

IN THE SUPREME COURT OF THE UNITED STATES

JEFFERY DANA SPARKS,

Petitioner,

v.

JEFF PREMO, Superintendent,
Oregon State Penitentiary.

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION

Petition for Writ of Certiorari of the
Supreme Court of the State of Oregon

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CAPITAL CASE

QUESTION PRESENTED

Did the state post-conviction court correctly apply this Court's decision in *Strickland v. Washington*, 466 U.S. 668 (1984), when it denied petitioner's claim that his trial counsel failed to provide constitutionally effective assistance during the guilt phase of his trial on charges of capital murder?

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RESPONDENT'S BRIEF IN OPPOSITION

STATEMENT OF THE CASE

In April 1998, petitioner kidnapped a 12-year-old girl, sexually assaulted her, and then murdered her by strangulation, leaving her partially clothed body by a railroad tracks. He was charged in state court with 15 counts of aggravated murder in violation of Or. Rev. Stat. § 163.095—a capital offense—and with kidnapping and numerous felony sexual offenses. *State v. Sparks*, 336 Or. 298, 300-02, 83 P.3d 304, *cert. denied*, 543 U.S. 893 (2004). The jury found him guilty on all those charges and then, in a separate penalty-phase proceeding, imposed a death sentence. *Id.*, 336 Or. at 302. On direct review of that judgment, petitioner raised 33 claims of error that challenged both the guilt-phase verdicts and the death sentence. The Oregon Supreme Court issued an opinion in which it rejected all those claims of error and affirmed the judgment and death sentence. *Id.* at 303-28.

Petitioner then filed a petition in state court seeking post-conviction relief under Or. Rev. Stat. § 138.530(1). In that petition, he alleged many claims that his trial counsel in the underlying criminal prosecution failed to provide constitutionally effective assistance—in violation of Oregon law and the Sixth Amendment to the United Constitution—during both the guilt phase and the penalty phase of the trial. *Sparks v. Premo*, 289 Or. App. 159, 167-68, 408 P.3d

276 (2017), *rev. denied*, 363 Or. 119 (2018). His petition included claims that his trial counsel, during the guilt phase, allegedly failed 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.”

Sparks v. Premo, 289 Or. App. at 167 (summarizing petitioner’s claims). The defendant superintendent¹ denied all of petitioner’s claims.

A trial was held before the post-conviction court on petitioner’s petition, at which he called many witnesses and presented other evidence in support his claims. *See Sparks v. Premo*, 289 Or. App. at 171-76 (summarizing evidence). The post-conviction court issued a six-page written opinion in which it denied all of petitioner’s claims of ineffective assistance of counsel relating to the guilt phase but granted some of his claims of ineffective assistance relating to the penalty phase. In effect, the post-conviction court affirmed all of petitioner’s convictions but vacated the death sentence and ordered a retrial of the penalty phase—if the state elects to seek a death sentence again. *Sparks v. Premo*, 289 Or. App. at 168.

¹ The defendant is the superintendent of the state prison at which petitioner is incarcerated.

Petitioner appealed from the post-conviction court's judgment to the Oregon Court of Appeals, and defendant superintendent cross-appealed. In his appeal, petitioner contended that the post-conviction court erred when it denied his claims that his trial counsel failed to provide constitutionally effective assistance relating to the guilt phase. In the cross-appeal, defendant superintendent contended that the post-conviction court erred when it granted petitioner relief on his claims of ineffective assistance of counsel relating the penalty phase. *Id.* at 161-62. The Court of Appeals issued a 30-page opinion in which it carefully analyzed the claims of error raised by both parties, rejected all of those claims, and affirmed the post-conviction court's judgment. *Id.* at 176-92.

Petitioner then filed a petition for review in the Oregon Supreme Court in which he asked that court to review the decision by the Court of Appeals insofar as it affirmed the post-conviction court's denial of his claims that his trial counsel failed to provide constitutionally effective assistance during the guilt phase. Defendant superintendent did not also file a petition for review.²

² As a result, the post-conviction court's grant of post-conviction relief to petitioner in the form of vacating the death sentence and ordering a retrial of the penalty phase was affirmed. Although this ostensibly is a "capital case," petitioner is no longer subject a valid death sentence.

The Oregon Supreme Court denied petitioner's petition for review without comment. *Sparks v. Premo*, 363 Or. 119 (2018).

In his petition to this Court for issuance of a writ of certiorari, petitioner contends that the Oregon Court of Appeals misapplied this Court's precedents when it affirmed that portion of the post-conviction court's judgment that denied his claims of ineffective assistance of counsel relating to the guilt phase. In particular, he contends that the Oregon Court of Appeals erred when it affirmed the post-conviction court's rejection of his claims that his trial counsel "failed to hire a forensic pathologist" in a timely manner and "failed to call her as a witness" during the guilt phase. (Pet. 6). In support of those claims, petitioner relies on this Court's decision in *Rompilla v. Beard*, 545 U.S. 374 (2005), which involved an application of the standard that this court previously had adopted in *Strickland v. Washington*, 466 U.S. 668 (1984). (Pet. 5-6).

REASONS TO DENY REVIEW

A. Petitioner does not identify any legal issue of significance beyond this case.

When the Oregon Court of Appeals considered and rejected petitioner's claims of ineffective assistance of trial counsel, the court expressly cited to and applied the correct legal standard for reviewing such a claim of ineffective assistance of counsel, as this Court set forth that standard in *Strickland*. *Sparks*

v. Premo, 289 Or. App. at 168-69. In his petition to this Court, petitioner does contend that the post-conviction court relied on an incorrect legal standard when it denied his claims of ineffective assistance of counsel based on the Sixth Amendment. Nor does he contend that the Oregon Court of Appeals applied an incorrect legal standard when it affirmed that judgment. In short, he acknowledges that both the post-conviction court and the Court of Appeals applied the *Strickland* standard in rejecting his claims.³

Moreover, in his appeal to the Oregon Court of Appeals, petitioner did not contend that the post-conviction court violated any provision of the United States Constitution when it made procedural and evidentiary rulings during the course of the post-conviction trial. That is, he did not contend that the post-conviction court violated the federal constitution either by erroneously excluding or by failing to consider evidence that he had offered in support of his claims of ineffective assistance of counsel.

In summary, petitioner does not dispute before this Court that the post-conviction court properly admitted and considered all the evidence that he had offered in support of his ineffective-assistance claims and that both that court and the Oregon Court of Appeals applied the correct legal standard, as

³ Petitioner does not ask this Court to employ this case either to modify the legal standard as set forth in *Strickland* or to adopt some new rule that would govern ineffective-assistance claims such as his.

prescribed by this Court, for deciding such a claim. At bottom, then, his claim before this Court is simply that the state courts, when applying the correct standard, came to the wrong conclusion based on the evidence before it.

Petitioner's petition thus asks this Court for nothing more than a fact-specific review to determine whether the state courts came to an incorrect conclusion when they applied the *Strickland* standard. He does not contend there is a split among state or federal appellate courts on the proper application of the *Strickland* standard in these circumstances such that it is necessary for this Court to conduct an error-correction review in this case as a means to resolve that split. (*See* Pet. 9). Consequently, he does not identify any constitutional issue of general application that is presented by this case that would warrant this Court's review.

Furthermore, the result of the post-conviction court's judgment, as affirmed by the Oregon Court of Appeals, is that the underlying criminal case has been remanded to the original trial court for either a retrial of the penalty phase or, at the district attorney's election, a modification of the sentence to be one of life imprisonment instead of death. Once a final judgment is re-entered on such a remand, petitioner may file a petition in federal district court seeking habeas-corpus relief under 28 U.S.C. § 2254 and he may assert in such a proceeding the same claim that he asserts in his petition to this Court—*viz.*, that

the state post-conviction and appellate courts erred by denying his claim that his trial counsel failed to provide constitutionally effective assistance during the guilt-phase trial. Consequently, it is not necessary for this Court at this time to take review of petitioner's claim because he eventually will have an opportunity to present that same claim to the federal district and appellate courts for consideration.

B. The state courts correctly applied the *Strickland* standard.

In any event, petitioner's claim before this Court has no merit because the state court properly applied *Strickland*. Petitioner premises his claim of ineffective assistance of trial counsel on a single piece of evidence that the state presented during the guilt phase—*viz.*, a used Band-Aid, which the police found near the victim's body. That Band-Aid contained DNA consistent with his. At trial, the evidence was overwhelming, if not uncontradicted, that the victim had been with petitioner in his trailer, in his bedroom, engaging in sexual activities with him, during the evening preceding her death and that he had left the trailer with her at about midnight, telling his housemate that he was "taking her home." He returned alone an hour or so later; meanwhile, the victim was strangled to death nearby sometime in the early-morning hours after she had left petitioner's trailer with him. *State v. Sparks*, 336 Or. at 300-02. The Band-Aid was significant because petitioner asserted that he and the victim had parted ways soon after they left the trailer together and that she was safe and headed

home alone when he last saw her; he asserted that someone else must have murdered the victim after they parted. The Band-Aid allowed an inference that, contrary to that story, he was near her when she died. *See Sparks v. Premo*, 289 Or. App. at 170-71.

After the state's experts testified concerning the Band-Aid, petitioner's trial counsel established on cross-examination that they could not say *how* the Band-Aid arrived at the scene. They conceded that it could have been transported there as a "secondary transfer"—*i.e.*, that it may have become attached to the victim's clothing during the previous close-quarter activities between petitioner and the victim in the trailer and then got deposited at the scene when she was attacked. *Id.* at 171-72.

In the subsequent post-conviction proceeding, petitioner presented an expert, Ms. Cwiklik, who testified that she could have testified in the guilt phase that the presence of fibers on the sticky part of the Band-Aid suggested that it had previously been attached to fabric such as clothing, which suggested that it had not fallen from petitioner's skin at the scene. (*See Pet. 7*). In response, defendant superintendent argued, and the post-conviction court agreed, that petitioner's trial counsel had sufficiently established the same point by their cross-examination of the state's experts, and that their tactical choice to rely on Cwiklik only to prepare for cross-examination rather than calling her as

a defense witness was reasonable under the circumstances and did not result in any actual prejudice to petitioner. *See Sparks v. Premo*, 289 Or. App. at 175-76.

The Oregon Court of Appeals, applying the *Strickland* standard, agreed:

“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. ... 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.”

Id. at 177-78.

Under *Strickland*, a petitioner alleging a claim of ineffectiveness of trial counsel must show both that his counsel’s performance was deficient and that the deficient performance prejudiced the defense. *Id.* at 687. That is, a petitioner must demonstrate that his “counsel’s representation fell below an objective standard of reasonableness,” and that “there is a reasonable

probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 688, 694. That inquiry is highly deferential, and a counsel's conduct must be evaluated "from counsel's perspective at the time." *Bell v. Cone*, 535 U.S. 685, 698 (2002) (quoting *Strickland*, 466 U.S. at 689). *See also Rompilla*, 545 U.S. at 380-81 (summarizing *Strickland* standard).

In this case, both the post-conviction court and the Oregon Court of Appeals correctly applied the *Strickland* standard and properly concluded that, according due deference to the tactical decisions made by petitioner's trial counsel during trial, their decision not to call Cwiklik as a witness during the guilt phase and instead to rely on cross-examination of the state's experts, as aided by her advice, did not amount to constitutionally ineffective assistance under the circumstances.

CONCLUSION

For the reason stated above, this Court should deny petitioner's petition for a writ of certiorari.

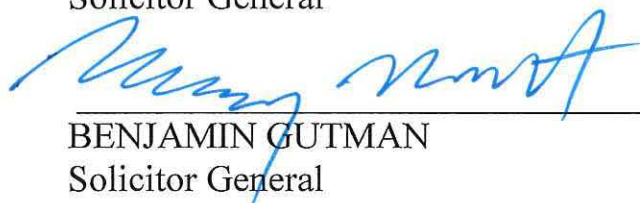
Respectfully submitted,

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No. 18-5985

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PROOF OF MAILING: RESPONDENT'S BRIEF IN OPPOSITION

I, Benjamin Gutman, a member of the Bar of the Court, hereby certify that on October 15, 2018, in compliance with Rule 29, I mailed the brief of Jeff Premo, as respondent in the above-entitled case; by depositing 10 copies thereof in the United States Postal Service mailbox, express mail, postage prepaid, addressed to the Office of the Clerk, Supreme Court of the United States, 1 First Street, N.E., Washington, D.C. 20543.



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PROOF OF SERVICE: RESPONDENT'S BRIEF IN OPPOSITION

I, Benjamin Gutman, a member of the Bar of the Court, hereby certify that on October 15, 2018, three copies of the brief of Jeff Premo, as respondent in the above-entitled case were served upon Michael Curtis, attorney for petitioner, by mail delivery to 1631 NE Broadway, No. 142, Portland, OR 97232 and Bert Dupre, attorney for petitioner, by mail delivery to 4110 SE Hawthorne Blvd., #276, Portland, OR 97214. I further certify that all parties required to be served have been served.



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