

FILED: December 31, 2014

IN THE COURT OF APPEALS OF THE STATE OF OREGON

MATTHEW DWIGHT THOMPSON,
Petitioner-Appellant,

v.

BRIAN BELLEQUE, Superintendent, Oregon State Penitentiary,
Defendant-Respondent.

Marion County Circuit Court
99C15857

A140461

Don A. Dickey, Judge.

Argued and submitted on May 20, 2013.

Daniel J. Casey argued the cause and filed the briefs for appellant.

David B. Thompson, Senior Assistant Attorney General, argued the cause for respondent. With him on the brief were Mary H. Williams, Deputy Attorney General, Anna M. Joyce, Solicitor General, and Susan G. Howe, Senior Assistant Attorney General.

Before Armstrong, Presiding Judge, and Nakamoto, Judge, and Egan, Judge.

ARMSTRONG, P. J.

Affirmed.

DESIGNATION OF PREVAILING PARTY AND AWARD OF COSTS

Prevailing party: Respondent

- No costs allowed.
 Costs allowed, payable by Appellant.
 Costs allowed, to abide the outcome on remand, payable by
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1 ARMSTRONG, P. J.

2 Petitioner was convicted of aggravated murder and sentenced to death. He
3 sought post-conviction relief challenging his conviction and sentence on a number of
4 grounds, which the post-conviction court denied. He appeals the resulting judgment,
5 contending that the post-conviction court erred in rejecting his claims that his trial and
6 appellate counsel provided him with constitutionally deficient representation in the guilt
7 and penalty phases of his trial and on appeal. For the reasons explained below, we
8 affirm.

9 I. THE UNDERLYING CRIMES

10 We begin with the facts of the underlying crimes, as taken from the Oregon
11 Supreme Court opinion on direct review of petitioner's conviction and death sentence.

12 "About 10:30 p.m. on November 18, 1994, Andrew McDonald and
13 his wife, Debra Oyamada, were at the Driftwood Tavern in Portland.
14 Defendant and his companion, Paul Witcher, entered the tavern and
15 ordered a pitcher of beer. Oyamada was sitting at a video poker machine
16 and McDonald was sitting at the bar. Defendant was wearing a plaid shirt.
17 Defendant and Witcher approached Oyamada. Defendant asked Oyamada
18 if she was from 'the "samurai family"' or 'from samurai blood.' She
19 responded, 'As a matter of fact, yes, I am.' Defendant continued, but
20 Oyamada said she did not want to talk. Oyamada turned her back to
21 defendant because she thought those were 'weird questions' and that
22 defendant was 'overbearing.' Defendant persisted, saying, 'I need to know
23 about it. I'm a warrior and I want to know about this.' Oyamada replied
24 that she did not want to talk about it. Defendant then sat next to Oyamada.
25 She said, 'You're sitting in someone else's seat.' After that, defendant got
26 up from the seat and started to walk toward the door. As they walked,
27 McDonald approached defendant and Witcher and said, 'Please leave her
28 alone, she doesn't want to talk about it.' Pat Disciascio, the bartender,
29 became concerned, and he directed defendant and Witcher to leave the
30 tavern. When defendant and Witcher did not leave immediately,
31 Disciascio said 'Good night, you guys,' and pointed toward the door. As

1 defendant and Whitcher left the tavern, one of the two men said, 'I feel like
2 killing somebody tonight.' Defendant and Whitcher then stood outside,
3 where defendant said to Whitcher, 'I'm going to go back in there and kick
4 that guy's ass.' Defendant stated to Whitcher, 'If we do this, you know,
5 we're going to jail.'

6 "Between five and ten minutes after leaving, defendant ran into the
7 tavern alone, grabbed McDonald from behind, began stabbing him, and
8 dragged him outside. Oyamada tried to pry defendant off of McDonald.
9 Defendant then turned on Oyamada, hitting her in the head, throwing her to
10 the ground, and stabbing her in the head and neck. Bill Jones, another
11 tavern patron, grabbed defendant. Defendant stabbed Jones six times.
12 Defendant then ran away. Ambulances took McDonald, Oyamada, and
13 Jones to the hospital. McDonald died as a result of his wounds.

14 "Defendant and Whitcher went to defendant's grandmother's home,
15 where defendant lived. Defendant introduced Whitcher to his grandmother,
16 then she went to her room to sleep. About 1:30 a.m. on November 19,
17 1994, defendant's grandmother awoke and went downstairs because she
18 heard a lot of noise. She saw Whitcher cleaning up broken glass and
19 defendant cleaning grape juice off the rug. She asked Whitcher to leave.
20 Defendant said that he was going to see that Whitcher got home safely, and
21 the two men left the house. When defendant returned shortly, his
22 grandmother was still cleaning grape juice. Defendant said he would clean
23 the grape juice and told his grandmother to go to bed, which she did.
24 Before she fell asleep, she heard the washing machine running.

25 "About 1:30 a.m. on November 19, 1994, Sally Woolley called 9-1-1
26 to report that she heard loud, angry, male voices outside her home.
27 Woolley reported that a man was lying face down in the street. Another
28 man, wearing a plaid shirt, was kneeling over him and rolled him partially
29 onto his side. The man in the plaid shirt rummaged through the other man's
30 pockets, then ran away.

31 "The police arrived. The man on the street was identified as
32 Whitcher. He had been stabbed 16 to 20 times and was dead. One pocket
33 had been turned inside out.

34 "About 2:00 a.m. on November 19, 1994, the police found defendant
35 walking nearby. He smelled of alcohol and was nervous and evasive. His
36 shoes were untied and, although it was a cold night, he was sockless. One
37 eye was swollen. The police thought that defendant might have witnessed
38 Whitcher's stabbing and questioned him. After denying that he had been in

1 an altercation, defendant stated that he lived nearby with his grandmother,
2 but gave the police his mother's address. He denied ever having been
3 arrested or being on probation. After a record check indicated that he had
4 been arrested and that currently he was on probation, defendant was taken
5 into custody.

6 "The police first contacted defendant's mother, who stated that
7 defendant did not live with her. She gave the police defendant's
8 grandmother's address. The police contacted defendant's grandmother at
9 her home. She invited the officers into her home and gave them permission
10 to look around. Defendant's grandmother then led them to the washing
11 machine in the basement and opened the lid. Blood was smeared on the
12 outside of the machine. The washed clothing in the machine had stains
13 consistent with blood. The grandmother told police that the clothing in the
14 machine was defendant's. The state's criminologist concluded that the
15 DNA recovered from the top of the washing machine, and from jeans, a
16 shoelace, and a sock found in the washing machine, was consistent with
17 Whitcher's.

18 "At 12:30 p.m. on November 19, 1994, detectives returned to
19 defendant's grandmother's home with a search warrant. After finding no
20 weapons, the police left. They returned around 5:00 p.m. that day. With
21 defendant's grandmother's consent, the detectives searched her basement.
22 A detective found a bloody knife on a cross-beam and a blood-smeared
23 wallet inside a wood stove. The knife was consistent with defendant's
24 grandmother's description of a knife defendant owned. The state's
25 criminalist concluded that the blood on the knife and wallet matched
26 Whitcher's blood type."

27 *State v. Thompson*, 328 Or 248, 250-52, 971 P2d 879, *cert den*, 527 US 1042 (1999).

28 Petitioner was charged in a 22-count indictment with the murders of
29 McDonald and Whitcher and related crimes. Petitioner pleaded not guilty to all counts
30 and proceeded to a jury trial, in which petitioner was represented by attorneys Lynne
31 Dickison and Jon Martz. The jury ultimately convicted petitioner of four counts of
32 aggravated murder, two counts of murder, two counts of felony murder, one count of
33 first-degree robbery, two counts of first-degree burglary, and two counts of first-degree

1 assault. *Id.* at 252-53. After a penalty-phase proceeding, petitioner was sentenced to
2 death. *Id.* at 253. On automatic and direct review, the Oregon Supreme Court affirmed
3 petitioner's death sentence, and the United States Supreme Court denied review.

4 II. THE POST-CONVICTION CASE AND APPLICABLE LAW

5 In a petition for post-conviction relief, petitioner alleged 22 claims of
6 ineffective assistance of counsel before and during the guilt and penalty phases of his
7 trial, and on appeal. Following the post-conviction trial, the post-conviction court issued
8 a 60-page letter opinion, as well as an additional 19-page memorandum detailing further
9 findings and conclusions, and rejected each of petitioner's claims. On appeal, petitioner
10 raises 26 assignments of error, many of which contain multiple arguments regarding trial
11 counsel's allegedly deficient performance and the ways in which those deficiencies
12 affected the outcome of petitioner's trial and appeal. We write to discuss only four of
13 petitioner's assignments of error, supplementing our discussion of each with a recitation
14 of the pertinent facts, although we have considered and reject without written discussion
15 the balance of petitioner's assignments.

16 To prevail in a post-conviction proceeding, a petitioner must establish by a
17 preponderance of the evidence a "substantial denial in the proceedings resulting in
18 petitioner's conviction, or in the appellate review thereof, of petitioner's rights under the
19 Constitution of the United States, or under the Constitution of the State of Oregon, or
20 both, and which denial rendered the conviction void." ORS 138.530(1)(a). As noted,
21 petitioner alleged in his post-conviction petition that his trial counsel had performed

1 deficiently at the guilt and penalty phases of his criminal trial, and that his appellate
2 counsel had performed deficiently in the subsequent appeal.

3 Petitioner's claims are grounded in both Article I, section 11, of the Oregon
4 Constitution and the Sixth Amendment to the United States Constitution, which
5 guarantee a criminal defendant the right to adequate representation by counsel.
6 *Strickland v. Washington*, 466 US 668, 688, 104 S Ct 2052, 80 L Ed 2d 674 (1984) (Sixth
7 Amendment right to counsel requires "effective" assistance by counsel); *Krummacher v.*
8 *Gierloff*, 290 Or 867, 872, 627 P2d 458 (1981) (Article I, section 11, requires "adequate
9 performance by counsel"). In reviewing petitioner's claims, we first consider his
10 arguments under Article I, section 11, proceeding to his arguments under the federal
11 constitution only if necessary. *Lichau v. Baldwin*, 333 Or 350, 358-59, 39 P3d 851
12 (2002).

13 We evaluate petitioner's claims of constitutionally deficient assistance of
14 counsel under Article I, section 11, in two steps:

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

20 *Montez v. Czerniak*, 355 Or 1, 7, 322 P3d 487 (2014) (quoting *Lichau*, 333 Or at 359).

21 While Oregon courts have construed and applied the requirements of
22 Article I, section 11, independently of the United States Supreme Court's construction
23 and application of the Sixth Amendment, the Oregon Supreme Court has nonetheless

1 recognized that the standards for determining the adequacy of legal counsel under the
2 state constitution are functionally equivalent to the standards governing the effectiveness
3 of counsel under the federal Constitution. *Montez*, 355 Or at 6-7; *State v. Davis*, 345 Or
4 551, 579, 201 P3d 185 (2008). Under the Sixth Amendment, we first determine whether
5 petitioner has established that his counsel's performance "fell below an objective standard
6 of reasonableness." *Strickland*, 466 US at 688. If so, we determine whether petitioner
7 has demonstrated "a reasonable probability that, but for counsel's unprofessional errors,
8 the result of the proceeding would have been different." *Id.* at 694.

9 In performing our task, we are bound by the post-conviction court's
10 findings of historical fact if there is evidence in the record to support them. *Montez*, 355
11 Or at 8. In the event that the post-conviction court failed to make a finding, and there is
12 evidence from which facts could be found in more than one way, we presume that the
13 facts were found consistently with the post-conviction court's ultimate legal conclusions.
14 *Id.* Finally, we "make every effort to evaluate a lawyer's conduct from the lawyer's
15 perspective at the time, without the distorting effects of hindsight." *Lichau*, 333 Or at
16 360; *see also Strickland*, 466 US at 689 ("A fair assessment of attorney performance
17 requires that every effort be made to eliminate the distorting effects of hindsight * * *").
18 And we will not "second-guess a lawyer's tactical decisions in the name of the
19 constitution unless those decisions reflect an absence or suspension of professional skill
20 and judgment." *Gorham v. Thompson*, 332 Or 560, 567, 34 P3d 161 (2001). As has
21 often been noted,

1 investigator, Philip Agrue, and the two met with petitioner in December 1994.
2 Difficulties immediately arose between petitioner and his defense team. At their initial
3 meeting, petitioner refused to discuss the murders in detail, and Agrue arranged to return
4 the following week. However, when Agrue contacted petitioner in preparation for their
5 meeting, petitioner again refused to speak with Agrue about the murders. Instead,
6 petitioner told Agrue that he was uncomfortable with Dickison serving as his attorney,
7 because petitioner questioned her record and believed that she was too busy to adequately
8 represent him. Notwithstanding that concern, petitioner told Agrue that he wanted to
9 meet with Dickison and discuss his case without Agrue present. Petitioner subsequently
10 told Dickison that he did not trust Agrue and that he wanted Dickison to employ another
11 investigator. Dickison complied and hired a second investigator, Shirley Beers, to
12 replace Agrue; a second attorney, Martz, was also appointed to assist Dickison.

13 Matters did not improve, and, by February 1995, petitioner had proposed a
14 motion to withdraw, as well as an accompanying affidavit, that he forwarded to Dickison.
15 The motion and affidavit were accompanied by a letter in which petitioner instructed
16 Dickison to execute and file the motion; petitioner also told Dickison that he was both
17 filing a civil action against her and submitting a complaint to the Oregon State Bar. In
18 early March 1995, petitioner refused to meet with his defense team, and the defense filed
19 a motion for substitution of counsel a few days later. On March 14, 1995, the court held
20 a hearing on the substitution motion. At the hearing, Dickison recounted the difficulties
21 that had arisen between petitioner and his defense team but told the court that she did not

1 believe that "the communications ha[d] deteriorated to the point where [the defense team]
2 cannot represent [petitioner]." After a lengthy colloquy, the trial court denied petitioner's
3 motion.

4 Over the same time span, as petitioner refused to cooperate with his defense
5 team, Dickison became concerned that petitioner was unable to aid and assist in his
6 defense. As a result, in late February 1995, Dickison hired a psychiatrist, Dr. Norman
7 Janzer, to evaluate petitioner. Between February and May 1995, Janzer met with
8 petitioner a number of times, interviewing him for "more than six hours" and
9 administering the Minnesota Multiphasic Personality Inventory (MMPI) psychological
10 assessment test. Janzer summarized the results of his evaluation in a letter to Dickison on
11 May 16, 1995, reaching the following conclusion:

12 "Based on the time I spent with [petitioner] and the somewhat usable
13 MMPI test, *I believe his long-standing psychopathology prevents him from*
14 *emotionally appreciating his legal situation and from assisting his attorney*
15 *in preparing his legal defense.* I believe this would likely be the experience
16 of any attorney now trying to help him. His paranoid ideation is mobilized
17 by stress, both protecting him from reality and preventing him from coping
18 with it. This critically interferes with learning, with considering relevant
19 facts, and with making rational decisions."

20 (Emphasis added.)

21 The following day, petitioner's defense team requested an aid-and-assist
22 hearing, which was held on May 22, 1995. At the hearing, Janzer testified that he had
23 been unable to reach a definitive diagnosis of petitioner and that--given Janzer's
24 affiliation with petitioner's defense team--he did not believe that petitioner would
25 cooperate with him further. Nevertheless, Janzer testified that petitioner's diagnosis was

1 "a matter of possibilities, but it's certainly in a paranoid family." Specifically, Janzer was
2 unable to determine whether petitioner suffered from a delusional disorder or simply a
3 paranoid personality disorder. Despite that uncertainty, Janzer did not believe that
4 petitioner was able to aid and assist in his defense:

5 "[Martz:] Now, Doctor, if I can just maybe--and correct me if I am
6 wrong--but it appears that[,] is it not your opinion that [petitioner] has some
7 form of either personality disorder or mental illness that prevents him from
8 aiding and assisting in his defense, but that it will take more time and more
9 observation before it sounds like you have formed the beginnings of an
10 opinion to what the problem is but it is going to take more time to try to
11 figure out the exact diagnosis so the diagnosis for the disorder is still
12 sketchy, correct?

13 "[Janzer:] Right.

14 "[Martz:] But as to the effects of that disorder concerning aid and
15 assist, it is your opinion at this time that he is not able to aid and assist?

16 "[Janzer:] Definitely."

17 Given the difficulties that he had had in reaching a diagnosis, Janzer
18 testified that, in his opinion,

19 "the logical and reasonable and I think legal thing to do would be to have
20 [petitioner] sent to the Oregon State Hospital where they would have a lot
21 more opportunity to observe him, maybe over 30, 60 days, something like
22 that. The effects of medication might make a real difference by reducing
23 anxiety and making it easier for him to take in new information and process
24 it more logically."

25 The trial court agreed with Janzer and ordered defendant to be transported
26 to the Oregon State Hospital for an aid-and-assist evaluation. Although defendant
27 refused to cooperate with hospital staff in the evaluation, he was observed at the hospital
28 over a period of approximately three weeks. During that time, petitioner participated in

1 various psychiatric, psychological, and social-work assessments. After reviewing those
2 assessments--as well as a number of petitioner's prior arrest, juvenile, school, and medical
3 records--psychologist Richard Hulteng diagnosed petitioner with an antisocial personality
4 disorder with paranoid features. Hulteng concluded that

5 "[w]hile it is likely that [petitioner] will be a demanding and, at times, quite
6 difficult client, he appears capable of understanding the nature of the
7 proceedings against him, and of cooperating and assisting counsel if he so
8 chooses. Accordingly, it is not recommended that [petitioner] be found
9 incompetent to stand trial."

10 At a second hearing, at which Janzer and Hulteng offered their competing diagnoses of
11 petitioner, the trial court found defendant competent to stand trial. Subsequently, at
12 petitioner's penalty-phase trial, Hulteng testified extensively about his diagnosis of
13 petitioner.

14 With that background in mind, we turn to the specifics of petitioner's post-
15 conviction claim. Petitioner set out the underlying claim in his operative petition for
16 post-conviction relief:

17 "Trial counsel initiated an aid and assist hearing to determine
18 petitioner's competency *without adequately considering the merits of that*
19 *motion in relation to the harm it would cause during petitioner's penalty*
20 *phase*. As a result, petitioner was subjected to a prolonged evaluation by
21 prosecution expert witness, Hulteng, on issues of future dangerousness and
22 rebuttal of defense mitigation. Based upon his access to petitioner, Hulteng
23 was able to effectively negate the testimony of petitioner's penalty phase
24 expert witness, Janzer, on issues of future dangerousness and mitigation."

25 (Emphasis added.) To prevail on that claim, petitioner was required to establish, by a
26 preponderance of the evidence, that trial counsel "failed to exercise reasonable
27 professional skill and judgment" when they requested the aid-and-assist hearing and that

1 that failure had a tendency to effect the result of petitioner's trial.

2 In his trial memorandum before the post-conviction court, petitioner
3 focused primarily on the second of those showings, emphasizing that, because of
4 petitioner's lengthy evaluation at the Oregon State Hospital, Hulteng was able to present
5 "a much more credible evaluation than that prepared by Janzer" during petitioner's
6 penalty-phase trial. As to the first showing, petitioner argued that "[c]ounsel's decision to
7 have petitioner subjected to an aid and assist evaluation was objectively unreasonable,"
8 because, when counsel requested the aid-and-assist hearing, "Janzer's examination was
9 still incomplete and he was still trying to figure out his diagnosis at the time of the
10 hearing."

11 The post-conviction court rejected petitioner's claim, reasoning:

12 "Dr. Janzer was hired on February 23, 1995. He had not completed
13 his examination process of Petitioner at the aid and assist hearing on May
14 22, 1995. The hearing was necessitated in no insignificant degree because
15 Petitioner voluntarily 'refused to cooperate with [Counsel]' and with Dr.
16 Janzer. Dr. Janzer supported the decision on aid and assist and noted that
17 Petitioner believed that Trial Counsel lied to him.

18 "* * * * *

19 "Based upon Dr. Janzer's letter, Counsel had an obligation to bring
20 up the aid and assist issue. The fact that there are two sides to bringing up
21 the issue is beside the point. Petitioner has a constitutional right to be able
22 to aid and assist in a criminal case. When the hired expert questioned the
23 Petitioner's ability to assist counsel, the issue should be raised."

24 On appeal, petitioner renews the argument that he made at his post-
25 conviction trial.¹ Specifically, petitioner challenges the post-conviction court's

¹ The state argues that, in his articulation of the claim on appeal, petitioner is raising

1 conclusion that trial counsel had an obligation to raise the aid-and-assist issue. Petitioner
2 grounds that challenge in Oregon's aid-and-assist statute, ORS 161.360, which provides
3 that "[a] defendant may be found incapacitated if, *as a result of mental disease or defect*,
4 the defendant is unable" to understand the nature of the proceedings against him or to aid
5 and assist in the preparation of his defense. (Emphasis added.) Because Janzer's report
6 did not "opine that petitioner's 'psychopathology' or 'paranoid ideation' constituted, or
7 resulted from, a 'mental disease or defect,'" petitioner contends that trial counsel was not
8 obligated to raise the issue of petitioner's ability to aid and assist in his defense. Further,
9 noting that Janzer ultimately diagnosed petitioner with a paranoid personality disorder--a
10 condition excluded from the statutory definition of "mental disease or defect," ORS
11 161.295(2) (excepting from the definition any "abnormality constituting solely a
12 personality disorder")--petitioner contends that, despite Janzer's report, trial counsel

a new claim that he did not assert in his petition for post-conviction relief--*viz.*, that trial counsel lacked a reasonable basis to request an aid-and-assist hearing--and, consequently, that we cannot consider petitioner's claim on appeal. *See* ORS 138.550(3) (requiring that all grounds for post-conviction relief "be asserted in the original or amended petition, and any grounds not so asserted are deemed waived"). In response, petitioner argues that whether trial counsel had a reasonable basis to initiate competency proceedings was an "implicit premise" of his claim that trial counsel failed to "adequately consider[] the merits" of their decision to initiate competency proceedings. He also argues that, in any event, "this court still must examine the objective reasonableness of [trial counsel's] concerns" in determining whether trial counsel "adequately considered the merits" of their decision to initiate the aid-and-assist hearing. We agree with petitioner. As we understand it, the crux of petitioner's argument--under either characterization--is that the lack of a concrete diagnosis in Janzer's report rendered unreasonable trial counsel's decision to initiate aid-and-assist proceedings.

1 lacked a reasonable basis to initiate the aid-and-assist proceeding.²

2 In response, the state argues that, given the Fourteenth Amendment's
3 prohibition on trying mentally incompetent criminal defendants, *Pate v. Robinson*, 383
4 US 375, 384-86, 86 S Ct 836, 15 L Ed 2d 815 (1966), trial counsel were "obligated to
5 inform the court if counsel reasonably question[ed] whether [petitioner was] legally
6 incompetent." Thus, because "[p]etitioner does not contest that trial counsel developed
7 concerns over [petitioner's] ability to aid and assist in his own defense," and because the
8 post-conviction court's findings to that effect are supported by evidence in the record, the
9 state contends that trial counsel were "constitutionally obligated to inform the trial court
10 of their concerns."

11 We begin by noting that, despite the parties' emphasis on the issue, we need
12 not determine whether trial counsel was "constitutionally obligated" to initiate the aid-
13 and-assist proceeding. Instead, our task is to determine whether petitioner established, by
14 a preponderance of the evidence, that trial counsel's decision to initiate the aid-and-assist
15 proceeding--viewed in the light of trial counsel's perspective at the time that they made
16 that decision--constituted a failure to exercise reasonable skill or judgment. *Montez*, 355
17 Or at 7; *Lichau*, 333 Or at 359-60. We conclude that he did not.

² As he did at the post-conviction trial, petitioner spends the bulk of his argument thoroughly cataloging the "damaging psychological information" that Hulteng was able to obtain and present at the penalty phase of petitioner's trial as a result of Hulteng's examination of petitioner. Because we conclude that trial counsel's decision to initiate the aid-and-assist hearing did not constitute inadequate assistance of counsel, we need not set out the particulars of that argument in detail.

1 Although petitioner correctly notes that Janzer had not reached a definitive
2 diagnosis of petitioner at the time that trial counsel requested the aid-and-assist hearing--
3 and that the ultimate diagnosis of petitioner did not constitute a "mental disease or defect"
4 under Oregon's statutory definition of that term--those facts alone were insufficient to
5 carry petitioner's burden of proof. Viewed from trial counsel's perspective at the time
6 that they made their decision to request a hearing, *viz.*, in the context of petitioner's
7 impending criminal trial, we conclude that trial counsel could, in a reasonable exercise of
8 professional judgment, conclude that an aid-and-assist hearing was necessary. As the
9 post-conviction court found, trial counsel was faced with a client who "refused to
10 cooperate" in the preparation of his defense nearly from the outset of their representation
11 of him. The expert whom trial counsel retained produced a report concluding that
12 petitioner's "long-standing psychopathology prevents him from emotionally appreciating
13 his legal situation and from assisting his attorney in preparing his legal defense." Further,
14 although Janzer had not reached a definitive diagnosis of petitioner, no diagnosis was
15 forthcoming because petitioner had stopped cooperating with Janzer. Added to that is the
16 very real time pressure that trial counsel faced: Petitioner's trial was scheduled to begin
17 in early July 1995, and Janzer's report was produced in mid-May 1995, approximately six
18 weeks before the scheduled trial date. Viewed in that light, trial counsel's decision to act
19 to ensure that petitioner was capable of aiding and assisting in his defense represented a
20 reasonable exercise of professional judgment.

1 B. *Failure to call expert witnesses regarding intoxication defense*

2 We turn next to petitioner's contention that the post-conviction court erred
3 in denying his claim of inadequate assistance of counsel based on trial counsel's alleged
4 failure to adequately prepare his intoxication defense. As set out in his petition for post-
5 conviction relief, petitioner contends:

6 "Trial counsel failed to adequately prepare for and present an
7 intoxication defense to the jury as follows:

8 "(a) Trial counsel failed to obtain the services of an expert witness
9 on toxicology. Had counsel obtained the services of such an expert,
10 counsel would have learned that petitioner's blood-alcohol level at the time
11 of the criminal incidents was approximately a .26 and that such a blood-
12 alcohol level is indicative of extreme intoxication. Counsel would further
13 have learned that as a result of such severe intoxication, petitioner's
14 capacity to control his behavior and appreciate the criminality of his
15 conduct was severely impaired, thereby negating the *mens rea* required for
16 his conviction offenses. Counsel failed to present any expert testimony
17 regarding intoxication at petitioner's trial."

18 The post-conviction court addressed that claim at length in its written
19 opinion, ultimately concluding that petitioner had failed to establish that there was a
20 reasonable likelihood that the proffered testimony of petitioner's experts would have
21 affected the jury's verdict, given the "overwhelming contrary evidence of Petitioner's
22 ability to form an intent." In reaching that conclusion, the post-conviction court set out
23 some of the "mountain of facts * * * regarding [petitioner's] ability to carry on and make
24 decisions during the 2 hours of the four assaults and two murders." For example, the
25 post-conviction court noted the following: After being asked to leave the bar, petitioner
26 was heard saying "something to the effect of 'I'm going to go back in there and kick that

1 guy's ass.'" After the first murder, petitioner returned to his grandmother's house, where
2 he located a bottle of alcohol and grape juice, made and consumed a drink, broke a glass,
3 and cleaned the resulting mess. When petitioner's grandmother asked Whitcher to leave
4 the house, petitioner told her that he wanted to walk Whitcher home. After killing
5 Whitcher, petitioner stole Whitcher's wallet, returned home, hid his knife and the wallet,
6 changed out of his bloody clothes, and placed the clothes in the washing machine.

7 After reciting those facts, and others, the post-conviction court concluded:

8 "These facts include decisions and actions of Petitioner which began
9 before the first assaults and lasted for several hours, collectively and
10 individually demonstrating an ability to act deliberately and intentionally
11 and for self-protection including destroying evidence and killing his
12 accomplice. * * * From these acts the jury reasonably found that Petitioner
13 had the requisite intent to kill Mr. McDonald and Mr. Whitcher. There is
14 no reasonable likelihood that an expert of the type claimed, or the specific
15 information which could have been elicited would have had any beneficial
16 effect on the jury's determination of intent for those murders."

17 On appeal, petitioner raises a number of challenges to the post-conviction
18 court's reasoning. He argues that the facts on which the post-conviction court relied to
19 reject his claim illustrate the importance of the expert testimony--*viz.*, to explain why
20 petitioner's ability to engage in such purposeful, goal-directed activity did not necessarily
21 mean that petitioner had the ability to form intent. In support of that argument, petitioner
22 identifies portions of an affidavit submitted to the post-conviction court by a medical
23 doctor, Gary Jacobsen, in which Jacobsen noted that "[o]ne does not have to demonstrate
24 gross signs of intoxication * * * in order to be significantly impaired from alcohol," and
25 that petitioner's cognitive, emotional, and perceptual functioning would have been

1 "extremely impaired." In turn, the state responds that it did not contest petitioner's severe
2 level of intoxication at trial but, rather, introduced much of the evidence that established
3 petitioner's intoxication. As to the effect of alcohol on petitioner's cognitive, emotional,
4 and perceptual functioning, the state contends that, because alcohol consumption is not
5 uncommon, the jury was fully capable of assessing impairment, given the evidence that
6 was presented.

7 Finally, the state argues that trial counsel's decision not to introduce expert
8 testimony was the sort of reasonable tactical decision that post-conviction courts should
9 not second guess. In support of that argument, the state points to an affidavit submitted
10 by Martz to the post-conviction court:

11 "[P]etitioner claims that we should have presented expert testimony in
12 support of the intoxication defense. Petitioner is correct that we did not
13 present that evidence. While we may have contacted a Mr. Larsen
14 regarding the intoxication defense, *we decided not to present the expert*
15 *testimony because the state would then be allowed to provide [its] own*
16 *expert to refute our claims.* Given that we had serious doubts that a jury
17 would buy the intoxication defense to begin with, we were concerned that
18 the jury would find the testimony of a state expert on why petitioner had the
19 full intent to commit the murders more credible than our expert's testimony
20 that petitioner might not have had the intent to commit the crimes due to
21 intoxication."

22 (Emphasis added.) Further, Martz noted that the jury had already heard testimony that
23 petitioner had consumed a substantial amount of alcohol, "including the testimony of a
24 convenience store clerk (who was likely very credible, given that he appeared to have no
25 bias in the case) that he had refused to sell petitioner alcohol several minutes before the
26 McDonald murder because petitioner was so drunk." In light of those assessments, the

1 state argues that, although trial counsel reasonably *could have* decided to call an expert
2 witness to testify about petitioner's level of intoxication, counsel's decision not to do that
3 was nonetheless a reasonable tactical decision.

4 Petitioner acknowledges the quoted portions of Martz's affidavit but
5 contends that it "hardly constitutes a *reasonable* tactical decision, where counsel
6 ultimately opted to present an intoxication defense," because, "without expert testimony,
7 the state easily would eviscerate [the] intoxication defense." As to Martz's stated concern
8 that the state would introduce its own experts to challenge any defense experts, petitioner
9 contends that the resulting tactical decision was untenable because "the same can be said
10 of raising *any defense*," and that, "once the decision to pursue the intoxication defense
11 was reached, trial counsel were obligated to support it with all available resources." We
12 disagree.

13 It is well established that a reviewing court will not second-guess a lawyer's
14 tactical decisions unless those decisions reflect an absence or suspension of professional
15 skill and judgment. *Krummacher*, 290 Or at 875-76. Among the universe of reasonable
16 tactical decisions is the decision not to present expert evidence. *Gorham*, 332 Or at 568
17 (concluding that trial counsel's decision not to call expert witness to present mitigation
18 evidence was a reasonable tactical decision); *Bonin v. Calderon*, 59 F3d 815, 834 (9th Cir
19 1995) ("[W]hile the Constitution requires that a criminal defendant receive effective
20 assistance of counsel, the presentation of expert testimony is not necessarily an essential
21 ingredient of a reasonably competent defense."). Nonetheless, tactical decisions must be

1 grounded on a reasonable investigation. *Id.* at 835; *Stevens v. State of Oregon*, 322 Or
2 101, 108, 902 P2d 1137 (1995). The question in each case is whether trial counsel's
3 investigation was legally and factually appropriate to the case. *Stevens*, 322 Or at 108.

4 Here, there is evidence in the record that trial counsel contacted an
5 intoxication expert and considered the tactical advantages and disadvantages of calling an
6 expert witness to testify about petitioner's level of intoxication and "decided not to
7 present the expert testimony because the state would then be allowed to provide [its] own
8 expert to refute our claims." Although petitioner contends that that decision was not
9 reasonable because that reasoning could apply to any defense, the relevant concern
10 animating trial counsel's decision was not simply that calling an expert witness would
11 allow the state to present expert testimony in rebuttal. Instead it was that, in light of the
12 facts of petitioner's case, "the jury would find the testimony of a state expert on why
13 petitioner had the full intent to commit the murders more credible" than a defense expert.
14 In light of those concerns, and the other evidence presented on petitioner's level of
15 intoxication, trial counsel's decision not to present expert testimony about petitioner's
16 level of intoxication was a reasonable tactical decision. *See, e.g., id.* at 109 ("A 'tactical
17 decision' in the course of an investigation is a conscious choice by a lawyer either to take
18 or to omit some action on the basis of an evaluation of the nature and complexity of the
19 case, the likely costs and potential benefits of the contemplated action, and other
20 factors.").

1 C. *Trial counsel's failure to "federalize" motion for judgment of*
2 *acquittal*

3 We turn next to petitioner's contention that the post-conviction court erred
4 when it denied his claims of inadequate assistance of counsel based on trial counsel's
5 failure to raise federal law in their motion for a judgment of acquittal as to two of
6 petitioner's aggravated murder convictions--Counts 18 and 19. Those counts alleged that
7 petitioner committed aggravated murder by "unlawfully and intentionally caus[ing] the
8 death of" McDonald and Whitcher, respectively, "in the course of the same criminal
9 episode." At the close of the state's case-in-chief, trial counsel moved for a judgment of
10 acquittal (MJOA) on all counts, arguing that "no juror could find beyond a reasonable
11 doubt, based on the Court's instructions and the State's evidence, there is * * * even a
12 prima facie showing that would allow these counts to go to the jury for their
13 consideration." Trial counsel then made a number of additional arguments pertaining to
14 specific counts. As to Counts 18 and 19, trial counsel added that "the State has failed to
15 show that this is the same criminal episode, the linkage between McDonald and
16 Whitcher." The trial court denied defendant's MJOA as to those counts.

17 In his operative petition for post-conviction relief, petitioner claimed that
18 the conduct of his trial counsel was inadequate:

19 "Trial counsel failed to move for judgments of acquittal on Counts
20 18 and 19 on the basis that the evidence in the record was legally and
21 factually insufficient to establish that petitioner had murdered two persons
22 in the same criminal episode *and that conviction on those counts therefore*
23 *] violates petitioner's right to due process under the Sixth and Fourteenth*
24 *Amendments to the United States Constitution.* Because counsel did not
25 move for acquittal on the above basis, petitioner received death sentences

1 on those counts. Had counsel so moved for judgments of acquittal, the trial
2 court would have been require[d] to grant the same."

3 (Emphasis added.)

4 Before the post-conviction court, petitioner argued that, in order to be
5 convicted of aggravated murder under ORS 163.095(1)(d), as alleged in Counts 18 and
6 19, the state was required to prove that each murder occurred during the "same criminal
7 episode," as defined in ORS 131.505(4). Petitioner argued that, because the murders of
8 Whitcher and McDonald were separated by more than two hours and occurred in
9 different locations, "[u]nder the definition of 'same criminal episode' the McDonald and
10 Whitcher homicides simply cannot be construed to have occurred in a continuous and
11 uninterrupted course of conduct. Counsel were obligated to move against Counts 18 and
12 19 on [that] basis."

13 The post-conviction court rejected petitioner's claim, because it concluded
14 that petitioner had failed to establish that any failure by trial counsel was likely to have
15 affected the result of petitioner's trial:

16 "The issue then is whether it would have made a difference if
17 Counsel had raised these arguments at the Trial Court. This Court
18 determines that it reasonably would not have made any difference. The
19 events involving Petitioner assaulting and stabbing three people and killing
20 one of them at about 10:30 p.m., involves the same criminal episode as the
21 events thereafter: Petitioner running away, continuing drinking and killing
22 his 'accomplice' * * * at about 1:30 a.m."

23 On appeal, as he did before the post-conviction court, petitioner spends the bulk of his
24 argument challenging that reasoning.

25 However, our task is to determine whether petitioner established, by a

1 preponderance of the evidence, that trial counsel failed to exercise reasonable
2 professional skill and judgment--and that petitioner suffered resulting prejudice--when
3 counsel failed to argue that "the record was legally and factually insufficient to establish
4 that petitioner had murdered two persons in the same criminal episode and that
5 conviction on those counts therefore[] violates petitioner's right to due process under the
6 Sixth and Fourteenth Amendments to the United States Constitution." As noted, trial
7 counsel *did* argue that "the State has failed to show that this is the same criminal episode,
8 the linkage between McDonald and Whitcher." Accordingly, petitioner's claim reduces
9 to whether trial counsel provided deficient representation when they failed to expressly
10 ground that argument in petitioner's due process rights under the Sixth and Fourteenth
11 Amendments. We conclude that petitioner did not establish that trial counsel was
12 inadequate or ineffective for failing to do that.

13 Petitioner also failed to establish that, had counsel expressly grounded the
14 MJOA motion in his due process rights, it would likely have affected the result of his
15 trial. Whether the trial court understood trial counsel's arguments to stem from federal
16 due process or Oregon law, the inquiry was the same: Did the state introduce enough
17 evidence to allow a rational juror to find that the two murders were committed during the
18 same criminal episode. *See State v. Bistrika*, 262 Or App 385, 400, 324 P3d 584, *rev den*,
19 356 Or 397 (2014) (noting the standard for granting an MJOA as "whether a rational
20 factfinder could find that the state proved every element of the offense beyond a
21 reasonable doubt"); *Jackson v. Virginia*, 443 US 307, 316, 99 S Ct 2781, 61 L Ed 2d 560

1 (1979) (federal due process requires "that no person shall be made to suffer the onus of a
2 criminal conviction except upon sufficient proof--defined as evidence necessary to
3 convince a trier of fact beyond a reasonable doubt of the existence of every element of
4 the offense"). In rejecting petitioner's MJOA--whether under Oregon law or the federal
5 due process standard--the trial court concluded that the state had introduced enough
6 evidence to survive the motion. Thus, even if petitioner is correct that the MJOA *should*
7 have been granted, and that the post-conviction court erred in concluding otherwise, he
8 has failed to establish that, had trial counsel expressly cited the federal constitution as
9 authority in the MJOA, it would have affected the trial court's ruling. Hence, the post-
10 conviction court did not err in rejecting petitioner's claim.

11 D. *Trial counsel's failure to prepare for and present evidence at the*
12 *penalty phase of petitioner's trial*

13 Finally, we turn to petitioner's contention that the post-conviction court
14 erred when it denied his claim for post-conviction relief based on trial counsel's alleged
15 failure to adequately prepare for and present mitigation evidence during the penalty phase
16 of petitioner's trial. Before addressing the substance of that claim, we first set out the
17 efforts of petitioner's defense team to prepare for the penalty-phase proceeding and
18 summarize the evidence that was ultimately presented.

19 1. *Investigation and presentation of penalty-phase evidence*

20 At the post-conviction trial, Martz testified that he and Dickison had
21 assigned to investigator Beers the task of "developing information about [petitioner's]
22 background, his family, his past life, looking for any witness or evidence * * * that would

1 be favorable to him. Somebody that could come in and say * * * that he is a good person
2 or has good character or * * * some information that would come forward that we
3 thought would benefit him." As Beers began gathering that information, Martz and
4 Dickison would meet with her to get updates on her interviews of potential witnesses,
5 review her reports, and collectively determine "what to go do next." In a series of reports
6 provided to Dickison--spanning 85 pages and entailing multiple interviews--Beers
7 detailed meeting with and interviewing petitioner on a number of occasions and
8 interviewing various family members and acquaintances from petitioner's past.
9 Specifically, Beers provided summaries of her interviews with petitioner's uncle,
10 grandmother, mother, father, pediatric dentist, several childhood friends, an employer, a
11 former girlfriend, several individuals whom petitioner had stabbed on previous occasions
12 as well as the father of one of those victims, and a high-school friend of petitioner's sister.
13 Additionally, Beers documented her unsuccessful attempts to interview petitioner's sister,
14 as well as her attempt to obtain petitioner's father's medical records, which had been
15 destroyed.

16 In addition to the information gathered in those interviews, counsel
17 "subpoenaed and ultimately received piles of documentation dating from [petitioner's]
18 childhood on up" in an attempt to explain the source of petitioner's anger and behavioral
19 problems. Those included "hundreds of pages of CSD, Juvenile, School and Medical
20 records regarding petitioner and his background."

21 Eventually, Martz and Dickison told Beers to stop looking for additional

1 mitigation evidence in petitioner's past. As Beers explained at the post-conviction trial,
2 "it was turning up that I was finding people about more incidents regarding [petitioner]
3 and kind of like more bad things * * *. [People who were contacted] were scared of
4 [petitioner], and they didn't want to have anything to do with him or didn't want to talk to
5 me or anything, because there had been a couple of them, past problems, and they didn't
6 want any retaliation from him." Testifying generally about the evidence that Beers had
7 uncovered, Martz explained, "I think the way we viewed a lot of the information, and it's
8 kind of a general recollection on my part, is everything seemed to be a two-edged sword;
9 that for every positive thing we could bring up, and quite frankly there wasn't a lot, it
10 could be turned around and used as something that would not be helpful." Likewise,
11 Dickison explained that Beers's investigation had become problematic to her because
12 "everyone [whom petitioner] referred us to, to talk to[,], wanted the District Attorney's
13 [phone] number because they wanted to testify against [petitioner]. So we pretty much
14 ceased going [down] that avenue."

15 Dickison explained that she began "worrying about" the penalty-phase of
16 petitioner's trial at the beginning of her representation of petitioner and that she had
17 assigned to Beers the task of locating mitigation evidence. She explained that her general
18 strategy was to "portray a sympathetic young man who grew up with many problems and
19 someone who deserved not to die for what had happened," but, as noted above, they had
20 had trouble locating mitigating evidence. As to the possibility of calling petitioner's
21 family members to testify on his behalf, trial counsel "had hoped to put on [petitioner's]

1 mother or his grandmother and sister, but * * * right at the last minute we decided not
2 to." As to petitioner's mother and grandmother, Dickison explained that the grandmother
3 had testified before the grand jury, that petitioner had made a number of admissions to
4 her, and that Dickison's "general thought was that neither of them would be helpful."

5 At the penalty-phase proceeding, over three days, the state called 27
6 witnesses to testify how petitioner had assaulted people in various ways throughout his
7 life--both while incarcerated and in the community. Specifically, the jury heard that,
8 while incarcerated, petitioner had assaulted and threatened jail and prison staff--including
9 in one incident punching a jail deputy in the head and, in another, kicking a deputy in the
10 thigh--and that petitioner had engaged in numerous fights with other inmates, including
11 one in which he had thrown boiling water in another inmate's face. They also heard that,
12 before the McDonald and Whitcher homicides, petitioner had, on three different
13 occasions, stabbed three separate people; that he had, on multiple occasions, physically
14 assaulted his ex-wife and a former girlfriend; that he had used a stick to strike a pregnant
15 woman in her stomach and her companion in the head when they came to his home to
16 visit his sister; and that he had made various threats against his teachers, the victims of
17 his assaultive behavior, and others.

18 Petitioner then introduced the testimony of three witnesses: Janzer, who, as
19 noted, had examined petitioner initially to ensure that he was able to aid and assist in his
20 defense; Dr. Frank Colistro, a psychologist who provided contract services for the
21 Oregon State Penitentiary involving the evaluation and treatment of inmates; and an

1 inmate who had been involved in a fight with petitioner while in prison. As to the two
2 experts, the post-conviction court summarized their testimony:

3 "[Trial counsel] first called Dr. Norman Janzer, a psychiatrist who
4 had evaluated petitioner. He had diagnosed petitioner as having a
5 'borderline personality disorder,' which explained petitioner's longstanding
6 behavioral problems. As part of his discussion of that diagnosis, Janzer
7 mentioned petitioner's difficult family relationships and his problem with
8 alcohol (a common feature for those suffering from borderline personality
9 disorder), as well as the fact that 'some mixed-up family setting' always is
10 associated with borderline personality disorder. He also noted that
11 petitioner was stuck at a very primitive level of emotional development.
12 Janzer opined that petitioner's disorder, although rather severe, was
13 treatable in a controlled environment like prison, acknowledging that
14 treatment for the particular disorder generally is a long, difficult process.
15 He stated, however, that quite often those suffering from the disorder 'grow
16 out' of it in their thirties or forties. When asked whether petitioner 'would
17 pose a threat in the future of engaging in violent acts,' Janzer said: 'Well, if
18 he follows the textbooks about borderline personality disorder, he should be
19 much more mellow by the time he's in his forties.'

20 "Petitioner's counsel next called Dr. Frank Colistro, a psychologist
21 who did contract work for the Oregon State Penitentiary that involved
22 evaluation and treatment of inmates, including those on death row. He
23 testified that, although he had not personally met with petitioner, he
24 believed that borderline personality disorder was treatable (although
25 treatment was very difficult). He further testified to the various treatment
26 programs--including some for personality disorders--that were available at
27 the prison."

28 Finally, counsel called an inmate who had been involved in a fistfight with
29 petitioner while both had been incarcerated. The inmate testified that the fight had been
30 the result of "bad words" and that the inmate believed that he had initiated the
31 confrontation with petitioner.

32 During the post-conviction trial, petitioner contended that, because of their
33 failure to prepare for the penalty-phase proceeding, petitioner's trial counsel had failed to

1 present a significant amount of mitigation evidence that was present in or evident from
2 the reports and records that Beers had accumulated.³ As identified by petitioner, that
3 mitigation evidence can generally be divided into two categories: First, testimony from
4 petitioner's family regarding their love for petitioner, his character and background, and
5 the effect that his execution would have on them. Second, evidence relating to
6 petitioner's dysfunctional upbringing and other challenges, as well as his multi-
7 generational family history of mental illness and substance abuse, which would provide
8 historical background and context for the development of petitioner's diagnosed
9 personality disorder.

10 In support of that claim, petitioner presented affidavits of a death-penalty
11 mitigation specialist, as well as various mental-health experts, which generally explained
12 and amplified the mitigation evidence in counsel's possession at the time of the penalty-
13 phase trial. He also presented affidavits and testimony from family members in which
14 they said that they would have testified, if called during the penalty-phase trial, that
15 petitioner's execution would devastate them. In response, the state argued that, given
16 extensive damning penalty-phase evidence presented by the state, trial counsel adopted
17 the reasonable strategy of tailoring their penalty-phase presentation solely toward the

³ Petitioner also argued that Beers's investigation was itself inadequate, because Beers lacked experience as an investigator in capital proceedings. The post-conviction court disposed of that argument, concluding that petitioner had failed to present sufficient evidence to prove that claim because the evidence on which petitioner relied in the post-conviction trial was derived from Beers's investigative efforts. Petitioner renews that argument in a single sentence on appeal, and we reject it without further discussion.

1 issue of future dangerousness. In its findings of fact and conclusions of law, the post-
2 conviction court adopted the state's reasoning, noting that

3 "[a]t the penalty phase of petitioner's trial, his counsel's approach was
4 obvious and straightforward: to convince the jury that although petitioner
5 had a serious personality disorder, which was responsible for his history of
6 violent conduct, his disorder could be treated in prison and successful
7 treatment would eliminate his violent conduct."

8 Reviewing the evidence that petitioner had presented, the post-conviction court rejected
9 petitioner's claim, concluding that trial counsel had made a reasonable tactical decision
10 that explained the failure to introduce the identified evidence:

11 "That evidence, although perhaps of some mitigating value, realistically
12 would have had little impact in a case where the state had presented a
13 mountain of evidence establishing petitioner's lengthy and continuing
14 history of extremely violent conduct in and out of an incarcerated setting.

15 "For that reason, *counsel reasonably could have viewed the evidence*
16 *as having limited value overall and no real value on the future*
17 *dangerousness question* (given that the evidence would serve only to
18 explain why petitioner was the way he was, and would not add much if
19 anything to the analysis of whether petitioner's personality disorder--the
20 root of his violent behavior--was treatable, which undeniably was the
21 critical question for the jury at petitioner's penalty phase). And based on
22 that view of the evidence, it was well within the bounds of reasonable
23 professional skill and judgment for counsel to decide, as a matter of
24 strategy, to limit the defense case at penalty phase to expert testimony
25 directly relevant to the future dangerousness question."

26 (Emphasis added.)

27 On appeal, petitioner challenges that conclusion, arguing that the post-
28 conviction court's finding that trial counsel made a tactical decision not to introduce the
29 proffered evidence is not supported by the record and, in any event, that such a tactical
30 choice was unreasonable. Before addressing petitioner's argument on appeal, we must

1 resolve a disagreement between the parties over the proper test for determining whether
2 the challenged conduct was the type of tactical decision-making that post-conviction
3 courts do not second guess in the context of an inadequate assistance of counsel claim
4 under Article I, section 11.

5 2. *Standard for evaluating reasonable tactical decisions of counsel*

6 In order to be considered an exercise of professional skill and judgment for
7 purposes of a claim of inadequate assistance of counsel under Article I, section 11, "a
8 lawyer's tactical decision 'must be grounded on a reasonable investigation.'" *Lichau*, 333
9 Or at 360 (quoting *Gorham*, 332 Or at 567). Thus, "tactical decisions made in the course
10 of preparing for trial must involve 'a conscious choice by a lawyer either to take or to
11 omit some action on the basis of an evaluation of the nature and complexity of the case,
12 the likely costs and potential benefits of the contemplated action, and other factors.'" *Id.*
13 (quoting *Stevens*, 322 Or at 109).

14 Given that standard, petitioner argues that the post-conviction court erred in
15 rejecting his claim on the basis that trial counsel "*could have* reasonably concluded" that
16 the evidence would add little or nothing to their penalty-phase case. Petitioner contends
17 that, under *Lichau*, in order for the post-conviction court to have concluded that trial
18 counsel made a reasonable tactical decision to narrow the scope of their penalty-phase
19 presentation, there must have been direct evidence that counsel made a "conscious
20 choice" as to each item of mitigation that they did not introduce. Petitioner notes that, as
21 to many items of mitigation evidence that he identified, trial counsel could not recall

1 making specific tactical decisions on whether to introduce it. As to others, petitioner
2 contends that counsel's decisions were unreasonable.

3 We disagree with petitioner's contention that, under *Lichau*, the record
4 required affirmative evidence that trial counsel made a tactical decision as to each item of
5 mitigation evidence that petitioner contends that counsel was inadequate for failing to
6 introduce or explain. Instead, where there is evidence that trial counsel made an
7 "evaluation of the nature and complexity of the case, the likely costs and potential
8 benefits of" various courses of action, *Lichau*, 333 Or at 560, and adopted a mitigation
9 strategy in the face of that evaluation, a post-conviction court can infer that the decision
10 to pursue individual pieces of mitigation fell within that broader tactical calculus. *See*,
11 *e.g.*, *Krummacher*, 290 Or at 883 (assistance of counsel not inadequate despite trial
12 counsel's inability to identify whether tactical decision was made to object to individual
13 questions but only that such a decision would have been consistent with counsel's
14 "general practice"); *Hayward v. Belleque*, 248 Or App 141, 155-56, 273 P3d 926 (2012),
15 *rev den*, 353 Or 208 (2013) (affirming denial of post-conviction relief because post-
16 conviction court's findings that "[t]he type of mitigating evidence that petitioner attempts
17 to rely on in this proceeding is the sort of double-edged sword that requires a calculated
18 tactical decision by trial counsel" and that "trial counsel reasonably could have concluded
19 that presentation of such evidence would have been merely cumulative at best" were
20 supported by evidence in the record); *Adams v. Nooth*, 239 Or App 613, 617-18, 245 P3d
21 173 (2010), *rev den*, 350 Or 130 (2011) (rejecting claim of inadequate assistance because

1 proffered evidence "would not have appreciably bolstered the defense theory at trial" and
2 "it appear[ed] that trial counsel made a tactical decision to simplify the case").

3 In arguing to the contrary, petitioner notes that in *Bogle v. Armenakis*, 172
4 Or App 55, 63, 18 P3d 390 (2001); *Aquino v. Baldwin*, 163 Or App 452, 460, 991 P2d 41
5 (1999), *modified on recons*, 169 Or App 464, 12 P3d 51 (2000); and *Aikens v. Maass*,
6 122 Or App 321, 327-28, 858 P2d 148 (1993), *rev den*, 318 Or 350 (1994), we declined
7 to speculate that trial counsel had made a reasonable tactical decision where there was no
8 evidence to support that counsel had done that. However, those cases do not present the
9 same tactical calculus that is present here: In *Bogle* and *Aikens*, trial counsel had failed to
10 object to erroneous jury instructions; in *Aquino*, trial counsel had failed to seek a
11 continuance to allow for production of a fingerprint analysis that trial counsel knew was
12 forthcoming. Unlike those cases, in which, in the absence of direct evidence to the
13 contrary, it appeared that counsel had made *no* conscious decision--tactical or otherwise--
14 here, there is evidence that trial counsel had dedicated significant resources to
15 investigating and gathering potential mitigation evidence and had made a conscious
16 decision to identify and call the witnesses that they did--and not to call those witnesses
17 whom they chose not to call.

18 3. *Failure to call petitioner's family members*

19 With that in mind, we address the specific items of mitigation evidence that
20 petitioner presented to the post-conviction court in support of his claim, turning first to
21 petitioner's family members. Petitioner argued that trial counsel provided inadequate

1 assistance of counsel when they failed to call his grandmother, his sister, his half-sister,
2 and his stepmother to testify about their love for him and the effect that his execution
3 would have on them.

4 As noted, trial counsel "had hoped to put on [petitioner's] mother or his
5 grandmother and sister, but * * * right at the last minute * * * decided not to." There was
6 evidence before the post-conviction court that that decision was based, in part, on the
7 ability of the state to elicit harmful testimony from them. As the post-conviction court
8 noted, petitioner's grandmother "had reportedly advised the police that she had always
9 thought that Petitioner would lose his temper and kill her * * *. The week Petitioner
10 moved in with her, [she] wrote out her funeral plans for the family, and purchased a
11 cemetery plot." Likewise, trial counsel was concerned that petitioner's sister "might be
12 more harmful than helpful because the prosecution would then be able to examine her
13 about negative incidents involving Petitioner during their childhood." In light of that
14 evidence, the post-conviction court did not err in concluding that trial counsel's decision
15 not to call petitioner's grandmother and sister was protected as a reasonable tactical
16 decision.⁴

17 As to petitioner's stepmother and half-sister, petitioner argues that, because
18 the record does not establish that trial counsel had attempted to contact them, trial

⁴ The post-conviction court rejected petitioner's claim as to his sister on the additional ground that petitioner had failed to prove that she was available to testify on behalf of the defense at the penalty-phase trial, in light of Beers's testimony that petitioner's sister had been unwilling to cooperate meaningfully with the defense investigation.

1 counsel could not have made a reasonable tactical decision to forgo calling them as
2 witnesses. Further, petitioner contends that the failure to interview them amounted to an
3 unreasonable mitigation investigation and, thus, reflected inadequate assistance of
4 counsel. But, even assuming that trial counsel made no attempt to contact petitioner's
5 stepmother and half-sister, that does not, on its face, amount to inadequate assistance of
6 counsel. As the Oregon Supreme Court recently explained:

7 "[I]n virtually every complex post-conviction matter, there is always *other*
8 evidence that could have been investigated or introduced. The standard,
9 however, is not whether counsel investigated or introduced every shred of
10 evidence regarding petitioner's background, psychological makeup, or other
11 factors that the jury might possibly have found to be mitigating; rather, the
12 standard under Oregon law is whether petitioner proved by a preponderance
13 of the evidence that his defense counsel failed to exercise reasonable
14 professional skill and judgment."

15 *Montez*, 355 Or at 16 (emphasis in original).

16 Here, the record supports the post-conviction court's conclusion that
17 petitioner did not make that showing with respect to counsel's alleged failure to
18 investigate petitioner's stepmother and half-sister. As noted, during her investigation of
19 petitioner, Beers interviewed numerous family members, friends, and acquaintances and
20 developed a file full of mitigation evidence that trial counsel considered to be "a two-
21 edged sword," because it had the potential to harm petitioner's case. Eventually, as
22 Dickison explained, that led trial counsel to stop pursuing that type of mitigation
23 evidence, out of concern that they would discover more damaging information or unearth
24 additional witnesses who would testify on behalf of the state.

25 In assessing the reasonableness of that decision, we "must make every

1 effort to evaluate [trial counsel's] conduct from [their] perspective at the time, without the
2 distorting effects of hindsight." *Lichau*, 333 Or at 360. Doing so, we conclude that the
3 trial court did not err in rejecting petitioner's claim. Faced with a difficult and often
4 uncooperative client, trial counsel engaged in a thorough investigation of petitioner's
5 family members, ultimately finding little useful mitigation evidence. Although, as
6 petitioner notes, trial counsel was aware that petitioner had lived with his stepmother and
7 half-sister "briefly as a teenager," the decision to stop investigating family members did
8 not amount to a failure to exercise reasonable professional skill or judgment.

9 4. *Failure to introduce evidence of petitioner's troubled history*
10 *and other mitigating evidence*

11 We turn next to petitioner's contention that trial counsel were inadequate
12 for "failing to present significant available evidence" of petitioner's "troubled history." In
13 support of that claim, petitioner presents a list of specific items that he contends represent
14 recognized types of mitigation evidence. Petitioner argues that that evidence--which he
15 has pulled from the investigative materials that trial counsel compiled before the penalty-
16 phase trial--was "relevant to assessing [petitioner's] moral culpability," *Wiggins v. Smith*,
17 539 US 510, 535, 123 S Ct 2527, 156 L Ed 2d 471 (2003), and was therefore admissible
18 as mitigation evidence. Petitioner reasons that, because the individual items of evidence
19 that he identifies are "recognized mitigation evidence," the failure to present that
20 evidence constitutes inadequate assistance of counsel.

21 The Oregon Supreme Court recently addressed--and rejected--a nearly
22 identical argument in *Montez*. There, the petitioner had argued that

1 "trial counsel provided inadequate assistance of counsel by failing to
2 investigate and present a long list of other kinds of evidence that the jury
3 should have been able to consider. According to petitioner, that evidence
4 included specific examples of petitioner's personal history of substance
5 abuse and mental illness; his family's history of substance abuse and mental
6 illness; his cultural background; his abusive marriage; his alcohol
7 consumption on the night of the murder; and positive evidence concerning
8 his character."

9 355 Or at 23-24. In affirming the post-conviction court's denial of the petitioner's claim,
10 the court reasoned:

11 "[p]etitioner may be correct that the specific examples or facts cited in his
12 brief were not individually investigated and presented to the jury as part of
13 his mitigation case. However, the broad themes represented by that
14 evidence--petitioner's struggles with drugs and alcohol, his dysfunctional
15 family relationships, and a lifetime of abuse--were all presented, albeit in
16 different forms and with some different details. Taken all together, that
17 evidence provided a foundation for the expert opinion that petitioner was, at
18 the time of his crimes, unable to differentiate between his actions and the
19 childhood traumas that he was mentally reliving. Again, the issue is not
20 whether the evidence could have been presented in a different way, or
21 whether additional facts could have been included, or facts that were
22 included omitted. Under our cases, the applicable standard is whether trial
23 counsel exercised reasonable skill and judgment. In assessing the
24 reasonableness of counsel's actions under the Oregon Constitution, we
25 'must make every effort to evaluate [the] lawyer's conduct from the lawyer's
26 perspective at the time, without the distorting effects of hindsight.' *Lichau*,
27 333 Or at 360. The fact that petitioner would, in retrospect, have
28 implemented his mitigation defense in one or more different ways is not a
29 ground for post-conviction relief if counsel acted reasonably in presenting
30 the defense that they did. That is the case here."

31 *Id.*

32 For the same reasons, we reject petitioner's argument here. Although
33 petitioner has identified a number of specific items that he contends could have--and
34 therefore should have--been presented to the jury, he acknowledges that the "broad
35 themes represented by that evidence" were presented through Janzer's testimony.

1 Regarding petitioner's troubled family, Janzer testified that petitioner's
2 records indicated substantial family problems, "so that all of the people who tried to help
3 [p]etitioner as he was growing up bumped up against family problems," and that those
4 issues are "still a big problem with [petitioner]," because he had not "come to terms with
5 his family yet." Janzer testified that petitioner's mother had abused him as a child, and
6 that the abuse had ended when petitioner, at around age 13, punched his mother in the
7 stomach and knocked her to the ground.

8 As a result of those problems, Janzer testified that petitioner had "spent a
9 lot of time with his grandmother, and then a series of foster homes, none of which
10 worked out very well, and various programs," but that petitioner "was a very difficult * *
11 * boy to help." Janzer testified that, in the records that he had reviewed, petitioner was
12 "turned down [by] probably seven programs in this area [that] decided they couldn't help
13 him." Additionally, Janzer testified that he had seen multiple records of petitioner being
14 hospitalized with "suicidal thinking."

15 Janzer also testified that petitioner had had difficulty in school, and that he
16 was using drugs and alcohol to "dull his appreciation of reality and to pull down his level
17 of anxiety." He testified that petitioner "started drinking a little bit and a little bit more
18 and a little bit more and finally he [was] drinking by the fifth * * * of vodka." Although,
19 in Janzer's opinion, petitioner was "kind of young for an alcoholic," he acknowledged
20 that "it does happen."

21 Janzer then explained the importance of that background:

1 "The reason I got lost in the background because that's important.
2 You never meet a borderline personality disorder who doesn't come from
3 some mixed-up family setting. Then as he gets older and is supposed to be
4 more independent the problems show up. And one of the ways of trying to
5 understand why he reacts the way he does is there's a frantic fear of being
6 abandoned or rejected. That seems to be the basic problem with the
7 borderline is that people are going to kick him out or ignore him, things of
8 that order. The relationships are unstable, and he goes between you're
9 either a good guy or a bad guy. You're either idealized or you're the worst.
10 There's nothing in between for him. And that fits in with a lot of his own
11 remarks."

12 Janzer went on to explain how petitioner's personality disorder leads him to act
13 impulsively, to overreact to rejection--perceived or real--and to engage in "inappropriate
14 displays of anger" that are "disproportionate." To an outside observer of those displays
15 of anger, Janzer testified that "[t]here [is] no explaining why [petitioner] would go to the
16 lengths he did in terms of what seemed to be happening."

17 Petitioner acknowledges those portions of Janzer's testimony, but he
18 contends that the presentation was incomplete, pointing to numerous other details of
19 petitioner's family history, his own treatment for mental illness, and his developmental
20 delays that were present in the reports that Beers had obtained during her investigation.
21 But, as in *Montez*, the issue before us "is not whether the evidence could have been
22 presented in a different way, or whether additional facts could have been included." 355
23 Or at 24. Instead, it is "whether trial counsel exercised reasonable skill and judgment" in
24 preparing for and presenting evidence in petitioner's penalty-phase trial. And, having
25 reviewed the record, we conclude that the post-conviction court did not err in concluding
26 that trial counsel did exercise reasonable professional skill and judgment. As the

1 Supreme Court concluded in *Montez*, we also conclude that "[a]lthough petitioner's post-
2 conviction counsel identified numerous details that could have been handled differently,
3 emphasized or deemphasized, included or excluded during his penalty-phase
4 [proceeding], those details do not demonstrate that defense counsel failed to exercise
5 reasonable skill and judgment in their representation of petitioner." *Id.* at 24-25.

6 IV. CONCLUSION

7 Having considered each of petitioner's post-conviction contentions raised
8 on appeal, we conclude that petitioner has failed to prove that his counsel's performance
9 was constitutionally deficient or that any deficiency had a tendency to affect the outcome
10 of the proceeding, and, hence, the post-conviction court did not err in denying petitioner's
11 claims for post-conviction relief.

12 Affirmed.