IN THE SUPREME COURT OF THE STATE OF OREGON

FELIPE PEREIDA-ALBA, Petitioner-Respondent, Respondent on Review, v. RICK COURSEY, Superintendent, Eastern Oregon Correctional Institution, Defendant-Appellant, Petitioner on Review.	Umatilla County Circuit Court No. CV090464 CA A146174 SC S060846

BRIEF ON THE MERITS OF PETITIONER ON REVIEW

Review of the Decision of the Court of Appeals
on Appeal from a Judgment
of the District Court for Umatilla County
Honorable JAMES R. HARGREAVES, Judge

Opinion Filed: August 29, 2012
Author of Opinion: Armstrong, P. J.
Concurring Judges: Haselton, C.J, and Duncan, J.

Continued . . .

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INTRODUCTION AND QUESTIONS PRESENTED

Petitioner was convicted of first-degree robbery in a jury trial. The post-conviction court concluded that petitioner's constitutional rights to the adequate and effective assistance of counsel in that trial were violated. It did so based solely on the fact that petitioner's trial lawyer did not request an instruction on the lesser-included offense of third-degree robbery, when there was some evidence in the trial record to support giving the instruction. The post-conviction court concluded that petitioner's constitutional rights were violated because it could not "imagine" why trial counsel would not have requested that instruction.

That conclusion conflicts with the burden of proof in a post-conviction case, and with the substantive legal elements of a claim of inadequate and ineffective assistance of counsel. Together, those standards required petitioner to prove historical facts affirmatively demonstrating that petitioner's trial lawyer did not, in fact, exercise reasonable professional skill and judgment in declining to request the instruction, and that the omission of the instruction likely affected the outcome of the case.

Petitioner did not prove those historical facts here. He based his claim on the record of his criminal trial and developed no facts regarding the circumstances that led counsel not to request the instruction. Without such facts, it, as a matter of

law, cannot be concluded that petitioner's lawyer failed to exercise reasonable professional skill and judgment by not requesting the instruction. Although the post-conviction court stated that it could not imagine any, there are many reasons why an objectively reasonable attorney could choose not to request a third-degree robbery instruction on the facts of this case. There also is no reason to think that the jury would have reached a different outcome, had the instruction been given. As a result, petitioner did not prove facts demonstrating that his conviction was obtained in violation of his constitutional rights to counsel, and is not entitled to relief from his conviction.

First Question Presented

When a post-conviction petitioner alleges that his trial counsel provided constitutionally inadequate assistance by not requesting an instruction for a lesser-included offense, and when the trial evidence would support giving the instruction, what must the petitioner show to establish that his counsel's performance was deficient?

Answer and Proposed Rule of Law

To establish that a trial attorney was deficient by not requesting a lesser-included-offense instruction, the petitioner must prove historical facts showing that trial counsel's omission of a request for the instruction resulted from the lawyer's failure to exercise reasonable professional skill and judgment.

Second Question Presented

Where a petitioner proves historical facts demonstrating that trial counsel failed to exercise reasonable professional skill and judgment in not requesting a lesser-included instruction, what must a petitioner prove to establish that his counsel's failure to request an instruction prejudiced him?

Answer and Proposed Rule of Law

To prove prejudice, a petitioner must prove that instructing the jury on a lesser-included offense would have had a tendency to affect the ultimate result of the prosecution. A petitioner does not meet that burden when he shows only that the court is "unable to determine" what the verdict would have been if the instruction had been given. He must show, instead, a reasonable probability that the jury would have acquitted on the greater charge and, instead, convicted on the lesser-included offense.

Statement of Facts

A. Using a firearm, petitioner stole food and milk from the Woodburn Shop'N Kart.

On June 1, 2005, petitioner rode his bicycle to the Woodburn Shop'N Kart, leaned it against the building, and entered the store, leaving the bicycle unlocked outside. (Ex 102, Trial Tr 40-41). In so doing, petitioner caught the eye of the Shop'N Kart's loss prevention officer, Craig Schmitz. Schmitz noticed petitioner because of his backpack, which Schmitz knew could be used to conceal items, and

because petitioner left his bike unlocked even though the store was in a high crime area. (Ex 102, Trial Tr 39-41).

In the store, petitioner selected two packages of snack cakes, and two containers of flavored milk. (Ex 102, Trial Tr 41-42). Petitioner then crouched behind a cereal display, placed the items in his backpack, zipped up the backpack, and left the store without paying. (Ex 102, Trial Tr 41-42). Schmitz observed that conduct and, after asking a Spanish-speaking store employee to accompany him, pursued petitioner outside.[1] (Ex 102, Trial Tr 44). The two confronted petitioner, and Schmitz showed petitioner his badge, explaining to petitioner that Schmitz was store security. (Ex 102, Trial Tr 44-45). Petitioner ran. (Ex 102, Trial Tr 46).

Schmitz chased petitioner, threw him to the ground, and put him in a headlock and a wristlock. (Ex 102, Trial Tr 46). Schmitz got petitioner up from the ground, and walked him into the store, still keeping him in a headlock and wristlock. (ex 102, Trial Tr 46). Petitioner struggled with Schmitz as they walked into the store, but stopped when they entered the store. (Ex 102, Trial Tr 46).

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[1] Petitioner is from Mexico, and speaks Spanish. (Ex 102, Trial Tr 1-2, 7-9, 147; Ex 4). Schmitz used the bilingual store employee as a translator for his communications with petitioner. (Ex 102, Trial Tr 45).

Schmitz took petitioner upstairs to the store office. (Ex 102, Trial Tr 46). The bilingual store employee accompanied them. (Ex 102, Trial Tr 46).

Precisely what transpired in the office was disputed at trial. What was undisputed is the fact that, at some point, petitioner removed a gun from his backpack. (Ex 102, Trial Tr 49-50, 80-83, 88, 145-49). After petitioner did so, Schmitz told petitioner to leave. (Ex 102, Trial Tr 50, 147-49). Petitioner left the store, taking his backpack containing the stolen items with him, and rode away on his bicycle. (Ex 102, Trial Tr 50-51, 83-84).

Schmitz called 911 to report the incident. (Ex 102, Trial Tr 52). Officers responded to take the incident report, but did not apprehend petitioner that day. (Ex 102, Trial Tr 92-93). Three days later, a detective on patrol spotted petitioner riding his bike. (Ex 102, Trial Tr 94-95). Petitioner started pedaling faster when he saw the detective, and did not stop when the detective turned on his overhead lights. (Ex 102, Trial Tr 95-96). The detective chased petitioner, eventually getting out of his car and running after him. (Ex 102, Trial Tr 96-98). Petitioner continued to flee, abandoning the bike and the backpack, and proceeding on foot. (Ex 102, Trial Tr 102). Petitioner eventually was apprehended another police officer. (Ex 102, Trial Tr 106).

B. Petitioner was convicted of first-degree robbery involving a firearm following a jury trial on the sole charge of first-degree robbery.

The state charged petitioner with one count of first-degree robbery using a firearm, alleged as follows:

> The defendant, on or about June 1, 2005, in Marion County, Oregon, did unlawfully and knowingly while in the course of committing theft, with the intent of overcoming resistance to defendant's taking of property and retention of the property after taking, use and threaten the immediate use of physical force on Craig Schmitz and use a dangerous weapon. The State further alleges that defendant used or threatened the immediate use of a firearm.

(Ex 101).

At trial, there was no dispute that petitioner had committed theft of the snack cakes and milk. (Ex 102, Trial Tr 37). The issue was whether petitioner had retained those items by threatening Schmitz with the use of the gun pulled from petitioner's backpack, thereby (a) "threaten[ing] the use of physical force" on Schmitz; (b) "us[ing] a dangerous weapon;" and (c) "threaten[ing] the immediate use of a firearm." (Ex 102, Trial Tr 32, 37-38, 176-77, 194). The state's theory of the case—which was supported by Schmitz's testimony— was that petitioner had pulled the gun out of the backpack and threatened Schmitz with it in order to escape with the stolen food. (Ex 102, Trial Tr 32, 176-77, 200-201). The defense theory of the case—which was supported by petitioner's testimony and, to a degree, by the testimony of the store employee who assisted Schmitz—was that

petitioner had taken the gun out of the backpack in response to Schmitz's demands to see what was in the backpack, and that petitioner had not used the gun to threaten Schmitz, and therefore had not committed first-degree robbery. Trial counsel argued: "Now, that doesn't take away from the fact that he stole the food. It just doesn't. He did it. But we're not talking about a Theft II here; we're talking about a robbery I, and that is a huge difference." (Ex 102, Trial Tr 194).

The jury was asked to return a verdict on the charge of first-degree robbery, and was asked, if it found that petitioner committed first-degree robbery, to determine whether petitioner had used or threatened to use a firearm in committing the crime. (Ex 17). Neither side requested that the jury be instructed on any lesser-included offenses. (Ex 102, Trial Tr 167-73). By a 10-2 verdict, the jury found that petitioner committed first-degree robbery. (Ex 17). The jury also found—by the same 10-2 split of jurors—that petitioner used or threatened the immediate use of a firearm. (Ex 102, Trial Tr 213-24; Ex 17).

The trial court sentenced petitioner to 90 months' incarceration under Ballot Measure 11. (Trial Tr 216; Ex 7). Petitioner appealed, the Court of Appeals affirmed without opinion, and this court denied review. (Exs 14, 16)

C. On collateral review, the post-conviction court granted relief on the ground that petitioner's trial counsel was inadequate and ineffective for not asking the trial court to instruct the jury on the lesser-included offense of third-degree robbery, and the Court of Appeals affirmed.

Petitioner thereafter filed this proceeding for post-conviction relief under ORS 138.510, *et seq.*. (TCF 1). In the operative petition, he alleged, among other things, that his state and federal constitutional rights to the "adequate and effective assistance of counsel" were violated because "Trial counsel failed to request a jury instruction on the lesser-included crime of Robbery in the Third Degree." (TCF 13).

At the post-conviction hearing, the only evidence that petitioner submitted in support of his claims consisted of (a) the police reports generated in response to the Shop'N Kart incident; and (b) records from petitioner's direct criminal proceeding. (TCF 23, Petitioner's Exhibit List). Petitioner did not testify at the post-conviction hearing. (Tr 6). The only evidence submitted by defendant also consisted solely of records from the petitioner's direct criminal proceeding, all but one of which duplicated exhibits submitted by petitioner.[2]

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[2] Defendant submitted six exhibits, Exhibits 101-106. Exhibits 101-105 duplicated exhibits submitted by petitioner. Defendant's Exhibit 101 (the indictment) was the same as petitioner's Exhibit 3. Defendant's Exhibit 102 (the transcript of petitioner's criminal trial and sentencing) was the same as petitioner's

Footnote continued...

Following the hearing, the post-conviction court took the matter under advisement. It subsequently issued a letter opinion ordering the denial of relief on all grounds except for petitioner's claim that trial counsel was inadequate and ineffective for not requesting an instruction on third-degree robbery. (ER 29-38). In reaching that conclusion, the post-conviction court found that there was no testimony from trial counsel or any other "direct evidence" of why counsel did not request a lesser-included instruction on third-degree robbery. (ER 33-35). The court then observed that "[s]hort of evidence that the petitioner on this case instructed the trial attorney to take an "all or nothing" approach as she did (and there is no such evidence) I simply cannot imagine why defense counsel would not have at least asked for at least a Robbery III and probably should have asked for a simple Theft instruction as well." (ER 35).

(…continued)

Exhibit 5. Defendant's Exhibit 103 (the Appellant's Brief from petitioner's direct appeal) was the same as petitioner's Exhibit 12. Defendant's Exhibit 104 (the Respondent's Brief from petitioner's direct appeal) was the same as petitioner's Exhibit 13. Defendant's Exhibit 105 (a letter to the court from trial counsel regarding juror misconduct) was the same as Petitioner's Exhibit 9. Defendant's Exhibit 106 was a letter to the court from the prosecutor addressing the issue of juror misconduct addressed in the letter submitted as Exhibit 9 and Exhibit 105.

Based on that observation, the post-conviction court concluded as a matter of law that "on the facts of this case, no reasonably competent defense attorney would have failed to ask for one or more lesser included instructions." (ER 35). The court further concluded that, had trial counsel requested a lesser-included instruction on third-degree robbery, the court would have delivered the instruction to the jury. (ER 35). Finally, based on the Court of Appeals' decision in *Trotter v. Santos*, 212 Or App 473, 157 P3d 1233 (2007), the court concluded that petitioner was prejudiced by trial counsel's failure to request a lesser-included instruction on third-degree robbery: "A reading of Trotter above tells us that the failure to ask for such an instruction was prejudicial to the petitioner in this case." (ER 35). Based on those findings and conclusions, the post-conviction court entered judgment granting relief. (ER 26, 31). The court ordered the conviction reversed and directed that the case "be sent back to the trial court for retrial or other further proceedings as may be appropriate." (ER 31).

Defendant appealed, assigning error to the court's grant of relief. (App Br 14). The Court of Appeals affirmed. *Pereida-Alba v. Coursey*, 252 Or App 66, 284 P3d 1280 (2012), *review allowed*, 353 Or 410 (2013). That court explained that, in its view, "the post-conviction court reasonably could infer that the defense attorney's failure to request an instruction on third-degree robbery was attributable to the attorney's failure to consider making such a request." *Id.* at 71. It then

concluded that the post-conviction court correctly concluded "that the attorney had failed to exercise reasonable professional skill and judgment in representing petitioner" based on the factual inference that trial counsel had not "considered" requesting the lesser-included instruction. *Id.* The court further held that, under *Trotter*, the post-conviction court correctly concluded that petitioner was prejudiced by trial counsel's failure to request the lesser-included instruction on third-degree robbery because the court "[could not] say that the jury's lack of awareness of a lesser offense is unlikely to have an effect on how the jury evaluates the greater offense." *Id.* at 72-73.

Defendant petitioned for review and this court allowed the petition. *Pereida-Alba v. Coursey*, 353 Or 410, __ P3d__ (2013).

Summary of Argument

The question in this case is whether proof of the mere fact that trial counsel did not request a lesser-included instruction on third-degree robbery, when there was some evidence to support the instruction, establishes a violation of petitioner's state and federal constitutional rights to the adequate and effective assistance of counsel. The answer to that question is "no."

In a post-conviction case, there is a presumption of regularity in the direct criminal proceeding, including a presumption that the petitioner's counsel performed in accordance with constitutional standards by exercising reasonable

professional skill and judgment. By statute, a petitioner bears the burden of proving historical facts demonstrating to the contrary that the particular act or omission by his or her trial lawyer resulted from the lawyer's failure to exercise objectively reasonable professional skill and judgment, and that the challenged act or omission likely affected the outcome of the petitioner's case to the petitioner's detriment.

Here, the historical facts proven by petitioner are insufficient as a matter of law to establish a violation of his constitutional rights to counsel. Petitioner chose to base his post-conviction case on the trial record from his criminal case, without introducing evidence of the circumstances that led his lawyer to take particular actions at trial. As a result, petitioner proved only that his lawyer did not request a lesser-included instruction on third-degree robbery, when there was evidence presented at trial that would support that instruction. Because there are many reasons why an objectively reasonable lawyer would not request lesser-included instruction on third-degree robbery on the facts of this case, proof of the mere fact that the instruction was not requested is, as a matter of law, insufficient to permit the legal conclusion that trial counsel's omission resulted from counsel's failure to exercise reasonable professional skill and judgment.

Likewise, the fact that the instruction was not given is insufficient as a matter of law to permit the conclusion that petitioner was prejudiced by the

omission of the instruction. To show prejudice resulting from the omission of the instruction on third-degree robbery, petitioner would have had to prove facts demonstrating a reasonable probability that, had the instruction been given, a reasonable jury, adhering to the law, would have had reasonable doubt as to petitioner's guilt on first-degree robbery, and therefore would have acquitted on first-degree robbery and convicted on third-degree robbery. On the facts of this case, there is no probability that that would have happened. The facts demonstrate that an instruction on third-degree robbery could have had no impact on how the jury resolved the disputed factual issue of how petitioner had used the gun. At best, any impact on the jury's finding that petitioner did threaten Schmitz with the firearm is completely speculative. And speculation is not sufficient to establish that the omission of the instruction tended to affect the outcome of the prosecution.

ARGUMENT

In addition to the questions presented in the petition for review, this court asked the parties to address the following question in briefing this case:

> Which party in a post-conviction proceeding involving allegations of inadequacy of trial counsel has the burden of production and burden of persuasion to establish that an action or inaction by trial counsel was the result of a tactical judgment.

The answer to that question, and to the substantive constitutional issue presented by this case, flow from (1) the burden of proof in a post-conviction case; and (2) the substantive elements of a claim of inadequate assistance. Defendant discusses each below, addresses the court's question, based on those discussions, and then discusses the proper resolution of the constitutional issue presented in this case.

A. In a post-conviction proceeding, a petitioner bears the burden of proving historical facts demonstrating that his or her constitutional rights were violated in the underlying criminal proceedings.

The Oregon Post-Conviction Relief Act provides a mechanism through which a convicted person can obtain relief from a conviction which was obtained in violation of the person's state or federal constitutional rights, if the constitutional violation is significant enough to void the conviction.

ORS 138.530(1)(a) states:

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

ORS 138.530(1)(a).

In in a collateral attack on a conviction, a reviewing court presumes that the underlying criminal proceedings were conducted in conformance with applicable

legal standards: "It must be kept in mind that a petition for postconviction relief is a collateral attack upon a judgment of the court which carries a presumption of regularity[.]" *Schram v. Gladden*, 250 Or 603, 605, 444 P2d 6 (1968). The convicted person, therefore, bears the burden of proving that his or her criminal proceedings were not "regular" but were, instead, conducted in violation of the state or federal constitutions:

> If the petition states a ground for relief, the court shall decide the issues raised and may receive proof by affidavits, depositions, oral testimony or other competent evidence. *The burden of proof of facts alleged in the petition shall be upon the petitioner to establish such facts by a preponderance of the evidence*."

ORS 138.620(2) (emphasis added). In other words, a post-conviction petitioner bears the burden of proving facts that rebut that presumption of regularity and that affirmatively prove that the petitioner's conviction was obtained in violation of the petitioner's constitutional rights. ORS 138.620(2); *Schram*, 250 Or at 605-606; *State v. Probst*, 339 Or 612, 628-29, 124 P3d 1237 (2005) (reaffirming principle that judgments of conviction "are entitled to a presumption of validity," such that "the burden is on the [person challenging the conviction] to prove by a preponderance of the evidence that [the conviction] was invalid.").

B. To prove that a conviction was secured in violation of the constitutional rights to counsel, a petitioner must prove that his or her attorney failed to exercise reasonable professional skill and judgment in conducting the defense, and that trial counsel's deficiency prejudiced the petitioner.

In Oregon and elsewhere, convicted persons often challenge their convictions on the ground that those convictions were obtained in violation of the state and federal constitutional rights to counsel. To obtain relief from a conviction on the ground that it was obtained in violation of the Article I, section 11, right to counsel, a petitioner must prove, "by a preponderance of the evidence, facts demonstrating that trial counsel failed to exercise reasonable professional skill and judgment and that petitioner suffered prejudice as a result." *Trujillo v. Maass*, 312 Or 431, 435, 822 P2d 703 (1991). To obtain post-conviction relief on a claim alleging the violation of the Sixth Amendment right to counsel, a petitioner must prove facts showing that "counsel's representation fell below an objective standard of reasonableness," and that there is a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland v. Washington*, 466 US 668, 688, 694, 104 S Ct 2052, 80 L Ed 2d 674 (1984); *Yarborough v. Gentry*, 540 US 1, 5, 124 S Ct 1, 157 L Ed 2d 1 (2003) ("The right [to counsel] is denied when a defense attorney's performance

falls below an objective standard of reasonableness and thereby prejudices the defense."). [3]

The interplay between (a) the allocation of the burden of proof in a collateral challenge to a conviction and (b) the substantive elements of a claim of inadequate assistance leads to three conclusions about the nature and scope of a court's review of a collateral challenge to a conviction based on an alleged violation of the right to counsel. First, where a convicted person collaterally attacks a conviction on the ground of inadequate assistance of counsel, the *Schram* presumption of regularity afforded to criminal convictions necessarily translates to a presumption that counsel performed competently:

> Counsel should be strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of

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[3] This court generally has treated the Article I, section 11, right to counsel as having the same scope as the Sixth Amendment right to counsel. *Krummacher v. Gierloff*, 290 Or 867, 871, 627 P2d 458 (1981); *see also State v. Davis*, 350 Or 440, 461-477, 256 P3d 1075 (2011) (tracing development of state and federal constitutional rights to counsel; observing that rights generally parallel one another). This court typically has referred to the Article I, section 11, right as the right to "adequate assistance of counsel." *Id.* at 872 & n 3. Under the Sixth Amendment, "'the right to counsel is the right to the effective assistance of counsel.'" *Strickland v. Washington*, 466 US 668, 686, 104 S Ct 2052, 80 L Ed 2d 674 (1984) (*quoting McMann v. Richardson*, 397 US 759, 90 S Ct 1441, 25 L Ed 2d 763 (1970)). For purposes of this brief, defendant employs the terms "inadequate" and "ineffective" (and "adequate" and "effective") interchangeably in describing the parallel constitutional rights to counsel.

> reasonable professional judgment. To overcome that presumption, a defendant must show that counsel failed to act reasonabl[y], considering all the circumstances.

Cullen v. Pinholster, __ U.S.__, 131 S. Ct. 1388, 1403, 179 L Ed 2d 557 (2011) (internal quotations and citations omitted; brackets original); *Roe v. Flores-Ortega*, 528 US 470, 482, 120 S Ct 1029, 145 L Ed 2d 985 (2000) ("We normally apply a strong presumption of reliability to judicial proceedings and require a defendant to overcome that presumption by showing how specific errors of counsel undermined the reliability of the finding of guilt." Internal quotations, citations and brackets omitted). That is, there is a presumption that the conviction was secured in compliance with the petitioner's constitutional rights to counsel, not in violation of those rights. *Yarborough*, 540 US at 8; *Chandler v. United States*, 218 F.3d 1305, 1314-1315 & n16-n17 (11th Cir. 2005); *see also Schram*, 250 Or at 605; *Probst*, 339 Or at 628-29. The challenger must prove facts that rebut that presumption.

Second, and relatedly, that presumption of regularity and competence means that a post-conviction petitioner usually cannot prevail on a collateral challenge to a conviction that is based solely on the record of the direct criminal proceeding. "That presumption [that counsel performed competently] has particular force where a petitioner bases his ineffective-assistance claim solely on the trial record, creating a situation in which a court 'may have no way of knowing whether a

seemingly unusual or misguided action by counsel had a sound strategic motive.'" *Yarborough*, 540 US at 8 (quoting *Massaro v. United States*, 538 US 500, 505, 123 S Ct 1690, 155 L Ed 2d 714 (2003)); *Trujillo*, 312 Or at 436-37 (noting that mere fact that record revealed that trial counsel failed to pursue particular procedure in connection with a plea was insufficient, standing alone, to establish deficient performance where record did not disclose what discussions, if any, counsel had with the petitioner about the procedure and "what reasons, if any, counsel might have had for not pursuing that procedure."); *Cheney v. Washington*, 614 F3d 987, 996 (9th Cir 2010) (reiterating that presumption of competence "takes on particular force" when claim of ineffective assistance is based solely on the trial record).

Thus, to prevail on a claim of inadequate assistance, a petitioner, as the party with the burden of proof, ordinarily must introduce evidence extraneous to the criminal trial record to prove specific historical facts demonstrating the particular surrounding circumstances that led counsel to take the challenged act or omission at trial. Without such facts, it usually will be impossible for a court to conclude that counsel's performance was constitutionally insufficient; evaluating that performance for constitutional sufficiency "requires that every effort be made to eliminate the distorting effects of hindsight, *to reconstruct the circumstances of counsel's challenged conduct*, and to evaluate the conduct from counsel's perspective at the time." *Strickland*, 466 US at 689 (emphasis added). A petitioner

ordinarily may not obtain relief simply by placing the record of his criminal proceedings before the post-conviction court and imagining that "other competent criminal defense lawyers would have tried [the] case differently." *Krummacher*, 290 Or at 884. "It is [the petitioner's] actual lawyers' performance which is in issue, however, not that of a hypothetical lawyer." *Id.*

Third, the statutory burden of proof and the substantive elements of a claim of inadequate or ineffective assistance of counsel dictate the answer to this court's question about what party to a post-conviction proceeding bears the burdens of production and persuasion as to whether a particular act or omission by trial counsel was a tactical decision. The answer is that no party *has* to prove that a particular act or omission by counsel was—or was not—a tactical decision. Ultimately, what a petitioner must prove is historical facts showing that trial counsel's challenged act or omission resulted from the failure to exercise reasonable professional skill and judgment. *Trujillo*, 312 Or at 435-37. "The relevant question is not whether counsel's choices were strategic, but whether they were reasonable." *Flores-Ortega*, 528 US at 481.

Although no party is *required* to prove that a particular act or omission by trial counsel was—or was not—a tactical decision, as a practical matter, the petitioner in a post-conviction case may attempt to advance his or her claim by proving that a challenged act or omission was not a tactical decision. Likewise, a

post-conviction defendant may attempt to affirmatively disprove the petitioner's claim (or to controvert it sufficiently to defeat it) by proving that a challenged act or omission was a tactical decision.

Thus, for example, a petitioner may attempt to prove a claim of inadequate assistance by proving as a matter of historical fact that a particular act or omission by counsel was the product of inadvertence, rather than a tactical decision. However, "even if an omission is inadvertent, relief is not automatic." *Yarborough*, 540 US at 8. The constitutional rights to counsel "guarantee[] reasonable competence, not perfect advocacy judged with the benefit of hindsight." *Id.* Consequently, even where a petitioner affirmatively proves as historical fact that an act or omission was the product of inadvertence, rather than a tactical decision, the ultimate question for the court is whether that inadvertence was objectively unreasonable, viewed in the context of counsel's overall representation. *See id.* "Just as there is no expectation that competent counsel will be a flawless strategist or tactician, an attorney may not be faulted for a reasonable miscalculation or lack of foresight or for failing to prepare for what appear to be remote possibilities." *Harrington v. Richter*, __ US __, 131 S Ct 770, 791, 178 L Ed 2d 624 (2011).

Similarly, the defendant to a post-conviction case may attempt to defend the case by affirmatively disproving the petitioner's claim.[4] The post-conviction defendant may do so by introducing evidence that would support a finding that a challenged act or omission was, in fact, a tactical or strategic decision. If the post-conviction court were to find by a preponderance of the evidence that a challenged act or omission was, in fact, a tactical decision, and then to conclude that that tactical decision was objectively reasonable, that finding and conclusion necessarily would defeat the petitioner's claim. *Wood v. Allen*, 558 US 290, 304, 130 S Ct 841, 175 L Ed 2d 738 (2010) (distinguishing the factual issue of whether particular action by counsel was a strategic decision from the separate legal question of "whether the strategic decision itself was an exercise of reasonable professional judgment under *Strickland*."). Of course, such a defense strategy can misfire. If the court were to conclude that the tactical decision was objectively unreasonable under the circumstances, the post-conviction defendant's litigation strategy would have affirmatively proved the petitioner's claim.

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[4] Of course, this is only one line of defense available to a post-conviction defendant. Because the petitioner in a post-conviction case has the burden of proving facts demonstrating that the challenged conviction is void, a post-conviction defendant can opt not to introduce any evidence at all and can defend on the ground that the petitioner has not met the burden of proving facts sufficient to warrant relief.

It bears repeating, however, that neither party is obliged by either the burden of proof in a post-conviction case or by the substantive elements of the constitutional rights to counsel, to prove, in fact, that a decision was or was not tactical. Rather, what a petitioner must prove is historical facts that compel the legal conclusion that trial counsel's acts and omissions in conducting the defense were *objectively unreasonable* "on the facts of the case, viewed as of the time of counsel's conduct," and that trial counsel's deficiencies prejudiced the petitioner. *Strickland*, 466 US at 690, 692. Ultimately, "[r]epresentation is constitutionally ineffective 'only if it so undermined the proper functioning of the adversarial process' that the defendant was denied a fair trial." *Harrington*, 131 S Ct at 791 (quoting *Strickland*, 466 US at 686).

C. Petitioner failed to prove facts sufficient to permit the legal conclusion that trial counsel's omission to request a lesser-included instruction on third degree robbery resulted from the failure to exercise reasonable professional skill and judgment.

In the light of the legal standards governing the evaluation of trial counsel's performance discussed above, this court should conclude that petitioner failed to prove sufficient facts to demonstrate that trial counsel performed deficiently by not requesting a jury instruction on third-degree robbery. The only fact petitioner proved in support of his claim is the fact that trial counsel did not request an instruction on third-degree robbery, when there was evidence in the trial record

that would support giving the instruction. But that fact, standing alone, is insufficient to allow the legal conclusion that trial counsel failed to exercise reasonable professional skill and judgment when she did not request the instruction. *Trujillo*, 312 Or at 436-37 (fact that trial counsel omitted to use particular procedure in connection with plea did not necessarily demonstrate deficient performance by counsel where record disclosed neither whether counsel had discussed procedure with petitioner nor counsel's reasons for not pursuing procedure). Without knowing more about what discussions, if any, counsel had with petitioner regarding the instructions, what directions petitioner may have given counsel regarding the conduct of the defense, and what other circumstances surrounded counsel's omission of a request for an instruction on third-degree robbery, this court cannot conclude that counsel failed to exercise reasonable professional skill and judgment by not requesting a third-degree robbery instruction.

Moreover, this is not the rare case where the trial record (which, for all practical purposes, is the record for this post-conviction case), on its face, rebuts the presumption that counsel acted competently in trying the case, and allows the conclusion that no reasonable lawyer could have acted in the manner that petitioner's lawyer acted. In assessing whether petitioner has proved facts sufficient to permit the legal conclusion that his lawyer performed deficiently, a

court is "required not simply to give [the] attorney[] the benefit of the doubt, but to affirmatively entertain the range of possible reasons [] counsel may have had for proceeding as [she] did." *Cullen*,131 S Ct at 1407. Here are just a few of the possible reasons objectively reasonable counsel in trial counsel's position may have opted not to request an instruction on third-degree robbery:

Objectively reasonable counsel could have chosen not to request an instruction on third-degree robbery because the instruction does not mesh well with the facts of this case, and it would have been difficult for counsel to deploy the instruction effectively without harming her client. The state's theory of the case was that the threatened use of the gun was the threatened use of physical force for purposes of the robbery. To capitalize on a third-degree robbery instruction,[5] trial

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[5] ORS 164.395 defines third-degree robbery. It provides:

> (1) A person commits the crime of robbery in the third degree if in the course of committing or attempting to commit theft or unauthorized use of a vehicle as defined in ORS 164.135 the person uses or threatens the immediate use of physical force upon another person with the intent of:
>
> (a) Preventing or overcoming resistance to the taking of the property or to retention thereof immediately after the taking; or
>
> (b) Compelling the owner of such property or another person to deliver the property or to engage in other conduct which

Footnote continued…

counsel would have had to present to the jury some theory as to how petitioner threatened the use of physical force but did not use the gun to do so.[6] That would entail pointing out to the jury that, although her client did not threaten the use of the gun, her client did, in fact, threaten Schmitz with some other form of physical force that the state itself had not identified. That approach would risk making petitioner look worse in the eyes of the jury. The simpler, more intelligible approach was for counsel to do exactly what she did—not request a lesser-included

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(…continued)

> might aid in the commission of the theft or unauthorized use of a vehicle.
>
> (2) Robbery in the third degree is a Class C felony.

[6] ORS 164.415 defines first-degree robbery. It provides:

> (1) A person commits the crime of robbery in the first degree if the person violates ORS 164.395 and the person:
>
> (a) Is armed with a deadly weapon;
>
> (b) Uses or attempts to use a dangerous weapon; or
>
> (c) Causes or attempts to cause serious physical injury to any person.
>
> (2) Robbery in the first degree is a Class A felony.

instruction on third-degree robbery and argue to the jury that it had to acquit because it could not find beyond a reasonable doubt that petitioner had threatened to use the gun when he removed it from his backpack. That approach evidently persuaded the two jurors who voted to acquit, confirming that it was objectively reasonable.

Second, trial counsel reasonably could have chosen not to request a third-degree robbery instruction in pursuit of an all-or-nothing strategy. Courts generally have recognized that is objectively reasonable for a trial lawyer to decline to request a lesser-included instruction in pursuit of an all-or-nothing strategy, particularly where the lawyer has adopted the strategy in consultation with her client. *State v. Grier*, 246 P3d 1260, 1273-74 (Wa 2011); *Ex parte Mills*, 62 So 3d 574, 589 (Ala 2010); *State v. Brown*, 999 A2d 295, 302 (2010); *Cruz v. State*, 700 SE2d 631, 639 (2010); *Autrey v. State*, 700 NE2d 1140, 1141-42 (Ind 1998). Moreover, on the facts of this case, an all-or-nothing strategy had a reasonable chance of success, making it a strategy that objectively reasonable counsel might pursue. Given (a) that the state's entire theory of robbery was that petitioner had threatened the use of the gun and (b) the conflicting evidence as to what, precisely, petitioner did with the gun, the facts of the case strongly supported adopting an "all or nothing" approach. The conflicting evidence (particularly that from the state's own witnesses) about how petitioner used the gun gave counsel a

strong argument that the jury could not find that petitioner had threatened to use the gun, and that the jury should, therefore, acquit.

Additionally, even if the "all or nothing" approach had been riskier than it was on the facts of this case, trial counsel still would have been objectively reasonable to pursue it if she needed to do so to meet her client's particular needs and objectives. It is possible that her client believed strongly that his version of the office interaction was the truth, that he was innocent of any form of robbery, and that he did not want the jury instructed on an offense that would give it the opportunity to reach a compromise verdict.[7] It is possible that trial counsel discussed with her client the potential for immigration consequences of any robbery conviction, and that petitioner opted not to request a third-degree robbery instruction because of the immigration consequences associated with a conviction for any degree of robbery.[8] *See, e.g.*, *Padilla v. Kentucky*, 559 US 356, 130 S Ct

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[7] Petitioner testified "But I never got the weapon out to threaten them and I never pointed at them or anything." (Tr 145).

[8] As noted earlier, petitioner testified at his criminal trial that he was born and raised in Mexico. Robbery generally is both a "crime of moral turpitude" and an "aggravated felony" under the immigration laws. *See, e.g. Ruiz-Lopez v. Holder*, 682 F3d 513, 519 (6th Cir 2012); *Mendoza v. Holder*, 623 F3d 1299, 1303-04 (9th Cir 2010); *United States v. McDougherty*, 920 F2d 569, 573 (9th Cir 1990) (robbery is "crime of violence" under immigration laws); 8 USC § 1101(a)(43)(F) (defining "aggravated felony" to include "crime of violence"). Conviction for

Footnote continued...

1473, 1480, 176 L Ed 2d 284 (2010); *Com v. Marino*, 981 NE2d 648, 659 (Mass 2013) ("That immigration consequences inform trial strategy is appropriate given the grave impact involvement with the criminal justice system can have on a noncitizen defendant's immigration status."). It is possible that a conviction for any degree of robbery would have collateral consequences for petitioner in other criminal proceedings or civil proceedings, and petitioner wanted to avoid that risk.[9] All of those possibilities (and there undoubtedly are more) would be objectively reasonable reasons to not request a third-degree robbery instruction. But, as the post-conviction court recognized, the record does not disclose why counsel did what she did. As a result, because there is a range of possible reasons why competent counsel could have elected not to request a third-degree robbery instruction, petitioner's proof of the mere fact that his lawyer did not request the instruction is insufficient to rebut the presumption that petitioner's lawyer performed competently.

(…continued)

either first-degree or third-degree robbery therefore may have rendered petitioner deportable. 8 USC § 1227(a)(2)(A)(i) and (iii).

[9] The record reflects that petitioner was facing trials on other charges following the trial at issue in this case. (Ex 102, Trial Tr 217-19).

Notwithstanding the absence of evidence of specific historical facts that would allow the legal conclusion that trial counsel's omission to request a third-degree robbery instruction resulted from the failure to exercise reasonable professional skill and judgment, the Court of Appeals affirmed the post-conviction court's ruling. It did so based on its assertion that the post-conviction court found as fact that trial counsel failed to consider requesting an instruction on third-degree robbery. *Pereida-Alba*, 252 Or App at 71. But the post-conviction court did not make that finding:

> In this case we have no testimony from trial counsel regarding why a lesser included instruction on Robbery III was not requested. As seen in the Pachl v. Zenon and Aquino v. Baldwin cases cited above, the lack of direct evidence has not slowed down the Court of Appeals on deciding such issues. In one case the Court searched the record and made its own determination if there might have been a reasonable strategy for the conduct and in the other it let the defendant simply argued the possibility of the existence of certain strategies.
>
> Given that Court of Appeals has not been deterred by the lack of direct evidence in such cases, neither shall I be.
>
> * * * *
>
> What happened in the office is in sharp dispute. If the store employees are to be believed, there was clearly a Robbery I. If the petitioner in this case is believed there was at most a Robbery II and maybe only a Theft. Short of evidence that petitioner in this case instructed trial attorney to take an "all or nothing" approach as she did

> (and there is not such evidence) I simply cannot imagine why defense counsel would not have at least asked for at least a Robbery III and probably should have asked for a simple Theft instruction as well.[10]

(ER 34-35). It is on that basis—that the court could not "imagine" why counsel would not have requested a third-degree robbery instruction—that post-conviction court granted relief. The court did not find, implicitly or explicitly, that trial counsel did not consider requesting a third-degree robbery instruction.

Moreover, even if the post-conviction court had made the factual finding that trial counsel did not consider requesting a third-degree robbery instruction, the evidence would not support it. Apart from the police reports, the only evidence in the post-conviction case consists of records from the direct criminal proceedings, and none of those records disclose the particular circumstances that led counsel not to request an instruction on third-degree robbery. The post-conviction court expressly recognized that point when it stated that there is no testimony or other "direct evidence" as to why counsel did not ask for an instruction on third-degree robbery. (ER 34-35).

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[10] Petitioner did not allege an ineffective-assistance-of-counsel claim predicated on counsel's omission to request a theft instruction. (ER 7-9). Presumably, if petitioner thought there was a basis for the claim, petitioner would have pleaded it as a ground for relief, along with the claim about the omission of the third-degree robbery instruction. But he did not, and, as a result, trial counsel's omission of a theft instruction cannot be the basis for a grant of relief.

Finally, even if the record could support a factual finding that trial counsel "failed to consider" asking for a third-degree robbery instruction, that factual finding would not permit the legal conclusion that trial counsel performed deficiently in this case. As noted above, counsel's approach to the case tracked the most intuitive, simple storyline of the case, and was an approach that had a reasonable chance of succeeding; there was no obvious, coherent way for trial counsel to present to the jury a theory as to why it could acquit on first-degree robbery and convict on third-degree robbery. True, it would have been possible for counsel to conjure up some theory of third-degree robbery and advocate to the jury that her client was guilty of third-degree robbery because he had threatened the use of physical force in some way that the prosecution had not identified. And maybe some lawyers would have taken that approach.[11] However, objectively reasonable counsel could "fail to consider" requesting a third-degree robbery instruction when it was so incompatible with the simple, reasonable approach to the case that petitioner's counsel did adopt. *Yarborough*, 540 US at 8 ("The issues counsel

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[11] Had petitioner's lawyer had taken that approach, and had petitioner been acquitted on first-degree robbery but convicted of third degree robbery, it is not inconceivable to think that petitioner might seek post-conviction relief under the theory that it was objectively unreasonable for counsel to request the third-degree robbery instruction, thereby depriving petitioner of an acquittal.

omitted were not so clearly more persuasive than those he discussed that their omission can only be attributed to a professional error of constitutional magnitude."). Again, the issue is not whether a hypothetical lawyer could have tried the case differently; the issue is whether petitioner's lawyer tried the case reasonably. *Krummacher*, 290 Or at 884. She did. The Court of Appeals' rationale for affirming the post-conviction court's ruling on counsel's performance thus provides no basis for sustaining the post-conviction court's ruling.

D. Petitioner also did not establish that he was prejudiced by the omission of an instruction on third-degree robbery.

The post-conviction court also erred when it concluded that petitioner was prejudiced by the omission of an instruction on third-degree robbery. Although the post-conviction court correctly concluded that the Court of Appeals' decision in *Trotter v. Santos*, 212 Or App 473, 157 P3d 1233 (2007), dictated the legal conclusion that the omission of the instruction on third-degree robbery prejudiced petitioner, *Trotter* applied an erroneous legal standard for prejudice. Under the correct legal standard, petitioner has not established that the omission of an instruction on third-degree robbery prejudiced him. As a result, the post-conviction court's decision should be reversed for that reason also.

1. Legal standards governing prejudice under Article I, section 11, and the Sixth Amendment.

As noted earlier, to establish the prejudice prong of an Article I, section 11, claim of inadequate assistance of counsel, a post-conviction petitioner must prove facts showing that trial counsel's deficient performance "had a tendency to affect the result of the prosecution." *Ryan v. Palmateer*, 338 Or 278, 294, 108 P3d 1127 (2005). To establish the prejudice prong of a Sixth Amendment claim of ineffective assistance of counsel, a post-conviction petitioner must prove facts demonstrating "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland*, 466 US at 694-95.

By its nature, assessing whether a deficiency by trial counsel affected the outcome of a criminal case in a way that undermines confidence in the outcome of the case requires a judicial act of imagination. A reviewing court must hypothesize how a criminal case would have ended had counsel performed competently. To guide and limit that act of conjecture, the Supreme Court has established a presumption that the judge and jury in that hypothetical, error-free case would act according to the law:

> In making the determination whether the specified errors resulted in the required prejudice, a court should presume, absent challenge to the

> judgment on grounds of evidentiary insufficiency, that the judge or jury acted according to law. An assessment of the likelihood of a result more favorable to the defendant must exclude the possibility of arbitrariness, whimsy, caprice, "nullification," and the like.

Strickland, 466 US at 695. The rationale for that presumption of a law-abiding factfinder (in a case where evidentiary sufficiency is not at issue) is simple: "[a] defendant has no entitlement to the luck of a lawless decisionmaker, even if a lawless decision cannot be reviewed." *Id.*

Put another way, the lost opportunity for a compromise verdict is not a constitutionally cognizable harm. That is because the core purpose of the constitutional right to counsel "is to ensure that a defendant has the assistance necessary to justify reliance on the outcome of the proceeding." *Strickland*, 466 US at 691-92. When there is no suggestion that a criminal defendant's conviction is not supported by the evidence, the fact that a criminal defendant has lost the opportunity to take advantage of "the luck of a lawless decisionmaker" does not undermine the reliability of the outcome of the defendant's criminal case, and thus cannot undermine a court's confidence that the defendant's conviction is a product of a constitutionally sound process.

Although this court has not addressed the issue, the rationale for presuming a law-abiding decisionmaker in the prejudice prong of a Sixth Amendment claim applies with equal force to the prejudice prong of an Article I, section 11, claim.

See State v. Davis, 350 Or 440, 461-477, 256 P3d 1075 (2011) (tracing development of state and federal constitutional rights to counsel; observing that rights generally paralleled one another). This court has recognized that the fundamental reason for affording a criminal defendant the right to counsel under either constitution is to ensure that the criminal defendant receives a fair and reliable trial. *Stevenson v. Holzman*, 254 Or 94, 99, 103-104, 458 P2d 414 (1969) ("the right to counsel is more essential to a fair trial than the right to a jury.") Because the lost opportunity for a "lawless decisionmaker" does not undermine the fairness or reliability of a defendant's criminal trial, it is not a cognizable harm for purpose of an Article I, section 11, claim. Therefore, in assessing prejudice in an Article I, section 11, claim, this court, like the Supreme Court, should presume that the hypothetical judge or jury would act according to the law, absent a challenge to the conviction on grounds of evidentiary insufficiency.

2. Petitioner was not prejudiced by the omission of the third-degree robbery instruction.

Under that legal test for prejudice, petitioner was not prejudiced by the omission of an instruction on third-degree robbery. Even if trial counsel had requested and the court had delivered the instruction (notwithstanding the instruction's poor fit with the facts), there is little likelihood that the instruction would have caused the jury to acquit on first-degree robbery and convict on third-

degree robbery. Neither the state nor trial counsel advocated in closing argument any theory that would suggest to the jury that it could convict on third-degree robbery, and petitioner did not allege below a claim that trial counsel was inadequate or ineffective for not arguing to the jury that it should convict on third-degree robbery. The only claim is that trial counsel should have requested the instruction. But detached from a coherent, articulated theory as to why the jury could acquit on first-degree robbery and convict on third-degree robbery, the instruction only would have confused the jury.

Moreover, even if trial counsel had argued to the jury that it should convict of third-degree robbery based on the evidence of the struggle, and the court had instructed the jury on third-degree robbery, the jury still would not have acquitted on first-degree robbery. Ten members of the jury found beyond a reasonable doubt that petitioner threatened Schmitz with the firearm. Based on that finding, the jury would have convicted of first-degree robbery and would not even have considered third-degree robbery. In accordance with ORS 136.460(2)— on which the jury would have been instructed, and which this court should presume that the jury would have followed—the jury would have considered third-degree robbery only if it acquitted of first-degree robbery. ORS 136.460(2) ("Only if the jury finds the defendant not guilty of the charged offense may the jury consider a lesser-included offense.").

For that reason, other courts to have considered the question have concluded that a post-conviction petitioner cannot establish prejudice under the circumstances present here. As the Washington Supreme Court recently explained, "Assuming, as this court must, that the jury would not have convicted [defendant] of second degree murder unless the State had met its burden of proof, the availability of a compromise verdict would not have changed the outcome of [defendant's] trial." *Grier*, 246 P3d at 1274; *see also Autrey*, 700 NE2d at 1142 (no prejudice from failure to request lesser included instruction; where jury convicted defendant of greater offense, and the evidence supported that conviction, there is no reason to think that instruction on the lesser offense would cause jury to have reasonable doubt about defendant's guilt on the greater offense). This court should likewise conclude that petitioner here was not prejudiced by the omission of the instruction on third-degree robbery. There is no reason to think that an instruction on third-degree robbery would have caused the jurors to have reasonable doubt as to whether petitioner threatened Schmitz with a gun; the omission of that instruction thus had no tendency to affect the verdict.

The Court of Appeals nonetheless concluded otherwise. In so doing, it relied on a series of direct appeal cases in which the Court of Appeals held that a trial court's erroneous failure to give a lesser-included instruction was not harmless error. *Pereida-Alba*, 252 Or App at 72-73. But harmless error under Article VII

(Amended), Section 3, of the Oregon Constitution, is not the same thing as prejudice on an inadequate-assistance-of-counsel claim. The two analyses differ fundamentally. Under the harmless error doctrine, an appellate court must reverse unless it can determine affirmatively that an error had "'little likelihood' of affecting the verdict." *State v. Lupoli*, 348 Or 346, 366 n 11, 234 P3d 117 (2010). That means that if an appellate court cannot tell whether or not the error affected the verdict, *i.e.*, cannot tell "whether the judgment of the court appealed from was such as should have been rendered in the case," it cannot deem the error harmless. Or Const Article VII (Amended), section 3; *State v. Link*, 346 Or 187, 202-203, 208 P3d 936 (2009).

By contrast, to conclude that a petitioner was prejudiced by an act or omission of counsel in a collateral challenge to a conviction, a post-conviction court must be able to conclude affirmatively that there is a reasonable likelihood that an act or omission by counsel did affect the verdict. That means that if a court cannot tell whether the verdict likely was affected, the petitioner has not established prejudice. In each instance, the party with the burden of proof bears the risk of the court not being able to ascertain whether an alleged error, act or omission affected the jury's verdict.

By conflating the prejudice prong of a claim of inadequate or ineffective assistance of counsel with harmless error analysis, the Court of Appeals applied the

wrong legal standard and came to the incorrect conclusion that petitioner was prejudiced by the omission of a lesser-included instruction. As explained above, the facts in this case do not permit the affirmative conclusion that omission of an instruction on third-degree robbery had a tendency to affect the verdict by causing the jury to convict petitioner on first-degree robbery when it otherwise would have acquitted on that charge. As a result, petitioner is not entitled to post-conviction relief, and the decision of the post-conviction court should be reversed.

CONCLUSION

In the end, the fact that petitioner's trial lawyer did not request a third-degree robbery instruction, standing alone, does not permit the legal conclusion that "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." *Strickland*, 466 US at 686. The grant of relief should be reversed.

Respectfully submitted,

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NOTICE OF FILING AND PROOF OF SERVICE

I certify that on May 16, 2013, I directed the original Brief on the Merits of Petitioner on review to be electronically filed with the Appellate Court Administrator, Appellate Records Section, and electronically served upon Erin K. Galli, attorney for Respondent on Review, by using the court's electronic filing system.

CERTIFICATE OF COMPLIANCE WITH ORAP 5.05(2)(d)

I certify that (1) this brief complies with the word-count limitation in ORAP 5.05(2)(b) and (2) the word-count of this brief (as described in ORAP 5.05(2)(a)) is 9327 words. I further certify that the size of the type in this brief is not smaller than 14 point for both the text of the brief and footnotes as required by ORAP 5.05(2)(b).

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