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

REPLY BRIEF ON THE MERITS OF PETITIONER 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.

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INTRODUCTION

This appeal largely boils down to two questions. First, is a criminal defense attorney deficient who, based on his investigation and previous experience, understands how to attack expert testimony on antisocial personality disorder and chooses to rely on that understanding rather than consulting with an expert? And second, even if the attorney should have consulted with an expert, could the failure to do so have tended to affect the outcome of the trial if, as a preliminary matter, it is not reasonably probable that competent counsel would have chosen to present the expert at trial? If the answer to either question is no, reversal is warranted.

As explained below, although petitioner correctly identifies some of the factors that might bear on whether counsel should consult with an expert, he ignores other relevant factors, including counsel's own level of experience with the subject matter. When all of the relevant factors are considered, counsel's decision not to consult with an expert here falls within the broad range of reasonable strategic judgments that attorneys are entitled to make. With respect to prejudice, the superintendent preserved the argument made here, the argument does not require this court to depart from the well-established

framework under federal and state law, and some of petitioner's responses are irrelevant in view of the specific post-conviction claim at issue.

ARGUMENT

A. Trial counsel reasonably chose not to consult with an expert.

As a threshold matter, the superintendent and petitioner agree on the appropriate the legal standards for evaluating whether counsel's strategic decision not to consult an expert constituted deficient performance. Petitioner agrees, for example, that the state and federal standards for evaluating counsel's performance are "functionally equivalent," and that no ostensible purpose is served by conducting a separate analysis under each standard. (Resp Br 13-14). Petitioner also agrees that the application of those standards is fact-specific and is not subject to categorical rules. Accordingly, petitioner agrees that counsel need not always respond to a state's expert with a defense expert. And thus, petitioner does not dispute that there can be valid reasons for proceeding without an expert. (Resp Br 25). Where the superintendent and petitioner differ, however, is in the application of those principles.

In contending that trial counsel's decision not to hire an expert was unreasonable, petitioner identifies four considerations that, in his view, a trial attorney should take into account when determining whether to consult an expert: (1) whether the issue is one that either requires expert testimony or for which expert testimony would be helpful; (2) whether any state expert's opinion

is adverse; (3) whether the issue is "fundamental" to the case; and (4) whether the state's expert can be rebutted with "substantive and contradictory evidence." (Resp Br 18). Although those factors are undeniably pertinent, they are not dispositive. Petitioner fails to acknowledge the other pertinent considerations that the superintendent has identified in this case.

Those include (1) that trial counsel had investigated, and understood, the basis for the opinion of the state's expert—specifically, the requirements of the *Diagnostic and Statistical Manual of Mental Disorders* (4th ed 2000) (DSM-IV) for an antisocial personality diagnosis; (2) that he understood the weaknesses in the expert's opinion about that diagnosis; (3) that he had firsthand experience consulting and using experts in dangerous-offender proceedings; (4) that he evaluated the likelihood that an expert would be helpful; and (5) that he had a clear and thorough plan for impeaching the state's witness without the need for an expert. In addition, petitioner's list of factors ignores the principle—recognized by the United States Supreme Court—that counsel can reasonably steer clear of expert witnesses to avoid "transforming the case into a battle of the experts." *Harrington v. Richter*, 562 US 86, 109, 131 S Ct 770, 179 L Ed 2d 624 (2011).

Petitioner's failure to acknowledge those other considerations is illustrated in his assertion that this case is "most like" *Stevens v. State of Oregon*, 322 Or 101, 902 P2d 1137 (1995), in which this court found that

counsel's investigation was deficient. (Resp Br 19). But *Stevens* is instructive only by way of contrast. There, counsel representing a defendant in a child-rape case failed to interview any of the victim's teachers or classmates, and—after his client told him he could not have committed rape because he was impotent—he failed to seek a medical opinion. 322 Or at 106-07. At the post-conviction hearing, the trial attorney testified that he did not interview any teachers or classmates because "his theory of defense was simply that petitioner's word would have to prevail over the word of the complaining witness." *Id.* at 107. And he did not obtain a medical diagnosis to determine whether his client was, in fact, impotent because he irrationally believed presenting such medical evidence "would risk [his client's] credibility." *Id.*

Unsurprisingly, this court found counsel's choice was not "based on a reasonable evaluation of the likely costs and potential benefits of pursuing the investigation." Instead, the court concluded, "it appears that trial counsel simply relied on the police report to identify the material witnesses." *Id.* at 109-110. In other words, counsel—without any reasonable explanation for why he failed to do so—failed to investigate any of the relevant fact witnesses to determine whether they might provide helpful information.

That is not the situation here. Counsel was experienced and knowledgeable in both in dangerous offender proceedings and the subject matter of the state's expert witness, he investigated and identified the

weaknesses in the expert's diagnosis of his client, and he reasonably chose to challenge that expert by exposing those weaknesses during cross-examination. The reasonableness of that choice is reflected in his performance on cross-examination, and the prosecutor's subsequent retreat from relying on his expert's diagnosis in closing argument. As this court observed in *Stevens*, "the exercise of reasonable professional skill and judgment generally requires an investigation that is legally and factually appropriate to the nature and complexity of the case so that the lawyer is equipped to advise and represent the client in an informed manner." *Id.* at 108. Here, counsel made sure that he was well-equipped to represent his client in an informed manner; in *Stevens*, counsel did not.

Petitioner also contends that trial counsel's decision in this case was not "based on an evaluation of the likely costs and potential benefits of conferring with an expert" because he "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." (Resp Br 24). But counsel's cross-examination in this case provided substantive evidence that supported the defense. On cross, counsel exposed the fact that the state's expert had no evidence that petitioner suffered from a conduct disorder before age 15, even though the DSM-IV required such evidence to support a diagnosis of antisocial personality disorder. (Ex 4 at 48-58). Although

petitioner now argues that counsel could use the DSM-IV only for impeachment, and not as substantive evidence, that made no difference here. Petitioner fails to recognize that counsel was cross-examining an expert who would have no choice but to acknowledge the substance of the DSM-IV diagnostic criteria. And that is what occurred. On cross, Dr. Suckow acknowledged that an antisocial personality disorder diagnosis under the DSM-IV criteria requires "evidence of" a conduct disorder before age 15. (Ex 4 at 38). Contrary to petitioner's argument, that point was made through the actual testimony of a witness. Rather than calling a defense expert—who himself would be subject to cross-examination—counsel reasonably chose to impeach the weaknesses in the state's expert's diagnosis through cross-examination.

B. Petitioner failed to meet his burden to show that he was prejudiced by any inadequacy in his counsel's failure to consult an expert as a potential witness for the defense.

1. The governing legal standards.

As to the governing legal standards for assessing prejudice, both petitioner and amicus agree with the superintendent that the state and federal standards, like those for assessing counsel's performance, are "functionally equivalent." (Resp Br 15; Amicus Br 1, 12). For example, they agree with the superintendent that both standards require less than a preponderance and more than a "mere possibility." (Resp Br 15, 31; Amicus Br 4, 10-11). They dispute, however, the superintendent's application of those standards here. Specifically,

petitioner and amicus dispute the superintendent's argument that in a failure-to-investigate case—before assessing the ultimate determination about whether uninvestigated evidence had a "tendency to affect the verdict"—the post-conviction court must first determine whether it is reasonably probable the evidence would or should have been offered at trial. Petitioner asserts that the superintendent's argument is unpreserved, and petitioner and amicus both insist that the step is not part of either the state or federal analysis. As explained below, they are incorrect.

a. The superintendent sufficiently preserved his argument.

The superintendent preserved his argument that a court must consider whether it is reasonably probable that competent counsel would have offered the uninvestigated evidence. Although the superintendent's argument is more detailed in this court, he made the same fundamental point in in the post-conviction court and the Court of Appeals.

In both courts, the superintendent argued that a reasonable attorney would not want to present Dr. Cooley's testimony because his report revealed numerous details about petitioner's criminal conduct and other behavioral problems as a youth, which would bolster the state's argument that petitioner had a propensity toward crimes that endanger others, and would fill gaps in Dr. Suckow's testimony. (TCF, Def Trial Memo at 13-14; App Br 25). To be sure, the superintendent made those arguments in his discussion of the performance

prong of his analysis. But as noted in the superintendent's opening brief, courts have not been clear on where in the analysis this inquiry belongs. Even the United States Supreme Court has, at times, considered it in the performance prong. (Op Br 23 n 7, citing *Richter*, 562 US at 108, in which Court addressed whether a competent attorney would use uninvestigated expert testimony).

Regardless of where in the analysis the issue was addressed, the superintendent asked both the post-conviction court and the Court of Appeals to consider whether a competent attorney would want to offer the testimony. And because the superintendent made that argument, petitioner is wrong that he was denied the opportunity to present evidence in the post-conviction court to respond to the claim. (Resp Br 29-30). Because petitioner was free to offer evidence to rebut that argument, the purposes of the preservation requirement were served in this case.

b. Addressing whether the uninvestigated evidence should have been presented is a preliminary step in assessing prejudice.

Contrary to petitioner's and amicus's arguments, the superintendent is not asking this court to depart from the traditional, functionally equivalent state and federal tests for assessing prejudice in post-conviction cases. Nor is the superintendent constructing a "Trojan Horse" to undermine this court's prior holdings. Rather, the superintendent's prejudice analysis merely recognizes a logical and necessary first step in assessing prejudice in the context of a failure-

to-investigate claim: evaluating whether the evidence would, or should, have been presented if counsel had done the investigation.

That is because the "tendency" standard (like the functionally equivalent federal standard) carries an assumption in failure-to-investigate cases: that the evidence that is the subject of the inadequacy claim should or would have been presented at trial. In other words, the "tendency" standard itself *assumes* that the trier-of-fact should have heard the evidence that is the subject of the claim of inadequate assistance. If the evidence should not, or would not, have been presented at the trial, then the petitioner could not have suffered harm from his counsel's failure to find it. But if the evidence should or would have been presented at the trial, then the petitioner could have been harmed, and the reviewing court turns to the ultimate prejudice question: whether the evidence had a "tendency to affect the verdict."

There is nothing novel about that analysis. As discussed in the superintendent's opening brief, both United States Supreme Court in *Wiggins v. Smith*, 539 US 510, 123 S Ct 2527, 156 L Ed 2d 471 (2003), and this court in *Lichau v. Baldwin*, 333 Or 350, 39 P3d 851 (2002), acknowledged the logic of such a preliminary question in failure-to-investigate cases. (Op Br 23-24).

c. The superintendent's analysis is consistent with the prejudice standard articulated in *Green*.

In their briefs, petitioner and amicus reject the preliminary step in evaluating prejudice out of out of hand, failing to account for its logical necessity. Instead, they insist that the superintendent is trying to engage in an end-run around the "tendency to affect the verdict" standard that this court reiterated in *Green v. Franke*, 357 Or 301, 350 P3d 188 (2015), by injecting a new "probability" standard. (Resp Br 30-31; Amicus Br 5). Petitioner and amicus misunderstand the superintendent's argument, and how it relates to the holding in *Green*.

In *Green*, this court ruled that, to establish prejudice, the petitioner does not need to establish that the result of the trial "would" have been different. This court held that such a "probability" standard was incorrect, concluding that the "tendency to affect the verdict" standard requires petitioners to show "more than mere possibility, but less than probability." *Id.* at 322. That is, a petitioner must show more than that it is merely *possible* that the outcome would have been different, but need not show that it is more likely than not. And that standard is consistent with the federal "reasonable probability" standard, which likewise does not rise to the level of more probable than not. *See Richter*, 562 US 86, 111-12.

In short, the superintendent's reference to a reasonable probability does not incorporate the preponderance standard that this court rejected in *Green*. Rather, the superintendent contends that—given the many downsides to offering Dr. Cooley as witness—it is not reasonably probable that a competent attorney would put him on the stand. That is wholly consistent with "functionally equivalent" state and federal standards for assessing prejudice.

2. Petitioner cannot evade his failure to meet his burden of proving prejudice with new theories offered for the first time in this court.

In apparent recognition of the downsides of offering Dr. Cooley's proposed testimony (*see* Op Br 26-29), petitioner and amicus now suggest that the superintendent has too narrowly limited the question of prejudice to consideration of the effect of Dr. Cooley's testimony as proposed in his report. In their view, there are other ways that counsel's decision not to consult an expert could have affected the result. But their arguments, raised for the first time in this court, part from petitioner's claim as litigated below.

In his petition for post-conviction relief, petitioner alleged that his counsel failed to "conduct an investigation to support his decision not obtain a psychological evaluation of petitioner to rebut" Dr. Suckow's testimony because a "defense psychologist would have provided testimony that petitioner does not meet the diagnostic criteria for antisocial personality disorder." (COA App Br ER 3-4). In support of that claim, petitioner offered one exhibit: Dr.

Cooley's report. Consistent with his post-conviction claim, petitioner argued in the post-conviction court and Court of Appeals that counsel's failure to offer Dr. Cooley's *testimony* caused him prejudice, arguing, for example, that "[t]he jury needed a defense expert who could refute Dr. Suckow" and that counsel was required to "fight fire with fire." (Pet Trial Memo at 38).

Now, petitioner offers four additional theories of prejudice. He contends that (1) Dr. Suckow could have changed his professional opinion in light of Dr. Cooley's opinion; (2) the prosecutor could have decided not to pursue a dangerous offender sentence in light of Dr. Cooley's report; (3) the parties may have reached a settlement for a different sentence; or (4) the trial court could have chosen not to impose the same sentence. (Resp Br 27-28).

But petitioner did not present those theories below, and he did not develop the record to support them. For example, petitioner cites no actual evidence from Dr. Suckow that Dr. Cooley's report would have caused him to alter his diagnosis, or from the prosecutor that Dr. Cooley's report would have led him to reconsider his decision to pursue a dangerous offender sentence or offer to settle for a lesser sentence. *See, e.g., Cunningham v. Thompson*, 186 Or App 221, 230-31, 62 P3d 823 (2003), *rev den*, 337 Or 327 (2004) (petitioner failed to show prejudice from any deficiency of counsel to present prosecutor additional information because prosecutor would not have considered a lesser

sentence). Instead, petitioner apparently assumes that he needs no such evidence, because the events he describes *could* have occurred.

But petitioner confuses the applicable legal standard for *assessing* prejudice with the factual predicate necessary for *establishing* prejudice. Petitioner's alternative theories required predicate facts. On the theory of prejudice petitioner *did* litigate in the post-conviction court—the effect Dr. Cooley's testimony could have had on the jury had he testified as a rebuttal witness—petitioner *did* offer such evidence in the form Cooley's report. On his new claims of prejudice he does not. In other words, in the absence of facts, he offers only "mere possibilities" that under *Green* do not establish prejudice.[1]

C. Petitioner and amicus misunderstand the dangerous-offender sentencing scheme and the post-conviction court's findings related to it.

Petitioner and amicus both offer erroneous statements regarding the dangerous-offender sentencing scheme that, while not necessary to the legal

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[1] Amicus also suggests new prejudice theories, including one that would involve Dr. Cooley's testimony and one that would include only the use of the adjustment disorder diagnosis found in the juvenile records in Cooley's report. (Amicus Br 7-9). But as noted, any theory not involving Dr. Cooley's testimony was not litigated below, and any theory involving his testimony would suffer from the same weaknesses as the one petitioner did litigate: the damaging material in Dr. Cooley's report about petitioner's antisocial behavior as a youth that not only supported Dr. Suckow's diagnosis, but undercut the long-term viability of the adjustment disorder diagnosis included in those records.

analysis of the issues on appeal, may leave a misimpression about how that scheme works. Accordingly, the superintendent provides brief responses.

First, petitioner asserts that "a court cannot impose a dangerous offender sentence * * * unless a fact finder concludes that the criminal defendant suffers from a 'severe personality disorder' as defined in the extant DSM." (Resp Br 22). But neither the statute nor the case law requires that that the factfinder make any particular factual finding based on any particular DSM definition. This court observed in *State v. Huntley*, 302 Or 418, 730 P2d 1274 (1986), that the DSM criteria may helpful, but also recognized that a severe personality disorder under the statute is ultimately a "lay concept." *Id.* 430-31. Indeed, the phrase "severe personality disorder" does not appear in the DSM at all.

Second, petitioner claims that the post-conviction court accepted, *as a factual matter*, that "petitioner did not in fact suffer from a severe personality disorder." (Resp Br 10). But the post-conviction court made no such finding. The post-conviction court was careful to qualify her remarks by concluding that Dr. Cooley's opinion "*if believed by the jury*, would not have allowed" a dangerous-offender sentence. (ER 24; emphasis added).

Finally, petitioner and amicus misunderstand what is required for an antisocial personality disorder diagnosis in the DSM. Both contend that a person cannot receive such a diagnosis unless "he or she has been *diagnosed* with a conduct disorder" before the age of 15. (Resp Br 21; Amicus Br 8 n 1;

emphasis added). But instead, the DSM-IV only requires "*evidence* of a conduct disorder * * * with onset before age 15 years." *DSM-IV* at 650 (emphasis added). After all, if an actual "diagnosis" were required, anyone who did not happen to receive a psychological evaluation as a youth could never receive an antisocial personality disorder diagnosis.

CONCLUSION

For the reasons discussed in this and the superintendent's opening brief, this court should court reverse the post-conviction court's judgment granting petitioner relief.

Respectfully submitted,

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NOTICE OF FILING AND PROOF OF SERVICE

I certify that on December 22, 2016, I directed the original Reply Brief on the Merits of 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 on review; and upon Dennis N. Balske and Jeffrey E. Ellis, attorneys for amicus curiae, 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 3,345 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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