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IN THE CIRCUIT COURT OF THE STATE OF OREGON

FOR THE COUNTY OF WASHINGTON

ANGELA D. McANULTY, Plaintiff, vs. ROB PERSSON, Superintendent, Coffee Creek Correctional Facility, Defendant	Case No.: C160443CV REVISED FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

This matter came before the court on a Petition for Post-Conviction Relief. Petitioner filed a Second Amended Petitioner for Post-Conviction Relief on September 29, 2017. Trial was held April 16 – May 1, 2018, with argument heard November 15, 2018 and submission of all material from the parties completed in December 2018. At trial, the parties presented testimonial and documentary evidence. The court, having considered that evidence, as well as the parties' written and oral arguments, grants in part and denies in part relief on petitioner's claims based on the findings of fact and conclusions of law set forth below.

FINDINGS OF FACTS

Findings of fact are included in the legal conclusions and findings below and as follows:

General Findings:

Petitioner was convicted of aggravated murder and sentenced to death for the torture- murder of her 15-year-old daughter, Jeanette Maples. The investigation demonstrated that Jeanette had been beaten, starved and otherwise abused by Petitioner over a long period of time. The facts of the crime were particularly gruesome. Attorney Krasik described it as the most indefensible case he had ever handled. Petitioner entered a guilty plea and proceeded to trial only on the penalty phase of the case. Petitioner's defense attorneys presented only a few lay witnesses at the 15-day sentencing trial and their presentation lasted approximately 4 hours. Petitioner was sentenced to death. The Oregon Supreme Court affirmed the conviction and sentence on direct review. *State v. McAnulty*, 356 Or 432, 338 P3d 653 (2014). The United States Supreme Court denied

certiorari. McAnulty v. Oregon, ___ US ___, 136 S Ct 34 (2015). Petitioner now seeks, in this court, post-conviction relief from both her conviction and sentence. Her Second Amended Petition for Post-Conviction Relief (Petition) sets forth seven claims, including sub-claims, for relief, all of which allege that she was denied constitutionally adequate assistance of counsel.

In December 2009, Kenneth Hadley and Steven Krasik, two seasoned criminal defense attorneys with experience representing capital murder defendants, were appointed to represent petitioner in the underlying criminal case, *State v. Angela Darlene McAnulty*, Lane Co case No. 20-09-27457. At the time of their appointment, Hadley and Krasik were under contract with the Oregon Public Defense Service (OPDS), the statutorily created agency that maintains Oregon's public defense system and that, in 2009, provided contract attorneys to represent indigent criminal defendants charged with aggravated murder in Lane County. Hadley and Krasik had certified to OPDS that they had the requisite skill, experience, and training to meet the OPDS Commission's published qualification standards for attorneys handling capital cases, and OPDS had accepted those certifications and awarded them contracts on that basis.

Mr. Krasik and investigator Roger Harris were at the same time involved in the Turnidge capital murder case in Marion County. Krasik and Harris had been consumed with the Turnidge bank bombing death penalty case for several months prior to Petitioner's trial, and their unavailability during that time prevented the defense team from completing their social history, psychological workup and other penalty defense preparations prior to trial. The Turnidge case did not conclude until December 22, 2010.

Trial counsel believed that the district attorney would agree to settle Petitioner's case for less than the death penalty and this belief impacted their preparations for trial. There were two settlement conferences in Petitioner's case — on December 2, 19 2010 and December 29, 2010. The case did not settle. Counsel then filed a motion for a continuance and the motion was denied. On the first day of trial, with her attorneys' encouragement, Petitioner entered a guilty plea to the charges in the indictment without any concession from the state. The trial then proceeded to the penalty phase and Petitioner was sentenced to death.

Findings as to claim 1:

1. In the early stages of trial counsels' representation of petitioner, they retained two mental health experts with whom they had worked on numerous prior cases—Dr. Jerry Larsen, a psychiatrist holding the position of associate clinical professor of psychiatry at the Oregon Health Sciences University, and Dr. Loren Mallory, a neuropsychologist who had been licensed in Oregon since 1992. In counsel's experience, Larsen was the "go-to" psychiatrist in criminal and capital cases, and Mallory often worked effectively with Larsen on such cases. Counsel asked Larsen and Mallory to advise counsel on petitioner's competency to stand trial (i.e., her competency to "aid and assist" counsel).

2. After evaluating petitioner in December 2009, Dr. Mallory advised counsel "that petitioner could aid and assist her counsel, that she did not have an intellectual disability, and that no

further neuropsychological testing was warranted." Dr. Mallory's only contact with petitioner was on December 23, 2009.

3. Dr. Larsen's impression of petitioner was that she was competent, with chronic depression and dependent personality traits. At the end of an eight-page report of his psychiatric evaluation of petitioner in January 2010, Dr. Larsen advised counsel that petitioner "can currently aid and assist in her own defense."

4. The defense team at times found that Petitioner had a difficult time understanding all the concepts that they discussed. At other times she seemed confused and on yet other occasions she was hard to communicate with because she was very emotional. Some concepts had to be explained repeatedly. Petitioner was on medication during her pretrial incarceration and her level of mental awareness and coping improved during that time period, although she remained emotionally fragile. It was particularly difficult for Petitioner to review and discuss the facts related to the death of her daughter Jeanette. Petitioner's emotionally fragile conditions often resulted in her crying and sobbing when dealing with her attorney's and defense team making it difficult and time consuming for them to deal with her.

5. Petitioner's intelligence level is below average and her maturity level at the time appeared less that her age.

6. In February and July 2010, Larsen again conducted psychiatric evaluations of petitioner. Those examinations did not raise any concerns about petitioner's competency, and Larsen did not report any such concerns to counsel. The 6 July 2010 visit was Dr. Larsen's last visit with petitioner.

7. At the end of a ten-page report provided to counsels in November 2010, Dr. Larsen told them that petitioner "display[ed] no evidence of a mental defect," but that she "ha[d] however, for years lived with a chronic depressive (dysthymic) disorder characterized by depressed mood, low self-esteem, energy, isolation, and social withdrawal." Larsen's report also again advised counsel that petitioner could "currently aid and assist in her own defense."

8. In December 2010, the state and petitioner participated in pretrial settlement conferences at which Judge Charles E. Luukinen acted as the settlement judge. Based on his 25 years of experience as a circuit court judge in Oregon and his personal observation of petitioner during the settlement conferences, Judge Luukinen believed that petitioner was legally competent to plead guilty and to stand trial.

9. On February 1, 2011, petitioner pleaded guilty to both charges in the Indictment: aggravated murder (Count 1) and tampering with physical evidence (Count 2). At the plea hearing, Dr. Alan Cohn, the Lane County Jail psychiatrist who provided psychiatric care for petitioner throughout petitioner's stay at that facility (beginning in December 2009), advised the trial court (Senior Judge Kip Leonard) that when Cohn last saw petitioner a little over one week

before on January 21, 2011, she appeared "perfectly competent" to decide whether or not to plead guilty to the charges in the Indictment.

10. The trial court accepted petitioner's guilty pleas, finding that petitioner had knowingly and voluntarily pleaded guilty.

11. During the 15-day penalty-phase trial that immediately followed petitioner's guilty pleas, she did not exhibit to her defense team legal incapacity to stand trial or to aid and assist her counsel.

12. Although, during the period from petitioner's arrest in December 2009 to the imposition of her death sentence on February 24, 2011, there were occasions when she was so emotionally distraught that members of the defense team (both the investigators and counsel) were unable to productively work with her, counsel did not during that period personally observe conduct by petitioner or receive information about petitioner's conduct from others that indicated she lacked the capacity to aid and assist counsel, to plead guilty, or to stand trial. To the contrary, petitioner exhibited to counsel and others on the defense team that she understood the nature of the legal proceedings against her, that she was able to assist and cooperate with counsel, and that she was able to participate in her defense.

13. During that same period, counsels did not ask the trial court to order a competency examination of petitioner under ORS 161.365; nor did the court on its own order such an examination.

14. The district attorney adamantly pursued the death penalty in petitioner's case. Had petitioner's trial counsel presented to the district attorney evidence suggesting petitioner's "marginal competence," the district attorney would have considered that fact, but it would not have affected the state's firmly held view that the death-penalty issue needed to go to a jury.

Findings as to Claim 2

15. Before the settlement conferences, petitioner's trial counsel consulted with multiple mental health experts about petitioner's mental status, and they and their investigators had interviewed petitioner's family members and friends.

16. In November 2010, counsel obtained from Dr. Jerry Larsen, the psychiatrist they had retained to evaluate petitioner, a ten-page report outlining Larsen's psychological evaluations of petitioner in February and July 2010. That report contained extensive discussion of petitioner's mental health and her social history.

17. Counsel asked Dr. Larsen to make himself available by phone for the settlement conferences in case there were any questions that counsel could not answer or that the doctor could better explain.

18. At the time of the settlement conferences, the defense mitigation effort was far from complete. At the settlement conferences, counsel presented a limited mitigation package

that included information about the abuse petitioner experienced while growing up, the unsolved murder of her mother, petitioner's drug abuse, her relationships with abusive men, and her prior experience with DHS in California and Oregon. The package also noted that the mental health experts had described petitioner as a "follower," that petitioner's relationship with Richard Sr. (her husband and codefendant) was unhealthy and rife with financial struggles, that petitioner had mild obsessive compulsive disorder that became worse around the time of Jeanette Maples' murder, that petitioner made a vow to cease beating the victim ten days before the victim's death and that petitioner was a model inmate at the jail and had helped save the lives of two female inmates who had threatened suicide.

19. The information provide by Petitioner's defense team at the settlement conferences did not meet the prevailing professional standards in 2011 because the mitigation investigation and preparation were not completed. The social history was not completed, and little had been done to develop the psychological information needed for trial. This was in large part due to the fact that attorney Krasik and lead mitigation investigator Roger Harris had, until recently, been involved in another capital murder case that took a large part of their time. The mitigation investigation had been hampered by the participation of Mr. Krasik and Mr. Harris in the Turnidge case, which took much of their attention in 2010. The failure to complete the social history investigation prior to the settlement conferences was not a conscious choice but was the result of inadequate time to complete the process.

20. Prior to the settlement conferences, petitioner's counsels believed that settlement was likely in petitioner's case. Defense counsel had completed some mitigation investigation at the time of the settlement conferences. However, defense counsel delayed the mental health investigation based on their belief that settlement was likely.

21. From the early stages of petitioner's case, and specifically with respect to settlement discussions, the district attorney consistently informed petitioner's counsels that settlement was unlikely given the egregious circumstances of petitioner's crime. According to Judge Luukinen, who served as the settlement judge, the district attorney was "adamant in seeking the death penalty."

22. The settlement conferences failed to produce a settlement, and petitioner's case proceeded to an entry of a guilty plea and penalty-phase trial, which resulted in a death sentence.

Findings as to Claim 3:

23. On January 12, 2011, petitioner's trial counsels filed a motion to postpone trial, which was set for February 1, 2011. The motion, which requested that the trial date be set over 90 days, identified six reasons for the requested postponement (set forth in attorney Hadley's affidavit in support of the motion): (1) attorney Krasik, who was assigned to handle the guilt phase of petitioner's trial, had been immersed in a 114-day aggravated murder trial (the Woodburn bombing case involving the Turnidge defendants), which had gone 30 days longer than expected and had not ended until December 22, 2010, with a death sentence for Krasik's client; (2) the state had been very slow in providing discovery to the defense—the autopsy report and all

attachments was not given to the defense until approximately November 2010 and over 3,000 pages of new discovery were delivered to the defense at the end of November 2010; (3) it would be very difficult for Krasik "to review all the new discovery, reread the old discovery, review all the defense investigation, meet with the defense team and client, and be ready for trial on February 1, 2011"; (4) as a general rule, "an attorney needs at least 30 days of rest after a death penalty case before starting to get ready for another death penalty case"; (5) Judge Luukinen, the settlement judge, had indicated that the defense "should prepare additional factual information for him to discuss with the Lane County District Attorney," and counsels needed more time to do that; (6) counsels needed to hire an expert to meet with petitioner and thoroughly explore her "mental condition," which counsel had held off doing because Dr. Larsen had advised them that, if an expert were to do that, "it would likely put [petitioner] into a serious mental decline that could result in her being psychotic and render her unable to assist her own defense at least for some period of time"; and in light of the unsuccessful settlement negotiations, counsel now had "no choice but to hire an expert to explore her mental condition even if it would result in a decline in her mental health."

24. The state objected to petitioner's request for postponement of trial. By the time the court heard the motion to postpone, the prosecution had already subpoenaed their witnesses.

25. Counsel had previously reported to the court and to the prosecution that they would be ready by the trial date of February 1, 2011. Counsel had recently reported this to the court on November 5, 2010.

26. At the hearing on the motion to postpone, attorney Hadley—in arguing for postponement—generally relied on the reasons set forth in his affidavit and added that he had expected the case would settle before the scheduled trial date. The prosecutor disputed some of Hadley's assertions about late discovery, questioned Hadley's belief that the case would settle, asserted that petitioner's counsels had repeatedly represented either expressly or implicitly to the trial court that they could deal with the February 1, 2011 trial date, even though attorney Krasik was involved in the Woodburn bombing trial, and, finally, said that petitioner's counsel had represented to the prosecution that they did not have a mental defense to present. The prosecutor argued there was no indication that Dr. Crossen's last-minute evaluation would change that situation. The prosecutor also stated he himself had seen no evidence that petitioner had mental health issues.

27. The trial court denied petitioner's motion to postpone.

28. The defense team all assumed the motion would be granted, because attorney Steve Krasik and investigator Roger Harris had been consumed with the Turnidge bank bombing death penalty case for several months prior to petitioner's trial, and their unavailability during that time prevented the defense team from completing their penalty defense preparations prior to trial.

29. Defense counsel filed a motion to suppress the statements that petitioner had made to police after Jeanette's death. At a hearing on petitioner's motion to suppress her statements, the state

called as their sole witness one of the interrogating detectives, to testify about petitioner's interrogation statements. The detective's testimony established that during petitioner's first interrogation, she was advised of her *Miranda* rights, waived them and began denying responsibility for the victim's death. At one point during the interrogation, petitioner asked the police to stop questioning her, but then continued the conversation by asking her own questions. The police continued to talk to petitioner, after which she made incriminating statements and eventually again asked that the questioning cease. Following additional questioning, petitioner again invoked, but the police persisted in questioning, whereupon petitioner made more incriminating statements. After the police ceased that interrogation, petitioner was left alone in a room for approximately one hour, after which she asked to talk again to detectives. Another round of police questioning commenced, where petitioner again made incriminating statements, after which the interrogation ceased for a time. Several hours later at the Lane County jail, the police interrogated petitioner one final time. Petitioner was again advised of her Miranda rights and made additional incriminating statements.

30. Trial counsel called no witnesses for the suppression hearing.

31. In moving to suppress petitioner's post-arrest statements to police, petitioner's counsel did not present, in the trial court, any evidence from a mental health expert attempting to show that petitioner had cognitive deficits and chronic mental health issues that impaired her ability to knowingly, voluntarily, and intelligently waive her Miranda rights; nor did counsel make such an argument to the trial court.

32. After hearing the testimony of the detective, the trial court ruled that all of petitioner's invocations were equivocal, that all her statements were made without threats, promises or coercion, and that all petitioner's statements to police were admissible.

33. On direct review, the Oregon Supreme Court held that petitioner's second and third invocations were unequivocal, that the police violated her rights by continuing the interrogation in the face of those clear invocations, and that the trial court erred in admitting certain statements which were obtained from the police violations of those specific invocations. However, the Court ruled that petitioner's subsequent waivers were not a fruit of the prior police misconduct and were thus voluntary. The Court found harmless the trial court errors in admitting petitioner's statements.

34. Prior to petitioner's trial, the state filed a motion in limine seeking a pretrial ruling on "the admissibility of photographs of the victim." At the pretrial hearing on the state's motion, the state argued that "[t]he photographs of the victim's body may certainly be construed as gruesome, but [they are] not overly prejudicial," and that the photographs therefore should be admitted. The state made it clear that its motion was intended to give notice that any or all of the identified photographs could be offered during the guilt phase and the penalty phase of petitioner's trial, with the understanding that the photographs would be subject to relevancy and other objections at trial.

35. Petitioner's counsel did not file any motion with respect to the photographs and, in response to the state's representation at the hearing on its motion in limine that the motion's principal purpose was to give notice of the state's intent to offer certain photographs at trial, petitioner's counsel argued that "when the time comes," the court should weigh each photograph's probative value against the risk of unfair prejudice in determining whether the photograph would be admitted.

36. The trial court then ruled that "rulings on particular photographs will be made at the time of trial." At the penalty-phase trial, when the state offered photographs of the victim's body (marked as State's Exhibits Nos. 1 through 22), petitioner's counsels stated that they had "no objection." The trial court received the photographs.

37. Prior to petitioner's penalty-phase trial, her counsels filed a "Motion to Bar Potential of Death Penalty, or in the alternative, Demurrer," and an accompanying memorandum. Trial counsels did not argue that petitioner's trial indictment only alleged the crime of non-capital aggravated murder, since the four factual determinations required to enhance the statutory maximum penalty from life imprisonment to death (deliberateness, future dangerousness, lack of provocation, whether the defendant should receive the death penalty) were not contained in the indictment.

38. At the time of petitioner's trial, the Lane County District Attorney's office had no written policy or criteria on selecting appropriate cases for capital prosecution. An Oregon prosecutor has sole discretion to make capital charging decisions. Trial counsel never challenged the constitutionality of Oregon's death penalty scheme on the ground that leaving capital charging and settlement decisions up to the unfettered discretion of individual prosecutors, with no judicial review of that discretion, fails to comply with the dictates of the Supreme Court, violating the Eighth and Fourteenth Amendments of the United States Constitution.

Findings as to Claim 4

39. On February 1, 2011, after settlement conferences in December 2010 had failed to produce a settlement in petitioner's criminal case, petitioner pleaded guilty to the charge of aggravated murder and the trial court accepted that plea as knowingly, intelligently, and voluntarily entered.

40. Petitioner's guilty plea to the aggravated murder charge was not based on plea negotiations with the state; it was a "straight-up guilty plea" with no agreements or concessions from the state, including with respect to sentence (the state would continue to pursue a death sentence and that question would be decided by a jury).

41. From the early stages of petitioner's case until the entry of her guilty plea, petitioner had repeatedly told her counsels and other members of the defense team that she did not want to go to trial. Petitioner was terrified of going through a trial, and just wanted it over with. Well before the guilty plea, counsels advised petitioner that, even though she did not want to go to

trial, she at least would have to go to trial on the sentencing question if the state continued to pursue the death penalty.

42. While competent, Petitioner was a compliant defendant. While she insisted that she did not want to go through a trial, Petitioner would have done so if ultimately her attorneys recommended that she do so. Petitioner's attorneys did not dissuade petitioner from pleading guilty but rather encouraged her to do so. Their strategy was for Petitioner to throw herself on the mercy of the jury and to contest the issue of future dangerousness in the sentencing phase.

43. The thought process of the defense team leading up to the guilty plea is illustrated in a series of defense team communications. Mr. Krasik, who was tasked with the guilt phase, told Mr. Hadley in a December 13, 2010 email that he had no idea what to do in the guilt phase. "I just can't think of anything to do for Angela in a guilt phase, except cross examine their witnesses, without pissing off the jury." On December 26, 2010, Mr. Krasik stated in a team email that he was "looking forward to trying to find a way out of this mess." On December 28, 2010, Mr. Krasik sent an email to Mr. Hadley in which he said, "OK, I've got a plan. It's crazy……but it just might work. On second thought, it's crazy alright, but there's no chance it would work. Plan: Stip facts trial. We win when judge convicts of Manslaughter." On January 17, 2011, Hadley sent an email to Krasik, stating, "One crazy thought I have is we 'might' plead her if the torture was taken out." On January 20, 2011, Lisa Harmening sent an email to the defense team in which she wrote, "We're still considering pleading to the agg. murder. Ken will make the final decision. Taking responsibility may be a wise choice."

44. On February 1, 2011, the day of the plea, the defense was not adequately prepared for trial. At the time of the plea, counsel had not completed their mental health investigation, because Dr. Crossen had not completed her testing and counsels had not received a final report from Dr. Crossen regarding petitioner's mental health issues. Counsel did not receive Dr. Crossen's "mitigation summary" until February 7, 2011, six days after the plea. Counsel did not receive Dr. Crossen's final report until February 16, 2011, fifteen days after the plea and two weeks into the trial just before the defense began its presentation.

45. Counsels believed that pleading guilty would prevent the jury from hearing aggravating evidence twice. Counsels advised petitioner that the guilty plea would prevent the prosecution from presenting aggravating evidence twice. ORS 163.150 prohibited repetitive evidence in the penalty phase and would have prevented the prosecution from presenting aggravating evidence twice. If a guilt phase had occurred, the length of the trial and the evidence presented would not have been significantly different. The prosecutor presented all possible details of the underlying crime at the penalty phase.

46. Evidence of petitioner's mental health issues could have been front-loaded into a guilt-phase trial if counsel had adequately investigated and prepared. Specifically, if counsel had evidence of petitioner's cognitive deficits and family history, counsel could have introduced this evidence to attack the torture element of the aggravated murder charge, and argue that petitioner's intent was to discipline, not torture. Team members do not recollect any discussion about potentially

front-loading mitigation into a guilt-phase trial. Counsel did not make a conscious choice to forgo frontloading mental health issues into the guilt phase.

47. The professional standard for capital defense counsel was to dissuade a client who wished to plead guilty without concessions from the prosecution. Even in cases with strong evidence of guilt, the professional norm in capital defense is to proceed to a guilt-phase trial unless a guilty plea is in exchange for concessions from the state.

48. The professional standards for capital defense counsel is to formulate a unified defense strategy that incorporates the penalty phase defense strategy into the guilt phase. At the time of petitioner's trial, it was the prevailing professional norm for capital defense counsel to attempt, where possible, to "frontload" mitigation into the guilt phase of the trial. The concept of frontloading mitigation in the guilt phase of a capital case was well-established and commonly known among capital defense practitioners at the time of petitioner's trial. At the time of petitioner's trial, capital defense attorneys were trained to strongly resist entering "no-concessions" guilty pleas, due to the prevailing belief that such a plea would increase the defendant's chances of getting a death penalty, for the reasons discussed above. Mr. Krasik testified that he believed that using a unified defense strategy and frontloading as much mitigation as possible was the standard at the time of Petitioner's entry of plea.

49. Another reason for proceeding to a guilt-phase trial — even where a verdict of guilty is likely — is that the guilty verdict gives jurors a means to express their anger and outrage at the crime in rendering a verdict before addressing sentencing. A further reason for proceeding to a guilt-phase trial — even where a guilty verdict is likely — is that the aggravating evidence will be further removed from the penalty phase, where the jury decides the sentence. Yet another reason for proceeding to a guilt-phase trial — even where a guilty verdict is likely — is that trial and appeal rights are preserved, and the client retains the chance of reversible error.

50. Dr. Crossen was hired one month before the beginning of trial. Dr. Crossen prepared a "Summary of Mitigating Evidence" for trial counsels and sent it to them after petitioner had plead guilty with death still on the table. Relevant to diminished capacity, Crossen's "Summary" noted she could testify about: "How [petitioner's] own abuse affected her ability to appreciate the seriousness of her behavior….How repeated head trauma and drug abuse led to frontal lobe dysfunction found in testing. Frontal lobe damage shows that defendant's 'ability to conform her conduct to the requirements of law was significantly impaired.' While it can be dangerous to show, due to influencing the jury that she won't be able to control herself in the future, I think I can argue how stress at the time further deteriorated her ability to use her executive functions."

51. Trial counsel could have used Crossen's evidence, if obtained in a timely manner, to support a credible diminished capacity defense, which even if unsuccessful would have front-loaded mitigation into the trial phase of her case. Specifically, counsel could have used the evidence to argue that petitioner's exposure to severe domestic violence throughout her childhood when combined with her psychological, cognitive and executive functioning issues, suggests that she was unaware of the substantial risk that her abuse would lead to the death of her daughter. In addition, the record in this case shows trial counsel never seriously examined a diminished

capacity defense in petitioner's case, and never ensured that any of their experts (Larsen, Mallory or Crossen) effectively looked at that issue.

52. Trial counsel could have also used Crossen's evidence to support an argument that the severe child abuse petitioner observed and experienced during her childhood showed that her intent during her severe beatings of Jeanette was not to inflict "intense physical pain…as a separate objective apart from any other purpose," but was to instead discipline Jeanette as she and her siblings had been disciplined: by denial of food and severe beatings with a belt or other objects. Under such a defense petitioner would have admitted responsibility for her daughter's death, leaving the jury to determine what degree of homicide was appropriate for her circumstances and behavior.

Findings as to Claim 5.

53. All of the deficiencies that petitioner identifies with respect to counsel's method of conducting the voir dire in petitioner's criminal case are based on counsel's alleged failure to follow what is commonly known as the "Colorado Method" for jury selection in a capital case, which is a method created by David Wymore, a capital litigator in Colorado.

54. Hadley, who handled most of the voir dire for the defense in petitioner's criminal trial, had by the time of petitioner's criminal trial selected ten to fifteen (or more) capital juries in his career, and he had received training in capital case jury selection that discussed the Colorado Method. He was very familiar with the Colorado Method, even though he had not been to the National College of Capital Voir Dire in Colorado.

55. In selecting the jury for petitioner's trial, Hadley did not follow the Colorado Method "word for word" because he did not want to "throw away everything [he'd] learned over the years" and because he believed that the Colorado Method, although parts of it were very good, was "not the only way to pick a jury."

56. Prior to voir dire, the parties submitted a questionnaire to prospective jurors that asked many questions, the answers to which, gave the parties a foundation for the voir dire that would follow. During voir dire, the prospective jurors were asked questions and gave answers that revealed their views on what kinds of cases would warrant capital punishment. There was also additional information imparted to the jury panel during voir dire.

57. The trial court excused for cause (upon the state's request) prospective juror Gonzalez after she expressed both her uncertainty as to whether she could vote for a death sentence if there were no evidence presented as to why petitioner killed her daughter, and her commitment not to favor or rule out any one of the three possible sentences. Prior to Gonzalez's excusal, which attorney Hadley opposed, Hadley questioned her, getting from her that, although she generally would have difficulty voting for a death sentence, she could do so in some cases and would consider petitioner's case with an open mind.

58. During voir dire by attorney Hadley, prospective juror Morales (who ultimately was seated as a juror) first stated that she could consider all three sentencing options, but then expressed doubt about her ability to consider the option that permitted parole after 30 years of imprisonment; she finally stated that, although that sentencing option would be the hardest for her to agree to, she would not "absolutely" reject it as an option.

59. During voir dire, petitioner's counsel conceded that, under the *Barone* case, the defense should not ask prospective jurors about the deterrent effect of the death penalty.

Findings as to claim 6 – issues related to the penalty phase trial.

60. The professional standard in 2011 was to consult with an expert in violence risk assessment as a part of the investigation and preparation for Oregon's second penalty phase question.

61. Professional standards in 2011 also included a duty "to discover all reasonably available mitigating evidence and evidence to rebut any aggravating evidence that may be introduced by the prosecutor."

62. At the penalty-phase trial, petitioner's counsel presented testimony from witnesses (jail personnel, including a mental health specialist, and a Catholic nun) who had had significant contact with petitioner while she was in the Lane County Jail who testified about facts relevant to the jury's determination of how to answer the second ("future dangerousness") penalty question.

63. The defense team did not interview Cynthia Young prior to trial but interviewed her after the trial had begun. The defense did not interview Carol Lee prior to trial but interviewed her after the trial had begun.

64. Alana Bruns testified for the prosecution on issues relating to prison conditions. The prosecution used Bruns' testimony to argue for a "yes" answer to the second question. Alana Bruns was not interviewed by the defense prior to trial.

65. Dr. Cunningham and other experts in violence risk assessment were available to consult and testify in capital cases in 2011. Prior to petitioner's trial, Dr. Cunningham had personally testified in Oregon as well as many other jurisdictions. Dr. Cunningham's testimony would have been relevant to the second question as posed to the jurors in petitioner's case. Dr. Cunningham's testimony was mitigating with respect to the second question in petitioner's case. Dr. Cunningham's testimony regarding violence risk among Oregon female inmates would have been particularly relevant and mitigating in petitioner's case.

66. If counsel had consulted and presented an expert such as Dr. Cunningham, the jury would have heard evidence that based on numerous factors, petitioner had a very low likelihood — far less than "more likely than not" — of committing acts of violence following a life sentence. Dr. Cunningham could have assisted the defense in addressing the state's assertion that the Petitioner was simply evil and would commit serious crimes in prison if serving a life sentence. Dr.

Cunningham testified that predicting future dangerousness is extremely difficult especially if scientific methodology is not used.

67. Neither Dr. Cunningham, nor any other expert in the field of violence risk assessment, were consulted by petitioner's counsel prior to trial. Late in the trial, on February 18, 2011, Mr. Krasik emailed Dr. Tom Reidy, a violence risk assessment expert. Mr. Krasik did not inquire at that time about Dr. Reidy testifying, but only asked for available data regarding female inmates in Oregon prisons. Dr. Reidy did send some data to Mr. Krasik that included data on violence among female inmates in the Oregon Department of Corrections. However, none of the data was submitted as evidence in petitioner's case.

68. The omissions relating to investigation of second question issues were likely caused by time constraints due to Mr. Krasik's work on the Turnidge case. There was no conscious strategic choice to forgo or delay investigation of second question issues.

69. The jury asked two questions to the court during their deliberations. Both jury questions asked for clarification of the second question.

70. Both the 2003 ABA capital defense guidelines (*Ex. 1*) and 2008 ABA Supplemental Mitigation Guidelines (Ex 2) provide detailed and extensive guidance to defense counsel on the proper use of mental health experts in capital cases. The 2003 ABA Guidelines for capital defense note that to create a competent mental health evaluation consistent with prevailing professional standards "counsel must compile extensive historical data, as well as obtain a thorough physical and neurological examination." The 2003 ABA Guidelines also state that "mental health experts are essential to defending capital cases" because "neurological and psychiatric impairment, combined with a history of physical and sexual abuse, are common among persons convicted of violent offenses on death row."

71. Professional standards of practice also require that trial counsel work closely with their mental health expert, which is "vital to the testifying expert's capacity to understand the client comprehensively, persuasively convey his findings to the fact finder, effectively answer legal questions posed to him regarding his findings, and adequately respond to challenges during cross-examination." *Pet. Ex. 2*, p. 986; *PCR Tr Vol 12*, pp. 3087-3088.

72. Capital defense counsel are also trained that capital defendants have the greatest chance of securing a life sentence when counsel use a combination of lay witnesses (e.g. family, friends, and community witnesses) to provide testimony about the defendant's mental difficulties, accompanied by mental health experts who complement and explain the significance of the lay testimony. *Pet. Ex. 2*, p. 732; *PCR Tr Vol 12*, pp. 3012-3013.

73. The ABA capital defense guidelines also state "[i]t is simply ineffective assistance for counsel to permit a mental health assessment of the client to occur before having made a reasoned decision about the purpose of the examination and having provided the examiner with the data necessary to reach a professionally competent conclusion respecting the question

presented." *Pet. Ex. 2*, Introduction, p. 672; *PCR Tr Vol 12*, p. 3090. The ABA capital defense guidelines also tell counsel they cannot expect a mental health expert to do a competent evaluation until the defense life history investigation is complete. *Pet. Ex. 2*, p. 974-5; *PCR Tr Vol 12*, p. 3090.

74. Trial counsel retained psychiatrist Dr. Jerry Larsen early in the case. Dr. Larsen was a trained physician specializing in the proper administration of psychotropic medication, and the treatment of drug and alcohol affected individuals. Trial counsel retained Larsen to evaluate petitioner's mental health status immediately following her arrest. Larsen was directed to determine what psychotropic medications might alleviate petitioner's mental health symptoms, monitor her response to that medication during her incarceration, determine her competence status, and conduct a social history interview and "psychiatric evaluation" of petitioner.

75. Dr. Larsen's social history interview of petitioner was incomplete and inadequate, because he relied solely on petitioner's statements without confirmation from collateral sources, as is the standard of practice. As a result, Larsen wrongly accepted at face value, petitioner's incorrect assertion that her family had no mental health history and that her childhood environment was "kind," "fair," and "never abusive."

76. Dr. Larsen drafted a report containing an inadequate and inaccurate life history outlining what petitioner told him about her "kind," "fair," and "never abusive" family background. Several months later, investigator Harmening sent Larsen a paragraph of information describing some of the abuse and trauma petitioner had suffered throughout her childhood. *Pet. Ex. 7-1*, p. 8205. Larsen inserted the investigator's paragraph into his report, but never changed any of the related parts to effectively incorporate this additional information into his analysis. In her post-conviction testimony Dr. Maron stated the inconsistencies in Larsen's report were such that it provided her with little useful information.

77. Dr. Larsen's report also contained a "Psychological Testing" section. Dr. Larsen diagnosed petitioner with Dysthymic Disorder, drug/alcohol abuse (not recent), and Dependent Personality Disorder with Obsessive Traits. *Pet. Ex. 8*, pp. 18-19.

78. Trial counsel never called Dr. Larsen to testify. A trained psychiatrist could have provided effective mitigating testimony about how the psychotropic medication he prescribed alleviated petitioner's worst untreated psychological symptoms during her pre-trial incarceration. Larsen could have also testified that such medications could be continued effectively in prison.

79. No one from petitioner's defense team ever interviewed jail psychiatrist Dr. Alan Cohn, and trial counsel never called him to testify about either competence or penalty issues, despite Cohn's availability and willingness to cooperate.

80. Had counsel interviewed and called Dr. Cohn, Cohn could have testified he repeatedly evaluated petitioner at the jail and estimated her intelligence at one standard deviation below the mean (20th percentile). Dr. Cohn could have also told jurors that he observed petitioner with

unusual mood fluctuations and saw her relating to others in a regressed/primitive/childlike manner. Cohn personally saw, and read jail staff notes about, petitioner's dependent, compulsive, and repetitive behaviors, and how medication helped alleviate her worst symptoms. Cohn could have also testified that petitioner did not appear at first to comprehend the reality of what was happening to her. He also observed that she was doing well and did not need treatment other than those recommended by Dr. Larsen.

81. Neuropsychology examines the major cognitive and executive functions, and the emotional status of an individual. Neuropsychologists study brain behavior relationships through assessment techniques based on scientific study of the central nervous system. They are skilled in specialized testing of different brain functions and understanding the implications of brain functioning on behavior. Because of the very high frequency of neuropsychological difficulties among capital defendants, neuropsychological examinations are the standard of practice in death penalty cases.

82. A complete neuropsychological assessment constitutes, at minimum, an examination of a person's cognitive and executive functions, and her emotional status. The major cognitive functions tested are attention (both auditory and visual), verbal functioning, response speed, memory and learning, visual perception, constructional abilities, and academic skills. Major executive functions tested are capacities for initiation, planning, organizing, flexible/appropriate responsiveness, self-control, self-monitoring, and reasoning/judgment.

83. Trial counsel retained neuropsychologist Mallory within two weeks of petitioner's arrest, even though at that point counsel had collected virtually no social history data regarding petitioner. Dr. Mallory visited petitioner at the jail and administered only three tests to her: Digit Span, Reynolds Intellectual Assessment Scales ("RIAS") and the Personality Assessment Inventory ("PAI"). Under existing professional standards, these three tests were insufficient to provide any reasonable analysis of petitioner's cognitive and executive functions, and they do not qualify as a neuropsychological assessment.

84. Dr. Mallory also conducted a capital life history interview of petitioner which was inadequate due to his lack of any social history information. Petitioner did not disclose painful and embarrassing details of her traumatic life history to Mallory during their one brief discussion of the topic, telling him instead that her family was "positive." Petitioner denied any verbal or physical abuse, incest or sexual abuse.

85. In the post-conviction trial, petitioner presented the testimony of OHSU neuropsychologist Dr. Leeza Maron to show the mitigating neuropsychological evidence that could have been presented at petitioner's 2011 penalty trial. Prior to Dr. Maron's evaluation of petitioner, she reviewed significant collateral materials about the crime and petitioner's social history, looking specifically, for things that would impact cognition, like exposure to early abuse, trauma, and poverty. Maron explained that collateral information often helps her choose the most appropriate tests to give a subject. The materials Maron reviewed included evaluations by forensic psychologists Crossen and Dahl (discussed below), psychiatrists Larsen and Cohn (discussed above), and neuropsychologist Mallory, as well as evidence from many social history witnesses.

86. Dr. Maron also reviewed prior testing by forensic psychologists Crossen (trial) and Dahl (post-conviction) and found that information helpful. Maron noted Crossen administered a full intellectual assessment to petitioner, showing an overall IQ score in the low average range, primarily due to deficits in verbal abilities. Crossen's DKEFS also showed petitioner had some executive functioning impairments. Dahl's cognitive screening tests of pre-morbid and intellectual functioning (discussed below) similarly showed petitioner's intelligence scores in the average/low average range, with some signs of executive dysfunction.

87. Concerning the cognitive aspects of petitioner's social history, Maron noted petitioner's extensive childhood and adult history of abuse, trauma, food insecurity and illicit drug use. Maron explained that severe abuse can negatively alter a child's neurodevelopmental trajectory, most particularly the development of her executive functioning. Dr. Maron also found it significant that petitioner's school grades put her at the lower end of her class, that she had difficulty in community college, and that her employment was consistently in unskilled jobs which did not require complex cognitive functioning. Significant also was petitioner's long-time methamphetamine abuse and possible roll-over car accident, both known to negatively impact cognition. Finally, Dr. Maron noted that petitioner exhibited her highest level of functioning when she lived briefly in a maternity home before the birth of her daughter, where petitioner was provided with previously lacking pro-social support and structure.

88. Dr. Maron evaluated petitioner at Coffee Creek Correctional Facility prior to the post-conviction trial. From the testing, Maron determined that petitioner's abstraction, inhibition, and sequencing executive functions were intact. However, petitioner suffered significant executive impairments involving tasks of problem solving and flexibility of thinking. Dr. Maron testified that petitioner's overall cognition fell into the average to low average range. Her language abilities ranged from impaired to average. In addition, petitioner's executive functioning demonstrated impaired problem solving and impaired flexibility of thinking.

89. Dr. Maron believed petitioner's executive dysfunction played a significant role in her inability to ask for and get help. Maron noted petitioner has "difficulty spontaneously generating effective alternative problem-solving strategies when her initial approach is unsuccessful." This means that petitioner would likely either try the same thing repeatedly, despite getting poor results each time, or would haphazardly try something else equally inefficient and maladaptive. Maron believed petitioner would not recognize when she needed help, and even if she did so, would not know how to effectively get help on her own. Dr. Moran, however, conceded that the lack of executive functioning did not explain why Petitioner abused Jeanette but not the other children. That would have to be caused by psychological factors for which she did not test.

90. Maron testified that for any person generally, while a little bit of stress and anxiety increases cognition, too much stress will decrease it. Maron noted that for someone like petitioner, who suffered from cognitive and executive functioning deficits already, stress is more likely to cause significant loss of functioning.

91. Maron testified that parenting is one of the most difficult and ambiguous tasks known to humankind, and when combined with significant executive dysfunction, can be "a recipe for quite a bit of functional impairment." Maron noted that petitioner had few positive parenting or problem-solving role models in her life, and thus learned very abusive and maladaptive behaviors early on, which were difficult for her to change due to her impaired problem-solving abilities. Thus, petitioner tended to engage in the same abusive disciplinary techniques over and over, despite feedback that those techniques were ineffective. Maron felt it was important for jurors to consider that dynamic when trying to understand petitioner's abuse of her daughter.

92. Social history information available to Dr. Maron showed that in the months before her daughter's death, petitioner was daily consuming coffee drinks with up to 18 shots, along with energy drinks and diet pills. Dr. Maron testified that consumption of such copious amounts of caffeine by those with pre-existing psychological problems can lead to insomnia, anxiety, irritability, and panic. In petitioner's case, Maron felt such consumption would likely exacerbate petitioner's already significant emotional dysregulation, depression and anxiety.

93. Maron testified that petitioner's problem-solving difficulties prevented her from generating any effective response to the stress of the police interrogation. That, combined with petitioner's often primitive psychological functioning, lead her to use the primitive coping strategy of simple denial (aka lying) during her police interrogation. Dr. Maron further explained that petitioner's sometimes childlike behavior and coping strategies resulted from the chronic and repeated traumas she suffered growing up. Maron noted petitioner's childlike behavior had been observed by herself and other experts in the case (such as Dr. Cohn, Cynthia Young, Dr. Crossen and Dr. Dahl).

94. Dr. Maron testified that objective test data showed that petitioner performed better on structured tests than on unstructured ones. Maron also noted that petitioner's history showed that she functioned at the highest level in her life when living in the structured setting of the Bishop Gallegos maternity home. Dr. Maron believed that test data and social history showed petitioner would likely function much better in circumstances such as prison where rules are clear, and where petitioner could develop a reliable daily routine.

95. Forensic psychologists are generally experts in either clinical, counseling or school psychology, who apply their expertise to legal questions. Forensic psychologists are often used (sometimes in conjunction with psychiatrists) to examine trial phase issues of insanity, extreme emotional disturbance, diminished capacity and competence. They can also be used at penalty phase to describe the adverse childhood factors in the defendant's life, and the effect of those factors on the defendant's developmental and life trajectory. They can also conduct violence risk assessments.

96. Forensic psychologists must be retained early in the case, because their work may affect other parts of the case investigation, including decisions about retaining other related mental health experts, motion practice, and plea negotiations. *Pet. Ex. 1*, (GLs 10.7 and 11.4.1(A)); *PCR Tr Vol 11*, pp. 2779, 3095-3096. Trial counsel and mitigation specialist should work closely with the forensic psychologist, who will advise on social history record gathering and witness

interviewing and ascertain the need for any specialized psychological assessments or experts. *PCR Tr Vol 12*, pp. 3087-3088.

97. In petitioner's case, trial counsel failed to hire forensic psychologist Dr. Holly Crossen until approximately 1½ months before trial, and without adequate vetting other than a last-minute recommendation by a Lane County defense attorney.

98. Counsel was aware that Dr. Crossen had no prior experience in capital sentence evaluations. Crossen's work had instead focused on conducting neuropsychological screenings of children and adults, working with children in correctional or inpatient settings, and developing training for social agency staff working with meth-affected families.

99. Despite Dr. Crossen's capital case inexperience, trial counsel gave her little guidance as to what issues she should examine in petitioner's case. Crossen communicated mostly by email with mitigator Lisa Harmening, not the attorneys. Counsels never talked with Crossen about what kinds of mitigation to look for, or about the initial case conceptualization document she drafted. Counsels also never discussed testing with Crossen, forcing her to make her own decisions about what tests to give. Finally, counsel never talked to Crossen about what issues they wanted to address in her testimony. Counsel did not provide Crossen with referral questions.

100. Trial counsels gave Crossen an incomplete social history for her evaluation, much of it in an untimely fashion. In total, Dr. Crossen spent 3 hours with trial counsel discussing petitioner's case. Trial counsel never gave Dr. Crossen any specific referral question(s) to examine. Instead, counsel asked Dr. Crossen to "find mitigation" for petitioner's pending capital trial. Dr. Crossen herself Googled "mitigating factors" and thus independently located the 2008 ABA Supplemental Mitigating Guidelines.

101. From her cognitive testing, as well as the personality profile from the MCMI-III, Dr. Crossen found petitioner qualified for the following diagnoses: Major Depressive Disorder, recurrent, severe, without psychotic features; PTSD, chronic; Obsessive Compulsive Disorder, in partial remission with medication; Social Phobia (Social Anxiety Disorder); Panic Disorder, without Agoraphobia, in partial remission; Amphetamine Dependence sustained full remission; Cognitive Disorder NOS; Bereavement; Partner Relational Problem; Physical Abuse of a Child (perpetrator); Physical Abuse of a Child (victim); Neglect of a Child (perpetrator); Neglect of a Child (Victim); Physical Abuse of Adult (Victim); Sexual Abuse of Adult (Victim); Borderline Intellectual Functioning; Dependent Personality Disorder; Avoidant Personality Disorder; Borderline Personality Features. In addition to petitioner's diagnoses, Dr. Crossen also advised trial counsel that she could testify at penalty phase about several topics as listed in her report.

102. Counsel's failure to provide Dr. Crossen with adequate social history information left her vulnerable to cross examination on critical issues, such as her initial diagnosis that petitioner suffered from a dependent personality disorder (DPD). In post-conviction, when Dr. Crossen was subsequently provided additional collateral information (that had existed during trial but was never given to her), she determined her initial DPD diagnosis was not supported by the evidence.

The cross-examination of Dr. Crossen by documents which, she had not been provided, undermining her diagnoses would likely have undermined her credibility, because counsel failed to give her necessary existing social history.

103. Because Dr. Crossen was hired in an untimely manner, she was unable to provide her final report until shortly before her scheduled testimony near the end of the penalty trial. Following receipt of Crossen's report, trial counsel had little time to decide whether to call Crossen to testify. Ultimately counsel concluded that Crossen's opinions were not well supported and that she would be subject to damaging cross-examination by the prosecutor. Counsel never called Crossen to discuss her report. Dr. Crossen had heard nothing from trial counsel during the last week of her evaluation and testimony preparation.

104. On February 23, 2011, Crossen drove from Portland to Eugene for her scheduled testimony, having no idea what questions trial counsel or the prosecutor would ask her on the stand. During Crossen's drive to Eugene, she received a call from trial counsel cancelling her testimony.

105. In post-conviction proceedings trial counsels testified that they cancelled Dr. Crossen's testimony because the state threatened to call Dr. Richard Hulteng if the defense called Crossen. Counsel decided to call off Crossen because a) Hulteng was significantly more experienced than Crossen, and b) counsels felt Crossen's report was not well supported.

106. Counsels' concerns about Crossen's testimony were a direct result of a) counsels' own improper vetting of Crossen before hiring her at the last minute, b) hiring Crossen shortly before trial began, and c) counsels' failure to work with, supervise and guide Crossen's work.

107. Petitioner called forensic psychologist Dr. Trayci Dahl to testify in post-conviction, to demonstrate the mitigating psychological penalty phase evidence that could have been presented in petitioner's penalty case. Dr. Dahl is a board-certified forensic psychologist with extensive experience conducting forensic evaluations on defendants charged with serious offenses, such as rape and murder, and has evaluated many women who killed their children. Dr. Dahl has testified as an expert on numerous occasions for both prosecution and defense.

108. Petitioner's post-conviction counsel posed eight referral questions to Dr. Dahl and provided her with social history material greater than trial counsel gave Dr. Crossen. Dr. Dahl also conducted collateral interviews with four significant members of petitioner's family, including petitioner's father, step-mother and two siblings. Two of the interviews took place in the home where petitioner grew up, enabling Dahl to observe its condition. During that visit Dahl discovered that the bathroom sink handles had been removed, preventing her from getting water from the sink. Dr. Dahl also met with petitioner on two occasions, interviewing her and administering various tests.

109. In post-conviction, Dr. Dahl testified in detail about petitioner's social history of poverty and horrific abuse as a child, where she and her siblings were beaten with belts and denied

food/water for punishment. Much of this evidence was produced at the penalty trial through witnesses produced by Petitioner's attorneys.

110. Dahl diagnosed petitioner with recurrent depressive disorder, anxiety, obsessive compulsive disorder and a history of PTSD. She described petitioner as needy, sometimes overly deferential and immature, with primitive coping mechanisms such as denial and externalizing blame. Dahl found no evidence of psychotic disorder.

111. Dahl noted petitioner's prior IQ scores from Crossen and Maron, and the remedial education classes in high school, leading her to conclude that petitioner had a low average IQ, had limited intellectual ability and had difficulty with problem solving. She was, however, intelligent enough to manage her activities of daily living and knew how to properly take care of children. Petitioner was also aware that her conduct was illegal. In addition, the prior neuropsychological testing by Crossen and Maron showed a deficit in her executive functioning which contributed to her killing Jeanette.

112. Dahl opined that petitioner is "constitutionally ill-equipped to parent. This was not her calling." In support of this, Dahl described petitioner's limited cognitive resources, her impaired, haphazard problem solving (especially in ambiguous situations), her emotional instability and immaturity, her difficulty conforming her behavior to feedback (as observed by Maron's testing), her depressive disorder and compulsions (including irritability, decreased frustration tolerance), primitive coping skills, and her unrealistic expectations of Jeanette's behavior because of the abuse in her family of origin.

113. Dahl explained that, like all humans, petitioner's functioning decreases in response to stress, but since she has fewer resources than the average person, she regresses to the primitive behavior of her family of origin.

114. Dahl addressed the question of why petitioner focused her aggression primarily on Jeanette. Dahl noted Richard's jealousy toward petitioner's ex (and Jeanette's father) Tony Maples, and that Richard frequently requested petitioner punish Jeanette. Dahl believed it was also possible that petitioner displaced her hurt from her other children's refusal to return to her onto Jeanette. Dahl felt that there was also a lack of bonding between petitioner and Jeanette, since Jeanette was removed from petitioner's custody for several years when Jeanette was very young. The lack of bond made it more difficult for petitioner to accept Jeanette's more challenging teenage behavior, especially since petitioner had no understanding of adolescent development. In addition, Dahl also thought it was interesting that petitioner and Jeanette closely resemble each other, and that perhaps petitioner was externalizing some self-hatred. Dahl also noted that petitioner felt something inappropriate was going on between Richard and Jeanette. Finally, Dahl believed that when stressed, petitioner takes it out on people who are smaller than her.

115. Dahl reviewed comments from jail staff about petitioner's unusual behavior, which they viewed as manipulative. Dahl explained that petitioner is manipulative in the way a child shops their parents, and that she does not have the intellectual resources to manipulate in any

sophisticated fashion. She will, however, make childlike attempts to improve her situation, like acting cute or submissive.

116. One referral question asked Dahl if petitioner would do well in a structured setting. Dahl believed she would, basing her opinion on petitioner's exemplary behavior at the maternity home, where petitioner volunteered and did chores without being asked. While not a prison, the maternity home had strict rules, and petitioner did well there. At the county jail, petitioner's only disciplinary infractions were for such things as passing notes or giving her toiletries to another inmate. Petitioner never disrespected or got violent with anyone at the jail, even the inmates who spit in her food, shorted her clothing and called her names. In addition, Dahl explained that petitioner is starved for affection due to being neglected as a child, and really wants to fit into her community. Petitioner has functioned better in structured settings than in unstructured ones and is eager to please the pro-social people around her.

117. As explained above, Dahl identified petitioner's numerous and severe adverse childhood experiences. Dahl testified that numerous studies consistently show that the effect of adverse experiences tend to be cumulative: the more risk factors present, the more likely a maladaptive outcome for the child, including: mood disorders, anxiety, substance abuse, attentional problems, criminality, poor academic performance and prolonged poverty.

118. Dr. Dahl also explained a point brought up by petitioner's original trial prosecutors: why petitioner's other siblings did not go on to murder their children. Dahl testified that protective factors in a person's life can help fortify that person against the adverse ones. While some of petitioner's siblings, especially the male ones, had significant protective factors in their lives, petitioner had very few protective factors, which were not enough to weigh against enormous number of adverse factors she experienced.

119. Prevailing professional capital defense standards mandate that trial counsel effectively supervise the mitigation investigation, to ensure that client family members, and other individuals who knew the client and his/her family (e.g., doctors, teachers, employers, neighbors, etc.) are located and interviewed. *Pet. Ex. 1* (GL 10.7,2 commentary; GL 11.4.1(D)(3)(B)).

120. Trial counsel must also ensure that all possible existing records be requested concerning the client, the client's parents, grandparents, siblings, and other members of her family. A collection of corroborating information from multiple sources is important wherever possible to ensure the reliability and persuasiveness of the evidence. To obtain necessary records, trial counsel should use all appropriate avenues including, for example, releases, court orders, and subpoenas. *PCR Tr Vol 11*, pp. 2751-2752, 3011, 3015- 14 3017, 3090, 3093-3094, 3103-3105, 3107-3109.

121. Petitioner's mitigation investigator interviewed only a portion of petitioner's numerous and available immediate and extended family members. Trial counsel also failed to collect relevant records on any of these individuals. Trial counsel also failed to ensure that record releases were obtained from family members, so that mental health or cognitive problems, drug/alcohol issues, poverty and domestic violence issues could be documented and corroborated. Trial counsel also never interviewed neighbors or other community members who knew petitioner or her family at

various stages of her life. Trial counsel thus presented little information to jurors on this topic. Trial counsel also never interviewed DHS staff and associated professionals participating in the forensic evaluations of petitioner's remaining children. Trial counsel also failed to ensure that Lane County Jail staff, contractors and volunteers who interacted with petitioner were timely contacted and interviewed. Trial counsel also failed to ensure that petitioner's complete jail records were timely obtained for benefit of counsel and experts.

122. Trial counsel did capture and present evidence that addressed Petitioner's chaotic and traumatic childhood through the testimony of her brothers Michael Feusi and George Feusi and other witnesses.

123. Although trial counsel attempted to arrange to meet with Petitioner's daughter Patience Feusi to assess her as a potential witness regarding execution impact, the effort was not undertaken until the trial was underway and they were not able to meet with Patience. Patience was called as a witness for the State, but trial counsel did not ask her about her reaction to her mother possibly being sentenced to death. Counsel was concerned that if he brought up the issue of the death penalty during questioning and Patience got upset that the jury might react adversely toward Petitioner. Counsel did not find out until after her testimony that Patience was not aware, when she testified at trial, that her mother faced the death penalty. Patience was age 11 at the time of the murder, 13 at the time of Petitioner's trial and 20 when she testified in this PCR trial.

124. Patience Feusi testified at the PCR trial that if she had been asked, she would have testified that she loved her mother and that petitioner and her husband Richard were equally at fault for Janette's death and that they should both get the same sentence. She would have also testified that it would be hard for her if her mother received the death penalty.

125. Petitioner's trial attorneys did not visit or take pictures of or otherwise gather evidence at the house where Petitioner lived and where Jeanette was murdered. The attorney for Petitioner's co-defendant Richard did visit the crime scene and noticed stacks of empty energy drink containers.

126. The prosecutor made the following comments in his opening statement to which trial counsel did not object:

> - "We will prove to you that [the victim's] death was unimaginably horrible, that she suffered for what must have seemed an eternity…that her lips were pulverized, her mouth pulverized over a period of months, that flesh and blood were torn from her body…"
>
> - "…from the waist down…[the emergency room physician] found the most incredibly brutal, open wounds on this girl's hip, both her right and her left that she had ever seen."
>
> -"…that [the victim] had open wounds on her body including one of the hip wounds, the flesh had been torn away all the way to Jeanette's bone."

-"Detective Wilkerson will show you the implements of torture that were used…"

- "I submit to you most importantly, you'll hear from Patience [the victim's younger sister]…that their mother would take Jeanette into what we might call the torture room…"

-"What will appear striking to you from well over an hour of videotaped interview is that Angela McAnulty appeared concerned little with the fact that her daughter had just died that night, seemed concerned much more with her own circumstances."

-"She acknowledged that she whipped the flesh off her daughter's legs…"

-"What will be, I suggest to you, disgustingly ironic about the defendant's comments is that help was offered over and over and rejected."

-"I'm going to thank you ahead of time for listening to this evidence, considering it. I suspect it will be unlike anything you've ever seen or had to deal with before."

-"…that there is nothing, nothing that Jeanette Maples did to provoke her mother to slaughter her in this manner."

127. Petitioner's trial attorneys did not give an opening statement at the beginning of the penalty phase trial but reserved it until the end of the state's evidence. Counsel delayed making an opening statement because he expected that Dr. Crossen would testify but he did not know at the time what Dr. Crossen's testimony would be. During defense counsel's opening, he promised jurors that they would hear testimony from a psychologist. Trial counsel never called a psychologist. After reviewing Dr. Crossen's report, he decided to not call her as a witness.

128. Trial counsel's opening statement included the assertion that petitioner's brother "did not turn out too bad" despite being raised in the same environment as petitioner. Trial counsel stated that petitioner got through her childhood "reasonably well".

129. Prosecutors called as their first witnesses two first responders (Wahlroos and Sheridan), and emergency room physician Hilton. All three testified to the victim's appearance and condition, discussing her injuries in detail. Following the prosecutor's direct examination, trial counsel asked each witness about their emotional response to the victim's condition and death. The questions and answers were as follows:

Wahlroos:
Q [by trial counsel]: How are you dealing with this in your….
A: "In 18 years, I've never cried about a call. I cried about—I cried after the shift about this call….I asked [my crew] if they needed help. We talked as a crew about the call when everyone got back….about what other members could or might need in terms of, you know, personal assistance….[i]t was an awful call."

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Q [by trial counsel]: “Still with you too, isn’t it?”
A: Yes.

Sheridan:
Q [by trial counsel]: How has this affected you, Mr. Sheridan?
A: I’m sorry. How has this affected me?
Q: Yes. Emotionally?
A: It was a difficult call. It’s probably the worst I can remember being on.
Q: And it got worse in the hospital when you saw the extent of the injuries, too, didn’t it?
A: Yeah.

Hilton:
Q [by trial counsel]: This was an emotional traumatic experience for you, wasn’t it, Doctor?
A: Sure, yes.
Q: And for the staff at this hospital as well?
A: Yes.

130. Det. Wilkerson testified that, among family pictures on petitioner’s living room wall, there were no recent pictures of victim Jeanette Maples.

131. During trial, the Court stated: "The evidence is difficult to hear." Referring to photos being displayed for the jury during witness testimony, the prosecutor stated: "…obviously this isn't for the faint-hearted and if anybody needs to leave, they can."

132. At the conclusion of the state’s evidence, Petitioner’s trial attorney’s made and argued a motion for Judgment of Acquittal bases on the argument that the state had not presented evidence from which a rational jury could find beyond a reasonable doubt that there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society. (The second question.) The court denied the motion. Counsel renewed the motion at the end of all the evidence and the court again denied the motion.

133. At one point in the closing argument, Petitioner’s attorney stated:

> “What we would submit to you is this is a horrible case. We don’t blame you for being disgusted and mad and whatever else. It just couldn’t be much worse. But – but you don’t jump to the death penalty and say it was terrible, it was awful, she deserves the death penalty, let’s go back in and sign twelve of us to do that. You go through these four questions first, and we submit that two of those questions under the evidence should be answered no.”

134. During closing arguments the prosecutor made the following statements:

> “This is distinguishable from something like Jerry Feusi. This is distinguishable from someone who is unable to control their rage and anger. This is someone

who calculates, methodically calculated, how she would do this, how the stage would be set."

On two occasions, the prosecutor stated that Petitioner: "carved the flesh off her own daughter/carved the flesh out of her own kid's body"

The prosecutor addressed the issue of whether the defendant's behavior was an unreasonable response to any provocation.

The prosecutor stated that the victim's blood was in every room in the house.

The prosecutor state that the only thing that belonged to the victim was the cardboard she slept on.

The prosecutor stated; "The defendant comes before you through her counsel asking you for mercy because she's sorry,"

The prosecutor stated: "There are some cases that are so heinous in nature that a person should pay for their crime with their life."

The prosecutor used the term "future dangerousness" in his argument.

The prosecutor stated that Petitioner " "…should be under the stress that someday her life will be taken from her."

With respect to Patience Feusi, the prosecutor stated that he had "…never seen a witness testify so well...".

The prosecutor stated: "You are the ones who decide whether this is a crime worthy of receiving the maximum punishment,"

With respect to the Jeanette, the prosecutor stated: "[S]he must have wondered why it was only her."

The prosecutor stated: "Because for those of us that were involved in this investigation from the very first night, we've had each other to lean on, and you haven't."

The prosecutor stated: "There are also ramifications to the State in its attempts to put value on what the worst crimes in our community are."

"[Prosecutor]: [The victim] must have wondered why it was only her as she's watching her siblings and her mother eat at the family table, as she's watching her siblings play video games and watch TV, and there's no reason for it. The defense told you they would try to explain why this happened, and I would suggest to you that they

failed miserably because the only person who knows why [defendant] hated her daughter so much is [defendant]."

"There are broader considerations to be made as to why and what penalty should be imposed in this case. Is this jury going to tell the defendant and the community that long-term psychological, mental, emotional and horribly physical torture is worth the maximum penalty or not? I'd suggest to you when you go back to the jury room that you perhaps not be as passionate as I am about this."

Trial counsel did not object to these arguments by the prosecutor.

135. Trial counsel did not request an instruction informing jurors that their decision about whether death was the appropriate penalty for petitioner was entirely theirs and would never be reviewed by any court, because there is no provision for court review of a jury's death sentence under Oregon law.

136. The court instructed the jury that they must consider if there is " a probability, meaning that it is more likely than not, that Angela McAnulty would commit crimes of acts of violence that would constitute a continuing threat to society." Trial counsel did not request a jury instruction which clarified or defined the phrase, "criminal acts of violence." The jury submitted a question which stated, "In Question No. 2, please define criminal acts of violence — emotional, mental, verbal, physical...?" The parties agreed to the following response: "'Criminal acts of violence' refers to acts characterized by the application of force which has the potential for inflicting bodily injury on another person or the overt threat of such force."

137. Trial counsel did not request that the jury be instructed that, to answer the second question in the affirmative, they must find beyond a reasonable doubt that petitioner would actually commit criminal acts of violence constituting a continuing threat to society, instead of merely the probability of that event. Such an instruction would have been contrary to Oregon case law.

138. Trial counsel submitted requested instructions on the issues of "Mitigating Circumstances Defined", "Consideration of Evidence in Mitigation", Definition of Deliberately", and "Death Never Required". The court rejected those requested instructions.

FINDINGS AS TO CLAIM 7.

139. Appellate counsel did not raise, on direct review, the preserved argument that Oregon's Death Penalty Statute is unconstitutional because jurors' predictions of future acts of violence under the second penalty question are highly unreliable.

140. Appellate counsel also did not raise on direct review the preserved argument that the "death qualification" process which struck jurors with religious opposition to the death penalty violated state and federal constitutional provisions.

FINDINGS REGARDING CREDEBILITY

I find the witnesses who testified in this post-conviction case to be generally credible with the exceptions as noted below. While I find Petitioner's trial attorneys and members of the defense team were generally credible, it was clear that they were concerned that Petitioner had received the death penalty and that fact caused them to testify favorably for the petitioner whenever possible. I do not find Mr. Hadley's testimony that Petitioner insisted on pleading guilty and that her attorneys simply gave in to her demands to plead guilty to be credible. The testimony of Mr. Krasak and other members of the defense team was to the contrary.

Dr. Cohn was not credible with regard to his testimony that when he was contacted by the court by phone at the time of the entry of plea that he did not understand that the court was inquiring about Petitioner's mental capacity to knowingly, voluntarily and intelligently enter a plea. The transcript of that hearing clearly indicates that Dr. Cohn was advised of the purpose of the court's inquiry.

I find the testimony of Dr. Sullivan to be not credible. This determination is based on his demeanor and the content of his testimony. At one point, Dr. Sullivan testified on cross-examination that one month before trial was too late to hire a forensic psychologist for a death penalty case and that he would have refused to work on a case under such conditions. Then on redirect he contradicted that testimony. It appeared that he was willing to change his testimony to suit the needs of the defendant. In the areas where Dr. Sullivan disagreed with Dr. Maron and Dr. Dahl, I find Dr. Maron and Dr. Dahl to be more credible and persuasive.

I find the testimony of Petitioner to be not credible. For the most part, she claims to not remember details about the plea and sentencing trial. She is not credible regarding the events or process leading up to her plea.

While I find the testimony or Richard Wolf to be generally credible, I was not persuaded by many of his opinions regarding the reasonableness of trial counsel's actions. According to Mr. Wolf, trial counsels was constitutionally ineffective in nearly every aspect of their representation of Petitioner. While I accepted Mr. Wolf's opinion in some issues, other of his opinions resulted from an overly rigid application or misapplication of the relevant ABA Guidelines and professional standards for litigating legal issues in capital cases.

CONSLUSIONS AND LEGAL FINDINGS

The following claims are allowed:

Claim 4. Petitioner *has* proven that her attorney's failed to exercise reasonable professional skill and judgment in advising her to plead guilty to the charge of Aggravated Murder without any concessions in return from the state. Advising a no-concessions guilty plea in a capital case is not per se unreasonable. There may be rare cases where this course of action is reasonable — based on particular circumstances. Petitioner's case is not one of those rare cases. Petitioner's case falls into the majority of capital cases in which a "no concessions plea" provides "little if any benefit" for the defendant. *Florida v. Nixon*, 543 US 175, 191 n 6 (2004); *Simonsen v. Premo*, 267 Or App 649, 658 (2014), *rev den*, 357 Or 324 (2015). In Petitioner's case there is no evidence of *any benefit* from the guilty plea. The gruesome and emotional nature of the evidence against petitioner, weighed against a strategy of removing a guilt-phase because one of the known drawbacks to a guilty plea is that the "gruesome" evidence is placed closer to the sentencing decision. Gruesome pictures, in particular, weigh against a strategy of pleading guilty, because pleading guilty ensures that the pictures will be presented in the penalty phase, closer to the sentencing decision. By going through a full trial before proceeding to guilt phase, the jury would have time to process the gruesome details and pictures and allow time for the shock to diminish before making a sentencing decision. The two-phase trial would also allow the jurors to express their anger and revulsion at Petitioner's conduct in rendering the guilty plea before considering the sentence.

The speculative benefit of showing remorse through a guilty plea was not enough to weigh against the other known benefits of proceeding to trial. Expressions of remorse could be built into a guilt phase trial. Even if guilt is evident, a guilt phase trial can be used to express remorse, acclimate the jury to the bad facts and introduce as much mental health and other mitigation information as possible. Mr. Mallon referred to the process as a slow guilty plea. Capital defense practitioners in this post-conviction proceedings consistently testified that attempting to show remorse by means of a guilty plea was an unreasonable strategy. None of the defense practitioners who testified, even after repeated questioning, could identify any benefit to Petitioner's case from entering the "naked" guilty plea.

Counsels' belief that the prosecution would be able to present aggravating evidence twice — in the guilt phase and then the penalty phase — was unreasonable because it was contrary to the law. ORS 163.150. While trial counsel's decision to recommend that Petitioner enter a guilty plea was strategic, the decision was an unreasonable strategy, and constituted deficient performance under the Oregon and Federal Constitutions. Throwing Petitioner on the mercy of the jury was not a reasonable strategy.

Defendant argues that Petitioner's case is similar to the case in *Simonsen*. As in *Simonsen*, the facts of Petitioner's case where overwhelming and it was irrefutable that Petitioner had murdered her daughter in a brutal and horrific manner. There was also no prospect that the state would agree to not seek the death penalty. Unlike in *Simonsen*, however, Petitioner received no benefit or concession from the plea. In fact, there was no plea agreement what so ever. It was unreasonable to believe that the jury would view the guilty plea as an expression of remorse. The fact that the course of Petitioner's behavior leading up to her daughter's death lasted months if not years, that she removed Jeanette from school to avoid detection, refused to get medical

care for Jeanette and the conduct of Petitioner after her arrest trying to avoid responsibility, would counteract any argument that she was remorseful. If in fact the defense strategy was remorse, the trial attorneys did very little to implement that strategy.

The entry of plea also negated any effort to develop a unified defense strategy. *Johnson v. Premo*, 361 Or 688 (2017). The mitigation strategy was based primarily on demonstrating that because Petitioner had been subjected to a horrible childhood and suffered from mental deficiencies, she should not be subjected to the death penalty. By recommending a guilty plea, counsel eliminated any opportunity to front load that information in the guilt phase trial rather than waiting for the penalty phase. As noted below, the mitigation investigation and the mental health evaluation of Dr. Crossen was not complete at the time of plea. At a minimum, engaging in a guilt phase trial would have provided additional time for that mitigation work to be completed.

I do not find Mr. Hadley's testimony that Petitioner insisted on pleading guilty and that the attorneys only conceded to her wishes to be credible. While Petitioner may have expressed that she did not want to go to trial, it is clear that these expressions by Petitioner were in the context that she did not want to face the facts of her crime in a public trial setting and did not want to have people sit in judgment of her. Pleading guilty did not relieve Petitioner of that ordeal. She still had to sit through all the evidence in the sentencing trial. Petitioner did not plead guilty contrary to the advice of her attorneys. Attorney Krasik testified that Petitioner made the final decision to enter the guilty plea with the strong support of her attorneys. Petitioner was very timid, emotional and compliant. She entered her guilty plea because her attorneys recommended it to her as the best strategy. They also told her it would shorten the trial process which she wanted to avoid. Petitioner made the final decision to plead guilty, but it was based on the strong recommendation and support of her attorneys. She would not have entered the guilty plea if her attorneys had encouraged and recommended that she not do so.

Petitioner has also proven prejudice on Claim 4. Petitioner was prejudiced because had she been adequately advised, she would have been advised to proceed to the guilt phase with a unified strategy, and she would have followed the advice of counsel. Based on the evidence presented in this case — that petitioner was a compliant client, that petitioner followed the advice of her counsel, that petitioner would have gone to trial if advised to do so — petitioner has proven by a preponderance of the evidence that she would have proceeded to a guilt-phase trial if counsel had properly advised her to do so.

Claim 6 related to the penalty trial:

A. Second question issues. Petitioner *did* prove that his trial attorneys failed to exercise reasonable professional skill and judgment in failing to adequately prepare for and present evidence on the second question (future dangerousness) during the penalty phase. ORS 163.150.(1)(B) provides that in order to impose a sentence of death, the jury must find that there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society. Petitioner did prove that his trial attorneys failed to conduct an

adequate investigation of issues relating to the second penalty question and, as a result, failed to present important mitigating evidence showing petitioner was not likely to commit acts of violence in prison. The issue that relate to deficiencies by counsel during the penalty phase trial arise primarily from the fact that the defense team was not ready for trial. Counsels' failure to retain and consult a risk assessment expert regarding the second question was below professional norms in 2011. Counsels' failure to consult a risk assessment expert regarding the second question, in the context of petitioner's case constituted constitutionally ineffective assistance of counsel. The failure to consult and use a risk assessment expert was particularly critical because Petitioner has little or no prior history of violence other than the crime against her daughter and the future dangerousness question was the primary focus of the defense team's efforts. The risk assessment expert's testimony would have also been complimented by testimony from mental health experts if properly prepared and presented. (See Claim 6 B below) Counsel's overall failures regarding the second question — including the failure to consult with an expert and failures in investigating and preparing other witnesses — fell below professional norms.

Petitioner has also proven prejudice. Given the fact that only one juror had to vote "no" on any penalty phase question for the Petitioner to avoid the death penalty, Petitioner has proven that the failure to call an expert such as Dr. Cunningham, could have had a tendency to affect the outcome of the sentencing trial. There is a reasonable probability that if counsel had called an expert such as Dr. Cunningham a single juror would have found reasonable doubt on the second question. The questions posed by the jurors during deliberations weigh in favor of a finding of prejudice, because they show that the jury was struggling with the second question in particular.

B. Inadequate Mental Health Investigation and Presentation.

Petitioner *did* prove that her trial attorneys failed to exercise reasonable professional skill and judgment in failing to conduct an adequate investigation and present evidence regarding Petitioner's mental health and psychological trauma during the penalty phase. A capital defendant's history of psychological trauma lies at the heart of a death penalty defense, because it is an almost universal feature of capital defendants and was present in Petitioner's case. Among the types of mitigating evidence that resonate strongly with capital jurors are low intelligence and mental illness. For that reason, effectively telling the story of a capital defendant's trauma and cognitive difficulties, showing how those difficulties negatively affected the defendant's developmental trajectory, and showing how the resulting mental problems contributed to the crime, can be the critical defense theme convincing jurors to spare a defendant's life. The extensive mental health and psychological testimony could have demonstrated that Petitioner's actions were a result, in part, of Petitioner's life and history and that she was not simply evil.

Trial counsel's failure to present mitigating psychiatric testimony was due to ineffectiveness, not to a reasoned strategy decision. Dr. Larsen did not testify because he was not useful as a witness due to inadequate supervision and preparation. Dr. Cohn was not called to testify. Concerning Dr. Cohn, trial counsel never interviewed Dr. Cohn and thus was unaware of the mitigating evidence he possessed. Dr. Crossen did not testify because she was retained too late

and was not adequately supervised or communicated with to allow her to develop competent testimony that would hold up under cross-examination.

Trial counsels' failure to obtain and present mitigating psychiatric evidence, forensic psychological evidence and neuropsychological evidence of petitioner, fell below existing standards of practice. Trial counsel never made a reasonable strategic decision under *Strickland* not to present neuropsychological evidence in petitioner's penalty trial. Trial counsel was constitutionally ineffective in failing to present significant existing mitigating neuropsychological evidence, such as the post-conviction testimony of Dr. Maron.

Trial counsel hired Dr. Crossen too late for her to effectively complete her required work and then failed to supervise her. Trial counsel's late hiring of Crossen fell well below existing professional standards. Trial counsel's failure to effectively prepare and call an experienced, qualified and well-suited forensic psychologist such as Dr. Dahl in petitioner's case was not a reasoned strategic decision. Instead, it resulted from trial counsel's failure to adequately prepare petitioner's mental health issues for the penalty trial.

Petitioner has also proven prejudice. While there was evidence of Petitioner's abusive childhood and adult life, the jurors were not provided with the testimony from expert witnesses regarding how her low intelligence, mental illness and childhood trauma impacted petitioner's development and behavior. Jurors were never provided with neuropsychological evidence to assist the them in understanding the origins and causes of Petitioner's behavior. Given the fact that it required only one juror to vote "no" on the death sentence and the lack of evidence of violence other than the crime itself, the failure to present adequate forensic psychological and neuropsychological evidence could have had a tendency to affect the outcome of the trial.

The following relief is granted: As to Claim 4, Petitioner's Guilty Plea, Conviction and Sentence of Death are vacated and Petitioner's case is remanded to the Circuit Court for the County of Lane for further proceedings. If relief were not granted under Claim 4, Petitioner would be entitled to a new sentencing trial under Claims 6A & 6B.

The following claims are denied:

Claim 1 is denied because Petitioner failed to establish the merits of the claim.

Petitioner did not prove that his trial attorneys failed to exerciser reasonable professional skill and judgement in failing to adequately monitor Petitioner's mental competence and alert the court to Petitioner's difficulties.

a. Petitioner's trial counsel reasonably relied on Dr. Mallory's and Dr. Larsen's opinions that petitioner was competent to proceed, i.e., able to aid and assist counsel in her defense. Based on counsel's extensive experience with Mallory and Larsen in prior criminal and capital cases, as well as counsel's reasonable view that both doctors were well-qualified to opine on petitioner's

competency, counsel reasonably believed that petitioner was fit to proceed under ORS 161.360 (competency statute). Petitioner has failed to prove that counsel performed deficiently by relying on their experts' opinions that petitioner was fit to proceed throughout the period that counsel represented her. Relatedly, petitioner has failed to prove that counsel, by relying on their experts' opinion, performed deficiently (1) by failing to monitor petitioner's competency to stand trial and to plead guilty, (2) by failing to obtain a further competency evaluation of petitioner, (3) by failing to move for a competency hearing, and (4) by failing to implement themselves or to request from the criminal trial court "litigation education and accommodations" designed to address a client's "borderline legal competence." Counsel reasonably believed—based on what Mallory and Larsen had provided them—that no significant issues concerning petitioner's legal competency were presented. From personal observation and information received from others, counsel reasonably believed that no significant issues concerning petitioner's legal competency were presented.

b. Even if, as petitioner contends, the tests that Mallory and Larsen administered in determining petitioner's competency were inadequate under accepted standards in their field, petitioner has failed to prove that all competent counsel would have recognized that deficiency and rejected the doctors' opinions on that basis.

c. With respect to petitioner's alleged "borderline legal competence," petitioner has failed to prove that, in order for counsel to have exercised reasonable professional skill and judgment under the state and federal constitutions, they were required to implement the "litigation education and accommodations" listed at page 8 (¶ 26) of the Petition—either by self-implementation or by requesting the trial court's assistance. Petitioner has cited no legal authority or established professional norm that requires a criminal defense attorney or a trial court to implement the listed measures for addressing a defendant's "borderline legal competence," and this court is aware of none. Trial counsels did make certain accommodations to assist petitioner prior to and during the trial.

d. More importantly, Petitioner has not proven prejudice. Petitioner did not prove that she was at any time unable to aid and assist her attorney's in defending against the charges. Even assuming that counsel performed deficiently with respect to testing and monitoring of Petitioner's mental status, petitioner has failed to prove that the alleged deficiencies had a tendency to affect the result of the trial or that but for counsel's unprofessional errors, the result of the trial would have been different. There is no evidence that additional testing or hearings would have found Petitioner unable to aid and assist her attorneys at any point during the pendency of Petitioner's charges. Notably, Petitioner did not offer expert testimony regarding whether Petitioner was able to aid and assist her attorneys during the pendency of her case. Specifically, Petitioner did not prove that she was not competent at the time of her entry of plea.

The evidence is insufficient to prove petitioner's contention that, had trial counsel brought petitioner's competence issues to light, it is reasonably likely that, with the district attorney knowing of petitioner's cognitive and mental issues giving rise to the competence concerns, he would have agreed to settle the case for an outcome less than death. This court was not persuaded by the testimony of petitioner's attorney expert, Richard Wolf, that the district

attorney, had he known that petitioner was marginally competent, "could have agreed to settle the case," I find to be more persuasive, the other substantial and credible evidence presented in this post-conviction trial establishing that the district attorney had little interest in any course other than presenting the death-penalty question to a jury, and that any evidence of petitioner's "marginal competence" would not have changed the district attorney's view on that course. In making the foregoing assessment of prejudice, this court has considered the actual view that the district attorney had in this case with respect to the death-penalty question. Petitioner has also failed to prove that the lack of appropriate accommodations could have had a tendency to affect the outcome of the penalty phase of the trail. Petitioner did not prove that had certain accommodations been provided, that she could have more fully participated in the penalty phase trial and by doing so that participation could have had a tendency to affect the outcome.

Petitioner makes reference to mental health mitigation being provided to journalists interested in Petitioner's case. Petitioner has also failed to prove that lack of information provided to journalist somehow could have impacted the outcome of the trial. There is no credible evidence to support this.

Claim 2 is denied because Petitioner failed to establish the merits of the claim.

a. Petitioner *did* prove that his trial attorneys failed to exercise reasonable professional skill and judgment in failing to adequately prepare for and present information to the district attorney as part of the settlement conferences. Preceding to a settlement conference in a capital murder case without a completed social history and without a completed mental health investigation was below the professional standard for capital murder cases in 2011. The belief that the case would likely settle without a full mental health investigation was unreasonable. In light of prevailing professional standards, the decision to "hold off" on mental health investigation based on an assumption that the case would likely settle was unreasonable. On the other hand, much of the difficulties in preparing for settlement and trial arose from the fact that Mr. Krasik, the lead attorney and Mr. Harris, the lead investigator in Petitioner's case were almost totally consumed by their work in the Turnidge case in 2010. Trial counsel presented what it had available at the settlement conferences, however, what they had was inadequate.

b. Petitioner, however *did not* prove prejudice. Given the position of the prosecutor in this case, Petitioner has not proven that there was a reasonable likelihood that the case would have settled for a sentence of less than the death penalty if more had been presented by the defense team at the settlement conferences. The prosecutor was adamant in seeking the death penalty. Petitioner has not proven that additional information could have changed the prosecutor's position. Petitioner has not proven that trial counsel's failure to adequately prepare for and present additional information at the settlement conferences could have had a tendency to affect the outcome of the settlement conferences.

Claim 3 is denied because Petitioner failed to establish the merits of the claim.

Petitioner *did not* prove that her trial attorneys failed to exercise reasonable professional skill and judgment in failing to effectively prepare pretrial motions. In this claim, petitioner alleges

that her trial counsel performed deficiently and prejudicially in their handling of various pretrial motions—namely, a motion to postpone trial, a motion to suppress petitioner's statements, a motion to limit autopsy photographs of the victim, and a motion challenging the constitutionality of Oregon's death penalty scheme.

Motion to continue. Trial counsels' performance in litigating the Motion to Postpone did not fall below an objective standard of reasonableness for defense counsel following then-prevailing professional standards. While more could always be done in arguing a motion, trial counsel's efforts were adequate under the circumstances. The fact that the motion was denied does not prove inadequate representation. The primary problem with the motion to continue was that it was filed too late. The court noted that the jurors had already been summoned in the denial of the motion. Petitioner does not allege that trial counsel was incompetent in the timing of the motion, only in the manner in which they litigated the motion. Issues not raised in the Petitioner cannot be a basis for granting post-conviction relief.

Petitioner also *did not* prove prejudice. Petitioner has failed to prove that, had counsel done what she contends they should have done with respect to the motion to postpone, the trial court likely would have granted the motion. In reading the judge's comments in denying the motion to continue, there is no indication that the results would have been different if trial counsel had offered more information or more testimony. The trial judge appeared to be focused on keeping the trial date regardless of what information was provided at the hearing, especially given the late date of the motion to continue.

Motion to suppress statements. Petitioner presented no credible evidence at the post-conviction trial to established that, when the motion to suppress statements was litigated in the trial court, there was an expert witness available to the defense who would have testified that petitioner had mental deficits that impaired her ability to knowingly, voluntarily, and intelligently waive her Miranda rights during the police interrogation at issue. In the absence of any such evidence, petitioner is unable to prove either that her counsel performed deficiently in failing to present the posited expert testimony or that counsel's alleged error prejudiced the defense. While Petitioner offered testimony of expert regarding Petitioner's mental deficits generally during the Post-conviction proceeding, Petitioner did not offer expert testimony regarding any such link between the deficits and her ability to knowingly waive her right to remain silent. In addition, petitioner has not proven that the presentation of such testimony could have had a tendency to affect the outcome of the motion to suppress hearing.

Motion To Limit Autopsy Photographs. Petitioner failed to prove that her attorneys were inadequate in addressing the issue of the autopsy photographs and failed to prove that Petitioner was prejudiced by their actions. Petitioner has not proven that the photographs were inadmissible, nor that trial counsels could have somehow kept them from being admitted.

Motion on Oregon's Death Penalty Scheme. This claim fails because the arguments that petitioner contends her trial counsel should have made against Oregon's death penalty scheme lack legal merit. See State v. Oatney, 335 Or 275, 66 P3d 475 (2003), cert den, 540 US 1151 (2004); State v. Walton, 311 Or 223, 251, 809 P2d 81 (1991). Trial counsel are not required to

raise issues that have no legal merit. There is no credible evidence that either the trial court or the appellate courts would have granted such a motion. Petitioner therefore has failed to prove that counsel performed deficiently or prejudicially.

Claim 5 is denied because Petitioner failed to establish the merits of the claim.

Petitioner did not prove that her trial attorneys failed to exercise reasonable professional skill and judgment in failing to conduct an adequate voir dire of the jury. This court is not persuaded that the evidence presented in this case establishes that the Colorado Method for jury selection in capital cases was—in 2011, when petitioner's penalty phase trial occurred—either the "standard of practice" for Oregon lawyers handling capital cases (in the sense that all reasonable lawyers were employing, or believed that they were legally required to employ, the Colorado Method exclusively in selecting capital juries) or the prevailing professional norm.

In any event, the question of what "standards of practice" for capital jury selection existed in 2011 is not determinative of whether counsel performed adequately here, because "[t]he question is whether an attorney's representation amounted to incompetence under 'prevailing professional norms,' not whether it deviated from best practices or most common custom." *Harrington v. Richter*, 562 US 86, 105 (2011) (citing Strickland, 466 US at 690). The court is aware of no federal or state decision applicable to Oregon lawyers that required them in 2011 to employ the Colorado Method in order to provide constitutionally adequate assistance in a capital case. Petitioner has cited no such authority.

Further, petitioner has failed to prove that counsel's method of conducting voir dire, which employed some of the Colorado Method's features, reflects the absence or suspension of professional skill and judgment. To the contrary, counsel's approach was reasonable, in that it was reasonably designed and implemented to accomplish the basic goal in selecting a jury, including a capital jury: assembling a fair and impartial jury. Further, counsel's approach was reasonably designed and implemented to seat a jury that would comply with the law specifically applicable to capital cases. Petitioner has also failed to prove that counsel gave prejudicially incorrect information during the voir dire process. No voir dire is perfect and could be criticized. Mr. Hadley's voir dire was not perfect. The issue is whether the voir dire conducted by counsel was so deficient that it denied Petitioner of her constitutional right to adequate counsel. It did not.

More importantly, Petitioner did not prove prejudice. Inadequate voir dire does not constitute structural error. Weaver v. Massachusetts, ___ US ___, 137 S Ct 1899, 1910-13 (2017); Ryan v. Palmateer, 338 Or 278, 294-97, 18 P3d 1127 (2005). Petitioner has offered nothing to show that any seated juror disregarded his or her oath to render an impartial penalty-phase verdict or that any seated juror was actually biased. Thus, Petitioner has not proven that the manner in which counsel conducted voir dire in her case could have had a tendency to affect the outcome of the trial.

Claim 6 C is denied because Petitioner failed to establish the merits of the claim.

Petitioner *did* prove that her trial attorneys failed to exercise reasonable professional skill and judgment in not conducting an adequate social history investigation. Trial counsel and the team conducting the social history investigation for Petitioner, acknowledge that because much of the team was working on another case leading up to Petitioner's trial date, that the social history investigation was inadequate. There was some work done early on but there was a last-minute rush to complete as much of the work as possible just before and during trial. The defense team admit that there was much more work that could have been done developing and compiling a social history. The work investigating and compiling a social history fell below the constitutional standard of care at the time.

Petitioner, however, *did not* prove prejudice. Petitioner's post-conviction team conducted an additional social history investigation and while they fleshed out what the original defense team had done, they did not produce any additional significant information that was not produced by the original defense team. While the original defense team could have and should have provided more information regarding Petitioner's social history, Petitioner has not proven that any of that additional information would have likely changed the outcome of the sentencing trial. Petitioner has not proven that the failure to do a more thorough social history investigation and presentation could have had a tendency to affect the outcome of the sentencing trial. The most significant negative impact from the social history investigation was not from its lack of thoroughness but from the fact that it was not completed until near or during the trial. This delayed any ability to complete the forensic psychological and neuropsychology work in a timely manner. The timeliness of the social history work was not raised in Claim 6 C by Petitioner but is largely captured in Claims 6 A and B above.

Petitioner *did* prove that trial counsel failed to exercise reasonable professional skill and judgment in failing to interview Patience Feusi prior to trial and if appropriate, have her testify regarding the impact on her of her mother possibly facing the death penalty. While trial counsel tried to contact Patience through her attorney, it was not attempted until a break in the trial. The effort was unsuccessful. Because, counsel did not know what her response would be, counsel did not raise the issue on cross-examination. Attorney Hadley testified that he regretted not having Patience testify regarding the impact of her mother facing the death penalty. Trial counsel's failure to investigate and present execution impact evidence fell below accepted capital defense standards of practice for capital social history investigation.

Petitioner, however, *did not* prove prejudice. While Patience testified at the PCR trial as to what, in essence, she would have said if asked at the original trial about execution impact, this court is not convinced that Petitioner has proven that her testimony could have had a tendency to affect the outcome of the trial. Patience was a 20-year-old college freshman when she testified at the PCR trial and appeared more forgiving of her mother with the passage of time and with her maturity. When she testified at the sentencing trial, she was age 13 and just 1 ½ years removed from her sister's brutal murder. She stated that she did not want to testify at that time and that it was hard for her. This court is not persuaded that the manner, content and impact of Patience's testimony would have been the same at the original trial as it was at the PCR trial.

In addition, asking Patience to testify regarding the impact of her mother's possible execution would have been risky and could have backfired by alienating the jury if the questions cause further trauma to Patience. It could have caused great damage to the mitigation effort.

Claim 6 D is denied because Petitioner failed to establish the merits of the claim.

Petitioner *did not* prove that her trial attorney failed to exercise reasonable professional skill and judgment in failing to view the crime scene. Counsel had access to and viewed the photos and other evidence gathered at the scene by the police. It was not necessarily unreasonable for trial counsel to forego visiting the crime scene. In this case there was no issue of whether Petitioner had brutally tortured and killed her daughter over a long period of time. There was no issue of where and how it happened.

In any event, Petitioner *has not* proven that a crime scene inspection would have produced any evidence such that it could have tended to affect the outcome of the trial. The crime scene photos would demonstrate the location of the blood. The fact that Petitioner consumed large amounts of caffeine drinks was not an issue. While the cases of energy drink bottles may have supported part of the defense theory, the defense was not dependent on it. There was other evidence of Petitioner's large consumption of caffeine drinks. Whether Jeanette's blood was all over the house or whether she owned more that the cardboard she slept on was not the issue of the case. None of these facts changed or negated the evidence of the brutal and gruesome manner in which Jeanette died.

Claim 6 E is denied because Petitioner failed to establish the merits of the claim.

Petitioner *has not* proven that her trial attorneys failed to exercise reasonable professional skill and judgment in failing to object to the portions of the Prosecutor's opening statement set forth in her Second Amended Petition. Petitioner has not proven that those portions of the opening statement were improper, given the facts of the case or that an objection would have been sustained. The facts of the case were gruesome and horrific and trial counsel was not inadequate for failing to object to portions of the opening statement that fairly described the facts of the case to the jury.

Petitioner has also *failed* to prove prejudice. Petitioner has not proven that any objection to the opening statement would have likely been sustained or that the failure to object somehow could have had a tendency to affect the outcome of the trial.

Claim 6 F is denied because Petitioner failed to establish the merits of the claim.

Petitioner *did not* prove that his trial attorney's failed to exercise reasonable professional skill and judgment in the timing and content of his opening statement. Petitioner did not prove that the strategic decision to reserve opening statement until after the state had presented its evidence was unreasonable given the circumstances of the case. There are times when it is reasonable to delay giving an opening statement until later in the case after the state has rested. It was not unreasonable to indicate that they would call a psychologist during opening, because at that time

the intent was to call Dr. Crossen as a witness. It was not until later that the trial attorneys changed their mind about calling Dr. Crossen to testify.

Petitioner *has also not* proven prejudice. Petitioner has not proven that delaying the opening statement or indicating in opening that they intended to call a psychologist were of such consequence to the jury that they could have had a tendency to affect the outcome of the trial.

Claim 6 G is denied because Petitioner failed to establish the merits of the claim.

Petitioner *did not* prove that her trial attorneys failed to exercise reasonable professional skill and judgment in failing to properly cross-examine many of the state's witnesses. Trial counsel's decision to ask the EMT personnel and the emergency room doctor about their emotional response was apparently a strategic decision because similar questions were addressed to all three. It was not unreasonable to ask the medical personnel about the impact the events had on them in an effort to show compassion for their situation. Petitioner has not proven that no reasonable attorney would have asked the questions in a similar situation. In any event, Petitioner *did not* prove that the questions and answers, even if not appropriate, could have had a tendency to affect the outcome. The jurors had an opportunity to see the pictures of Jeanette's body and no doubt experienced some of the same feelings that the medical personnel experienced. Petitioner did not prove that the questions and answers from the medical personnel had any tendency to impact the verdict.

Petitioner *did not* prove that her trial attorneys failed to exercise reasonable professional skill and judgment in failing to adequately cross-examine Lynn McAnulty, Richard McAnulty, Amber Davis, Patience Feusi, Mary Freeman, Lt. Alana Bruns, Kelly Rahm, Kathleen Remington and Anthony Hunter. With the exception of Patience Feusi, whose potential testimony was addressed in Claim 6 C, none of the witnesses mentioned were called as witnesses in this PCR trial. Petitioner has not proven what the testimony of these witnesses would have been if asked additional questions on cross-examination. Asking questions on cross-examination is fraught with danger. It can often lead to more harmful testimony. For the same reason, Petitioner has not proven prejudice.

Claim 6 H is denied because Petitioner failed to establish the merits of the claim.

Petitioner *did not* prove that her trial attorney's failed to exercise reasonable professional skill and judgment in failing to object to statements by the court and the prosecutor that the evidence was difficult to hear and that the photos were not for the faint of heart. The court and the prosecutor were simply stating what was obvious to everyone in the courtroom and were not improper. There was no reasonable basis for an objection and Petitioner has not proven that an objection would have been granted. For the same reason, Petitioner has failed to prove prejudice.

Claim 6 I is denied because Petitioner failed to establish the merits of the claim.

Petitioner *did not* prove that her trial attorneys failed to exercise reasonable professional skill and judgment in failing to object to various testimony and evidence as set forth in Claim 6I of the Second Amended Petition. During the course of a trial it is not unusual for technically inadmissible evidence to come in without objection because trial counsel makes a strategic decision that certain evidence, while technically inadmissible, either could be made admissible with proper foundation of is not important enough to object to. While some of the testimony noted by Petitioner in this claim is technically objectionable, Petitioner has not proven that his trial attorneys were constitutionally ineffective for not objecting. They are the kinds of evidence that often comes in without objection. Petitioner has also not proven that any of the noted testimony that came in without objection was so prejudicial, given the facts of the case, that it could have had a tendency to affect the outcome of the trial.

Petitioner also *did not* prove that his trial attorneys were ineffective for failing to object to the bloody dollhouse being displayed to the jury over a long period of time. The dollhouse was properly admitted as evidence. The evidence at the PCR trial established that the dollhouse was not in full view of the jury for long periods of time. It was kept by the clerk's desk with the other evidence, covered by an opaque plastic bag and the blood spots were not visible.

Claim 6 J is denied because Petitioner failed to establish the merits of the claim.

Petitioner *did not* prove that her trial attorneys failed to exercise reasonable professional skill and judgment in failing to adequately prepare for and argue the Motion for Judgment of Acquittal on the Second Question (future dangerousness.) In particular, Petitioner argues that trial counsel should have cited *Berry v. Texas*, 233 S.W.3d 850 (2007) and argues that counsel should have offered evidence at the hearing. A motion for judgment of acquittal is a motion to test the adequacy of the state's evidence and is not a hearing at which the defendant offers additional evidence. Petitioner has not proven that trial counsel's approach was inadequate.

More importantly, Petitioner *did not* prove prejudice. The denial of the motion for judgment of acquittal was raised in the appeal to the Oregon Supreme Court. The Supreme Court ruled that the denial of the motion was proper. The Supreme Court's ruling was not based on the failure to argue certain cases or failure to offer evidence, it was based on a review of the evidence in the record. The Supreme Court stated: "In reviewing a denial of a motion for judgment of acquittal, this court considers whether a rational trier of fact could have found, beyond a reasonable doubt, a probability that the defendant would commit future criminal acts of violence." This is the same standard the trial court would use in ruling on the motion. The Supreme Court ruled: "That evidence (referring to evidence in the record) was sufficient to permit an inference beyond a reasonable doubt that it was probable that defendant would commit future criminal acts of violence." *State v McAnulty*, 356 Or 432, 477-480 (2014). Petitioner has not proven that further preparation, argument or citation of cases could have had a tendency to change the courts ruling on the motion for judgment of acquittal either before the trial court or the Oregon Supreme Court. Even if trial counsel had somehow offered evidence at the MJOA hearing, the outcome would have been the same. At such a hearing, the court does not weigh the evidence to see which it find more credible but rather it determines whether the state has offered sufficient evidence, if the jury believes it, from which a reasonable jury could reach a "yes" verdict on the

second question, even if the defendant has offered contrary evidence. If there is contrary evidence that conflict is to be resolved by the jury, not the trial judge.

Claim 6 K is denied because Petitioner failed to establish the merits of the claim.

Petitioner *did not* prove that his trial attorney failed to exercise reasonable professional skill and judgment in failing to make an adequate closing argument. Petitioner's argument is that her attorneys gave an inadequate closing because they had failed to offer adequate evidence upon which to make an argument. The inadequacy of evidence is addressed above. Trial counsel could only base an argument on the evidence that was in the record. As such, trial counsel's argument was not inadequate. It is not inadequate for a defense attorney to argue that the state has failed to carry its burden to prove each issue or element beyond a reasonable doubt. That is a common, and at times successful, argument in criminal cases. Trial counsel was also not ineffective for stating during closing that "It just couldn't be much worse". In the context of this case, this was not unreasonable. Counsel was simply acknowledging what everyone in the courtroom knew, that Petitioner had killed her daughter Jeanette in brutal and horrific fashion but was arguing that in spite of these facts, the state had not proved the issue of future dangerousness. Petitioner has also failed to prove prejudice. Petitioner has not proven that a more concise or eloquent closing could have had a tendency to affect the outcome.

Petitioner also *did not* prove that his trial attorneys failed to exercise reasonable professional skill and judgment in failing to object to portions of the prosecutor's arguments to the jury. Because many lawyers refrain from objecting during opening statement and closing argument, absent egregious misstatements, the failure to object during closing argument and opening statement is within the 'wide range' of permissible professional legal conduct. Given the facts of the case and context in which the prosecutor made the statements, Petitioner has not proven that the statements were improper or if they were technically improper, that every reasonable trial attorney would have objected. Petitioner has also failed to prove prejudice. Petitioner has failed to prove that an objection to anyone of the comments would have been sustained and that the prosecutor's statements were so egregious that the failure to object could have had a tendency to affect the outcome of the trial.

Petitioner's assertion that counsel "failed to request sur-rebuttal" is not supported by the record. Counsel filed a motion with the trial court requesting sur-rebuttal, which the state responded to. After considering the parties' arguments, the trial court denied the motion.

Claim 6 L is denied because Petitioner failed to establish the merits of the claim.

Petitioner *did* prove that her trial attorney's failed to exercise reasonable professional skill and judgment in failing to request an instruction that informed the jury that their decision that death was the appropriate penalty for petitioner was entirely theirs and would never be reviewed by any court. Counsel submitted a pre-trial memorandum addressing this issue but did not submit a request for a jury instruction. Failure to do so fell below the reasonable standard of care,

Petitioner, however, *did not* prove prejudice. There is no evidence that the jurors believed that their verdict was not a final determination. The point was addressed in other ways during the trial. There is no evidence that failure to request the instruction could have had a tendency to affect the outcome of the trial. It did not constitute structural error.

The Petitioner *did not* prove that her trial attorneys failed to exercise reasonable professional skill and judgment in failing to request an instruction defining the term "criminal acts of violence". There was no reason to include a definition of the term "physical injury" because that term is not included in the instruction that was given. There was also no reason to explain that the term "criminal acts of violence" did not include acts that were not criminal because of various defenses. By definition, they would not be included because they were not "criminal".

Petitioner also failed to prove prejudice. Any error in not instructing the jury on the term "criminal acts of violence" was corrected when the jury submitted a question on the issue and the court properly instructed the jury on the meaning of the term. The failure to request such an instruction is not structural error. Petitioner has not proven that the failure to request and instruction defining "criminal acts of violence" could have had a tendency to affect the outcome of the trial.

Trial counsel was *not* ineffective for failing to request an instruction that the jury must find beyond a reasonable doubt that petitioner would actually commit criminal acts of violence constituting a continuing threat to society, instead of merely the probability of that event. Such an instruction was contrary to Oregon case law and would not have been given.

Petitioner *did not* prove that her trial attorneys failed to exercise reasonable professional skill and judgment in failing to offer any evidence to support the four jury instructions that were titled "Mitigating Circumstances Defined," "Consideration of Evidence in Mitigation," "Definition of 'Deliberately,'" and "Death Never Required." Petitioner has not proven what evidence trial counsel should have submitted and that submission of that evidence would have caused the judge to allow the instructions. Finally, Petitioner has not proven that inclusion of the requested instructions could have had a tendency to affect the outcome of the trial.

Claim 7 is denied because Petitioner failed to establish the merits of the claim.

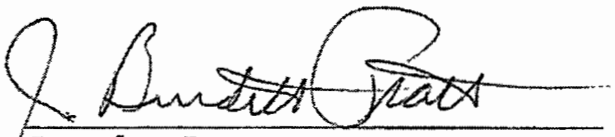
Petitioner *did no*t prove that her appellate attorney failed to exercise reasonable professional skill and judgment in failing to raise issues related to the constitutionality of the Oregon Death Penalty statute and argue that Oregon's second penalty question is unconstitutional and that striking jurors opposed to the death penalty based on religious beliefs was unconstitutional. Both of these issues have been decided by Oregon courts contrary to Petitioner's position. *State v. Wagner*, 305 Or 115 (1988), vacated on other grounds, 492 US 914 (1989); *State v. Walton*, 311 Or 223, 243 (1991). Petitioner did not prove that all competent appellate counsel would have asserted the claims, nor has she proven that had the claims of error been raised, it is more probable than not that the results would have been difference. *Pratt v. Armenakis*, 199 Or App 448, 464, 112 P3d 371, adh'd to on recons, 201 Or App 217 (2005). Petitioner has not proven that raising these issues in her case would have changed Oregon caselaw.

Federal and State Constitutional questions were presented and decided. All questions presented were decided.

ORDER

NOW, THEREFORE, Claims 4, 6A and 6B are granted and Petitioner's Guilty Plea, Conviction and Death Sentence are vacated and the Petitioner's case is remanded to the Circuit Court for Lane County for further proceedings. This relief does not apply to the Petitioner's conviction and sentence for Tampering with Physical Evidence. The findings regarding Claims 4, 6A and 6B do not apply to the charge of Tampering with Physical Evidence. All other claims are denied and dismissed with prejudice. Petitioner's counsel will prepare a judgment consistent with this order.

Dated this 10th day of July, 2019.



J. Burdette Pratt
Senior Judge