IN THE SUPREME COURT OF THE STATE OF OREGON

KYLE JAMES GREEN, Petitioner-Appellant, Respondent on Review, v. STEVE FRANKE, Superintendent, Two Rivers Correctional Institution, Defendant-Respondent, Petitioner on Review.	Umatilla County Circuit Court No. CV110230 CA A150877 SC S062231

PETITIONER ON REVIEW'S REPLY BRIEF

Review of the Decision of the Court of Appeals
on Appeal from a Judgment of the Circuit Court for Umatilla County
Honorable RICK J. MCCORMICK, Judge

Opinion Filed: February 12, 2014
Before: Armstrong, P.J., Nakamoto, J., and Egan. J.

Continued…

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STATEMENT OF THE CASE

In petitioner's answering brief on the merits, he argues (among other things) that this court should dismiss review as improvidently allowed because the superintendent did not preserve his performance or prejudice arguments in the post-conviction trial court and in the Court of Appeals. As explained below, this court should decline to dismiss the case because the superintendent either adequately preserved his arguments in the lower courts, or because the issues presented by the Court of Appeals' opinion and in the petition for review remain worthy of this court's consideration.[1]

ARGUMENT

A. The superintendent either sufficiently preserved his "performance" argument, or was not required to do so in light of the Court of Appeals' precedent to the contrary.

The issue in this case is whether petitioner's trial counsel was inadequate by not requesting an instruction to prevent the jury from considering evidence for a propensity purpose. In its opening brief in this court, the superintendent argued, first, that petitioner did not carry his burden on the performance prong because he did not prove that all reasonable trial attorneys would have wanted a

[1] The superintendent does not reply to petitioner's other arguments, as those issues are adequately addressed in the superintendent's opening brief.

limiting instruction. The superintendent contended that, on the post-conviction record, a reasonable attorney could have made a strategic decision to avoid the instruction, and in fact, the instruction would have conflicted with his counsel's apparent strategies. (Pet BOM 19-23).

The superintendent made the same fundamental point in the post-conviction trial court, albeit in less detail. In addition to arguing that petitioner was required to rebut the presumption that counsel's decisions "might be considered sound trial strategy," the superintendent specifically argued that petitioner was required to show that he "actually wanted the instruction[.]" (TCF, Def Tr Memo at 7, 18). Because petitioner did not prove that fact, the superintendent argued, petitioner did not show "any trial counsel deficiency * * *." (TCF, Def Tr Memo at 18). That argument was sufficient to present the post-conviction court with the same essential theory on which the superintendent relies in this court. And contrary to petitioner's argument (Resp BOM 12), it also was sufficient to put petitioner on notice that he may wish to offer evidence from his trial counsel about his specific reasons for not requesting the instruction.[2]

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[2] To the extent that petitioner characterizes the superintendent's argument in this court as a contention that he was *required* to obtain evidence from his trial counsel explaining his decision not to request the instruction, that is not accurate. (Resp BOM 12). The superintendent has not argued that the petitioner *must* obtain evidence from counsel, but only that, without it, the

Footnote continued…

Regardless, this court can and should consider the "performance" argument presented in the superintendent's opening brief. As explained below, controlling Court of Appeals case law effectively defeated that argument at the time of the post-conviction hearing and on appeal. Thus, in light of that Court of Appeals precedent, discussed below, any attempts to present a more specific version of the performance argument to the lower courts would have been futile. *Cf. Stranahan v. Fred Meyer, Inc.*, 331 Or 38, 47 n 6, 11 P3d 228 (2000) (addressing argument raised for the first time in the Supreme Court when earlier court precedent resolved the issue, and the lower courts were bound by it).

In 2007, the Court of Appeals issued its opinion in *Trotter v. Santos*, 212 Or App 473, 476, 157 P3d 1233, *adh'd to on recons*, 214 Or App 696, *rev den*, 343 Or 691 (2007), a case in which, as here, the petitioner claimed that his trial counsel was inadequate for not requesting a particular jury instruction. In concluding that the trial attorney had performed inadequately by not requesting the instruction, the *Trotter* court relied on the fact that "*there is no indication* that [the petitioner's] criminal trial counsel made a tactical decision not to request the instruction." *Id.* at 477 (emphasis added). In so holding, the Court of Appeals effectively eliminated the possibility that a trial attorney's

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presumption that counsel acted reasonably has particular force. (Pet BOM 17, 20).

performance about a jury instruction could be defended on tactical grounds, without affirmative evidence proving that point.

In light of *Trotter*—which the superintendent maintains was wrongly decided—the superintendent would have gained nothing in the post-conviction court by making a more specific argument that his counsel's decision not to request an instruction might have well been strategic. The *Trotter* decision refuted that argument, making any additional argument on that point futile in the post-conviction court.

Moreover, by the time the superintendent filed his brief as respondent in the Court of Appeals, that court had decided another case that compounded the futility of the performance argument. In particular, the court decided *Pereida-Alba v. Coursey*, 252 Or App 66, 284 P3d 1280 (2012), *rev allowed*, 353 Or 410 (2013). In that case, which also addressed a trial attorney's failure to request an instruction, the Court of Appeals declined to overrule the reasoning of *Trotter* on the performance prong. This court has since allowed review in *Pereida-Alba* to address that same issue presented in *Trotter*—what a petitioner must prove to establish that his counsel was inadequate for not requesting an instruction.[3] Because *Pereida-Alba* is pending in this court, and because this case presents the same essential issue in a different factual context, this court

[3] This court held oral argument in *Pereida-Alba* on September 16, 2013.

should not dismiss review as improvidently allowed; rather, it should consider this case in conjunction with *Pereida-Alba*.

In sum, the superintendent sufficiently preserved his performance argument in the post-conviction trial court. Regardless, any attempt to advance a more particular version of that argument in the lower courts would have been futile in light of existing precedent.

B. The superintendent sufficiently preserved his "prejudice" argument in the lower courts.

The superintendent also argued in his opening brief in this court that petitioner failed to establish prejudice as a result of his counsel's failure to request a limiting instruction about propensity evidence. In particular, the superintendent contended that the record did not show that an instruction would have had a tendency to affect the verdicts because propensity inferences were not necessary or important to the jury's decision. (Pet BOM 23, 25-27).

Although the superintendent's prejudice argument is more detailed in this court, he made the same underlying argument in both the post-conviction trial court and in the Court of Appeals. In both proceedings, that is, the superintendent argued that petitioner had not shown that the absence of an instruction about propensity evidence would have tended to affect the jury's verdicts. (TCF, Def Tr Memo at 18; App Br 29-30). The fact that the superintendent's argument in this court is more detailed does not mean that it is

not preserved; and indeed, the Court of Appeals addressed the prejudice issue on the merits.

To the extent that petitioner argues that the superintendent did not preserve his current contention that the Court of Appeals employed the wrong prejudice standard, the superintendent could not have preserved that argument before that court issued its opinion. Thus, the superintendent was not required to preserve that argument.

CONCLUSION

The superintendent adequately preserved his arguments in the lower courts, or any attempts to make more specific arguments in those courts would have been futile. Because the issues under review remain worthy of this court's review, this court should decline to dismiss the case.

Respectfully submitted,

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NOTICE OF FILING AND PROOF OF SERVICE

I certify that on October 9, 2014, I directed the original Petitioner on Review's Reply Brief to be electronically filed with the Appellate Court Administrator, Appellate Records Section, and electronically served upon Jason Edward Thompson, attorney for appellant/respondent on review, 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 1,241 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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