Suckow, namely that petitioner had been diagnosed with an adjustment disorder. He could explain that it is a critical fact because the DSM-IV-TR requires diagnosis of a conduct disorder before age 15, and there is none in petitioner's records. He could provide his own expert opinion, contrary to Suckow's, that petitioner suffers from an adjustment disorder rather than any type of severe personality disorder such as antisocial personality disorder. Moreover, Dr. Cooley could introduce mitigation by informing the jury of petitioner's mother's abusiveness.[2]

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[2] Review of the ABA Standards for Criminal Justice, the Defense Function (3d ed 1993) supports this conclusion. Standard 4-4.1, titled "Duty to Investigate," provides that "(a) Defense counsel should conduct a prompt investigation of the circumstances of the case and explore all avenues leading to facts relevant to the merits of the case and the penalty in the event of conviction." The commentary explains that "[t]he lawyer also has a substantial and important role to perform in raising mitigating factors both to the prosecutor initially and to the court at sentencing." *Id*. at 183. "Investigation is essential to fulfillment of these functions." *Id*.

The commentary to Standard 4-8.1, "Sentencing," underscores counsel's critical sentencing role. "Indeed, the Supreme Court has even suggested that the need for counsel may be greater at sentencing than in the determination of guilt because '[t]here a judge usually moves within a large area of discretion and doubts. . . . Even the most self-assured judge may well want to bring to his aid every consideration that counsel for the (continued)

Under either scenario, a post-conviction court would be justified in concluding that counsel's failure to investigate "'*could have tended to affect* ' the outcome of the case." *Green*, 303 Or 322 (quoting *Lichau v. Baldwin*, 333 Or 350, 365, 39 P3d 851 (2002) (emphasis by court). Thus, prejudice can be established two separate ways. Neither would pit trial counsel's cross-examination against Dr. Cooley's detailed deconstruction of Dr. Suckow's unsupported position.

C. By adding language to the Article I, Section 11 test from the Sixth Amendment test for prejudice, the state's proposed test unduly confuses the constitutional analysis.

Under the Sixth Amendment, prejudice results where "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland v. Washington*, 466 US 668, 694 (1984). In the leading Sixth Amendment case, the Court clarified that the "reasonable probability" test is less than a preponderance of the evidence. *Strickland*, 466 US at 693. It explained that "we believe that a defendant need not show that counsel's deficient conduct more likely than not altered the outcome in the case." *Id*. "The result of a proceeding can be rendered unreliable, and hence the proceeding itself unfair, even if the errors

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accused can appropriately urge.'" *Id*. at 234 (quoting *Carter v. Illinois*, 329 US 173, 178 (1976)).

of counsel cannot be shown by a preponderance of the evidence to have determined the outcome." *Id*.

A "'reasonable probability' is a less demanding standard than 'more likely than not.'" *Gonzalez v. United States*, 722 F3d 118, 135 (2d Cir 2013) (citing *Kyles v. Whitley*, 514 US 419, 434 (1995)); *see Robinson v. Schriro*, 595 F3d 1086, 1111 (9th Cir 2010) (quoting *Summerlin v. Shriro*, 427 F3d 623, 643 (9th Cir 2005)). "[A] defendant need not establish that the attorney's performance more likely than not altered the outcome in order to establish prejudice under *Strickland*." *Gonzalez*, 722 F3d at 135 (quoting *Nix v. Whiteside*, 475 US 157, 175 (1986)).

In *Gonzalez*, when the lower federal district court decided the prejudice issue, it "framed the question as to whether [trial counsel's] inadequate assistance at sentencing 'had an adverse effect," …; and it concluded that Gonzalez had failed to demonstrate that the substandard performance 'adversely affected his sentence.'" 722 F3d at 135. The appellate court set this finding aside because the standard applied by the district court was too demanding. It found that "the district court in assessing the prejudice prong appears to have erroneously applied a standard at least as demanding as more-likely-than-not." *Id*.

Thus, if this Court were to add a second, "reasonable probability" test to its "could have tended to affect the outcome of the case" prejudice test, it will have to decide how to define a "reasonable probability." If it goes with *Strickland's* Sixth Amendment test, the reasonable probability will likely be a second incarnation of the Oregon constitutional test, "more than mere possibility, but less than probability." *Green*, 303 Or at 322. If it determines that a "reasonable probability" requires proof by a preponderance of the evidence or any other form of probability, it will find itself with a separate standard from the federal standard, and post-conviction trial and appellate courts that do not find prejudice under the state constitution will be required to conduct a separate analysis under the federal constitution.[3]

In short, this court recently explained exactly what standard must be applied to determine prejudice under Article I, Section 11. It would be unwise to complicate that straightforward test by adding a layer and trying to craft a definition that ensures consistency with the federal test. And it would be especially unwise to do so in this case, where it is possible to demonstrate

[3] It will be important to do so in order for the Oregon courts to be afforded deference under AEDPA. Specifically, pursuant to 28 USC § 2254(d), deference is afforded only to "any claim that was decided on the merits in state court." If the post-conviction court does not separately determine the ineffective assistance of counsel claim under the Sixth Amendment, it will not qualify for deference because it will not have been "decided on the merits."

prejudice with or without showing that competent trial counsel would call Dr. Cooley as a witness to introduce the new evidence.

CONCLUSION

This court should affirm the decisions by the post-conviction trial court and the Court of Appeals.

Respectfully submitted,

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NOTICE OF FILING AND PROOF OF SERVICE

I certify that on December 8, 2016, I directed the original Brief on the Merits of Amicus Curiae Oregon Criminal Defense Lawyers Association to be electronically filed with the Appellate Court Administrator, Appellate Court Records Section, and electronically served Jason Weber, Frederick Boss, Benjamin Gutman, and Patrick Ebbett, Attorneys for Petitioner on Review, by using the Court's electronic mailing system.

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

I certify that (1) this brief complies with the word-count limitation in ORAP 5.50(2)(b) and (2) the word count of this brief (as described in ORAP 5.05(2)(a)) is 2410 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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