

CIRCUIT COURT OF OREGON

MARION COUNTY

ELIZABETH DIANE DOWNS,  
Petitioner,  
v.  
ROBERT SCHIEDLER,  
Superintendent, Oregon Women's  
Correctional Center,  
Defendant.

No. 87-C-11753

MEMORANDUM IN SUPPORT  
OF MOTION FOR SUMMARY  
JUDGMENT

STATE OF OREGON  
DEPARTMENT OF JUSTICE  
1991 MAY -9 3:11 PM  
NOTICE  
ENTERED  
MAY 9 1991

Petitioner brings this petition for post-conviction relief under the Post-Conviction Hearing Act, ORS 138.510 to 138.680. She was convicted for the murder of one of her children and the attempted murder of her two remaining children on August 28, 1984. Exhibit 2. Two convictions for assault in the first degree were merged with the attempted murder convictions and petitioner was sentenced as a dangerous offender pursuant to ORS 161.725(1). Id. Defendant moves for summary judgment pursuant to ORCP 47B in an attempt to winnow from petitioner's thirty-three (33) page Fifth Amended Petition those issues on which there are no material disputes of fact. Elimination of issues which may fairly be decided on the existing record should permit a trial in this case to focus on those few questions on which there might be serious debate. The general rules for assessing the propriety of granting summary judgment  
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1 are outlined in Seeborg v. General Motors Corporation, 284 Or.  
2 695, 698-70, 588 P.2d 1100 (1978) and in Celotex Corp. v.  
3 Catrett, 477 U.S. 317 (1986), which interprets the cognate  
4 provisions of Fed. R. Civ. P. 56. The summary judgment  
5 procedure is particularly apt in post-conviction cases because  
6 the issues are generally framed by an existing record and  
7 post-conviction procedures invite trial on that record.  
8 ORS 138.620(2).

9 As a prefatory matter, it should be noted that defendant  
10 concedes the merit of petitioner's contentions in paragraph  
11 7A(3) of her petition and her jurisdictional claims related to  
12 the imposition of restitution. The imposition of consecutive  
13 gun minimums was impermissible at the time of petitioner's  
14 sentencing and should have been challenged on appeal. State v.  
15 Hardesty, 68 Or. App. 591, 682 P.2d 824 (1984), aff'd., 298 Or.  
16 616, 695 P.2d 569 (1985). Similarly, the trial court had no  
17 jurisdiction to impose restitution following petitioner's  
18 appeal of her conviction to the Court of Appeals on  
19 September 19, 1984. Exhibits 8, 9 and 10. The subsequent  
20 orders to pay restitution entered by the trial court on  
21 October 30, 1984 and November 9, 1984 were void. ¶¶ 7A(2) and  
22 7D of the Fifth Amended Petition are therefore correct to the  
23 extent they contend that restitution should not have been  
24 imposed. As a result of these concessions, an order voiding  
25 the consecutive gun minimums -- but not the initial gun minimum  
26 -- should be entered. In addition, this case should be

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1 remanded to the trial court for the sole purpose of holding a  
2 hearing on the amount of restitution to be ordered.

3 On May 19, 1983 at about 10:00 p.m., petitioner shot all  
4 three of her children while they were in her 1983 Datsun Pulsar  
5 on the way home from an outing. She shot them with a .22  
6 caliber Ruger pistol she had taken from her ex-husband prior to  
7 her relocation to the Eugene-Springfield area some one and  
8 one-half months previously. Tr. 1086-1087, 1477. <sup>1</sup> As a  
9 result of the shooting, one of her children died, another  
10 remains unable to walk and a third suffered a stroke the  
11 effects of which endure. Tr. 629-31.

12 It should be emphasized at the outset of this case that  
13 despite petitioner's constantly shifting tales about what  
14 occurred on the evening of May 19, 1983 -- and in part because  
15 of them -- there is not the slightest doubt about who shot her  
16 children. Petitioner had a motive for killing her children,  
17 albeit a twisted one, because she held the misshapen belief  
18 that her children stood in the way of an imagined connubial  
19 bliss with Robert Knickerbocker, of whom she was infatuated.  
20 Tr. 1464-1526. Petitioner left Arizona on April 4, 1983 with a  
21 .22 caliber Ruger pistol in the trunk of her car. Tr. 1477,  
22 1504. That pistol was never found after it was used to shoot  
23 the Downs children, but two .22 caliber cartridges were found  
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26 <sup>1</sup> The transcript is marked Exhibit 1, but will be  
referred to as "Tr." in this memorandum.

1 in a .22 caliber rifle in petitioner's apartment that bore  
2 exactly the same extractor marks as those located on the empty  
3 casings on Old Mohawk Road at the site of the shootings.  
4 Tr. 1347-1356. The cartridges located in the rifle had once  
5 been in the chamber of the murder weapon and had been extracted  
6 from it before they were loaded in the rifle. Id.  
7 Petitioner's initial and rather cartoonish version of events  
8 was that a Bushy Haired Stranger (BHS) flagged her down on Old  
9 Mohawk Road, demanded her car and shot her children while they  
10 lay sleeping in the car before turning the gun on the only  
11 other adult at the scene, who was for some reason outside the  
12 car. See, e.g., Tr. 920-923. After the shootings, petitioner  
13 heroically fooled the BHS by pretending to throw the keys to  
14 the car into the bushes, kicked him with her mighty foot, and  
15 sped away toward the hospital to tend her children. Tr. 920-23,  
16 926.

17 Following the shootings, Joseph Inman came upon  
18 petitioner's car roaring down Old Mohawk Road toward  
19 Springfield. The car was speeding toward the  
20 McKenzie-Willamette Hospital in Springfield with three  
21 critically wounded children at about 10 miles per hour or  
22 less. Tr. 454. Mr. Inman followed the car for about two and a  
23 half minutes around the curves of Old Mohawk Road before he  
24 could find a place to pass it. Id. It took petitioner  
25 approximately 50 minutes to drive from the site of the  
26 shootings to the McKenzie-Willamette Hospital, a trip that

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1 would take 25 minutes if she were driving at a normal rate of  
2 speed. Tr. 1417, vol. 20, pp. 3, 13. Petitioner's nine year  
3 old daughter took the stand and testified unequivocally that  
4 she was shot by "My mom." Tr. 691.

5 These facts and a large fund of circumstantial evidence  
6 render petitioner's strident assertions of innocence laughable,  
7 though grimly so. There is not the slightest chance that  
8 anyone other than Elizabeth Diane Downs shot her children. Her  
9 latest tale, told in a letter to her attorney following her  
10 conviction, is pregnant with that fundamental and unalterable  
11 fact. Exhibit 3.

12 This memorandum will treat petitioner's claims seriatim,  
13 as they appear in her petition. Defendant assumes that there  
14 is no need to reduplicate the material appended to petitioner's  
15 Fifth Amended Petition and will therefore freely refer to it as  
16 if it were before the Court on this motion.

17 I. ¶17A(1) INEFFECTIVE ASSISTANCE OF APPELLATE  
18 COUNSEL(VINDICTIVE SENTENCE).

19 Petitioner first claims that her appellate counsel were  
20 constitutionally ineffective as a result of their failure to  
21 argue that her sentence was illegal because it "was based on  
22 emotion and vindictiveness which is an unconstitutional basis  
23 for a sentence under Oregon law." Petition, p. 9. This claim  
24 is based on an asserted violation of Article I, section 15 of  
25 the Oregon Constitution and was addressed in defendant's motion  
26 to dismiss. The relevant portion of the transcript containing

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1 the trial court's remarks on sentencing are located at Tr.  
2 2992-2993.

3 The claim that a particular sentence violates Article I,  
4 section 15 of the Oregon Constitution because it is "founded on  
5 the principles \* \* \* of vindictive justice," is a thinly veiled  
6 variant of the claim that the sentence is cruel and unusual  
7 punishment in violation of the eighth amendment to the United  
8 States Constitution. See, State v. Dinkel, 34 Or. App. 375,  
9 579 P.2d 245 (1978). A claim that a sentence imposed within  
10 the statutory maximum offends either Article I, section 15 of  
11 the Oregon Constitution or the eighth amendment has never  
12 prevailed in any case in Oregon.

13 It is now settled that appellate counsel need not raise on  
14 appeal every colorable or nonfrivolous issue in order to  
15 discharge the obligation to provide the effective assistance of  
16 counsel. Jones v. Barnes, 463 U.S. 745, 754 (1983) holds that  
17 nothing in the Constitution requires "judges to second-guess  
18 reasonable professional judgments and impose on appointed  
19 counsel a duty to raise every 'colorable' claim suggested by a  
20 client." The "process of 'winnowing out weaker claims on  
21 appeal and focusing on' those more likely to prevail, far from  
22 being evidence of incompetence, is the hallmark of effective  
23 appellate advocacy." Smith v. Murray, 477 U.S. 527, 536  
24 (1986). An appellate lawyer has the obligation to "exercise  
25 judgment in identifying the arguments that may be advanced on  
26 appeal." McCoy v. Court of Appeals, 486 U.S. 429, 438 (1988).

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1 The failure to raise a claim under Article I, section 15  
2 amounts to no more than a recognition by counsel that the claim  
3 would have been frivolous, had no possible chance of success,  
4 and would have damaged the potential for prevailing because a  
5 claim of that sort amounts to a signal that the underlying case  
6 has no merit. Moreover, the claim that the sentence in this  
7 case was excessive for the crime committed would have damaged  
8 the credibility of counsel. Far from being ineffective  
9 assistance, the failure to raise the claim was a mark of able  
10 appellate advocates.

11 In order to prevail on a claim of ineffective assistance  
12 of appellate counsel, petitioner must establish "(1) that a  
13 competent appellate counsel would have asserted the claim, and  
14 (2) that had the claim of error been raised, it is more  
15 probable than not that the result would have been different."  
16 Guinn v. Cupp, 304 Or. 488, 496, 747 P.2d 984 (1987). It is  
17 patently impossible for petitioner to seriously argue that had  
18 a vindictive sentence claim under Article I, section 15 been  
19 raised, it is probable that the Court of Appeals would have  
20 concurred.

21 It is in the nature of petitioner's claim that there can  
22 be no material disputes of fact relating to it; there is no  
23 testimony or evidence outside the existing record necessary for  
24 or useful to a resolution of the matter. Defendant has,  
25 nonetheless, appended affidavits from petitioner's appellate  
26 counsel, Howard Collins and Mark Geiger, which explain their

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1 reasons for failing to raise certain issues, including the  
2 vindicting sentence issue. Exhibits 4 and 5. Defendant is  
3 entitled to summary judgment on the claim that appellate  
4 counsel was ineffective for failing to assert that the sentence  
5 was unconstitutionally vindictive under Article I, section 15.

6 II. ¶7A(2) INEFFECTIVE ASSISTANCE OF APPELLATE COUNSEL  
7 (RESTITUTION).

8 Paragraph 7A(2) of the Fifth Amended Petition raises  
9 questions concerning restitution ordered by the trial court  
10 after a notice of appeal had been filed. Since defendant  
11 concedes that the restitution order was void, there is no need  
12 to address the question here.

13 III. ¶7A(3) INEFFECTIVE ASSISTANCE OF APPELLATE COUNSEL  
14 (GUN MINIMUMS).

15 Defendant concedes that the trial court's imposition of  
16 consecutive gun minimums was impermissible. State v. Hardesty,  
17 supra. Petitioner's second and third gun minimums on the  
18 attempted murder convictions should be vacated.

19 IV. ¶7B INEFFECTIVE ASSISTANCE OF APPELLATE COUNSEL  
20 (WITNESS RESTRICTION).

21 Petitioner claims that she was restricted from contacting  
22 the victim "during the pendency of the trial," Petition, p. 11,  
23 and that this restriction "severely prejudiced Petitioner's  
24 ability to prepare her defense." Id. She further contends that  
25 "(a)t trial" the restriction was modified to permit contact  
26 with the victim "with the permission of her attorney William

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1 Furtick" and that she was prejudiced by this lack of access.  
2 The restriction, petitioner asserts, should have been raised as  
3 error on appeal.

4 On June 6, 1983 Judge Foote, who also presided at the  
5 trial in this case, entered an order in In the matter of  
6 Christie Ann Downs, Lane County Juvenile Court No. 83-232 which  
7 stated in part that:

8 "4. No person connected with the  
9 investigation of the Cheryl Downs homicide or  
10 injuries of sibling, or attorneys concerning  
11 this matter, shall contact or interview the  
12 above-named child without the prior knowledge  
13 and consent of the child's attorney, Mr. Furtick.

14 5. No person shall make contact or visit  
15 the above-named child without the prior  
16 knowledge and consent of the Children's Services  
17 Division." Petition, Appendix A-4.

18 It is apparent from the court's order that both the prosecution  
19 and the defense were equally subject to the restriction;  
20 neither party could contact the victim without the knowledge  
21 and consent of CSD and the victim's attorney.

22 On April 6, 1984, over a month before trial, the trial  
23 judge modified his Juvenile Court order and permitted defense  
24 counsel to interview the victim if she wished to be  
25 interviewed. The question was raised at the outset of the  
26 Omnibus hearing. In arguing petitioner's motion, trial counsel  
stated that:

"I don't think in the criminal case the  
Court can order her to be interviewed, I would  
agree.

However, I would request the Court to

1 release any previous prohibition of our  
2 contacting her and interviewing her, that's  
3 correct. I think the Court's without authority  
4 in the criminal case to order her with respect  
5 to this particular motion." Tr. p. 11.

6 The trial court granted petitioner's motion in the following  
7 terms:

8 "THE COURT: I believe where it leaves me is that I  
9 don't believe the Court has the authority to order any  
10 witness contact to any counsel. The only thing that the  
11 Court can do is order the witness to appear pursuant to a  
12 subpoena and answer questions truthfully. That is in the  
13 context of a court proceeding, not in the context of an  
14 interview.

15 I'm prepared to grant a request that for the purposes  
16 of the criminal case that counsel be released from the  
17 juvenile court order which prevents contact. I think the  
18 thrust of that is that if Christie Downs through her  
19 counsel wishes to meet with anybody involved in the  
20 criminal case including defense counsel, she may do so but  
21 that the Court is without authority to order her to do so.

22 So I suspect that it's up to Mr. Furtick and Christie  
23 as to whether or not she wants to be interviewed, and the  
24 Court can simply leave it at that.

25 MR. HUGI: For a little clarification, it's your  
26 intent that any communication with Christie Downs be done  
27 through Mr. Furtick and that he not be circumvented?

28 THE COURT: Yes.

29 MR. HUGI: It's not your intent that she be approached  
30 directly?

31 THE COURT: Yes. Mr. Furtick represents her and has  
32 been appointed in the juvenile case, and I'm assuming he's  
33 going to act in her interest." Tr. 12-13.

34 Petitioner's counsel objected that "the Court is without  
35 authority to in a criminal case place some precondition to  
36 contacting a witness, that we do that through an attorney when  
37 she is not a party to this particular criminal case." Id.

38 It is clear from this colloquy that the trial court placed  
39 no impediment on trial counsel's ability to interview the  
40 victim. Contrary to petitioner's allegation, the trial court

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1 did not modify the Juvenile Court order "to permit contact with  
2 Christie with the permission of her attorney William Furtick."  
3 Petition, p. 11. The permission of Mr. Furtick was plainly not  
4 required as a predicate to interviewing the victim.  
5 Mr. Furtick was to be no more than a conduit for expressing the  
6 wishes of his client.

7 The "restriction" that petitioner request to interview the  
8 victim through the intermediation of her attorney was in fact  
9 no restriction at all. There is no salient distinction between  
10 asking a victim directly whether she will consent to an  
11 interview and asking the same question of the victim through  
12 her attorney. More to the point, the trial court lacked  
13 authority to either require CSD to make the victim available to  
14 petitioner's counsel or order her to talk to him. State ex rel  
15 O'Leary v. Lowe, 307 Or. 395, 401, 769 P.2d 188 (1989)("There  
16 is no statutory right in Oregon for a criminal defendant to  
17 depose a potential state's witness. Nor has any basis been  
18 shown to us that the prosecutor individually has any legal  
19 authority to require CSD to produce the children for  
20 out-of-court interviews."). Since "the discovery statutes do  
21 not purport to direct the actions of all the minions of the  
22 government," Id., 307 Or. at 402, the trial court could  
23 properly have left the question whether the victim should be  
24 interviewed up to CSD or Mr. Furtick. He could, in short, have  
25 left matters as they stood under the Juvenile Court order  
26 because that order did no more than direct what CSD had the

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1 power to do in the first instance.

2 Under these circumstances, it could not have been  
3 ineffective assistance of counsel to fail to raise the  
4 "restriction" on access to the victim. That is so, first,  
5 because there was no restriction, second, because even if there  
6 had been a restriction, there was no colorable claim to raise  
7 as the trial court had no authority to direct the victim's  
8 counsel or CSD to do anything at all in the criminal  
9 proceeding, State ex rel O'Leary v. Lowe, supra, and finally  
10 because there was no possible prejudice to point to given that  
11 the victim would not talk to petitioner's attorney.<sup>2</sup> The  
12 claim that petitioner's appellate counsel should have raised  
13 the question of the restriction on access to the victim fails  
14 because the claim was not even colorable and because it would  
15 have had no chance at all of altering the outcome of the appeal.

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19 <sup>2</sup> The entire problem is an empty one, as petitioner  
20 well knows. Her trial counsel went to Mr. Furtick and  
21 requested an interview and was told in writing that the victim  
22 did not wish to talk to him. Mr. Furtick testified in his  
23 deposition that he went to the victim at her foster home and  
24 asked her if she wanted to talk to petitioner's counsel. The  
25 victim said no. Mr. Furtick had nothing to do with the  
26 victim's decision. Exhibit 6, p. 19. This cannot, of course,  
have a direct bearing on the question whether the claim would  
have prevailed on appeal, but it is most improbable that the  
Court of Appeals would have accepted a claim of this sort when  
the record suggests, Tr. 12, that the victim refused to talk to  
counsel and the record is entirely devoid of any suggestion  
that petitioner might have been prejudiced by any real or  
imagined "restriction."



1        V. ¶7C INEFFECTIVE ASSISTANCE OF APPELLATE COUNSEL (GRAND  
2        JURY NOTES).

3        Petitioner claims that appellate counsel was  
4        constitutionally ineffective because they failed to raise on  
5        appeal the trial court's denial of trial counsel's motion for  
6        discovery of grand jury notes. In a letter opinion dated  
7        April 5, 1991, the Court dismissed this claim on the ground  
8        that the grand jury notes were not discoverable. State v.  
9        Goldsby, 59 Or. App. 66, 650 P.2d 952 (1982). The question  
10       therefore need not be debated here.

11       VI. ¶7D INEFFECTIVE ASSISTANCE OF APPELLATE COUNSEL  
12       (RESTITUTION).

13       Once again, the failure of appellate counsel to object to  
14       the restitution imposed on petitioner after the notice of  
15       appeal was filed is conceded to have been erroneous and the  
16       restitution orders should be vacated.

17       With respect to ¶7D, there seems to be some dissonance  
18       between petitioner's initial outline of her claim and her  
19       elaboration of it. In her Fifth Amended Petition, petitioner  
20       claims that appellate counsel "Did not raise the issue of the  
21       illegality of Petitioner's sentence in that the trial Court  
22       lacked jurisdiction at the time of the sentence and therefore  
23       while Petitioner was found guilty by a jury she has not been  
24       legally sentenced." Petition, p. 4. That claim, whatever its  
25       legal source, disappears from the Statement of Facts  
26       elaborating ¶7D, which addresses only the restitution

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1 question. Petition, p. 12. Defendant assumes, because of its  
2 absurdity, that petitioner does not intend to argue that the  
3 trial court's initial sentence order of incarceration was  
4 somehow void because she was able to appeal it prior to the  
5 imposition of restitution and that she was therefore never been  
6 properly sentenced to incarceration. As a consequence of that  
7 assumption, defendant will not address the issue until  
8 petitioner tries to argue it.

9 VII. ¶9A INEFFECTIVE ASSISTANCE OF TRIAL COUNSEL (FAILURE  
10 TO OBJECT).

11 In paragraph 9A of her petition, petitioner raises three  
12 distinct claims of ineffective assistance of trial counsel.  
13 Those claims are related because in each petitioner contends  
14 that trial counsel should have requested a mistrial following  
15 misdeeds by the prosecutor. In assessing these claims, it is  
16 perhaps appropriate to rehearse for the Court once again that  
17 which is most familiar.

18 The clearest outline of the principles by which a claim of  
19 constitutionally ineffective assistance of counsel is to be

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1 measured is that of the United States Supreme Court in  
2 Strickland v. Washington, 466 U.S. 668 (1984).<sup>3</sup> Under  
3 Strickland:

4 "A convicted defendant's claim that counsel's  
5 assistance was so defective as to require reversal of a  
6 conviction or death sentence has two components. First,  
7 the defendant must show that counsel's performance was  
8 deficient. This requires showing that counsel made errors  
9 so serious that counsel was not functioning as the  
10 'counsel' guaranteed the defendant by the Sixth  
11 Amendment. Second, the defendant must show that the  
12 deficient performance prejudiced the defense. This  
13 requires showing that counsel's errors were so serious as  
14 to deprive the defendant of a fair trial, a trial whose  
15 result is reliable. Unless a defendant makes both  
16 showings, it cannot be said that the conviction or death  
17 sentence resulted from a breakdown in the adversary  
18 process that renders the result unreliable." Strickland v.  
19 Washington, supra. 466 U.S. at 687.

20 The first component of the Strickland standard requires  
21 petitioner to point to:

22 " \* \* \* acts or omissions of counsel that are alleged not  
23 to have been the result of reasonable professional  
24 judgment. The court must then determine whether, in light  
25 of all the circumstances, the identified acts or omissions  
26 were outside the wide range of professionally competent  
assistance." Id., 466 U.S. at 690.

A petitioner must demonstrate that counsel's representation

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3 Krummacher v. Gierloff, 290 Or. 867, 627 P.2d 458  
(1981) retains vitality to the extent that analysis of the  
claim under Article I, section 11 of the Oregon Constitution  
differs from the federal reading of the sixth amendment to the  
United States Constitution. Since Krummacher is consistent  
with Strickland and it intentionally declines to adopt a  
single standard, the Strickland standard may safely be applied  
without reference to Krummacher.

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1 fell below an objective standard of reasonableness, Id., 466  
2 U.S. at 688. In assessing whether counsel achieved that level  
3 of performance, the performance must be evaluated from  
4 counsel's perspective at the time of the alleged error,  
5 Kimmelman v. Morrison, 477 U.S. 365, 381 (1986) and the "court  
6 must indulge a strong presumption that counsel's conduct falls  
7 within the wide range of reasonable professional assistance;  
8 that is, the (petitioner) must overcome the presumption that,  
9 under the circumstances, the challenged action 'might be  
10 considered sound trial strategy.'" Strickland v. Washington,  
11 supra, 466 U.S. at 689. The second component of the Strickland  
12 standard is met if petitioner shows that "there is a reasonable  
13 probability that, but for counsel's unprofessional errors, the  
14 result of the proceeding would have been different." Id., 466  
15 U.S. at 694.

16 A. Medical Reports of Danny Downs.

17 At trial, prior to closing argument, petitioner's counsel  
18 offered into evidence the medical records of Stephen Danny  
19 Downs and Christie Downs. Tr. 2395. The prosecution objected  
20 to the introduction of the records on the ground that they were  
21 hearsay and irrelevant. That objection was provisionally  
22 overruled. Tr. 2402; 2844-2845. Just prior to closing  
23 arguments, the trial court again considered the admissibility  
24 of the medical records, but made an inconclusive ruling.  
25 Tr. 2844-2845. Subsequently, the debate dilated on a specific  
26 portion to the medical reports which detailed statements made

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1 by Danny Downs to a nurse. Tr. 2866-2874. The prosecutor  
2 objected to "two statements made by Danny Downs in the medical  
3 records," on the ground that Danny Downs was not a competent  
4 witness. Tr. 2866. At the conclusion of arguments on the  
5 motion, the trial court sustained the state's objections to the  
6 introduction of the statements of Danny Downs which  
7 petitioner's counsel wished to introduce. Tr. 2874.

8 During the course of closing argument the prosecutor was  
9 explaining to the jury the importance, or lack of it, of the  
10 medical records. The following colloquy occurred:

11 " And, so when you see these written here, I think you're  
12 going to see a lot of stuff where the children are saying  
13 they wanted their -- they love their parents. And many of  
the details like,

14 'Dad came in and talked to Danny. Danny very  
excited to talk to him. Danny's father called from  
15 Arizona.'

16 This one where Danny says -- is asked about who shot you  
implied,

17 'Mommy -- mommy shot me.

18 I thought you said that a man shot you?'

19 I said and he says,

20 'They both shot me.'

21 And he replied,

22 'Let's go read a story.'

23 You're going to find a lot of that and I'm not --  
24 don't get me wrong, I'm not explaining that because Danny  
Downs said in one place in a medical report that his  
25 mother shoots him, that that's any evidence at all that --  
that happened. I don't believe that -- that his is  
26 competent evidence of that. He says,

'Jack shot him.'

A man shot him, someone shot you that was outside in a  
car. You can see a lot of confusing statements. You're  
not -- you're when you're reading these and you see that  
it all points in one direction, any direction, that they  
are fearful of their mother and disliking of her or their  
father or that they're just in need of their parents.

MR. JAGGER: Excuse me, I hesitate to interrupt but

1 some of this stuff I must object to. I don't want to  
2 interrupt. So, you know, my objection is that this stuff  
3 is not in evidence. If you want something in, you can't  
4 just put it in there, that was our objection.

MR. HUGI: I'm sorry if I inadvertently ---

MR. JAGGER: ---- It may confuse the jury to find  
5 some stuff that are not in there and I don't think you  
6 want that in.

MR. HUGI: I'm sorry if ---

THE COURT: -- Are you making objection or ---

MR. JAGGER: --- I guess for the record, to let the  
7 jury know that some things that are being repeated may not  
8 be in there. We may assume that it was submitted in the  
9 record, so it should be remembered ---

THE COURT: --- I'll sustain the objection." Tr.  
vol. 23, pp. 178-183.

10 It should be evident from this that petitioner's counsel had no  
11 basis on which to seek a mistrial. The material read to the  
12 jury which had been excluded by the trial court on the state's  
13 motion was offered by petitioner at trial because it was  
14 favorable to the defense. It was equivocal and demonstrated  
15 that Danny Downs did not know who shot him. The fact that  
16 Danny Downs implicated petitioner without knowing who shot him  
17 also cast doubt on the testimony of Christie Downs, because the  
18 inference that the identification was false is transferable.  
19 If Danny Downs could identify petitioner as the one who shot  
20 when he obviously did not know who shot him, the same could be  
21 said of Christie Downs.

22 Since the material read to the jury by the prosecutor was  
23 favorable to the defense, or at most equivocal, it could not  
24 have formed the basis for a mistrial. It would, in any event,  
25 have been discounted by a jury thoroughly aware that Stephen  
26 Danny Downs was a three year old child shot in the back while

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1 sleeping and had no idea who shot him. Tr. 671, 1302, 2866.  
2 Moreover, as Judge Foote notes in his affidavit, he would not  
3 have granted a mistrial had a motion been made. Exhibit 32, p.  
4 2.

5 The fact that trial counsel had no grounds for a mistrial  
6 motion is the strongest basis for rejecting the claim of  
7 ineffective assistance of counsel on this point, but there are  
8 others. The strong presumption remains that the failure to  
9 seek a mistrial "might be considered sound trial strategy,"  
10 Strickland v. Washington, supra, 466 U.S. at 689, because,  
11 after a lengthy trial, counsel may well not have desired a  
12 mistrial and the potential for a different jury and new  
13 evidence. Or counsel might well have considered a motion for  
14 mistrial to have had little chance of success and therefore  
15 avoided it for tactical reasons. Moreover, petitioner can  
16 hardly demonstrate prejudice, either in the sense that the  
17 trial court would have granted the motion or in the sense that  
18 it would have granted the motion and she would have been  
19 acquitted on retrial. Similar considerations apply with equal  
20 force to all three of petitioner's claims concerning the  
21 failure to apply for a mistrial.

22 B. Dr. Mann Report.

23 Petitioner contends that her trial counsel should have  
24 requested a mistrial when the prosecutor, on cross-examination,  
25 misquoted portions of a psychological evaluation of her  
26 prepared by Dr. Paul S. Mann in 1981. The quotations

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petitioner objects to are these:

"Had a 'major psychopathology with depression and high anxiety disorganizing cognition and judgment."

"Judgment tends to be immature and behavior erratic. Her motive of sexual/social control over her husband is likely to be frustrated should she participate in the program."

"Her history of immaturity promiscuous, histrionic behavior leads to a high level of uncertainty as to her ability to sustain personal care appropriate for pregnancy over the nine month course."

"Her questionable motivation and her history of erratic, histrionic behavior leaves a substantial question as to whether or not she would be willing to terminate her parental rights under the emotional circumstances which are likely to prevail."

"Finally, Ms. Downs' search for stability and acceptance in her marriage is likely to be better achieved by facing problems directly rather than engaging in a major decision which has heavy overtones of mutual exploitation." Tr. 2277-2278.

The prosecutor scrupulously quoted from the psychological evaluation and accompanying cover letter prepared by Dr. Mann. Exhibit 11. There were no inaccuracies for petitioner to complain about and no grounds for a mistrial motion. Moreover, the cross-examination questions were not themselves evidence, were not objectionable as cross-examination, and any inaccuracies could have been redeemed on redirect testimony.

C. Jamison Report.

Finally, petitioner claims that her counsel should have requested a mistrial when the prosecutor stated, contrary to the facts, that petitioner's own psychologist, Polly Ann Jamison, had diagnosed her as a deviant sociopath. The only reference before the jury to a diagnosis related to Ms. Jamison was the following question and answer on cross-examination of

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1 petitioner:

2 "Q. You were labeled a deviant sociopath by the tests  
3 she gave you?

4 A. I don't know?" Tr. 2342; Exhibit \_\_\_\_.

5 Contrary to petitioner's assertion, then, the prosecutor did  
6 not say that Ms. Jamison diagnosed her as a deviant sociopath.  
7 He asked whether the tests taken by petitioner labeled her a  
8 deviant sociopath; a very different matter. Ms. Jamison's  
9 diagnosis of petitioner, if there was one, was never mentioned.

10 The prosecutor had some basis for concluding that an MMPI  
11 taken by petitioner resulted in scores indicating she is both  
12 deviant and a sociopath. Exhibit 12. The 'Goldberg  
13 Heirarchical Classification" at the bottom of the first page of  
14 the MMPI score sheet indicates that petitioner was deviant on  
15 one scale and sociopathic on another. Id. It may fairly be  
16 assumed that a sociopath is deviant, whether or not there is a  
17 recognized category of deviant sociopaths.

18 Mr. Hugi may or may not have been correct in drawing the  
19 conclusion that the MMPI test taken by petitioner diagnosed (or  
20 labeled) her as a sociopath, deviant or otherwise. It matters  
21 not at all, because the question put to petitioner on  
22 cross-examination was based on a reasonable reading of an  
23 existing document. Exhibit 12. No attorney is required to  
24 produce an absolutely accurate foundation for every question  
25 asked of a witness on cross-examination. All that can be  
26 required is a reasonable basis for asking a question. The  
nerve of the matter is that there was absolutely nothing wrong

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1 with the question asked of petitioner, even if its assumed  
2 predicate turns out to be wrong. The question was not itself  
3 evidence of anything and cannot possibly have premised a motion  
4 for mistrial.

5 VIII. ¶9B(1) INEFFECTIVE ASSISTANCE OF TRIAL COUNSEL  
6 (INVESTIGATION AND PREPARATION).

7 In paragraph 9B(1) of her petition, petitioner claims that  
8 her trial counsel failed to adequately investigate and prepare  
9 her case. She raises four instances in which counsel is  
10 alleged to have failed to counter the state's case by  
11 introducing available evidence on collateral matters.

12 A. Photograph and Pex Report.

13 Petitioner first asserts that counsel,

14 " \* \* \* did not use the photographic evidence which would  
15 have proven that Petitioner was standing at the time of  
16 the shooting as discussed in her deposition and which  
17 would have discredited the state's theory of the case (See  
18 photocopy of photo). This photograph specifically shows  
19 blood on a rail near the driver's door. There was also  
20 blood on Petitioner's pants which had dripped downward as  
21 noted in the reports on Petitioner's clothing which were  
22 generated by James Pex, OSP criminalist. Neither the  
23 photograph specifically referred to above, or the Pex  
24 reports were used at trial although they would have  
25 supported Petitioner's claims."

26 Petitioner's claim that a photograph of the driver's side  
of her 1983 Datsun was not introduced at trial and would have  
been exculpatory is based on a mistake. In fact, a picture of  
the driver's side of the Datsun, showing a small smear on the  
seat runner, was introduced at trial as Exhibit 144. See,  
Tr. 1133, 1154; Exhibit 13. The photograph to which petitioner

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1 refers in her petition is a photograph of the passenger seat,  
2 not the driver's seat. A comparison of the two photographs,  
3 Exhibits 13 and 14, should make it abundantly clear that  
4 petitioner is talking about the wrong photograph. There is, in  
5 any event, nothing exculpatory about either photograph and  
6 certainly nothing which would begin to suggest she was standing  
7 when she was shot.

8 To the extent that petitioner's claim is taken to imply  
9 that trial counsel was ineffective for failing to introduce a  
10 photograph of petitioner proving that she was standing at the  
11 time of the shooting, the claim also rests on a mistake. There  
12 was no photograph that could have been introduced which  
13 indicates that petitioner was standing at the time of the  
14 incident.

15 Petitioner also contends that a report prepared by James  
16 Pex should have been introduced because it noted that blood  
17 spots on petitioner's pants indicated that the blood had  
18 dripped downward. Exhibit 15. Petitioner's pants were  
19 introduced at trial as Exhibit 23. Tr. 1154. The Pex report  
20 catalogues:

21 "One sealed brown paper bag enclosing one pair of  
22 blue denim pants labeled 'Wrangler.' Examination reveals  
23 bloodstains on the front hip area predominantly between  
24 the zipper and the left front pocket. Other bloodstains  
25 are visible on the front left upper pant leg area. One  
26 droplet, with downward directionality is also visible on  
the back lower left pant leg." Exhibit 15.

The claim is absurd. James Pex testified at trial and  
could have been asked about the blood droplet while on the

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1 stand. The pants themselves were in evidence. There was no  
2 need to introduce the report. The report was not exculpatory  
3 in any event. It is more than odd to argue, as petitioner  
4 does, that the presence of a single droplet of blood on the  
5 back lower left of her pant leg proves that she was standing at  
6 the time of the shooting, even assuming that whether she was  
7 standing makes any difference. The blood, assuming it was hers  
8 and not her children's, could just as easily -- more easily --  
9 have dropped on the back of her pantleg when she was seated in  
10 the car (or standing in the hospital, for that matter).

11 B. X-Rays.

12 Petitioner contends that her trial counsel was ineffective  
13 because he failed to introduce an x-ray taken on the night of  
14 the shooting. This x-ray, petitioner contends, would have  
15 supported her version of events because it proved that "(t)he  
16 front portion of my arm twisted and jammed back two inches  
17 which shows there was a struggle." Exhibit 17A, p. 35.

18 X-rays of petitioner's left arm were in fact introduced at  
19 trial as Exhibit 376. Tr. 1159, 1163. Her treating physician,  
20 Dr. Carter, testified at trial that petitioner's "only specific  
21 injury was the wound to the forearm," Tr. 1367, which consisted  
22 of "an entrance wound on the dorsal or the top side of the  
23 forearm on the thumb side, the dorsal radial and \* \* \* two  
24 additional wounds that I felt were exit wounds on the ulnar or  
25 the little finger side of the top part of the forearm." Id.  
26 There is no basis for the contention either that x-rays would

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1 show that petitioner's arm was twisted and jammed back two  
2 inches or that, if they did, the twisting resulted from a  
3 struggle. Counsel can not be faulted for failing to introduce  
4 cumulative x-rays -- assuming there are any -- or failing to  
5 invent evidence on petitioner's behalf.

6 C. Peckles Photograph.

7 Petitioner next claims that John Peckles photographed her  
8 at the hospital following the shootings and that a picture  
9 taken of her was exculpatory because it "shows a tear streaked  
10 face, Petitioner's injury, and the blood on her hands."  
11 Petition, p. 16. She asserts that her trial counsel should  
12 have introduced the photograph because it "discounts not only  
13 the theory that Petitioner was unemotional but also the theory  
14 that Petitioner washed her hands." Id. In fact, petitioner's  
15 counsel was "never able to ascertain obviously that the picture  
16 was ever in existence." Exhibit 16, p. 31. Petitioner's  
17 statement is the only evidence that a picture like that  
18 described was ever taken. Id. While pictures of petitioner  
19 were taken by Mr. Peckles on May 20, 1983, none of them show  
20 what petitioner would like them to show and all of them were  
21 provided to the defense. As Mr. Peckles states in his  
22 affidavit appended as Exhibit 18:

23 " \* \* \* I took many photos concerning this case. Some  
24 of those photographs were taken at the hospital. On one  
25 roll of film, I attempted to take photographs in the  
26 emergency room area of the hospital. Unfortunately, that  
roll of film did not advance properly in the camera.  
Therefore, that roll of film did not turn out and we were

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1 not able to obtain any negatives or photographs from it.  
2 The photographs that I attempted to take on that roll of  
3 film were of Ms. Downs and Cheryl Downs. Even if these  
4 photographs had turned out, I do not believe that any of  
5 them would have shown Ms. Downs with a tear-streaked  
6 face. I never saw any indication that Ms. Downs was  
7 crying during my contact with her at the hospital.

8 All of the other photographs that were taken produced  
9 negatives and were developed. Copies of the photographs  
10 were provided to both the defense and to the prosecutor.  
11 I have reviewed all of those photographs. None of those  
12 photographs contained a picture of Ms. Downs with a  
13 tear-streaked face and blood on her hands." Exhibit 18,  
14 p. 2.

15 The matter of whether petitioner cried at the hospital is,  
16 in any event, entirely collateral. Petitioner was tried for  
17 murder and attempted murder, not failing to produce tears.  
18 Further, her counsel introduced testimony to the effect that  
19 petitioner cried at the hospital. Tr. 1677-1678, 2614. Any  
20 photograph, to the extent that it could possibly have revealed  
21 tear streaks, would have been cumulative. And whether or not  
22 petitioner would have been shown with blood on her hands at the  
23 time the photograph was taken would have had no bearing on the  
24 question whether she washed her hands; a question which itself  
25 is irrelevant. See argument, infra. Finally, evidence that  
26 petitioner was in fact in tears at the hospital would have been  
inconsistent with her strategy of proving that psychological  
damage to her as a result of childhood sexual abuse was  
responsible for her lack of emotion. Petitioner offered  
perjured testimony to the effect that sexual abuse by her  
father caused her lack of an appropriate emotional response.  
Compare, Tr. 1650, 1656-1658, 1818-1819 and Exhibit 19. She

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1 could not argue at trial both that she was unemotional because  
2 of (a fraudulently conceived) sexual abuse as a child and that  
3 she was emotionally distraught at the hospital. It cannot have  
4 been ineffective assistance of counsel to fail to pursue a line  
5 of investigation that would have destroyed the basic defense  
6 petitioner posited for her lack of emotional response to the  
7 shootings.

8 D. Pond Report.

9 Finally, petitioner contends that a report prepared by  
10 Officer Roy Pond should have been introduced at trial because  
11 the report states that Ms. Judith Patterson told Officer Pond  
12 that "she could not recall Diane ever asking her to use the  
13 restroom, however, Diane walked away out of her sight on  
14 several occasions during this period of time." Exhibit 20.  
15 This, petitioner argues, proves that she did not wash her hands  
16 on the night of the shootings, contrary to Ms. Patterson's  
17 testimony at trial. At trial, Ms. Patterson testified that at  
18 the hospital, petitioner asked where the restroom was, was  
19 shown its location, and went in. Tr. 476-477. Subsequently,  
20 Ms. Patterson heard running water. Id.

21 In her affidavit in this case, Ms. Patterson explains the  
22 apparent inconsistency between her statement to Officer Pond  
23 that she could not recall petitioner asking to use the restroom  
24 and her testimony at trial. She remembered the events after a  
25 meeting and "walk-through" at the hospital with the prosecutor  
26 and several other hospital employees. Exhibit 21, p. 2. The

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1 explanation turns on the entirely natural occurrence of a  
2 revived memory. In fact there is no inconsistency between the  
3 statement by Ms. Patterson to Officer Pond that she did not  
4 recall petitioner asking to use the restroom and her statement  
5 on the stand that she recalls running water in the restroom  
6 after petitioner entered it. The "inconsistency" petitioner  
7 thinks should have been pursued was barren; a mere matter of  
8 revived memory. Ms. Patterson never said petitioner did not  
9 use the restroom, only that she did not recall it. In light of  
10 Ms. Patterson's explanation, it is fairly obvious that  
11 attempting to impeach her with her prior statement to Officer  
12 Pond would have gained nothing. This is especially so as  
13 petitioner does not deny that she went to the restroom. She  
14 only denies that she washed her hands.

15 Perhaps more importantly, the whole debate over whether  
16 petitioner washed her hands on the night of May 19, 1983  
17 reflects a monumental instinct for the capillary. Again,  
18 petitioner was not convicted because she washed her hands. The  
19 issue is trivial. Two experts testified at trial that a .22  
20 caliber weapon will generally not produce traceable amounts of  
21 gunshot residue. Tr.1194; 1339. The fact that gunshot residue  
22 tests on petitioner produced no positive results may as well be  
23 attributed to that fact as any washing of the hands. Whether  
24 or not petitioner performed the rather natural act of washing  
25 her hands while in the restroom made no difference. Trial  
26 counsel cannot be faulted for failing to pursue a trivial

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1 potential dissonance which would have done nothing but  
2 emphasize the fact that she probably did wash her hands in the  
3 restroom.

4 IX. ¶9B(2) INEFFECTIVE ASSISTANCE OF TRIAL COUNSEL  
5 (CONTINUED).

6 In paragraph 9B(2) of her petition, petitioner offers four  
7 more examples of imperfection on the part of her trial  
8 counsel. She claims that counsel failed to obtain medical  
9 records for Danny Downs which might have been exculpatory,  
10 failed to obtain a legible copy of a property report, failed to  
11 impeach a forensic expert with his handwritten notes, and  
12 failed to introduce psychological reports. As with her prior  
13 claims, petitioner here chases chimera.

14 A. Medical Records of Danny Downs.

15 Petitioner first asserts that defense counsel failed to  
16 "obtain 30 days of medical records from Sacred Heart Hospital  
17 on Danny Downs which may have proved exculpatory to  
18 Petitioner." Petition, p. 17.

19 The medical records for the period from May 25, 1983 to  
20 June 21, 1983 are attached. Exhibit 22. They were not given  
21 to the state by Sacred Heart Hospital prior to trial. Exhibit  
22 23, p. 6. There is nothing in those reports which would have  
23 been of value to petitioner's defense. There are no directly  
24 exculpatory statements and evidence of petitioner's  
25 attentiveness and solicitude for Danny Downs would have been

26 ///

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1 cumulative. If the records had contained statements by Danny  
2 Downs to the effect that someone other than petitioner shot  
3 him, they would not, of course, have been admissible, for the  
4 reasons outlined by the trial court when it excluded other,  
5 similar, statements. See, argument under section VII(A) above,  
6 pp. 16-19. Petitioner's argument that the reports "may have  
7 proved exculpatory" clearly indicates that she is fishing with  
8 this claim.

9 B. Peckles Property Report.

10 Petitioner argues that her counsel was constitutionally  
11 inadequate because he did not obtain an exact copy of a report  
12 prepared by John Peckles on the night of the shootings. Had  
13 defense counsel obtained a legible copy of the report,  
14 petitioner alleges, "it could have been used to attempt to  
15 suppress statements and evidence obtained from Petitioner at a  
16 time when she had not been advised of her rights and was not  
17 aware that she was considered a suspect." Petition, p. 18.  
18 The copy of the Peckles report allegedly obtained by counsel in  
19 discovery and a more exact copy are appended as Exhibits 24 and  
20 25. The significant difference between the two is that there  
21 is a line through a small "s" next to petitioner's name which  
22 was obscured on the report apparently furnished to petitioner's  
23 counsel.

24 The argument that anything of importance turns on the  
25 stroke through the "s" on the Peckles report is silly.

26 Petitioner initially argued that had she known she was a

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1 suspect, she would have obtained counsel and proceeded  
2 differently. Exhibit 17A, p. 75. This argument shatters on  
3 impact with the obvious fact that petitioner was not entitled  
4 to and did not receive the Peckles report until after she was  
5 indicted.

6 With that argument in pieces, petitioner now asserts that  
7 had counsel known of the stroke through the little "s" he would  
8 have been able to suppress statements and evidence. The  
9 argument apparently assumes that petitioner would have been  
10 entitled to Miranda warnings because she was a focal suspect at  
11 the time she entered the hospital. As defendant pointed out in  
12 his motion to dismiss, that assumption is wrong. Miranda  
13 warnings are only required when a suspect is in custody. See,  
14 e.g., State v. Sadler, 85 Or. App. 134, 735 P.2d 1267, mod. on  
15 reconsideration, 86 Or. App. 152 (1987)(citing Berkemer v.  
16 McCarthy, 468 U.S. 420, 441-42 (1984)); State v. Paz, 31 Or.  
17 App. 422, 499 P.2d 1357 (1972). The fact that petitioner was a  
18 declared a suspect by Mr. Peckles immediately after the facts  
19 of the crime became known is a jejune fact with no legal  
20 consequences.

21 C. Murdock Impeachment.

22 Petitioner next claims that her trial counsel should have  
23 impeached the credibility of the state's forensic expert, John  
24 Murdock, by using handwritten notes provided to him prior to  
25 trial. Those notes, petitioner asserts, are inconsistent with  
26 Mr. Murdock's trial testimony that he was "certain that the

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1 same extractor made all those marks." Petition, p. 18.

2 In making this claim is either confusing or attempting to  
3 confuse testimony about extractor marks on shells with  
4 handwritten notes and a typed report addressing lands and  
5 grooves and magazine lip marks; wholly different matters.

6 At trial Mr. Murdock testified that the striations, or  
7 extractor marks, on the casings found at the scene of the  
8 shootings matched extractor marks on two cartridges found in  
9 the tubular magazine of a rifle taken from petitioner's  
10 apartment. Tr. 1343-56. In short, "the same extractor made  
11 the mark on all six cartridge cases and the two unfired  
12 cartridges from the tubular magazine of the rifle." Tr. 1350.  
13 Mr. Murdock also testified when asked whether he had any doubts  
14 about his conclusion, "I feel quite comfortable. I'm certain  
15 that the same extractor made all those marks." Tr. 1351.

16 This testimony more than anything else was responsible for  
17 petitioner's conviction, because it put the murder weapon in  
18 her hands. If petitioner could make a case for the proposition  
19 the John Murdock was wrong, she might approach a level playing  
20 field. The difficulty is that Mr. Murdock's testimony is  
21 unimpeachable. Moreover, it both reiterates the testimony of  
22 James Pex, another expert witness, Tr. 1217, and is consistent  
23 with the findings of petitioner's own criminalist, Bart Reid.  
24 Exhibit 36, p. 3.

25 Petitioner attempts to address the testimony of Mr.  
26 Murdock by showing contradictions between his testimony and

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1 handwritten notes and a typed report Mr. Murdock prepared prior  
2 to trial. The typed report prepared by Mr. Murdock states:

3 "An examination of the fired plain lead nominal .22  
4 cal long rifle bullets E-1, 2 and 7 revealed all to have  
5 been fired through a gun barrel having 6 lands and grooves  
6 with a right hand twist. I inter compared these bullets  
7 microscopically and was not able to establish that all  
8 were fired through the same gun barrel to the exclusion of  
9 all others. They could have been however. Perhaps if I  
would have had more time to compare them I would have been  
able to make a stronger associative evidence statement.  
All of these bullets had the same physical appearance and  
one was definitely established as being manufactured by  
Remington-Peters." Exhibit 26, Attachment A, pp. 3-4.

10 This unedited version of the report makes it clear that what  
11 Mr. Murdock is talking about is land and groove marks on  
12 bullets, not extractor marks on casings. In a previous portion  
13 of the report, Mr. Murdock concluded that "all of those marks  
14 have been produced by the same extractor." Exhibit 26,  
15 Attachment A, p. 3. As Mr. Murdock notes in his affidavit,

16 "In the portion of the testimony to which the petitioner  
17 is referring, I was discussing the identification of  
18 extractor marks on two unfired cartridges and six  
19 cartridge cases. (Tr. 1348-1351) In that particular  
20 portion of my testimony, I was referring to findings that  
21 are contained in paragraph 1 of my typewritten report  
22 dated August 19, 1983. (See Tr. 1348, and the attached  
23 copy of the report, which is marked Attachment A.)  
24 Specifically, my testimony pertaining to the extractor  
25 marks concerned State's Exhibits E-3, E-4A, E-4B, E-5,  
26 E-6A, E-6B, E-14A and E-14B. (Tr. pp. 1349-1350, and  
Attachment A.) On the bottom of page 18 to the top of  
page 19 of the Fifth Amended Petition, the petitioner  
claims that my testimony conflicted with a portion of my  
report in which I stated that I was not able to establish  
that 'all' were fired through the same gun barrel to the  
exclusion of others. What the petitioner fails to state  
is that this portion of my report refers only the States'  
Exhibits E-1, E-2 and E-7. (See, Attachment A, pp. 3-4).  
Thus, the portion of the report to which the petitioner

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1 refers concerns entirely different items of evidence than  
2 those about which I was testifying." Exhibit 26, pp.2-3.

3 Mr. Murdock's report would not have served as an instrument to  
4 impeach his testimony on extractor marks and counsel therefore  
5 cannot be held to have been ineffective for not employing it  
6 for that purpose.

7 Petitioner's other argument similarly rests on a  
8 confusion. Petitioner argues that the handwritten note  
9 comparing "bullets marked as evidence 14A with E-5 (in which)  
10 he notes that is 'not enough for an ID,' somehow provides  
11 grounds for impeachment. Mr. Murdock's handwritten notes  
12 state: "Comparison of 14A lip m/c w/sim mark on casing E-5:  
13 General ms agreement but not enough for an id. - Perhaps more  
14 comparison can be done later." Exhibit 26, Attachment B.  
15 There is no need for defendant to attempt to improve on Mr.  
16 Murdock's rebuttal of this claim:

17 "On page 19, line 5, of the Fifth Amended Petition for  
18 Post Conviction Relief, the petitioner makes certain  
19 claims concerning my handwritten notes. The petitioner is  
20 referring to page 15 of my handwritten notes. (Attachment  
21 B.) The first mistake that she makes in reading these  
22 notes is her statement that I was comparing 'bullets.'  
23 These notes do not concern bullets. These notes concern a  
24 comparison of cartridge cases and an examination for  
25 magazine lip marks on the case side of the cartridges.  
26 The lip mark on E-5 was compared to a similar mark found  
on the side of the cartridge marked E-14A. Although I  
found a general agreement in comparing those marks, I  
could not find sufficient agreement to establish an  
identification. These findings are reflected on page 3 of  
my report of August 19, 1983, in the third paragraph under  
the part marked 'Examinations Performed and Conclusions  
Reached.' (Attachment A.) Once again, it should be noted  
that these notes and reports have nothing to do with the

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1 extractor marks about which I was testifying. Magazine  
2 lip marks on casings are different from extractor marks.  
3 Because the report and the notes concern different items  
of evidence, I do not see how my testimony could have been  
impeached by using them." Exhibit 26, pp. 3-4.

4 As with the prior claim, the assertion that Mr. Murdock's  
5 testimony could have been impeached depends on a transparent  
6 confusion. There was no ground for impeachment.

7 D. Psychological Reports.

8 Having once argued that her counsel was ineffective for  
9 failing to discover a photograph demonstrating that she was  
10 emotional at the hospital, petitioner here contends that  
11 counsel was ineffective for failing to introduce psychological  
12 reports which she claims would explain why she was  
13 unemotional. She claims that reports prepared by Dr. Paul Mann  
14 and by Dr. Fred Lipovich (actually Dr. Mario Tafur) would have  
15 "shed some light on Petitioner's propensity to hide her  
16 emotions and to be overly trusting of strangers in situations  
17 which the majority of individuals would consider threatening."  
18 Petition, p. 19. The relevant reports are appended as Exhibits  
19 11 and 27. The reports do not support anything like the claims  
20 petitioner makes for them. And even if they did, the negative  
21 conclusions reached by both Dr. Mann and Dr. Tafur far outweigh  
22 anything in the reports that might be construed as helpful.  
23 The failure to introduce the reports was obviously a legitimate  
24 tactical choice on the part of trial counsel. It would have  
25 been much easier to charge him with ineffective assistance had  
26 he introduced them.

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X. ¶9B(3) INEFFECTIVE ASSISTANCE OF TRIAL COUNSEL (FAILURE TO CALL AND CONTACT WITNESSES).

Petitioner also claims that her trial counsel was constitutionally ineffective because he failed to call Dr. Polly Jamison and Dr. Jerry Vergamini to testify on her behalf and failed to contact a Mr. Burrell Webb, who claimed to have helpful information.

Petitioner argues that her counsel should have called Dr. Jamison to the stand "in an effort to rebut the erroneous allegation made by Mr. Hugi that Dr. Jamison had diagnosed her a deviant sociopath." Petition, p. 20. The argument is predicated on the mistaken notion that Mr. Hugi alleged that Dr. Jamison diagnosed petitioner as a deviant sociopath. In fact, the question by Mr. Hugi to petitioner on cross examination refers to an MMPI test which labeled petitioner both deviant on one scale and sociopathic on another. Exhibit 12. Since it was never suggested that Dr. Jamison diagnosed petitioner adversely, she would have had nothing relevant to say on the point. Moreover, it was plainly a tactical choice by trial counsel not to call Dr. Jamison to the stand. Exhibit 16, pp. 47, 80-81. As petitioner's current counsel indicates in her affidavit, Dr. Jamison had nothing to offer on the question of guilt or innocence. Petition, Exhibit 28 ("she had no concrete information one way or another with regard to guilt or innocence."). Calling Dr. Jamison would only have opened up a very damaging line of inquiry into petitioner's

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1 psychiatric makeup, for had she been called the prior diagnoses  
2 by Dr. Mann and Dr. Tafur could have been explored more fully.  
3 Counsel cannot be faulted for making this sort of tactical  
4 decision.

5       Petitioner additionally argues that counsel was  
6 ineffective for failing to call Dr. Jerry Vergamini because, as  
7 Christie Downs' treating physician, he could have testified,  
8 consistent with his Progress Notes, that the victim "denies  
9 that she recalls any details of the events leading to her  
10 hospitalization. She appears genuinely confused about how her  
11 trauma occurred." Exhibit 29. Any testimony by Dr. Vergamini  
12 to that effect would have been cumulative and would have  
13 crashed through an open door. It was undisputed that Christie  
14 Downs was most reluctant to talk about the shootings when she  
15 was initially hospitalized. The testimony of Dr. Carl Peterson  
16 was most explicit on that point. Tr. 697-700. Whether she  
17 actually failed to remember the shootings or was simply  
18 unwilling to talk about them is a moot point. Counsel cannot  
19 have been constitutionally ineffective for failing to introduce  
20 cumulative testimony. Dr. Vergamini's testimony about his ten  
21 day treatment of Christie Downs would have added nothing to the  
22 testimony of Dr. Peterson, who treated the victim for months.

23       Finally, petitioner faults counsel for failing to pursue  
24 information which might have been provided by Mr. Burrell  
25 Webb. As the appended documents eloquently display, Mr.  
26 Burrell Webb has absolutely nothing to contribute to the

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1 debate. He hasn't a clue what this case is about. Exhibits 30  
2 and 31.

3 XI. ¶9C CHANGE OF VENUE.

4 Petitioner's penultimate claim of ineffective assistance  
5 of trial counsel is that counsel "should have requested a  
6 change of venue due to the barrage of pretrial publicity in  
7 Lane County." Petition, p. 21. Neither petitioner nor her  
8 counsel desired a change of venue prior to trial because they  
9 considered Lane County a favorable location. Exhibits 16, pp.  
10 60-61 and 17B, pp. 65-67. Moreover, petitioner cannot begin to  
11 demonstrate that trial in Lane County prejudiced her.

12 XII. ¶9D JURY POLL.

13 Finally, petitioner contends that defense counsel rendered  
14 ineffective assistance because he failed to poll the jury.

15 There is no constitutional right to a jury poll. Brooks  
16 v. Gladden, 226 Or. 191, 358 P.2d 1055 (1961); State v.  
17 Lehnherr, 30 Or. App. 1033, 569 P.2d 54 (1977); State v. Prado,  
18 26 Or. App. 481, 484 n. 2, 552 P.2d 1317 (1976). What right  
19 there is to a jury poll derives from a statute, ORS 136.330(1),  
20 which provides, in pertinent part:

21 "The jury in a criminal action may, in the discretion  
22 of the court, be polled in writing. If the jury is polled  
23 in writing, the written result shall be sealed and placed  
24 in the court record."

25 It is, of course, axiomatic that in order to prevail on a  
26 claim of ineffective assistance of trial counsel a  
post-conviction petitioner must prove not only that counsel's

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1 performance was deficient, but that the deficient performance  
2 prejudiced the defense. Strickland v. Washington, supra, 466  
3 U.S. at 687. A showing of prejudice requires proof that "there  
4 is a reasonable probability that, but for counsel's  
5 unprofessional errors, the result of the proceedings would have  
6 been different." Id., 466 U.S. at 694.

7 Given the fact that petitioner apparently agrees that the  
8 jury was unanimous on the murder charge and divided 10-2 in  
9 favor of a guilty verdict on the attempted murder charges, it  
10 is difficult to see what she is driving at with this claim.  
11 Petitioner apparently believes there is some inconsistency  
12 between the unanimous verdict and the split verdict -- an  
13 inconsistency explainable in a variety of ways -- and that "(a)  
14 jury poll - had one been requested, might have shed some light  
15 on this inconsistency." Petition, p. 22. But that is patently  
16 impossible. A poll is just that; a poll, not an opportunity to  
17 grill jurors about alleged inconsistencies. A poll in this  
18 case would, at most, have revealed what petitioner says she  
19 knows -- that the jury split on the attempted murder charges  
20 and agreed on the murder charge. That should be an end to it,  
21 because out of this can arise no prejudice.

22 In addition, as a structural matter, it is impossible for  
23 plaintiff to meet her burden to prove that the failure to  
24 request a poll of the jury was prejudicial because in order to  
25 do so she would have to prove a) that the trial court would  
26 have exercised its discretion to permit a jury poll; and b) had

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1 the jury been polled, some mistake would have been discovered.  
2 In the nature of things, petitioner cannot prove either of  
3 these prerequisites for a finding of prejudice. She cannot  
4 ascertain what the trial judge would have done had he been  
5 asked to poll the jury and she cannot now prove that some  
6 mistake either occurred or would have been revealed by a poll.  
7 As Judge Foote's affidavit indicates, he asked the jurors  
8 whether any of them disagreed with the verdict and none of them  
9 responded. Exhibit 32, p. 3. The likelihood of an error is  
10 miniscule.

11 Petitioner's trial counsel cannot be deemed ineffective  
12 for failing to request what amounts to a meaningless  
13 formality. Even if the failure to request a pointless jury  
14 poll counts as ineffective assistance, it couldn't possibly  
15 have prejudiced petitioner because, on her own account, enough  
16 members of the jury found her guilty to support the conviction.

17 It is fair to observe, after this last of a multitude of  
18 claimed imperfections by petitioner's counsel, that counsel  
19 very nearly performed a feat of alchemy. This quite long and  
20 complete record is stuffed with evidence of the exceptional  
21 diligence and capability of trial counsel. He alone was able  
22 to keep the jury out for approximately 50 hours in a case in  
23 which the guilt of petitioner cannot seriously be debated.  
24 None of petitioner's many assertions of inadequate assistance  
25 of counsel come very close to the constitutional line; and in a  
26 lengthy, complex murder trial like this one, that is a major

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1 accomplishment.

2 XIII. ¶11A(1) PROSECUTORIAL MISCONDUCT (MEDICAL RECORDS).

3 In her first claim of prosecutorial misconduct, petitioner  
4 asserts that medical records kept by Sacred Heart Hospital in  
5 Eugene concerning Danny Downs were subpoenaed by the state but  
6 were not provided to defense counsel. Petition, pp. 22-23.  
7 Petitioner was in fact provided all of the medical records from  
8 Sacred Heart Hospital which that hospital provided to the state  
9 as a result of the subpoena. Exhibit 23, p. 6. Petitioner was  
10 given all the medical records the state possessed. No more  
11 than that is required. The state has no obligation to  
12 investigate on behalf of a criminal defendant. See, e.g.,  
13 Arizona v. Youngblood, 488 U.S. 51 (1988). Moreover, as the  
14 missing records indicate, nothing in them would have been  
15 admissible, non-cumulative, and exculpatory. Exhibit 22.  
16 Petitioner therefore cannot demonstrate that she was prejudiced  
17 by the failure to supply her with medical records even if the  
18 state had them and failed to provide them.

19 XIV. ¶11A(2) PROSECUTORIAL MISCONDUCT (PECKLES PHOTOGRAPH).

20 Petitioner asserts that the state failed to provide her  
21 with a copy of a photograph taken on the night of the shooting  
22 by John Peckles "showing Petitioner's injury, the blood which  
23 was still on her hands and which showed that at that time  
24 Petitioner was crying." Petition, p. 23. That is because  
25 there was and is no such photograph. See argument, pp. 24-26,  
26 supra. As Mr. Peckles indicates in his affidavit, photographs

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1 of petitioner were taken at the hospital, but due to a  
2 malfunction those photographs could not be developed. Exhibit  
3 18, p. 2. All other photographs were provided to the defense.  
4 Id. Even if the photograph petitioner seeks could have been  
5 developed, it wouldn't have shown what petitioner wants it to  
6 show. Mr. Peckles, who operated the camera, avers that he  
7 "never saw any indication that Ms. Downs was crying during my  
8 contact with her at the hospital." Id.

9 XV. 11B PROSECUTORIAL MISCONDUCT (PECKLES PROPERTY  
10 REPORT).

11 Petitioner charges the prosecutor with providing her with  
12 "tampered" documentary evidence because, she claims, a property  
13 report prepared by John Peckles was provided to her that was  
14 improperly copied on a photocopier. Petitioner asserts that

15 "The property evidence report completed only two hours  
16 after the shooting designated Petitioner as a suspect at  
17 that time. The document was copied in such a way as to  
18 distort it so that the designation could not be seen. It  
19 is Petitioner's contention that this was intentional and  
20 that had Petitioner been aware that she was a suspect at  
21 this time, she would have taken steps to protect  
22 herself." Petition, pp. 23-24.

23 The relevant documents are appended as Exhibits 24 and 25.

24 The argument tracks the argument advanced in paragraph  
25 9B(2) of the Fifth Amended Petition except that the reasoning  
26 is altered. See, pp. 29-31, supra. In charging her trial  
counsel with inadequate representation for not obtaining a  
clear copy of the Peckles report, petitioner argued that had he  
obtained a correct copy he could have moved to suppress

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1 statements and evidence. Here the argument is altered to  
2 suggest that had she been given a true copy of the report, she  
3 would have been aware that she was a suspect at the time and  
4 "would have taken steps to protect herself." The argument is,  
5 of course, absurd. Petitioner was not entitled to any  
6 documents prior to the time she was indicted, at which time she  
7 surely knew that she was a suspect. Tr. 2083, 2092.

8 The miscopied Peckles report supplied to petitioner's  
9 counsel was a natural mistake attributable to a photocopying  
10 error; an error that is common when large numbers of documents  
11 are transferred. Exhibit 23, p. 6. There is no good reason to  
12 attribute diabolical motives to it. This is especially so as  
13 the document had no significance. As noted above, the fact that  
14 John Peckles considered petitioner a suspect from the time she  
15 entered the hospital (or that she was one, for that matter) had  
16 no legal consequences. A suspect does not have to be told he  
17 or she is a suspect and the fact that a person is a suspect  
18 does not have legal effects. State v. Paz, supra.  
19 Petitioner's characteristic attempt to attribute her conviction  
20 to a trivial occurrence leads nowhere because nothing of  
21 significance follows from the photocopying error.

22 XVI. ¶11C PROSECUTORIAL MISCONDUCT (DESTRUCTION OF  
23 EVIDENCE).

24 In her last batch of claims before attacking the victim's  
25 credibility, petitioner alleges that the prosecution destroyed  
26 evidence that would have been exculpatory. She claims that

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1 bullet casings were not tested for fingerprints, her car was  
2 washed, reports were destroyed, and blood spatter evidence was  
3 destroyed. Since these claims basically depend on doctrines  
4 associated with those announced in Brady v. Maryland, 373 U.S.  
5 83 (1963), it is perhaps best to outline those principles  
6 before treating the facts.

7 It is a baseline requirement of the Due Process Clause of  
8 the Fourteenth Amendment that "the suppression by the  
9 prosecution of evidence favorable to an accused upon request  
10 violates due process where the evidence is material either to  
11 guilt or to punishment, irrespective of the good faith or bad  
12 faith of the prosecution." Brady v. Maryland, supra, 373 U.S.  
13 at 87. In order to show a Brady violation, a defendant must  
14 make at least some showing, to the extent reasonable under the  
15 circumstances of the case, to support at least a belief and  
16 contention in good faith that the thing sought is favorable to  
17 him and material to his guilt or innocence. State v.  
18 Bodenschatz, 62 Or. App. 606, 612, 662 P.2d 1 (1983), rev.  
19 denied, 295 Or. 446.

20 The state has an obligation under the Due Process Clause  
21 to divulge to a criminal defendant any material exculpatory  
22 evidence it might have, but when the state is charged with the  
23 failure to "preserve evidentiary material of which no more can  
24 be said than that it could have been subjected to tests, the  
25 results of which might have exonerated the defendant," Arizona  
26 v. Youngblood, 488 U.S. 51, 57 (1988), the defendant must show

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1 bad faith on the part of the police in failing to preserve the  
2 evidence. Id., 488 U.S. at 58. The police have no  
3 undifferentiated and absolute duty to retain and to preserve  
4 all material that might be of conceivable evidentiary  
5 significance in a particular prosecution, Id., and have no duty  
6 at all to use a particular investigatory tool or perform any  
7 particular tests. Id., 488 U.S. at 59.

8 A. Fingerprints.

9 Petitioner first contends that bullet casings found at her  
10 apartment were not tested for fingerprints. By the time the  
11 defense expert was given access to the casings, petitioner  
12 asserts, the bullets and casings had been handled by the police  
13 and "any fingerprints which may have been on them were  
14 destroyed." Petition, p. 24. Petitioner argues that the  
15 bullets found in her apartment did not originate there and "the  
16 fingerprint evidence would have proved this." Id. Petitioner  
17 provides no objective basis for her speculation either that  
18 there were fingerprints on the cartridges or that they would  
19 have been someone else's prints. See, State v. Hockings, 29  
20 Or. App. 139, 142-43, 562 P.2d 587 (1977)(defendant must prove  
21 that destroyed fingerprint lifts would have been viable as  
22 fingerprint evidence and would have been favorable).

23 At trial, John Murdock testified that he has processed a  
24 lot of ammunition over the years for fingerprints and that he  
25 has never been able to lift an identifiable amount of ridge  
26 detail from a .22 caliber cartridge. Tr. 1357. James Pex

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1 testified that he is not aware of any instance in which  
2 fingerprings have been successfully removed from a .22 caliber  
3 cartridge or casing. Tr. 1313. It is improbable that a  
4 fingerprint can be lifted from a .22 cartridge, although it  
5 could be if one took a .22 cartridge and carefully rolled a  
6 print onto it. Tr. 1329. Mr. Pex examined the cartridges  
7 found in petitioner's apartment with low power magnification.  
8 He saw no prints. Exhibit 33, p. 7. He subsequently contacted  
9 Lt. Aas of the ID Section in Salem and she told him that she  
10 had no knowledge of the ID Bureau ever successfully completing  
11 a fingerprint comparison on a .22 cartridge. Id.

12 The claim that the state destroyed exculpatory fingerprint  
13 evidence can, therefore, be disposed of in at least four ways.  
14 First, the state had no obligation to attempt to obtain  
15 fingerprint evidence from the cartridges found in petitioner's  
16 apartment. Arizona v. Youngblood, supra. Second, there weren't  
17 any fingerprints on the cartridges. Exhibit 33, p. 7. Third, it  
18 would have been most unlikely that fingerprint evidence could  
19 have been obtained from the cartridges. Tr. 1329, 1357. And  
20 finally, there is no way that petitioner can possibly meet her  
21 burden to prove that a) there were fingerprints on the  
22 cartridges; b) they could have been lifted; and c) they were  
23 not hers. State v. Hockings, supra.

24 B. Car Wash.

25 Petitioner next contends that when the prosecutor showed  
26 her car to the jury, it had been washed. From this she

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1 concludes that "fingerprint evidence which would have  
2 corroborated Petitioner's version of events, was destroyed."  
3 Petition, p. 25. She bases this belief "on the fact that none  
4 of the people whose fingerprints would have been on the car  
5 were ever contacted in an effort to eliminate them as  
6 suspects." Id.

7 In fact, petitioner's car was washed on the day of the  
8 jury view. Exhibit 34, p. 2. It had remained unwashed for  
9 approximately a year before trial and was filthy. Exhibit 23,  
10 p. 9. Prior to the time it was washed, petitioner's  
11 criminalist, Bart Reid, was allowed to examine the vehicle upon  
12 request. Id., Exhibit 36, p. 2. He did so. Exhibit 36, p. 2.  
13 Fingerprints were taken from the car by the state. Exhibit 18,  
14 p. 3 and attachment 1. The results of the fingerprinting were  
15 discussed by the prosecutor with petitioner's counsel and it  
16 was concluded that they were not helpful to either side.  
17 Exhibit 23, p. 9.

18 Petitioner's speculations about fingerprints on her car  
19 and their destruction by the state when the car was washed are,  
20 then, entirely wrong. The car was fingerprinted and the car  
21 and prints were made available to petitioner's counsel and her  
22 criminalist. The car was not washed until the day of the jury  
23 view. Petitioner therefore has no basis for complaint; and  
24 even if she had one, she couldn't get anywhere with it because  
25 she couldn't begin to show that any fingerprints would have  
26 been favorable to her.

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1           C. Pond Reports.

2           Petitioner asserts that Detective Pond destroyed over 100  
3 reports that he compiled during the course of investigating the  
4 shootings. She admits that it is impossible to say how many of  
5 the reports "destroyed by Pond contained evidence which would  
6 have helped Petitioner," petition, p. 25, but deems the  
7 destruction "curious" in light of a continuing investigation  
8 into petitioner's case. Petitioner makes no pretense that she  
9 has information about what the reports contained or that the  
10 reports were exculpatory, but notes that Detective Pond  
11 "testified in his opinion some of the destroyed reports did  
12 tend to corroborate Petitioner's version of events." Id.

13           The question of the Pond reports was thoroughly litigated  
14 at trial, Tr. 142-234, 2632-2680, and was the subject of  
15 petitioner's third assignment of error on appeal. Exhibit 35,  
16 pp. 55-60. ORS 138.550(2) provides that when a petitioner  
17 sought and obtained appellate review of the conviction, "no  
18 ground for relief may be asserted by petitioner in a petition  
19 for relief under ORS 138.510 to 138.680 unless such ground was  
20 not asserted and could not reasonably have been asserted in the  
21 direct appellate review proceeding." Since petitioner actually  
22 raised the question whether the failure to divulge certain  
23 reports generated by Detective Pond amounted to a violation of  
24 Brady v. Maryland, supra, it is clear that she cannot pursue  
25 that matter or related claims here. Petitioner either raised  
26 her claim concerning the Pond report on appeal or could have

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1 raised it, depending on what her claim now is. ORS 138.550(2)  
2 bars this claims. See, e.g., Hunter v. Maass, 106 Or. App. 438  
3 (1991).

4 Petitioner's statement of the claim is, in any event,  
5 wrong in almost all particulars. During the course of a  
6 hearing prior to trial, Detective Roy Pond testified that he  
7 was contacted by 100 to 150 persons concerning either sightings  
8 of the BHS or the yellow car in which he was alleged to be  
9 travelling. Tr. 172 ("I can only guess. 100, 150, I don't  
10 know.") He did not write reports or reduce to writing all of  
11 the contacts. Id. He reduced to writing "probably in the  
12 neighborhood of 30 to 50" of the contacts in formal report  
13 form. Tr. 173. See also, Tr. 2758 (30-35 reports). Those  
14 formal reports were made from notes that he took at the time of  
15 the interviews. Tr. 173. The notes from which the formal  
16 reports were taken were discarded. Id.

17 During a discussion of this issue prior to trial, the  
18 trial court reviewed the formal reports. After its review, the  
19 trial court gave petitioner's counsel three additional pages of  
20 reports and stated that they were the only portions of the  
21 reports that "even remotely supported anything offered by the  
22 defense." Tr. 2711. Subsequently, all of the formal reports  
23 were placed in a sealed envelope and were available to the  
24 Oregon Court of Appeals on appeal. Exhibit 38, p. 28.

25 A criminal defendant has no right to require "the  
26 prosecution (to) make a complete and detailed accounting to the

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1 defense of all police investigatory work on a case." Moore v.  
2 Illinois, 408 U.S. 786, 795 (1972). Accordingly, the Oregon  
3 Court of Appeals "has held consistently that officers' notes,  
4 the contents of which are included in reports, are not  
5 discoverable 'statements.'" State v. Armstrong, 71 Or. App.  
6 467, 469, 692 P.2d 699 (1984), citing, State v. Peters, 39 Or.  
7 App. 109, 591 P.2d 761, rev. den. 287 Or. 1 (1979).

8       Petitioner, as she admits in her petition, cannot possibly  
9 meet the prerequisites for establishing a Brady claim  
10 concerning the Pond notes. The formal reports were before the  
11 trial court and the Oregon Court of Appeals and there is no  
12 suggestion that Detective Pond's field notes contained anything  
13 of substance not contained in the formal reports and no  
14 suggestion that, if there were other notes, they might have  
15 contained exculpatory information.

16       D. Blood Spatter Evidence.

17       Petitioner asserts that blood spatter evidence from the  
18 front passenger quadrant of the car was destroyed. Petition,  
19 p. 26. She contends that blood spatter in the passenger  
20 quadrant was never photographed or tested and that had the  
21 state done so, it "would have tended to corroborate  
22 Petitioner's version and discredit that of the state \* \* \*."  
23 Petition, pp. 26-27.

24       The reason for the absence of blood spatter evidence in  
25 the passenger quadrant of petitioner's car is that there never  
26 was any. Exhibit 33, p. 8. James Pex, a criminalist at the

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1 Oregon State Police Crime Lab, closely examined the passenger  
2 quadrant. There was a large pool of blood on the floor of the  
3 quadrant and photographs were taken of it and of the passenger  
4 quadrant generally. Id. Mr. Pex did a luminol examination of  
5 the entire vehicle, including the passenger quadrant. Id.  
6 There was no bloodspatter on the dash or passenger quadrant of  
7 the car. Exhibit 33, p. 9. Bart Reid, petitioner's  
8 criminalist, confirms that there was no blood spatter in the  
9 passenger quadrant of the vehicle and that he saw no indication  
10 that evidence in that area had been destroyed. Exhibit 36, pp.  
11 2-3.

12 The state had no obligation to photograph or test  
13 bloodspatter in or around the passenger quadrant of  
14 petitioner's automobile. Arizona v. Youngblood, supra. But  
15 they in fact did so and there was none.

16 XVII. 111D PROSECUTORIAL MISCONDUCT (TAMPERING WITH  
17 EVIDENCE AND TESTIMONY)

18 Petitioner alleges that the "prosecution and authorities"  
19 "tampered with evidence and testimony." (Petition, pp. 5-6).  
20 Her claim involves two unrelated issues: 1) the trial testimony  
21 of Christie Downs, Petition, pp. 27-29; and 2) the  
22 investigation concerning Ronald Wahwahsuk, who allegedly "bore  
23 a striking resemblance" to the composite drawing of the Bushy  
24 Haired Stranger. Petition, pp. 29-31.

25 A. Testimony of Christie Ann Downs

26 Petitioner alleges in paragraph 11D that the records

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1 of Dr. Vergamini show that Christie "had no memory of the  
2 shooting itself," and that "Christie's trial testimony was the  
3 result of an elaborate reconstruction process by counselors,  
4 CSD workers and attorneys." Petition, p. 27. The petition  
5 then recounts allegedly inconsistent statements by Christie  
6 which were either discovered after trial or occurred after  
7 trial. Petitioner's allegations could be viewed several ways:  
8 1) as a direct attack on the veracity of Christie's trial  
9 testimony; 2) as an allegation that the prosecution knowingly  
10 used false testimony; or 3) as an allegation that Christie was  
11 simply the unwitting mouthpiece of the State to give the  
12 state's version of the shooting. No matter how the allegations  
13 are viewed, the claim fails.

14 The general rule is that a post-conviction proceeding is  
15 "not intended to provide a second trial of every criminal case  
16 in which a disappointed convict, with a new lawyer, a new  
17 theory, and new ideas about trial strategy, might think the  
18 first trial (and appeal) was not properly conducted by his  
19 counsel." Howell v. Gladden, 247 Or 138, 142, 427 P2d 978  
20 (1967). A post-conviction petitioner may not retry the  
21 verities of trial testimony. As the Fifth Circuit has aptly  
22 noted, "In the absence of a showing that the prosecution  
23 knowingly and intentionally used material, perjured testimony  
24 to obtain a conviction, appellant is entitled to no  
25 post-conviction relief even where testimony is perjured."  
26 Elliott v. Beto, 474 F.2d 856, 857 (5th Cir. 1975), cert.

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1 denied, 426 U.S. 920 (1976), citing Jackson v. United States,  
2 384 F.2d 375 (5th Cir. 1967), cert. denied 392 U.S. 932  
3 (1968). Were the rule otherwise, the primary question of the  
4 credibility of witnesses at a criminal trial would have to be  
5 twice tried.

6 In somewhat similar circumstances, the Oregon Supreme  
7 Court has rejected the contention that newly discovered  
8 evidence of perjury not attributable to the prosecution  
9 provides a ground for post-conviction relief. In Anderson v.  
10 Gladden, 234 Or. 614, 383 P.2d 986 (1963) the petitioner  
11 produced an affidavit from a witness at trial stating that he  
12 lied when he testified that he saw petitioner commit the  
13 murder. The Court noted that the affidavit at most established  
14 that "Garcia either lied when he said at Anerson's trial that  
15 he saw Anderson kill Miller, or he is lying now when he says he  
16 did not see Anderson kill Miller." Id., 234 Or. at 625. The  
17 Court stated that "As a general rule, habeas corpus (or its  
18 statutory counterpart in post-conviction proceedings) does not  
19 provide relief from a conviction resulting from a mistake of  
20 fact, where proof of the jury's mistake must depend on the  
21 credibility of newly discovered evidence. See Shaver v. Ellis,  
22 255 F.2d 509 (5th Cir. 1958)." Id., 234 Or. at 625-26.  
23 Therefore, if the allegations regarding Christie are taken as  
24 claiming that Christie lied at trial -- as petitioner's  
25 supporting material more than suggests -- petitioner should be  
26 denied post-conviction relief because the trial was the proper

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1 forum to attack her daughter's credibility. In addition, the  
2 inconsistent statements now attributed to Christie are not  
3 relevant to allegations in paragraph 11D, which focus on  
4 "prosecutorial misconduct", not witness misconduct. Petition,  
5 p. 5.

6 Petitioner should not be granted relief even if the  
7 allegations in paragraph 11D are read to mean that the  
8 prosecution used perjured testimony to obtain the conviction  
9 against petitioner. The use of testimony which is later shown  
10 to be perjured does not amount to a due process violation  
11 warranting post-conviction relief, unless it is also proved  
12 that the prosecution knew of the perjury at the time of trial.  
13 Mooney v. Holohan, 294 U.S. 103 (1935); Napue v. Illinois, 360  
14 U.S. 264 (1959); Giglio v. United States, 405 U.S. 150 (1972).

15 Paragraph 11D of petitioner's petition does not allege  
16 that the prosecutor knew that Christie's testimony was false at  
17 the time he used it. Paragraph 11D only addresses newly  
18 discovered evidence intended to suggest that Christie lied when  
19 she testified at trial that petitioner shot her. The evidence  
20 petitioner has submitted with her petition does not provide any  
21 basis on which to find that the prosecution knowingly used  
22 perjured testimony. Moreover, the evidence defendants submit  
23 in this case unequivocally demonstrates that no one working for  
24 the state had any reason to believe that Christie lied at  
25 trial. Exhibit 23, p. 11 (Hugi Affidavit); Exhibit 39, pp.  
26 3-12 (Krogdahl Affidavit); Exhibit 40, pp. 3-8 (Staffel

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1 Affidavit); Tr. 698-825 (Peterson testimony). If petitioner's  
2 claim is taken to be that the prosecutor knowingly presented  
3 false testimony, it is baseless.

4 That leaves the potential contention that, through a  
5 nefarious plot of unnamed participants--"counselors, CSD  
6 workers, and attorneys", Christie became the mouthpiece through  
7 which the State could tell its own version of the story. The  
8 central focus of this claim is consequently on the unnamed  
9 conspirators in this plot, and not on Christie. The evidence  
10 in this case does not remotely support petitioner's conspiracy  
11 theory.

12 The evidence submitted by defendant demonstrates  
13 unequivocally that no one who worked for the State or on behalf  
14 of the State coerced Christie, or even suggested a version of  
15 events to Christie. This was strongly brought out at the  
16 criminal trial. See the testimony of Dr. Becker, Tr.628-660,  
17 Christie Tr. 668-681, Dr. Peterson Tr. 698-825, Dr. Hawkins  
18 Tr. 2514-1517, Susan Staffel Tr. 2765-2771, Nancy Whitacre Tr.  
19 2774, John Tracey Tr. 2778, Dr. Miller Tr. 2781-2782, and  
20 Evelyn Slaven Tr. 2786-2788. Indeed, the trial testimony  
21 indicates that if anyone attempted to tamper with Christie's  
22 testimony, it was petitioner. See the testimony of Steve Downs  
23 Tr. 975-1078, George Hurrey Tr. 1558-1563, Doug Welch Tr. 1575,  
24 and Diane Downs Tr. 1739-1744, 1747-1751, 1753-1756, 1876-1877,  
25 2040, 2348-2349, 2469-2471.

26 Defendant has submitted affidavits from those involved

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1 with Christie on behalf of the State. All the evidence is that  
2 Christie was never coerced or told what version of the shooting  
3 to tell. See affidavit of Christie, attached to petition at  
4 Appendix C-11 (a copy is filed as Exhibit 45 with this motion);  
5 Exhibit 23, p. 10; Ex. 40, pp. 3-8; Ex. 39, pp., 3-12; Ex. 41.  
6 Christie was represented by counsel, Bill Furtick, who confirms  
7 in his affidavit (a copy of which is filed as Ex. 42 with this  
8 motion--the original was previously filed with the court) and  
9 his deposition Exhibit 6, p. 32 that no one associated with the  
10 state tampered with Christie's testimony. The hard,  
11 unassailable fact is that Christie truthfully testified that  
12 Diane Downs shot her and her siblings.

13 The "evidence" petitioner supplies does not create a  
14 material fact issue about whether the State concocted  
15 Christie's testimony. The "affidavits" of Ronald Bowser,  
16 Virginia Andresen, Mark Andresen, Martha Andresen, and Dena  
17 Reinhardt are not in fact the affidavits of these people and do  
18 nothing more than attack the credibility of Christie's  
19 testimony. None of these people have information that the  
20 State coerced Christie or gave Christie a "memory." The  
21 "affidavits" supplied by petitioner in support of her petition  
22 are nothing more than the affidavits of Catherine Conrad, the  
23 law clerk for petitioner's counsel. They do not comply with  
24 ORCP 47D. Martha Andresen, in an affidavit she actually  
25 signed, states that Christie showed her a picture of Diane  
26 Downs, and she denies that Christie showed her a drawing of a

Page

1 man. Exhibit 44. The report of Dr. Vergamini only reiterates  
2 what Dr. Peterson testified to at trial: that Christie had no  
3 early memory of the shooting. The supposed statement from  
4 Shawn Werder regarding a single incident of "inappropriate  
5 interaction between caseworker Susan Staffel and Christie one  
6 day while Christie was at Sacred Heart visiting Danny,"  
7 petition, p. 29, means nothing. Even if true, it does not  
8 support the theory that there was a conspiracy to brainwash  
9 Christie. There is no verification that Ms. Werder even made  
10 the supposed statement; and she is currently unavailable, under  
11 the care of a psychiatrist. Finally, the article on the  
12 general effects of Dilantin does not bear on the conspiracy  
13 theory because, as Christie's treating physician, Dr. David  
14 Miller, states in his affidavit, Christie was not adversely  
15 affected by the use of Dilantin, and was not susceptible to  
16 manipulation. Exhibit 37, pp. 1-2.

17 The record lacks any evidence at all that Christie Down's  
18 testimony at trial was the result of coercion or suggestion by  
19 the State.

20 B. Wahwahsuk Investigation

21 Petitioner also alleges in paragraph 11D that the  
22 "authorities" did not respond to information provided by  
23 Delores Holland and her daughter, Laurie Holland, to the effect  
24 that Ronald Wahwahsuk, Laurie's "ex-boyfriend" "bore a striking  
25 resemblance" to the composite drawing of the BHS.

26 There are two answers to this claim. First, this claim,

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1 at the most, refers only to a failure by police to investigate  
2 and is therefore barred by Arizona v. Youngblood, supra.  
3 Second, the claim is factually incorrect. As indicated in Fred  
4 Hugi's affidavit Exhibit 23, pp. 10-11, Wahwahsuk's picture was  
5 placed in a photo line-up and was shown to petitioner, who did  
6 not identify Wahwahsuk or anyone else in the line-up as her  
7 assailant. In addition, the police attempted to locate  
8 Wahwahsuk, but were unable to do so. These facts were brought  
9 out at trial. Tr. 1588-1590, 2339-2341, 2793-2796. The photo  
10 line-up is included as Exhibit 43 with this motion. There is  
11 no basis on which to grant petitioner relief on the Wahwahsuk  
12 claim.

13 XVIII. THE PROSECUTORIAL MISCONDUCT (ALLOWED PERJURED  
14 TESTIMONY TO BE ADMITTED)

15 Petitioner alleges in paragraph 11E that the prosecutor  
16 knowingly allowed the following four people to commit perjury:  
17 1) Kim Morrison; 2) Evelyn Slaven; 3) Judy Patterson; and 4)  
18 "Jim" (sic) Murdock. The prosecution's use of perjured  
19 testimony may constitute a denial of due process sufficient to  
20 warrant post-conviction relief, but only if the prosecution  
21 knew about the perjury before or at trial. Mooney v. Holohan,  
22 supra; Napue v. Illinois, supra; Giglio v. United States,  
23 supra.

24 A review of the evidence in this case quickly dispels this  
25 claim. First, the prosecutor, Fred Hugi, did not knowingly use  
26 any perjured testimony. Exhibit 23, pp. 11-12 Second, and

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1 more importantly, the testimony was not perjured. Petitioner  
2 has not carefully related the actual trial testimony. Kim  
3 Morrison did not testify that Danny "didn't cry for his  
4 mother"; she testified that Danny was "indifferent" (Tr.  
5 2785). Evelyn Slaven did not testify that the "shooting" was  
6 never discussed in her home; she testified that no one in her  
7 home ever told Christie that petitioner was a suspect (Tr.  
8 2786-2788). Judy Patterson did not testify that petitioner  
9 washed her hands; she testified that Diane Downs asked for a  
10 bathroom and that she heard running water (Tr. 476-477.) As  
11 mentioned earlier, whether the petitioner washed her hands is  
12 of little significance in view of the expert testimony  
13 concerning the gunshot residue testing. Finally, as explained  
14 in paragraph IX.C., supra, there were no inconsistencies in  
15 John Murdock's testimony and his reports. The claims in  
16 paragraph 11E. should be denied.

17 XIX. 111F PROSECUTORIAL MISCONDUCT (READING MEDICAL  
18 REPORTS IN CLOSING ARGUMENT)

19 In this claim, petitioner contends that the prosecutor  
20 engaged in misconduct by intentionally reading portions of  
21 Danny Down's medical records to the jury in closing argument.  
22 This allegation is the obverse of petitioner's claim that her  
23 trial counsel was inadequate for failing to move for a mistrial  
24 when the prosecutor read these reports. Accordingly, most of  
25 the argument set forth in paragraph VII (A) of this memorandum,  
26 supra, applies to this claim. There is no need to repeat that

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1 entire argument here. The fact that this claim is framed in  
2 terms of prosecutorial misconduct does, however, warrant some  
3 discussion.

4 The evidence demonstrates that Mr. Hugi did not  
5 "intentionally" engage in any misconduct. As Mr. Hugi states  
6 in his affidavit, there was a great deal of confusion  
7 surrounding the admissibility of these reports. Exhibit 23,  
8 pp. 1-3. The Court considered the documents at least three  
9 times before it reached its final decision. Tr. 2402,  
10 2844-2845, 2866-2874. Mr. Jagger referred to Danny's medical  
11 records several times during his closing argument. Exhibit 23,  
12 pp. 2-3. As a result of the confusion concerning the reports,  
13 Mr. Hugi inadvertently referred to reports that had been ruled  
14 to be inadmissible as a result of his own objections.  
15 Exhibit 23, p. 3.

16 It was, moreover, the defense, not the prosecution, that  
17 offered these medical records into evidence. Tr. 2395-2402.  
18 Petitioner's trial counsel specified that he wanted both  
19 parties to be able to argue points raised by these reports.  
20 Tr. 2402. The statements contained in the reports were  
21 beneficial to the defense, not the prosecution. This is true  
22 even with respect to Danny's statement that his mother shot  
23 him. Because Danny was a three and one-half year old child who  
24 was asleep at the time of the shooting, presenting this  
25 statement to the jury would have allowed the defense to argue  
26 that, if Danny could be induced to utter such a statement, the

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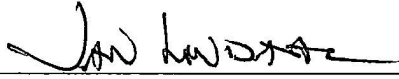
1 same would apply to Christie. If Mr. Hugi caused prejudice by  
2 reading these statements, it was prejudice to his own case and  
3 not to the defense.

4 XX. ¶13 LACK OF JURISDICTION TO SENTENCE PETITIONER

5 Petitioner alleges in paragraph 13 that petitioner has not  
6 yet been "legally sentenced" because the trial court lacked  
7 jurisdiction when petitioner was sentenced. (Petition, p. 6).  
8 She provided no basis for this claim, if it was made, in  
9 paragraph 7A(2) of her petition and supplies no basis for the  
10 claim here. Petitioner was found guilty of murder and two  
11 counts of attempted murder by a jury. The trial court properly  
12 sentenced her as a result of that finding. The fact that  
13 petitioner appealed her conviction before restitution was  
14 ordered has no bearing on the validity of the conviction  
15 itself. She was properly sentenced to incarceration; and while  
16 it is true that restitution was subsequently imposed without  
17 authority, nothing follows.

18 Respectfully submitted,

19 DAVE FROHNMAYER #71001  
20 Attorney General

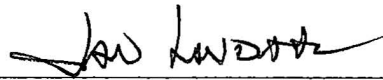
21   
22 JAN PETER LONDAHL #76222  
23 Assistant Attorney General  
24 Of Attorneys for Defendant  
25  
26

Verified Correct Copy of Original 1/13/2017.

CERTIFICATE OF SERVICE

I certify that on May 9, 1991, I served the foregoing  
Memorandum in Support of Motion for Summary Judgment upon the  
parties hereto by mailing, regular mail, postage prepaid, a  
true, exact and full copy thereof to:

Steve Gorham  
Attorney at Law  
341 State Street  
Salem, OR 97301



JAN PETER LONDAHL #76222  
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8230J/dsk