Case No.

IN THE SUPREME COURT OF THE UNITED STATES

JEFFERY DANA SPARKS, Petitioner, v. JEFF PREMO, Superintendent, Oregon State Penitentiary, Respondent.	)	On Petition for Writ of Certiorari to the Supreme Court of the State of Oregon

PETITION FOR WRIT OF CERTIORARI

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CAPITAL CASE

I. Question Presented

Whether defense counsel in a death penalty trial provided effective assistance where that counsel failed thoroughly to prepare to cross-examine foreseeable prosecution experts and failed to present all available evidence to contradict the prosecution's theory of the case.

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State v. Sparks, 336 Or. 298, 83 P.3d 304 (2004)

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Sparks v. Premo, 363 Or. 119, 421 P.3d 354 (2018)

V. Basis for Jurisdiction

Petitioner seeks review of the Oregon Supreme Court *Order Denying Review* of an Oregon Court of Appeals decision affirming in part and denying in part Petitioner's claims for post-conviction relief. The *Order Denying Review* was entered on June 7, 2018.

Jurisdiction to review is conferred by 28 U.S.C.A. § 1257.

VI. Statement of the Case

On May 14, 1999, Petitioner, Jeffery Dana Sparks, was convicted in Yamhill County Circuit Court of fifteen counts of aggravated murder, and was sentenced to death on each count. (*State v. Jeffery Dana Sparks*, Yamhill County Circuit Court No. CR98326). The Judgment of Conviction and Sentence of Death of Death was entered on September 1, 1999.

Petitioner was subjected to substantial denials of his right to the adequate and effective assistance of counsel during the pre-trial, trial, and penalty phases of that case.

The Oregon Supreme Court conducted automatic direct review and affirmed the convictions and sentences. (*State v. Sparks*, 336 Or. 298, 83 P.3d 304 (2004).)

On January 24, 2004, Petitioner timely filed his Petition for Post-Conviction Relief (*Sparks v. Belleque*[1], Marion County Case No. 07C11052). In that post-conviction proceeding Petitioner raised claims of ineffective assistance of counsel pertaining to both phases of the capital trial.

[1] At the time Petitioner filed his Petition for Post-Conviction Relief, Brian Belleque was the Superintendent of the Oregon State Penitentiary. Later, when Jeff Premo became Superintendent, he was substituted as the Defendant.

The post-conviction trial court conducted a hearing from April 11, 2011, to April 14, 2011. On April 3, 2012, the trial court granted judgment in favor of Petitioner as to his claim of ineffective assistance of counsel during penalty phase, but denying relief as to all other claims.

Petitioner and Defendant timely appealed to the Oregon Court of Appeals.

In the Oregon Court of Appeals, Petitioner argues that the Court of Appeals should utilize the analytical framework of *Rompilla v. Beard*, 545 U.S. 374, 125 S.Ct. 2456, 162 L.Ed.2d 360 (2005).

Rompilla was a case in which there was "no question that defense counsel were on notice" that:

> Counsel knew that the Commonwealth intended to seek the death penalty by proving Rompilla had a significant history of felony convictions indicating the use or threat of violence, an aggravator under state law. Counsel further knew that the Commonwealth would attempt to establish this history by proving Rompilla's prior conviction for rape and assault, and would emphasize his violent character by introducing a transcript of the rape victim's testimony given in that earlier trial.

Rompilla, 545 U.S. @ 383.

It was also clear that defense counsel failed to act: "It is clear, however, that defense counsel did not look at any part of that file, including the transcript, until warned by the prosecution a second time." *Rompilla*, 545 U.S. @ 384.

This mattered because:

> If the defense lawyers had looked in the file on Rompilla's prior conviction, it is uncontested they would have found a range of mitigation leads that no other source had opened up.

Rompilla, 545 U.S. @ 383.

In *Rompilla* the failure of counsel occurred through:

- Notice to counsel that an issue was important. (In *Rompilla*, the information that the prosecution was going to rely on the prior conviction.)
- Failure to act until it was too late. (In *Rompilla*, the failure timely to examine the file relating to the prior conviction, which contained important mitigation leads.)

In this case as in *Rompilla*, trial counsel was on notice: that, pre-trial, the prosecution saw itself as having relatively little physical evidence and that the prosecution saw a Band-Aid as being significant. (Page 4 of Petitioner's Opening Brief in the Oregon Court of Appeals.)

In this case, as in *Rompilla*, trial counsel failed to take appropriate action.

First, trial counsel failed to hire a forensic pathologist. (Post-Conviction Trial Ex. 47, pp. 32, 73):

> Well, there -- on looking back at it now, I probably should have retained a pathologist. I thought the cause of death was pretty well determined. And I did some checking around on an informal basis to ascertain that I wasn't -- that I didn't have enough material to tie down the time of her death, and, therefore, I did not have a pathologist look at her. And I will concede that with hindsight that I maybe should have.

(Post-Conviction Trial Ex. 47, p. 32.)

Second, while trial counsel did belatedly hire a forensic scientist to review the case and some of the evidence involved, when she developed opinions consistent with trial counsel's theory of the case, they failed to call her as a witness.

As a result of counsel's failures, they deprived themselves of the possibility of producing evidence in the Petitioner's favor, and of rebutting the arguments of the prosecution in its closing argument. The jury was left with:

> To consider that somebody else came into Sparks' bedroom and picked up the Band-Aid directly or indirectly is as about as fanciful as assuming that Sparks threw it on the ground outside of his trailer, a bird came down and picked it up, flew it down to the body and tucked it neatly under her skin.
>
> Ladies and Gentlemen, beyond a reasonable doubt is not disproven all fanciful conjecture. It is not to a mathematical and absolute certainty. It is you are satisfied the evidence shows one result in this case, and there is only one that the evidence points to.
>
> The Defendant left that Band-Aid at that body while he was murdering. Nobody else had the opportunity. Nobody else had the motive. Nobody else had the reason. And there's no other reasonable explanation for that Band-Aid being there.

(Trial Tr., p. 1417, 3/24/99.)

With Ms. Cwiklik's[2] testimony, the jury could have heard a counterargument indicating that the Band-Aid had not fallen from Petitioner's skin, because the fibers on it indicated it had been most recently on fabric. That, taken with the failure to match those fibers with anything of the Petitioner's, dramatically undermined the prosecutions theory of the significance of the Band-Aid. (Post-Conviction Trial Ex. 45, pp. 17-9.)

Because trial counsel had notice of the Band-Aid significance, especially when there was little physical evidence to buttress the prosecution's theory, and because trial counsel failed to take appropriate actions, and because trial

[2] Ms. Cwiklik was the potential defense expert the defense failed to call.

counsel's failings deprived Petitioner of significant evidence and arguments, the post-conviction court's denial of guilt phase relief should be reversed.

In the instant case:

- Relative to preparation for evidence to be presented by Dr. Lewman and other witnesses, trial counsel did nothing. Trial counsel has admitted that looking back they probably should have hired a consulting forensic pathologist.
- Relative to the Band-Aid, trial counsel did hire Chesterene Cwiklik. However, what trial counsel did with the information she presented to them was clearly inadequate. They did not call her as a witness, despite the fact that she would have provided an alternative analysis of the crucial evidence.

Again, because trial counsel had notice of the Band-Aid significance, especially when there was little physical evidence to buttress the prosecution's theory, and because trial counsel failed to take appropriate actions, and because trial counsel's failings deprived Petitioner of significant evidence and arguments, the post-conviction court's denial of guilt phase relief should be reversed.

The Court of Appeals affirmed via written opinion (*Sparks v. Premo*, 289 Or. App. 159, 408 P.3d 276 (2017)).

Petitioner timely petitioned for review to the Oregon Supreme Court. That Court denied review (*Sparks v. Premo*, 363 Or. 119, 421 P.3d 354 (2018)).

VII. Argument Amplifying the Reasons Relied on for Allowance of the Writ

Petitioner here restates his position before the Oregon Supreme Court, with an appropriate modification by deleting references to Oregon constitutional provisions:

This case involves the interpretation of two constitutional provisions, one Federal, and the other Oregon. The Federal provision is the Sixth Amendment standard that "In all criminal prosecutions, the accused shall enjoy the right * * * to have the Assistance of Counsel for his defence."

This case involves the interpretation of an Oregon statute, ORS 138.530(1)(a), in light of that constitutional provision. ORS 138.530(1) provides:

> (1) Post-conviction relief pursuant to ORS 138.510 to 138.680 shall be granted by the court when one or more of the following grounds is established by the petitioner:
>
> (a) A substantial denial in the proceedings resulting in petitioner's conviction, or in the appellate review thereof, of petitioner's rights under the Constitution of the United States, or under the Constitution of the State of Oregon, or both, and which denial rendered the conviction void[.]

This case presents issues that arise often in the context of death penalty litigation. (Petitioner recognizes that such litigation is not a significant portion of the number of cases that arise. However, he submits that such cases draw significant attention and resources.) These issues are properly preserved, and the case is free from factual disputes or procedural obstacles that might prevent this Court from reaching the legal issues.

VIII. Prayer

Wherefore, Petitioner prays that this Honorable Court grant his *Petition for Writ of Certiorari*.

Submitted September 1, 2018.

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IX. Appendix

B. Judgment of the Marion County, Oregon, Post-Conviction Court

STATE OF OREGON
Marion County Circuit Courts
APR 03 2012
FILED

IN THE CIRCUIT COURT OF THE STATE OF OREGON

FOR THE COUNTY OF MARION

JEFFERY DANA SPARKS,	)	
	)	
Petitioner,	)	
	)	
v.	)	**No. 07C11052**
	)	
JEFF PREMO, Superintendent, Oregon State Penitentiary	)	
	)	
Defendant.	)	

GENERAL JUDGMENT

IT IS HEREBY ORDERED AND ADJUDGED THAT:

Relative to the First, Third, Fourth, Fifth, Sixth, Seventh, Eighth and Ninth Claims for Relief, Judgment is hereby rendered in favor of defendant Jeff Premo, Superintendent, Oregon State Penitentiary, and against petitioner Jeffery Dana Sparks.

Relative to the Second Claim for Relief, in so far as petitioner's Second Claim for Relief relates to the penalty phase of his trial in *State v. Jeffery Dana Sparks*, Yamhill County Circuit Court No. CR98326, Judgment is hereby rendered in favor of Jeffery Dana Sparks and against Jeff Premo, Superintendent, Oregon State Penitentiary, and it is further ordered and adjudged that Jeffery Dana Sparks be retried as to penalty phase only.

Relative to the Second Claim for Relief, in so far as petitioner's Second Claim for Relief relates to portions of the trial other than the penalty phase of his trial in *State v. Jeffery Dana Sparks*, Yamhill

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County Circuit Court No. CR98326, Judgment is hereby rendered in favor of Jeff Premo, Superintendent, Oregon State Penitentiary, and against Jeffery Dana Sparks.

SO ORDERED AND ADJUDGED this 3 day of April, 2012.

Marshall L. Amiton
Senior Circuit Court Judge

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C. Opinion of the Oregon Court of Appeals

IN THE COURT OF APPEALS OF THE STATE OF OREGON

JEFFERY DANA SPARKS,
Petitioner-Appellant
Cross-Respondent,
v.
Jeff PREMO,
Superintendent,
Oregon State Penitentiary,
Defendant-Respondent
Cross-Appellant.

Marion County Circuit Court
07C11052; A151267

Marshall L. Amiton, Senior Judge.

Argued and submitted March 31, 2016.

Michael D. Curtis argued the cause for appellant-cross-respondent. With him on the briefs was Bert Dupre.

Timothy A. Sylwester, Assistant Attorney General, argued the cause for respondent-cross-appellant. With him on the brief were Ellen F. Rosenblum, Attorney General, and Anna M. Joyce, Solicitor General.

Before Ortega, Presiding Judge, and Lagesen, Judge, and Garrett, Judge.

ORTEGA, P. J.

Affirmed on appeal and cross-appeal.

ORTEGA, P. J.

In 1999, in a two-phase trial, a jury found petitioner guilty of several counts of aggravated murder for killing a 12-year-old girl and determined that he should be sentenced to death. On direct review, the Supreme Court affirmed his convictions and death sentence. *State v. Sparks*, 336 Or 298, 300, 83 P3d 304, *cert den*, 543 US 893 (2004). Petitioner then brought this action for post-conviction relief, claiming that he received inadequate assistance of trial counsel[1] in both phases of the jury trial. The post-conviction court denied relief as to petitioner's guilt-phase claims, concluding that petitioner failed to prove those claims. However, the court granted relief to petitioner on his penalty-phase claims, concluding that trial counsel's strategic decision to forgo presenting "mitigating evidence"[2] to the jury during the penalty phase was not supported by a reasonable investigation into the available mitigating evidence, and that petitioner was prejudiced by trial counsel's inadequate investigation. Accordingly, the post-conviction court ordered a retrial of the penalty phase. Petitioner appeals and the superintendent cross-appeals the resulting judgment.

On appeal, petitioner asserts that trial counsel provided inadequate assistance during the guilt phase when he failed to effectively counter the limited direct physical evidence that tied petitioner to the victim's murder, and that the post-conviction court erred by concluding otherwise. In his view, trial counsel's failure to hire a forensic pathologist hindered counsel's ability to effectively undermine the testimony of the forensic pathologist who testified for the

[1] Michael Ford and Gerald Petersen represented petitioner in his criminal trial, with Petersen primarily handling the guilt phase of the trial, and Ford primarily handling the penalty phase. For ease of reference, we refer to Ford and Petersen collectively as "trial counsel" throughout this opinion unless the context requires otherwise. Ford died before petitioner instituted this action and he was therefore unavailable to testify at the post-conviction trial regarding his actions during petitioner's criminal trial.

[2] Generally, the parties and the post-conviction court use the term "mitigation" or "mitigating" evidence to refer to evidence related to a defendant's character, background, or social history that may have, in the jury's judgment, reduced the degree of petitioner's moral (as opposed to criminal) culpability such as to weigh against a sentence of death. Accordingly, we use the term in the same manner throughout this opinion.

prosecution about his findings at the victim's autopsy. He claims that trial counsel retained a forensic scientist too late to allow her to effectively "work the case" and that, regardless, he should have called her as a witness during the trial to raise doubts about the limited direct physical evidence that tied petitioner to the crime scene.

On cross-appeal, the superintendent asserts that the post-conviction court erroneously concluded that petitioner received inadequate assistance during the penalty phase of the trial. In the superintendent's view, trial counsel made a reasonable strategic choice to forgo introducing mitigating evidence because trial counsel's preliminary mitigation investigation reasonably led him to conclude that petitioner's best chance to avoid the death penalty was to focus exclusively on convincing the jury that the state could not prove that petitioner was a future danger to society—*i.e.*, the "future dangerousness" question. The superintendent maintains that the record shows that trial counsel's mitigation investigation was sufficient to allow him to make the reasonable and appropriate tactical decision that presenting mitigating evidence could undermine his stronger "future dangerousness" argument. Alternatively, the superintendent argues that, even if trial counsel failed to exercise reasonable professional skill and judgment, petitioner did not suffer prejudice from that failure.

On appeal, we conclude that the post-conviction court did not err in concluding that petitioner failed to demonstrate that trial counsel's performance during the guilt phase of the trial was inadequate. On cross-appeal, we conclude that the post-conviction court did not err in concluding that trial counsel's decision to forgo presentation of mitigation evidence was not supported by a reasonable investigation and trial counsel's failure tended to affect the result of his case. Accordingly, we affirm.

I. UNDERLYING CRIMES

For context, we begin with the facts of the underlying crimes as recounted by the Supreme Court on direct review.

"On April 20, 1998, the victim, who was 12 years old, left her home on her bicycle. At about 6:00 p.m. the victim's mother and her friend, Blake, saw the victim with some friends near the local post office. Defendant also was present. After speaking with her mother, the victim returned home for a short time and then left again to retrieve her bicycle, which had a flat tire. At about 8:30 p.m., the victim's grandmother saw the victim walking her bicycle with a man with long dark hair similar to defendant's hair.

"That night, according to Keith, defendant and the victim entered the trailer where Keith and defendant lived. Defendant took the victim into the back bedroom and told Keith that he was 'not home.' An hour later, defendant came out of the bedroom and told Keith to go buy him condoms and a douche. Defendant had a cut on the right side of his face that had not been there before. Keith also heard what sounded like sexual sounds coming from the back bedroom.

"At some point that night, Keith saw the victim come out of the bedroom and go into the bathroom. Defendant followed her into the bathroom and Keith heard water running. At about 12:30 a.m., defendant told Keith that he was taking the victim home, and left with her. Defendant returned alone about an hour later and seemed agitated. Defendant left again at 3:00 a.m. and returned at 6:00 a.m.

"Rodriguez, an acquaintance of defendant, saw defendant at approximately 4:00 a.m. walking from the park or the railroad tracks. Defendant was wearing a black trenchcoat and a black stocking hat. When Rodriguez saw defendant again at 5:30 a.m., he was not wearing the coat or hat, and appeared to be nervous and sweating.

"The victim did not return home. Throughout the night, the victim's mother and Blake drove around and visited the victim's friends in an attempt to locate her.

"On the morning of April 21, 1998, while operating a train, an engineer observed what appeared to be a sleeping transient on the side of the railroad embankment. He called his dispatcher, who then notified the Yamhill County Sheriff's Office. The police responded to the call and discovered the partially nude body of the victim. Someone had strangled her both manually and by ligature. There was a small bruise to the entrance of her vagina consistent with sexual assault. Swabs of the victim's body were negative

for the presence of semen and defendant's DNA. However, police found a Band-Aid near the victim's body that contained DNA that was consistent with defendant's DNA and that could not have come from the victim.

"On the morning of April 21, defendant told Keith to clean the trailer because the police would be searching it. Keith burned drug paraphernalia behind the trailer, and defendant also may have burned some items. Defendant told Keith not to tell the police that he had left at 3:00 a.m. After the police interviewed Keith on April 22, defendant tried to convince Keith that the victim had not been at the trailer and he threatened to kill Keith if he caused any problems.

"On April 21, Detectives Runyon and Crabtree interviewed defendant. Defendant had a fresh scratch on the right side of his face, fresh scratches on his arm, and bruising around his biceps. During the interview, defendant repeatedly changed his story. After initially denying that he knew the victim or had had any contact with her, defendant admitted to meeting her once on April 20 in front of the market.

"Runyon, Crabtree, and Detective Ludwig interviewed defendant a second time on April 23. They confronted defendant with the information that Keith had provided. Defendant admitted that he was with the victim in his bedroom and had fondled her buttocks, breasts, and vagina. However, defendant denied having sex with her.

"The state charged defendant with 15 counts of aggravated murder, ORS 163.095; one count of first-degree sexual abuse, ORS 163.427; one count of first-degree kidnapping, ORS 163.235; one count of second-degree kidnapping, ORS 163.225; one count of first-degree attempted rape, ORS 163.375 and ORS 161.405; and one count of second-degree attempted rape, ORS 163.365 and ORS 161.405."

Sparks, 336 Or at 300-02.

At trial, petitioner's trial counsel attempted to establish reasonable doubt that petitioner committed the murder because, although petitioner had admitted to having sexual contact with the victim in his residence, there was evidence that the victim had been with petitioner

"willingly" and that they had been in "good standing" when they left petitioner's residence. Accordingly, petitioner's trial counsel attempted to show that "there was no reason for him to kill her" and that, given the lack of physical evidence tying petitioner to the crime scene, there was reasonable doubt that he killed the victim. The jury found petitioner guilty on all charges.

In the subsequent penalty phase of the trial for petitioner's aggravated murder convictions, the prosecution presented several witnesses who testified about petitioner's extensive history of criminal behavior, including a long history of sexual assaults on women and underage children, and a history of propositioning underage girls for sex. In addition, the prosecution presented evidence about petitioner's extensive possession, use, and distribution of controlled substances, and evidence outlining the conclusions from two psychological evaluations of petitioner performed in 1991. Those evaluations included diagnoses of sexual disorder and antisocial personality disorder, with elements of sadism in petitioner's sexual arousal pattern, and opinions that petitioner had a "mixed personality disorder with paranoid or sociopathic traits." Dr. Maletzky opined that petitioner presented a "very high risk to reoffend sexually" and concern that he would "use violence to gain access to additional victims for sexual crimes." On cross-examination, however, he acknowledged that, in his opinion, petitioner presented less than a 50 percent chance of committing serious violent assaults in prison.

Petitioner's trial counsel argued to the jury that the state could not carry its burden, as required by ORS 163.150(1)(b)(B), to prove beyond a reasonable doubt that "there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society." The jury had to unanimously answer "yes" to that question to recommend a death sentence. ORS 163.150(1)(e), (f). Accordingly, trial counsel attempted to convince the jury that the prosecution could not prove "future dangerousness" beyond a reasonable doubt because the evidence showed that, if petitioner was sentenced to life without the possibility of parole, he did not present a

danger to the relevant "society"—*i.e.*, the adult male prison population.

Trial counsel presented evidence that petitioner had been "written up" for disciplinary reasons only twice for minor infractions in almost six years of imprisonment, and that he had received favorable reviews for the work he had performed as an inmate and for assistance he provided to other inmates. Trial counsel also presented expert testimony from Dr. Cunningham, a national expert on "future dangerousness," who testified that, under a three-prong analysis (consisting of statistical data analysis, a review of petitioner's relevant personal history and prison record, and an in-person interview), defendant was not a future danger to the adult male prison population. He opined that petitioner presented a low risk (less than 20 to 33 percent) of inflicting serious violence on adult males in prison, and a risk in the seven to 15 percent range for persistent violence in prison. Cunningham acknowledged that, based on petitioner's past behavior, he presented a high risk that he would "sexually offend [against] young girls, young boys, and women if *** outside of prison," and that, outside of prison, there was a concern of violence in the community in general—even against adult males. In pursuing the "future dangerousness" line of defense, trial counsel did not present any testimony from petitioner's family and acquaintances, nor did trial counsel present any evidence as to petitioner's social history and upbringing.

The prosecution countered trial counsel's penalty phase case by arguing to the jury that "society" in ORS 163.150(1)(b)(B) was not limited to the adult male prison population because the legislature intended "society" to refer more broadly to the unsuspecting public. Accordingly, the prosecution asserted that it had proved "future dangerousness" because petitioner's trial counsel had conceded that petitioner was a danger to society outside of prison and, alternatively, even if "society" was limited to the prison population, the evidence showed that petitioner would find someone to prey upon in prison.

The jury determined that petitioner had acted deliberately, that defendant posed a continuing risk to society, and

that defendant should receive a death sentence.[3] Accordingly, the trial court sentenced petitioner to death.

II. POST-CONVICTION CLAIMS

In a petition for post-conviction relief, petitioner raised numerous claims for relief, most of which are not at issue on appeal. As relevant to this appeal, petitioner asserted that he was deprived of his constitutional rights to adequate assistance of counsel during the guilt phase of the trial because, given counsel's defense theory—that there was reasonable doubt that petitioner was with the victim when she was killed—trial counsel ineffectively undermined the significance and credibility of the forensic pathologist who testified for the state, and ineffectively undermined the value of the limited physical evidence that tied petitioner to the victim's murder. To support those claims, petitioner alleged that trial counsel had performed inadequately by failing to (1) adequately prepare to cross-examine the pathologist who testified for the state, (2) retain a forensic pathologist to consult with trial counsel and, as appropriate, testify at trial, (3) *timely* retain a forensic scientist, and (4) call the forensic scientist whom he eventually retained as a witness to undermine the value of the physical evidence that was located with the victim's body.

Petitioner also claimed that he had received inadequate assistance at the penalty phase of his trial because trial counsel performed an inadequate penalty-phase investigation into potential mitigation evidence, which meant

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[3] ORS 163.150(1)(b) requires the court, in a death-penalty sentencing proceeding, to submit four questions to the jury after the presentation of the evidence:

> "(A) Whether the conduct of the defendant that caused the death of the deceased was committed deliberately and with the reasonable expectation that death of the deceased or another would result;
>
> "(B) Whether there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society;
>
> "(C) If raised by the evidence, whether the conduct of the defendant in killing the deceased was unreasonable in response to the provocation, if any, by the deceased; and
>
> "(D) Whether the defendant should receive a death sentence."

The parties stipulated that the evidence did not raise the issue of whether the killing was an unreasonable response to provocation by the victim, so the question contained in subparagraph (C) was not submitted to the jury.

that trial counsel's decision to focus solely on "future dangerousness" was not a reasonable strategic choice. Petitioner asserted that, had trial counsel performed an adequate investigation and presented evidence that was available (with additional investigation) about petitioner's "life story marked by horrific physical and sexual abuse, poverty, and neglect," the jury likely would not have sentenced him to death.

The post-conviction court denied petitioner's claims as to the guilt phase of trial counsel's representation, concluding that petitioner presented insufficient evidence to sustain his allegations of inadequate assistance. However, as to the penalty phase, the court concluded that, based on what trial counsel had learned during his preliminary investigation into petitioner's background, "[a]t minimum, there were enough clues in what the defense team did know, that a reasonable attorney would and should have continued the investigation further before deciding not to present mitigation evidence." The court explained that "the investigation in this case was not complete enough before it was decided to terminate the investigation and not present mitigation evidence to the jury." The court also concluded that, if the mitigation evidence had been presented at trial, "there is a reasonable probability that the results of the proceedings would have been different (federal standard) and that such failure had a tendency to affect the result of the trial (Oregon standard)." Accordingly, the post-conviction court granted petitioner relief and ordered a retrial of the penalty phase.

A. *Constitutional Right to Adequate Assistance of Counsel*

Article I, section 11, of the Oregon Constitution guarantees a criminal defendant the constitutional right to "adequate" representation. *Montez v. Czerniak*, 355 Or 1, 6, 322 P3d 487 (2014). Similarly, the Sixth Amendment to the United States Constitution guarantees the right to "effective" assistance of counsel. *Strickland v. Washington*, 466 US 668, 688, 104 S Ct 2052, 80 L Ed 2d 674 (1984). Although we interpret and apply Article I, section 11, independently of the Sixth Amendment, the analyses are "functionally equivalent." *Montez*, 355 Or at 6-7.

To demonstrate that he is entitled to post-conviction relief, petitioner must show that counsel failed to exercise reasonable professional skill and judgment, and that petitioner suffered prejudice as a result of counsel's inadequacy. *Johnson v. Premo*, 361 Or 688, 699, 399 P3d 431 (2017). We review a post-conviction court's determinations for errors of law, accepting the court's findings of historical fact if there is evidence in the record to support them. *Montez*, 355 Or at 8. If the post-conviction court fails to make a finding, and there is evidence from which facts could be found in more than one way, we presume that the facts were found consistently with the post-conviction court's ultimate legal conclusion. *Thompson v. Belleque*, 268 Or App 1, 6, 341 P3d 911 (2014), *rev den*, 357 Or 300 (2015).

We evaluate inadequate assistance claims in two steps:

> "First, we must determine whether petitioner demonstrated by a preponderance of the evidence that [his lawyer] failed to exercise reasonable professional skill and judgment. Second, if we conclude that petitioner met that burden, we further must determine whether he proved that counsel's failure had a tendency to affect the result of his trial."

Lichau v. Baldwin, 333 Or 350, 359, 39 P3d 851 (2002) (internal citations omitted); *see also Strickland*, 466 US at 688 (the pertinent inquiry under the Sixth Amendment is whether counsel's performance "fell below an objective standard of reasonableness").

In conducting the first step, we "make every effort to evaluate a lawyer's conduct from the lawyer's perspective at the time, without the distorting effects of hindsight." *Lichau*, 333 Or at 360. Accordingly, we do not "second guess a lawyer's tactical decisions in the name of the constitution unless those decisions reflect an absence or suspension of professional skill and judgment." *Gorham v. Thompson*, 332 Or 560, 567, 34 P3d 161 (2001). In fact, the test "allows for tactical choices that backfire, because, by their nature, trials often involve risk." *Krummacher v. Gierloff*, 290 Or 867, 875, 627 P2d 458 (1981). Further, a defendant does not have a constitutional right "to a perfect defense—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." *Id.* Nevertheless, the Supreme Court has also noted that, in cases where the petitioner was charged with aggravated murder and the state sought the death penalty, "no type of criminal case requires more care in preparation." *Johnson*, 361 Or at 701.

In conducting the second step, we evaluate whether petitioner demonstrated that counsel's failure had a "tendency to affect the result of his trial," *Lichau*, 333 Or at 359 (applying Article I, section 11), or that there is a reasonable probability that the result of the proceeding would have been different. *Strickland*, 466 US at 694 (applying Sixth Amendment). A "tendency to affect" the result of a trial demands "more than [a] mere possibility, but less than [a] probability." *Green v. Franke*, 357 Or 301, 322, 350 P3d 188 (2015).

B. *Petitioner's Appeal*

We begin with trial counsel's performance during the guilt phase of the trial before examining the evidence and arguments put forth at petitioner's post-conviction trial.

1. *Evidence adduced at criminal trial*

As a starting point, we briefly recount the relevant evidence that was adduced at petitioner's criminal trial—focusing in particular on the physical evidence because it is at the heart of petitioner's guilt-phase post-conviction claims.

The state presented evidence—through eyewitness testimony and petitioner's admissions—that supported the inference that petitioner had sexually abused the victim in the bedroom of his residence on the night before her body was found. Petitioner, who had a fresh cut on his face, left his residence with the victim around midnight. In the ensuing early morning hours, petitioner was in and out of his residence for extended periods of time. He was also spotted by an acquaintance walking from the direction of the railroad tracks at about 4:00 a.m. Later that morning, the victim's partially nude body was found in heavy brush next to railroad tracks with a belt wrapped loosely around her neck. Her shorts had been cut off and her shirt and bra had

been pushed up. Police discovered a Band-Aid on the ground "along her left side near her middle torso, slightly underneath" that had a "reddish brown stain."

As to the physical evidence located at the crime scene, the state presented testimony from forensic scientists and employees of the Oregon State Police Crime Lab. First, Neville testified that she had arrived at the crime scene, observed a detective collect physical evidence (including the Band-Aid), and had the evidence (including fibers from the Band-Aid) processed at the crime lab. Scarapone and Wampler testified that DNA testing of the Band-Aid revealed that DNA located on the Band-Aid was consistent with petitioner's DNA. Putnam testified that he eliminated the victim's clothing as the source of the fibers that were stuck to the Band-Aid. He also had conducted a "hair analysis" of the two hairs collected near the body. He found that one hair was consistent with petitioner's "head hair standards" and one was consistent with the victim. Accordingly, the state emphasized that, in addition to all the circumstantial evidence of petitioner's guilt, the presence of the Band-Aid with the body placed petitioner at the scene of the murder. That is, the state posited that the Band-Aid had fallen off of petitioner at the crime scene while he was strangling the victim.

In cross-examining the state's witnesses, petitioner's trial counsel focused on two themes. First, he established that none of the physical evidence collected at the crime scene had tested positive for semen. Second, he focused on showing that there was limited physical evidence that tied petitioner to the crime scene, and that the evidence that existed did not conclusively place petitioner there. For example, he elicited testimony from the state's witnesses that called into question how the Band-Aid and the hair had been transported to the crime scene. Scarapone admitted that she did not know how the Band-Aid ended up there. As for the hair, Putnam explained that, just because the hair was consistent with petitioner's head hair standards, he could not positively identify petitioner as the source of the hair. He also admitted that he could not tell if the hair had been transported to the scene via primary or secondary transfer—that is, he could not tell whether the evidence was

deposited by the primary source of the hair or whether it could have been transported to and deposited at the scene by a secondary source, such as the victim.

The state also presented the testimony of the forensic pathologist who had performed the victim's autopsy, Dr. Lewman. First, Lewman described his qualifications as a forensic pathologist and his role as the Oregon State Medical Examiner. Mainly, however, he testified about his findings from the victim's autopsy. In particular, he explained that the victim's cause of death was asphyxia by manual and ligature strangulation. He opined that a black belt that had been wrapped around the victim's neck when she had arrived at the medical examiner's office had likely been "the implement that was used," and explained that the injuries he had observed had led him to conclude that the victim died of asphyxia by strangulation. Lewman further testified that he had observed other injuries on the victim's body, including blunt force injuries to her head, scratches on her arms, legs, and torso, and one small bruise to the entrance of her vagina, which he opined would be consistent with sexual assault.

Petitioner's trial counsel performed very limited cross-examination of Lewman during which he established that no semen had been located during the autopsy.

2. *Evidence adduced at post-conviction trial*

In his post-conviction trial, petitioner attempted to prove that trial counsel performed inadequately because he failed "to use what was available to him" to undermine the value of the limited physical evidence that linked petitioner to the crime scene. Specifically, petitioner asserted that, given that trial counsel's defense theory was to prove that there was reasonable doubt that petitioner was at the crime scene, it was imperative that trial counsel "marshal and present all evidence supporting [that] theory."

First, petitioner asserted that, had trial counsel hired a forensic pathologist, he could have more effectively cross-examined Lewman. He claimed that a "more-thorough" cross-examination of Lewman would have raised a "large number of points of potential evidentiary significance to the

jury" and could have called into question Lewman's "lack of medical expertise" regarding the unusual circumstances of the victim's murder. In particular, he identified 31 points[4] that he posited could have been developed more thoroughly on cross-examination and that would have undermined the "significance" and "credibility" of Lewman's testimony and expert opinions. However, petitioner did not explain specifically how those "31 points" would have called into question petitioner's guilt, other than to assert that "the sheer number of points that counsel could point to would undermine the significance and credibility" of Lewman's testimony.

Second, petitioner claimed that, given the importance of the limited physical evidence that linked petitioner to the crime scene, trial counsel performed inadequately because he hired a forensic scientist with inadequate time for her to "work the case," and then failed to call her as a witness at the criminal trial. During the post-conviction trial, petitioner demonstrated that trial counsel hired a forensic scientist, Cwiklik, in early February 1999 to examine and test some of the physical evidence in the case. Cwiklik had expertise in the analysis of trace evidence, including fibers, hairs, soil, and other materials. Cwiklik testified that, given that she was hired only a few weeks before the start of petitioner's criminal trial, "[w]e did the things that seemed to be most important to the case, questions at the time, and we had to let some things go. And not that this is unheard of but we—I think we let some things go that—that would have been very beneficial to have done."

Cwiklik explained that she had performed testing on the Band-Aid—specifically focusing on cloth fibers that were stuck to it. That testing indicated to Cwiklik that "there [had been] some kind of intermediary transfer of object or a person that would have been a fabric object."

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[4] The "31 points" highlighted by petitioner generally relate to the following issues: the factual circumstances of the case were unusual; Lewman never went to the crime scene and was unable to determine the time of death; Lewman did not know how the victim's body had been removed from the scene or how the body had been handled at the scene and during transport to the medical examiner's office; Lewman lacked "scientific evidence" about the victim's location and activities in the hours before her death; and the "scientific evidence" of sexual assault of the victim was limited and there was no evidence of sexual penetration.

Specifically, she had reached the conclusion that the Band-Aid did not just "fall off of somebody's skin onto the ground" but rather, that it "was probably stuck to some piece of fabric *** and then fell to the ground." Her investigation prior to the criminal trial also revealed that the two hairs that were located on a branch near the victim's body could easily have been deposited at the crime scene by "secondary transfer."

Cwiklik testified that she had helped trial counsel prepare for the cross-examination of the state's witnesses but that, if she had been called as a witness at petitioner's criminal trial, she could have testified that the Band-Aid and hair "could have been explained as having gotten there without [petitioner] being the source of them." Petitioner asserted that those conclusions were imperative to counter the state's claim that the physical evidence demonstrated that petitioner had been at the crime scene. In petitioner's view, trial counsel performed inadequately by not calling Cwiklik as a witness to testify about her findings. In sum, petitioner asserted that trial counsel could have "more effectively" called into question petitioner's presence at the scene by demonstrating that the only physical evidence that connected him to the scene was "at best ambiguous, and that it could have arrived there separately from him."

In general, the superintendent countered that petitioner had failed to demonstrate how trial counsel's performance was deficient. Alternatively, even if trial counsel performed deficiently in the manner alleged by petitioner, the superintendent challenged how those deficiencies would have had any tendency to affect the result of the trial given that other witnesses established the points that petitioner raised and given the overwhelming circumstantial evidence of petitioner's guilt.

As for Lewman's testimony, the superintendent argued that trial counsel reasonably decided not to hire a forensic pathologist to undermine Lewman's credibility. The superintendent asserted that there was no evidence that Lewman's expertise or credentials in the field of forensic pathology could be challenged. Moreover, the superintendent claimed that many of the "31 points of evidentiary significance" that petitioner identified were actually raised

at trial in various ways. For example, the superintendent pointed to the instances where trial counsel elicited testimony that there was limited "scientific" evidence of sexual assault, that the state's evidence was mostly circumstantial, and "various other evidentiary difficulties in the state's case." As for many of the other "31 points," the superintendent asserted that those were "nitpicky" questions that, "at best, might have emphasized the circumstantial nature of evidence Lewman was able to obtain from his examination of the victim's body." Further, the superintendent pointed out that trial counsel's closing argument highlighted the limited amount of "scientific physical evidence" of sexual assault, the circumstantial—rather than direct—evidence that petitioner had been at the crime scene, and other potential evidentiary difficulties in the prosecution's case. Finally, the superintendent maintained that petitioner failed to show how a more "effective" cross-examination would have elicited answers that were "helpful" to petitioner's defense, pointing out that many of the "31 points" were not particularly important to the defense theory. In sum, the superintendent maintained that trial counsel reasonably could have concluded that it was not necessary to retain a forensic pathologist in order to establish the same points that were made at the trial.

As for petitioner's allegations about trial counsel's failure to undermine the evidentiary value of the Band-Aid, the superintendent argued that Cwiklik's testimony simply established that, had she been called to testify at the criminal trial, she would have testified that the hair and Band-Aid might have ended up at the crime scene from a source other than petitioner. In the superintendent's view, trial counsel effectively established that point in other ways at the trial, so deciding not to call Cwiklik was not an unreasonable strategic choice. In particular, the superintendent explained that Cwiklik had helped trial counsel prepare to cross-examine the state's witnesses as to the possibility of "secondary transfer," enabling counsel to elicit testimony acknowledging that possibility. The superintendent also pointed out that trial counsel had emphasized during closing argument that the state had not proven how the Band-Aid (or petitioner's hair) had ended up at the crime scene. Given

those circumstances, the superintendent asserted that reasonable trial counsel could conclude that simply consulting with Cwiklik in preparation for cross-examination was preferable, or at least sufficient, to establish the limited point that the Band-Aid and hair could have been "transferred" to the crime scene by someone other than petitioner.

As noted, the post-conviction court denied petitioner's guilt-phase claims, concluding that he did not provide sufficient evidence to prove those claims. Petitioner appeals the resulting judgment, challenging the court's conclusion.

3. *Analysis of petitioner's appeal*

On appeal, both parties generally reprise their arguments from the post-conviction trial. Accordingly, the question is whether, as a matter of law, the post-conviction court correctly concluded that the facts proved by petitioner did not demonstrate that trial counsel failed to exercise reasonable professional skill and judgment during the guilt phase.

First, as to petitioner's claims concerning Lewman's opinions and expertise, we agree with the superintendent that it was not error to conclude that petitioner failed to show that not hiring a forensic pathologist fell below the standard of adequacy. Overall, petitioner failed to demonstrate that trial counsel had any reason to doubt Lewman's credentials or the substance of his testimony, such that the exercise of professional skill and judgment necessitated hiring a forensic pathologist. Nothing in the record showed that there was a reasonable basis for trial counsel to challenge Lewman's expertise and credentials. And perhaps more importantly, Lewman's testimony about the victim's injuries and cause of death was not controversial nor was undermining it central to petitioner's defense theory. That is, there does not appear to be any dispute that the victim died of strangulation at or near the place where her body was found.

As to the "31 points" of "evidentiary significance" raised by petitioner, the most relevant of those points were addressed in other ways during the trial, and to the extent

some were not raised, petitioner failed to demonstrate that those points were significant enough that reasonable trial counsel would have been compelled to raise them. Overall, Lewman's testimony was not particularly controversial in the context of the criminal trial, so trial counsel reasonably decided not to expend resources hiring a forensic pathologist to challenge Lewman's testimony, and trial counsel reasonably tied his cross-examination of Lewman to the defense theory—that the state could not prove beyond a reasonable doubt that petitioner was with the victim when she was killed. Accordingly, the post-conviction court did not err in concluding that trial counsel's decision not to hire a forensic pathologist was constitutionally adequate.

We also agree that the post-conviction court did not err in concluding that trial counsel's performance with respect to hiring Cwiklik and deciding not to call her as a witness was within the range of reasonable professional skill and judgment. Petitioner failed to establish that hiring Cwiklik in February 1999, as opposed to some earlier date, hampered her ability to properly prepare for petitioner's defense. She vaguely suggested that "we let some things go that—that would have been very beneficial to have done" but did not provide sufficient detail as to what they neglected to do because of the limited time, and how those things would have been helpful to petitioner's defense. Accordingly, petitioner failed to prove that the timing of Cwiklik's hiring was problematic. Further, as to trial counsel's failure to call her as a witness, the main point that she could have testified about—that the Band-Aid and hair evidence did not conclusively place petitioner at the crime scene—was addressed by trial counsel in other ways at trial.

It is possible that Cwiklik could have more forcefully established the point that the existence of fibers on the Band-Aid suggested that it had been transferred to the crime scene from clothing and not directly from a person's skin. As it was, the testimony elicited by trial counsel on cross-examination of the state's witnesses established the more general point that "secondary transfer" could explain the presence of the Band-Aid at the crime scene. Nevertheless, the failure to call Cwiklik to potentially establish that nuanced point does

not rise to the level of an absence of professional skill and judgment in the context of the entire case. The constitution does not afford petitioner a right to a "perfect defense," but allows for the reality that a lawyer "seldom *** walk[s] away from a trial without thinking of something that might have been done differently." *Krummacher*, 290 Or at 875. In short, the post-conviction court did not err in concluding that the facts proved did not demonstrate that reasonable trial counsel could not have concluded that it would have been sufficient to use cross-examination to establish the limited point that the Band-Aid and hair could have been "transferred" to the crime scene by someone other than petitioner, particularly, where that point was part of a larger strategy to demonstrate that the prosecution's case was built on circumstantial evidence. Accordingly, we affirm the post-conviction court's judgment on appeal.

C. *The Superintendent's Cross-Appeal*

Next, we address the superintendent's cross-appeal, in which he challenges the post-conviction court's conclusion that trial counsel performed inadequately during the penalty phase of petitioner's trial. We begin with a brief overlay of the applicable statutory context.

1. *Penalty phase questions for the jury*

After the jury found petitioner guilty of aggravated murder, ORS 163.150(1)(a) required the court to conduct a separate sentencing proceeding "to determine whether the defendant shall be sentenced to life imprisonment ***, life imprisonment without the possibility of release or parole ***, or death." At the close of evidence in the penalty phase, the court was required to submit four issues to the jury:

> "(A) Whether the conduct of the defendant that caused the death of the deceased was committed deliberately and with the reasonable expectation that death of the deceased or another would result;
>
> "(B) Whether there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society;

> "(C) If raised by the evidence, whether the conduct of the defendant in killing the deceased was unreasonable in response to the provocation, if any, by the deceased; and
>
> "(D) Whether the defendant should receive a death sentence."

ORS 163.150(1)(b). ORS 163.150(1)(d) required the state to prove the first three issues beyond a reasonable doubt. For the trial court to impose the death penalty, the jury had to unanimously answer "yes" to all four questions. ORS 163.150(1)(e), (f).

2. *Trial counsel's penalty phase preparation and decision*

Shortly after being retained to defend petitioner, trial counsel hired Jaqua, an "experienced mitigation investigator," to find possible mitigating evidence to present at the penalty phase. Jaqua, who had worked with trial counsel on prior capital cases, conducted her investigation by interviewing petitioner "a few times," petitioner's mother once, and at least one of his brothers.[5] She also reviewed discovery provided by the state that included petitioner's extensive juvenile, criminal, and school records, although she did not interview any individuals connected to those records or the information contained in them. Her investigation into petitioner's social history revealed a "very criminal family" that was "very abusive emotionally, some physical." Based on her investigation, Jaqua prepared a "timeline" of petitioner's life. The timeline listed petitioner's prior convictions and incarcerations, other uncharged criminal acts, his employment history, and other points in his social history. Notably, the timeline contained very limited information related to petitioner's childhood. Jaqua noted that petitioner was disciplined by "an ass whipping with an electrical cord" during his childhood and that petitioner remembered being hospitalized at around one-and-a-half years old but could not remember the reason for that hospitalization. Otherwise, the timeline did not address petitioner's life between his birth and the age of 12. She communicated regularly with trial counsel regarding her investigation.

[5] At the post-conviction trial, Jaqua testified that she did not remember everyone to whom she had talked or the specific efforts she had made to talk to additional people. Moreover, she explained that her files related to her mitigation investigation of petitioner could not be located.

Based on Jaqua's investigation, trial counsel decided before trial to forgo presenting mitigation evidence at the penalty phase. Instead, trial counsel chose to focus solely on the "future dangerousness" question by preparing to present evidence to the jury that, if petitioner were sentenced to life in prison without the possibility of parole, the state could not prove beyond a reasonable doubt a "probability that [he] would commit criminal acts of violence that would constitute a continuing threat to society." ORS 163.150(1)(b)(B). In preparation for that defense, trial counsel retained Cunningham to evaluate petitioner and offer an opinion on the likelihood that petitioner would commit violence in prison.

At the post-conviction trial, trial counsel addressed his decision to focus solely on "future dangerousness." He explained:

> "We had identified some potential mitigation witnesses who were people that liked [petitioner], and this is a shorthand method of language, in essence were saying that [petitioner] was a good guy. But I did not feel those witnesses were of any value to us because of the ability of the district attorney to say, well, did you know about him raping X? No. Well, *** would that change your opinion about [petitioner] being a good guy? If you had known about him raping Y, would that change—and frankly, I don't care whether they said yes or no. I did not know of any character witnesses that we could use in this case."

In addition, trial counsel felt that there would be a risk in putting any of petitioner's family members on the witness stand because they generally had criminal histories that could reflect poorly on petitioner.

Trial counsel also feared that "mitigation evidence" might have detracted from, or even undermined, the strong "future dangerousness" defense that they had planned to pursue. Trial counsel explained:

> "It was our position that we were, together with the state psychiatrist, agreeing that [petitioner] was not dangerous within the prison setting. [The state's psychiatrist] specifically stated that there was less than 50 percent of the danger. And the only experts that we knew would be

> testifying would be testifying that within the prison setting that [petitioner] was not going to be dangerous. We put our eggs in that basket, as you can see by reviewing the trial transcript."

He also noted:

> "Anytime, in my opinion, that you have extremely strong evidence that you're basing your case on, the presentation of evidence of lesser quality has a tendency to demean from your strong evidence, and I try to keep that in mind."

Trial counsel explained that he felt it could be counterproductive to introduce "additional things [such] as the blame of this runs to something other than [petitioner]."

As noted, the jury rejected trial counsel's argument that the state failed to prove "future dangerousness," and concluded that petitioner should receive the death penalty.

3. *Penalty phase evidence adduced at post-conviction trial*

In petitioner's post-conviction case, he set out to prove that trial counsel's strategic decision to focus solely on "future dangerousness" was unreasonable because it was based on an inadequate mitigation investigation. In other words, petitioner argued that, at the time trial counsel made the decision to forgo presenting mitigation evidence, he did not have adequate information to make that decision. Further, petitioner argued that, had the jury heard the complete and true picture of his life story through the wealth of mitigation evidence that was available at the time of his criminal trial, the jury likely would not have determined that the death penalty was appropriate.

Before examining petitioner's post-conviction case, we pause to set out the specific legal standards that apply to petitioner's claim. Generally, "strategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable." *Strickland*, 466 US at 690. However, "strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation." *Id.* at 690-91. Our Supreme Court has put it another way: Tactical decisions are deserving of

considerable deference, but they "must be grounded on a reasonable investigation." *Gorham*, 332 Or at 567. "Accordingly, each decision to limit investigation of a particular defense itself must be a reasonable exercise of professional skill and judgment under the circumstances." *Lichau*, 333 Or at 360.

Accordingly, "a particular decision not to investigate must be directly assessed for reasonableness in all the circumstances, applying a heavy measure of deference to counsel's judgments." *Strickland*, 466 US at 691. In such cases, the applicable inquiry is not whether counsel should have presented a mitigation case, it is "whether the investigation supporting counsel's decision not to introduce mitigating evidence of [the petitioner's] background *was itself reasonable*." *Wiggins v. Smith*, 539 US 510, 523, 123 S Ct 2527, 156 L Ed 2d 471 (2003) (emphasis in original).

Here, to prove his claim, petitioner first offered evidence that trial counsel had failed to uncover vast amounts of mitigation evidence that was available at the time of petitioner's criminal trial. He offered a report prepared by Rogers, a mitigation specialist, based on information that she opined was known or reasonably discoverable at the time of petitioner's criminal trial. That report was based on the discovery that Jaqua had reviewed at the time of petitioner's criminal trial as well as interviews conducted by Rogers of 13 people—consisting of petitioner's family members, friends, and acquaintances. Her report outlined petitioner's background and social history in extensive detail. Ultimately, she opined that trial counsel had failed to discover a substantial body of mitigation evidence that had been available at the time of petitioner's criminal trial.

In particular, Rogers concluded that the investigation failed to uncover the terrible circumstances of petitioner's childhood. Rogers noted that Jaqua's timeline failed to address the extent of sexual and physical abuse suffered by petitioner, the environment of extreme poverty and neglect in which he grew up, the criminal behavior his parents and siblings exhibited, as well as alcohol and illegal drug use by petitioner's parents, his introduction to the use of alcohol and illicit drugs by his father, a lack of adequate

medical care, and his exposure to domestic violence, violence between siblings, and pervasive criminal behavior.

Petitioner also presented witnesses at the post-conviction trial who testified about the chaotic and violent circumstances of petitioner's childhood. In particular, those witnesses testified that petitioner's father abused alcohol and was physically, mentally, verbally, and sexually abusive. Further, the testimony demonstrated that petitioner's mother abused alcohol until petitioner turned 12 years old, that she was generally neglectful, that the family as a whole moved often, attended school sporadically, fought like "cats and dogs," and that all eight children in petitioner's family demonstrated signs of serious disturbance.

Next, petitioner presented expert testimony to demonstrate that trial counsel failed to meet professional standards for mitigation investigations in capital cases. First, Albarus-Lindo, a mitigation specialist, explained that a mitigation investigation requires a "complete work-up" of the accused that is dedicated to looking into the person's life to identify the factors that may have shaped the person's development. Albarus-Lindo testified that it was "never appropriate" to limit a mitigation investigation to a review of documents that exist about the person because face-to-face interviews with the defendant and people involved in the defendant's life "really helps to individualize the person." She emphasized that, because defendants in capital cases often come from "broken situations," mitigation investigators must take time to develop trust with the defendant and his family and friends so that the investigator can break down "barriers to disclosure."

Turning to the specifics of petitioner's criminal trial, Albarus-Lindo opined that Jaqua's timeline suggested that "it's time to start looking because there are a lot of red flags here that would suggest that there is a lot of things going, a lot of risk factors going on in [petitioner's] life that need to be explored." In particular, she expressed concern that the timeline addressed very little between petitioner's birth and age 12 because such a gap in petitioner's social history meant that his "childhood essentially is not there."

She explained that, in her view, the timeline included indications that petitioner grew up in a dysfunctional family with domestic violence, substance abuse, and possible child neglect. She also felt that, given petitioner's history of serious sex offenses, trial counsel had enough information to compel further investigation into instances of sexual abuse in the family.

Therefore, in Albarus-Lindo's opinion, Jaqua conducted an inadequate mitigation investigation. She believed that Jaqua should have conducted hours of interviews with defendant, his family, neighbors, teachers, and others who knew him, yet Jaqua had interviewed petitioner "a few times" and had otherwise relied almost entirely on the discovery documents provided by the prosecution. She also thought that Jaqua's time entries (and the total amount of time spent investigating mitigation) indicated that the investigator's work was insufficient.

Balske, a capital defense attorney, testified on petitioner's behalf about the professional standards in death penalty cases in Oregon that existed at the time of petitioner's criminal trial. In his opinion, a competent attorney must discover "every fact" about the defendant in a capital case so that the attorney is able to form a "unified strategy" with respect to the guilt and penalty phases of the trial. That is, once the attorney has a full picture of the available mitigation evidence, trial counsel can make a decision on how to present the penalty phase. He opined that, in 1999, a competent and effective attorney would not make a decision on how to present the penalty phase without a complete mitigation investigation.

As for the mitigation investigation in petitioner's case, Balske thought that it was not sufficiently complete. He explained that Jaqua's timeline provided insufficient information on which to base a decision not to pursue a mitigation defense at the penalty phase and that, in this case, trial counsel "gave away" the mitigation defense without knowing what he would have had. In other words, because the mitigation investigation was incomplete, trial counsel's decision not to pursue a more complete mitigation investigation was unreasonable.

Balske also explained that, in his view, Oregon's unique statutory structure made trial counsel's decision all the more unreasonable because petitioner could have had "two bites at the apple." He noted that Oregon is unique because in most states "future dangerousness" is merely an aggravating factor that is weighed against other mitigating factors. In Oregon, however, "future dangerousness" is a separate question that must be answered affirmatively by the jury to impose the death penalty. Balske opined that trial counsel was "free to fight about future dangerousness" but that, in doing so, reasonable trial counsel would not give up the opportunity to introduce evidence that might explain petitioner's actions in a way "that calls for mercy."

Finally, petitioner presented testimony of expert witnesses about how the mitigation evidence that was available at the time of petitioner's criminal trial could have been used to explain the person whom petitioner turned out to be. Dr. Close, a professor in special education, testified that, based on his review of records and an interview with petitioner, petitioner presented with a number of risk factors that may increase the likelihood that a child will have a "negative outcome" later in life. In addition, Cunningham—the expert who had testified in petitioner's criminal trial about "future dangerousness"—testified on petitioner's behalf. He explained that he had been asked by trial counsel to only address "future dangerousness," although he had, in other cases at that time, conducted evaluations into "adverse development factors" that would have informed an appropriate mitigation case. Further, he identified some "adverse development factors" from the mitigation information that Rogers had uncovered. In his view, the mitigation evidence uncovered by Rogers showed "adverse development factors in several primary arenas." In particular, he identified adverse development factors in the "wiring arena," the "parenting and family arena," and the "community arena." He concluded that those factors can lead to an increased likelihood of a troubled life as an adult.

In sum, petitioner presented evidence that trial counsel conducted an inadequate mitigation investigation, and that, in a capital case such as this one, an attorney

exercising reasonable professional skill and judgment would have conducted a more thorough mitigation investigation before deciding to forgo that line of defense. Further, because the mitigation investigation that ultimately supported trial counsel's decision not to present mitigation evidence was itself not reasonable, trial counsel's strategic choice to focus solely on future dangerousness was not reasonable.

The superintendent countered petitioner's case by arguing that trial counsel made an informed strategic choice not to present mitigation evidence during the penalty phase after investigating petitioner's family background, criminal record, and social history. He argued that, based on the information gathered in trial counsel's investigation, trial counsel had made a reasonable tactical decision to forgo mitigation evidence because he had feared that such a presentation would backfire on petitioner by undermining petitioner's stronger argument that the state could not prove "future dangerousness."

The post-conviction court found that there was significant additional mitigation evidence that existed at the time of petitioner's criminal trial, and that Jaqua would have discovered "a good portion" of the same information if she had been allowed to continue her investigation. The court also found that the additional mitigation evidence revealed a "childhood so horrible that it is almost beyond comprehension." Further, the court determined that trial counsel's preliminary mitigation investigation was an insufficient basis on which to decide to abandon a mitigation strategy. That is, the court concluded that "[a] mitigation investigation that in essence simply outlines a defendant's criminal history and school attendance, and says very little about the nature of a very traumatic upbringing or psychological history, is not sufficient to base a decision not to present mitigating evidence." The court noted that, "[a]t minimum, there were enough clues in what the defense team did know, that a reasonable attorney would and should have continued the investigation further before deciding not to present mitigation evidence." The court concluded that "the investigation in this case was not complete enough before it was decided to terminate the investigation and not present mitigation evidence to the jury." As to the prejudice, the court concluded

that had the available mitigation evidence been presented at trial, it likely would have had a tendency to affect the result of the trial.

4. *Arguments on cross-appeal*

a. Inadequacy

On cross-appeal, the superintendent reiterates the arguments he made to the post-conviction court—*i.e.*, trial counsel made a reasonable and constitutionally adequate tactical choice not to present mitigating evidence during the penalty phase and, instead, attempted to convince the jury that petitioner would not present a danger to society if he was incarcerated for life without parole. The superintendent argues that the evidence at the post-conviction trial demonstrated that, at the time trial counsel made the tactical decision to forgo presenting mitigating evidence, he had sufficient information to make that choice.

The superintendent points out that there was evidence that, at the time of trial counsel's decision, he had information that petitioner's family background included "domestic abuse" and a lack of steady employment. Trial counsel also had information that the people who petitioner thought could be called as mitigation witnesses, including members of petitioner's family, would not have been useful in presenting a compelling mitigation case for petitioner because petitioner's family was "dysfunctional" with many family members having criminal records. The superintendent also notes that trial counsel's decision was colored by his knowledge that jurors reasonably may choose to view mitigating evidence as aggravating evidence—for example, to show that the defendant is seriously damaged and beyond redemption. Accordingly, such evidence has been widely recognized by courts as a "two-edged sword." *See Montez*, 355 Or at 32 ("[M]itigation evidence, by nature, often is a 'two-edged sword' that, with respect to a jury, may be as capable of damaging a case as it is of aiding it.").

Whether trial counsel performed adequately in a particular case is intensely case specific. However, the United States Supreme Court's decision in *Wiggins* provides some guidance in this case. In *Wiggins*, the Court engaged

in the same inquiry that we are charged with in this case: Whether the investigation supporting counsel's decision not to introduce mitigation evidence of the petitioner's background was itself reasonable. 539 US at 523. In *Wiggins*, the record demonstrated that counsel's mitigation investigation drew from three sources: a psychological evaluation, a written presentencing investigation that included a one-page "personal history," and records documenting the petitioner's various placements in the foster care system. *Id.* The Court noted that counsel's decision not to expand the scope of the investigation beyond those sources fell short of professional standards that prevailed in Maryland at that time, as well as capital defense guidelines propounded by the American Bar Association. Despite the "well-defined" norms in capital defense work, "counsel abandoned their investigation of petitioner's background after having acquired only rudimentary knowledge of his history from a narrow set of sources." *Id.* at 524. Further, the Court concluded that, based on the information that counsel had discovered, any reasonably competent attorney would have realized that pursuing these leads was necessary to making an informed choice among possible defenses. *Id.* at 525. The Court noted that "[i]n assessing the reasonableness of an attorney's investigation *** a court must consider not only the quantum of evidence already known to counsel, but also whether the known evidence would lead a reasonable attorney to investigate further." *Id.* at 527. Although *Wiggins* does not dictate any particular result in this case, it does provide a useful framework for evaluating the post-conviction court's resolution of petitioner's penalty-phase claims.

Under that framework, we conclude that the post-conviction court did not err in concluding that trial counsel's decision to forgo presenting mitigation evidence was not "grounded on a reasonable investigation." *See Gorham*, 332 Or at 567. Petitioner proved, by a preponderance of the evidence, that trial counsel's investigation fell below professional standards that existed at that time, and that there was enough information uncovered in the limited investigation that was conducted to compel reasonable counsel to pursue additional investigation.

To recap petitioner's post-conviction case, petitioner presented evidence that trial counsel's mitigation investigation uncovered practically no information about petitioner's childhood, and was based on limited interviews of petitioner, his mother, and one of petitioner's brothers, and discovery provided by the prosecution. The post-conviction court found that there was significant additional mitigation evidence available at the time of the trial that could have been uncovered (and would have likely been uncovered) with additional investigation. That available evidence included significant detail about a "childhood so horrible that it is almost beyond comprehension." Moreover, petitioner introduced evidence that there were enough "red flags" in the mitigation evidence that trial counsel had uncovered that reasonably competent counsel would have conducted additional investigation. And, prevailing professional standards in Oregon at the time dictated a thorough mitigation investigation that should have, at least in part, focused on petitioner's upbringing. Finally, petitioner produced evidence that the mitigation evidence that trial counsel failed to uncover could have been used, through regular and expert testimony, to present a case to the jury that petitioner's upbringing and social history reduced his "moral culpability" for his crimes.

Furthermore, we disagree with the superintendent that this is a case where the evidence showed, as a matter of law, that a limited investigation into mitigation was reasonable because there was evidence to suggest that a mitigation case would have been counterproductive, or that further investigation would have been fruitless. *See Wiggins*, 539 US at 525 (recognizing that, in such cases, limited investigations into mitigation evidence can be reasonable). We acknowledge that trial counsel decided to focus solely on "future dangerousness" in part because he viewed any "character" witnesses on behalf of petitioner as counterproductive and felt, based on the information that he had, the better tactical approach was to go with the stronger argument on "future dangerousness." In some situations, that tactical approach might have been a reasonable choice. However, in this case, where the post-conviction court did not err in concluding that the underlying mitigation investigation was inadequate, it did not err in concluding that

trial counsel did not have a reasonable basis to evaluate whether his "future dangerousness" argument was in fact the stronger of the arguments available to him. Moreover, a lack of "character witnesses" is fundamentally different than the type of mitigation evidence that petitioner demonstrated could have been uncovered and presented in this case. That is, petitioner's claim is based on trial counsel's failure to uncover and put forth evidence about petitioner's background that might have explained the person that petitioner "came to be," not that he was a "good guy." And finally, this is not a case where both strategies ("future dangerousness," and "mitigation") were necessarily mutually exclusive. In fact, trial counsel knew that the prosecution was going to put on a parade of witnesses to testify about petitioner's long criminal history, including his extensive history of sexual assault of women and underage children. It is unclear how that evidence—left unchallenged and unexplained by any mitigation evidence—would not have undermined trial counsel's "future dangerousness" theory more than the mitigation evidence that trial counsel had uncovered.

b. Prejudice

Finally, we must examine the post-conviction court's conclusion that petitioner met his burden to prove that "trial counsel's acts or omissions '*could have tended to affect*' the outcome of the case." *Green*, 357 Or at 323 (quoting *Lichau*, 333 Or at 365 (emphasis in *Green*)). On cross-appeal, the superintendent advances a number of reasons why the post-conviction court's determination of prejudice was erroneous.

The superintendent argues that, at least as to some of petitioner's proposed mitigation witnesses, petitioner failed to show that the witnesses would have been willing and available to testify at petitioner's criminal trial, or that their testimony would have been both admissible and exculpatory in the context of this case. The superintendent also argues that much of the mitigation evidence introduced at petitioner's post-conviction trial would have been inadmissible at the penalty phase of his criminal trial as hearsay, mere speculation, or not based on the witnesses' first-hand knowledge.

The superintendent also takes aim at the availability and persuasive value of some of the potential mitigation evidence uncovered by Rogers. For one, the superintendent argues that any evidence that petitioner had been sexually abused was not available at the time of the initial investigation. Petitioner had previously denied that he had been abused, and, according to the superintendent, there is no evidence that petitioner ever informed trial counsel of any abuse. In addition, the superintendent claims that much of the mitigation evidence that Rogers uncovered involved incidents that took place in petitioner's family as opposed to things that happened to petitioner. Accordingly, the superintendent characterizes that evidence as limited in value because it was not specific to petitioner.

The superintendent also dismisses the potential testimony of Close and Cunningham as unpersuasive because it simply would have told the jurors something that they could have surmised for themselves—a troubled childhood leads to increased risks of a troubled adulthood. And finally, the superintendent argues that petitioner failed to demonstrate prejudice because, even if trial counsel had completed his mitigation investigation and produced that evidence at trial, the jury would have recommended the death penalty anyway because of the overwhelming nature of the aggravating evidence.

We conclude that the post-conviction court did not err in concluding that petitioner established prejudice. As noted, the court explicitly found that, had Jaqua been allowed to continue her mitigation investigation, she would have found the same information (or at least a "good portion of it") that Rogers located. And the court concluded that, had the jury been presented with a mitigation case consisting of some or all of that information, it could have had a tendency to affect the result.

Here, even if we agree with the superintendent that some of the mitigation evidence discovered by Rogers would not have been available or admissible at the criminal trial, we are convinced that a reasonably competent attorney would have introduced a significant amount of the

mitigation evidence in an admissible form.[6] *See Wiggins*, 539 US at 535 (concluding that had a competent attorney been aware of undiscovered mitigation evidence he would have introduced it at sentencing in admissible form). Accordingly, we are convinced that the evidence that would have been admitted would add up to enough of a mitigation case to create more than a "mere possibility" that it would have affected the outcome of the penalty phase. That is particularly true given that the prosecution's presentation of extensive evidence about petitioner's criminal history and sexual assaults on women and children went unchallenged. Some level of a mitigation case would have provided some explanation for petitioner's actions, or, at least, could have influenced at least one juror's appraisal of petitioner's moral culpability enough to tip the balance in favor of sparing petitioner from the death penalty. Accordingly, the post-conviction court did not err in granting petitioner relief on his penalty-phase claims.

Affirmed on appeal and on cross-appeal.

[6] The superintendent does not argue that had trial counsel been aware of the full extent of the mitigation evidence that was eventually uncovered by Rogers, he would not have presented a mitigation case to the jury.

D. Order Denying Review of the Oregon Supreme Court

IN THE SUPREME COURT OF THE STATE OF OREGON

JEFFERY DANA SPARKS,
Petitioner-Appellant
Cross-Respondent,
Petitioner on Review,

v.

JEFF PREMO, Superintendent, Oregon State Penitentiary,
Defendant-Respondent
Cross-Appellant,
Respondent on Review.

Court of Appeals
A151267

S065665

ORDER DENYING REVIEW

Upon consideration by the court.

The court has considered the petition for review and orders that it be denied.

THOMAS A. BALMER
CHIEF JUSTICE, SUPREME COURT
6/7/2018 10:05 AM

c: Timothy A Sylwester
Michael D Curtis
Bert Dupre

jr

ORDER DENYING REVIEW

REPLIES SHOULD BE DIRECTED TO: State Court Administrator, Records Section,
Supreme Court Building, 1163 State Street, Salem, OR 97301-2563
Page 1 of 1

Certificate of Service

I hereby certify that I served the foregoing *Petition for Writ of Certiorari* delivered contemporaneously with this Certificate of Service in keeping with Rule 29 of this Court, by depositing it with the United States Postal Service, with first-class postage prepaid, addressed to:

Timothy A. Sylwester
Senior Assistant Attorney General
1162 Court St NE
Salem OR 97301-4096
timothy.sylwester@state.or.us

Attorney for Respondent;

I further certify that I transmitted an electronic version of the Motion for Permission to Proceed *In Forma Pauperis* in Portable Document Format on Mr. Sylwester at his e-mail address on this date; and I further certify that I have served all parties required to be served by Rule 29.

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