IN THE SUPREME COURT OF THE STATE OF OREGON

MICHAEL SCOTT BLACK, Petitioner-Appellant, v. MARK NOOTH, Superintendent, Snake River Correctional Institution, Defendant-Respondent.	Malheur County Circuit Court Case No. 12069499P CA A156862 S064152

BRIEF ON THE MERITS OF PETITIONER ON REVIEW

Review of the decision of the Court of Appeals
on an appeal from a judgment of the Circuit Court
for Malheur County
Honorable Linda L. Bergman, Senior Circuit Court Judge

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Filed 10/16

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PETITIONER'S BRIEF ON THE MERITS

STATEMENT OF THE CASE

This post-conviction case raises the issue of whether petitioner's trial counsel at his underlying criminal trial was ineffective and inadequate for failing to object to the prosecutor's closing argument that commented on the petitioner's invocation of his right to remain silent.

Petitioner was charged with sexual offenses against an allegedly physically helpless victim. At trial, the case essentially boiled down to a credibility contest between the victim and petitioner. In closing argument, the prosecutor argued that petitioner's failure to tell the police his side of the story until trial suggested he was guilty. Trial counsel did not object.

The issue before this court involves two related inquiries. First, whether the prosecutor's comment during closing argument was improper. Second, if it was, whether petitioner's trial counsel was ineffective and inadequate for failing to object and whether that failure prejudice petitioner. The prosecutor's comment here exceeded the bounds of acceptable argument by suggesting the jury consider petitioner's invocation for an impermissible purpose, specifically to infer that he is not credible and is guilty. Trial counsel was ineffective and inadequate for failing

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to object to the impermissible comment. The failure to object prejudiced petitioner because the prosecutor's improper closing argument could have affected the outcome of the jury's deliberations.

Question Presented and Proposed Rule of Law

Question Presented:

In what circumstances is a criminal defense trial attorney ineffective and inadequate under Article I, section 11, of the Oregon Constitution and the Sixth Amendment to the United States Constitution for failing to object to a prosecutor's closing argument that the defendant is not credible because, prior to being arrested, he invoked his right to remain silent?

Proposed Rule of Law:

A criminal defense attorney, exercising reasonable professional skill and judgment, would object when a prosecutor impermissibly comments on a defendant's invocation of his right to remain silent in circumstances in which the jury is likely to infer the defendant's guilt from the prosecutor's argument. A prosecutor can comment on the fact that the defendant invoked his rights, if doing so is necessary to impeach a factual assertion from the defendant's testimony. However, the prosecutor's argument is impermissible if it goes beyond that and urges the jury to infer the defendant's guilt based on his invocation.

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Summary of Argument

A criminal defendant is constitutionally entitled to effective and adequate assistance of counsel. Under Article I, section 11, of the Oregon Constitution and the Sixth and Fourteenth Amendments to the United States Constitution, a criminal defense attorney is ineffective and inadequate if (1) the attorney fails to exercise reasonable professional skill and judgment, and (2) the failure to do so prejudices the defendant.

A criminal defense attorney, exercising reasonable professional skill and judgment, would object when a prosecutor impermissibly comments on a defendant's invocation of his right to remain silent. A prosecutor can comment on the fact that the defendant invoked his rights, if doing so is necessary to clear up a misapprehension of the facts given by the defendant's testimony. However, the prosecutor's argument is impermissible if it goes beyond that and urges the jury to infer the defendant's guilt based on his invocation. A defendant's right to adequate and effective assistance of counsel is violated when a defense attorney fails to protect a defendant from the likelihood that the jury will improperly infer guilt based on the exercise of the constitutional right to remain silent.

Here, the prosecutor argued that petitioner's version of events at trial was not credible, in part because he invoked his right to remain silent before he was

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arrested and did not tell the police his version of what happened. The prosecutor impermissibly commented on petitioner's invocation, and his trial attorney was ineffective and inadequate for failing to object. The ineffective and inadequate advocacy likely affected the outcome of the proceedings because this case was essentially a credibility contest, and the prosecutor's argument invited the jury to find petitioner not credible based on an impermissible criterion, specifically the exercise of his constitutional rights.

Statement of Historical and Procedural Facts

I. Facts from Criminal Proceedings

In Washington County case no. C092113CR, a grand jury indicted petitioner with rape in the first degree (Count 1) and two counts of sexual abuse in the first degree (Counts 2-3), all alleging as the victim. Ex 1 (indictment).

At trial, the state presented evidence that one night, went to a bar with her son, and his fiancée, Black. Ex 12 (trial transcript) at Tr 57-58. Meanwhile, petitioner, who is Black's brother, stayed at their house to babysit and Black's children. Ex 12 at Tr 121-23. had several drinks at the bar and became intoxicated. Ex 12 at Tr 58-60. She returned to home and fell asleep in one of the children's rooms. Ex 12 at Tr 61-63, 120-21.

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woke up to find petitioner "having sex with [her] * * * from behind vaginally." Ex 12 at Tr 65. turned over as she was waking up from her "dream state," and petitioner gave her "a real quick kiss," and then "sucked on [her] left breast" "real quick [and] very hard." Ex 12 at Tr 63-64. "jumped up and ran out" of the room and went to sleep in another room. Ex 12 at Tr 64, 68-69. did not consent to having sexual contact with petitioner. Ex 12 at Tr 67. reported the incident to her son and the police the next day. Ex 12 at Tr 69-72. A DNA swab of breast contained a DNA profile that matched petitioner. Ex 12 at Tr 216-17. There was no DNA test performed on a vaginal swab because there was no sperm present on the sample. Ex 12 at Tr 216.

Petitioner testified that he had been babysitting, but that earlier in the evening his girlfriend had also been present at the house. Ex 12 at Tr 307-08. After the parents left, petitioner and his girlfriend had sex two times, without using a condom, and then petitioner's girlfriend left to go home. Ex 12 at Tr 309-11. Petitioner acknowledged going into the same bedroom as but said they talked for a bit and then "we just ended up – our lips started touching, you know, we both moved in and our lips started touching each other so we started kissing at that point." Ex 12 at Tr 320. Petitioner started to suck on breast, but

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then she got up and left the room. Ex 12 at Tr 321. Petitioner testified that the police contacted him six months later to get his DNA sample:

> "Six months later, after not hearing anything, I had the same phone number, lived in the same address, you know, talked to my sister on a regular basis, even hung out with her, she came to my house, you know, everybody knew where I lived, you know, didn't change nothing about myself, was still working, and yeah, they came over and they said, 'We have a search warrant to get some DNA.'"

Ex 12 at Tr 323-24.

On cross-examination, the prosecutor asked why petitioner did not talk to the police before he was arrested:

> "Q * * * So you knew that there was an active investigation going on involving – involving you as a suspect in a rape case?
>
> "A Not necessarily because, like I said, I had heard through the grapevine that the cops had been called, so I was like, okay, well, then, since she wants to accuse me of this, I'm probably going to get arrested. That was a logical way of thinking about it; it didn't happen, so I figured, okay, then there's nothing going on, it's done, it's over with, she finally is telling the truth that that didn't happen, and I can move on.
>
> "And then six months later, the DNA people came.
>
> "Q But the police were actively trying to contact you, weren't they, [petitioner]?
>
> "A No, sir. After six months, that's the first contact that there was –
>
> "Q December –

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"A -- and there's a knock – a knock on my door.

"Q December, January?

"A Nothing.

"Q Not even once?

"A Not even once.

"Q Not a business card?

"A Not a business card.

"Q Not a phone call?

"A Not a phone call.

"Q You didn't call –

"A No e-mails –

"Q -- Detective Scott?

"A Nothing.

"Q I'm sorry, I didn't hear what you said.

"A No e-mails, nothing.

"Q I didn't ask about e-mails. No – you didn't leave a message, a voice message for the detective on the case?

"A No, sir.

"Q You're sure about that?

"A Yes, sir.

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"Q Okay. So why did you have an attorney contact the police officer?

"* * * * *

"* * * In March, early March, about three months after the incident occurred?

"A The reason I did that was my father actually suggested it, he just told me, he said, you know, you should just have a lawyer, you know. I said, 'Okay, what do I need one for?' he said, 'It's always better to have one,' so I said, 'Okay. But I don't think anything's going on, I haven't heard anything, nothing,' so I just – young, listened to my father's advice, I don't know.

"Q So you knew that the – you heard the cops had been called?

"A Yes, sir.

"Q So you knew – you figured there was some risk that you could get arrested for something?

"A Yes, sir.

"Q And the police had – never even contacted you between November 22nd and the DNA – the DNA time, right?

"A That's what I remember – I don't remember any phone calls or anything, no.

"Q Okay. No – none of your friends or relatives said, 'Hey, the cops are moseying around looking for you?'

"A No, sir.

"Q Nothing at all?

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"A No, sir.

"Q Okay. And so let's see, December, January, February –

"A Yes, sir.

"Q -- after three months of absolutely no police activity that you could discern, you decide to have Attorney Cogan write a letter to the police detective?

"A He had suggested that because again, my father persuaded me, said, 'You should have an attorney just in case something does,' and I was like, 'Well, but I haven't heard anything so why should I get – get an attorney,' you know, he said, 'Like I said, it's always better to have one just in case something does arrive unexpectedly.'

"So I don't know if he maybe had heard something at that point that I was unaware of, I'm not sure, I don't know. But he suggested it, and I just listened to him.

"Q And you made a choice in this case – just so we're all clear – to not talk to the police, is that right?

"A Yes, sir.

"Q So the first time that anybody's heard your version of these events was – at least apart from what we heard on the jail calls – today?

"A Yes, sir."

Ex 12 at Tr 374-77.

As a rebuttal witness, the state called Officer Scott, who testified that after the incident was reported in November 2008, he made several attempts to contact

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petitioner. Ex 12 at Tr 413-14. In response, about a month and a half before the police took a DNA sample, the officer received "a message from [petitioner] letting me know that in no uncertain terms that he didn't wish to speak to – with me and that he had retained legal counsel." Ex 12 at Tr 414.

Arguing the case to the jury, the state emphasized that the case was a credibility contest. *See* Ex 12 at Tr 28 (during opening, arguing that petitioner's "statements are somewhat significant in this case"); Ex 12 at Tr 526 (during closing, arguing that "[i]n order to explain a not guilty verdict in this case, you would have to say things like, 'I didn't believe the victim,'" "[o]r 'I believed the defendant's testimony[,]' [o]r a combination of those two things").

The state emphasized that petitioner did not give a full statement of his version of events until trial. Ex 12 at Tr 450, 457. The state also mentioned petitioner not talking to the police:

> "Who do we know that lied for sure? Who can we say without any doubt told – got caught in one big fat whopper today? The defendant. He, for reasons unknown, decided that he was going to adamantly insist that he never was contacted by the police in the days and weeks following this incident. 'No, I didn't get – they never tried to contact me, I never – I never talked to them, absolutely not.'
>
> "He wasn't trying to avoid anybody or avoid giving a statement in this case. That's not true, he spoke to the detective on the phone. He contacted an attorney and had the attorney write letters. This young man knew he was under active police investigation in the early part of December 2008 and early 2009. He didn't want to talk to the

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> police; he was refusing to give a statement, and he told Detective Scott that. Now, he apparently forgot or lied about it, and I suggest to you that he lied because you're not going to forget something like that.
>
> "* * * * *
>
> "* * * [T]his is different than a full confession case, this is a case where we have a young man facing a – a young man in a pickle because he's facing a very credible sexual assault allegation, and a young man who for reasons known only to him, refuses to give a statement to the police, and – and that's his right, but he refused to give one and so we're left with sort of cobbling together what we can[.]"

Ex 12 at Tr 520, 522.

The jury found petitioner guilty of Count 1 (rape in the first degree) and Count 2 (sexual abuse in the first degree, based on "Touching of breast – physical helplessness"), and not guilty of Count 3 (sexual abuse in the first degree, based on "Touching of breast – forcible compulsion"). Ex 9 (findings and order from jury trial); Ex 10 (verdict). The court sentenced petitioner to 100 months' incarceration for Count 1 and 75 months' incarceration for Count 2, to be served concurrently and to be followed by 20 years of post-prison supervision, minus time served. Ex 11 (judgment).

II. Facts from Post-Conviction Proceeding

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In his formal petition for post-conviction relief, petitioner alleged that his trial counsel was inadequate and ineffective under the state and federal constitutions as follows:

> "[16(l)] Failed to object to the state commenting on petitioner's right to remain silent. Petitioner did not make any statements to police when he was initially interviewed. During closing the prosecutor commented that petitioner did not give a statement to anyone until he testified at trial. This was an impermissible comment on petitioner's right to remain silent and prejudiced the jury against petitioner."

App Br at ER-5.

The court denied relief in a written judgment and explained its ruling as follows:

> "* * * Pet testified that he decided not to talk to police. DA impeached him with testimony that police never tried to call to him. DA argued that pet had plenty of time after he got the discovery and that he saved it for trial but that V had been consistent from beginning. DA didn't argue that he didn't talk to police, but that jail calls inconsistent with testimony.
>
> "* * * * *
>
> "* * * No inadequacy, no prejudice by trial att."

App Br at ER-9.

Petitioner appealed and assigned error to the court's denial of relief on the claim that petitioner's trial counsel offered inadequate and ineffective assistance of counsel when he failed to object to the state commenting on petitioner's right to

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remain silent. The Court of Appeals affirmed without opinion. *Black v. Nooth*, 277 Or App 135, 370 P3d 564, *rev allowed*, 360 Or 235, __ P3d __ (2016).

Argument

This case involves the intersection of related questions: whether a prosecutor's closing argument is improper, and, if so, whether a criminal defense trial attorney is ineffective and inadequate for failing to object. In this case, the prosecutor impermissibly commented on petitioner's right to remain silent by arguing to the jury that it should infer petitioner's guilt from not talking to the police. In the circumstances of this case, petitioner's trial counsel should have objected and was ineffective and inadequate for not doing so.

I. Applicable legal principles

a. A criminal defendant is constitutionally entitled to effective and adequate representation.

A post-conviction petitioner is entitled to relief if he establishes a "substantial violation" of his "rights under the 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). Article I, section 11, of the Oregon

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Constitution[1] guarantees a criminal defendant *adequate* assistance of counsel. *Krummacher v. Gierloff*, 290 Or 867, 872, 627 P2d 458 (1981). Similarly, the Sixth and Fourteenth Amendments of the United States Constitution[2] require that all criminal defendants receive *effective* assistance of counsel. *Strickland v. Washington*, 466 US 668, 687, 104 S Ct 2052, 80 L Ed 2d 674 (1984). This court has noted that the standards are "functionally equivalent." *Montez v. Czerniak*, 355 Or 1, 6-7, 322 P3d 487 (2014).

A court should grant a petitioner post-conviction relief under ORS 138.530(1)(a) if the petitioner proves by a preponderance of evidence (1) "facts demonstrating that trial counsel failed to exercise reasonable professional skill and judgment," and (2) "that petitioner suffered prejudice as a result." *Trujillo v. Maass*, 312 Or 431, 435, 822 P2d 703 (1991). Under Article I, section 11, a petitioner establishes prejudice by showing that counsel's deficient performance "'*could have tended to affect*' the outcome of the case." *Green v. Franke*, 357 Or 301, 323, 350 P3d 188 (2015) (quoting *Lichau v. Baldwin*, 333 Or 350, 365, 39

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[1] Article I, section 11, provides in part that "[i]n all criminal prosecutions, the accused shall have the right * * * to be heard by himself and counsel."

[2] The Sixth Amendment guarantees that "[i]n all criminal prosecutions, the accused shall enjoy the right * * * to have the Assistance of Counsel for his defence."

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P3d 851 (2002); emphasis in *Green*). Under the Sixth Amendment, a counsel's ineffectiveness prejudices a petitioner if there is a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 US at 694. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.*

This court reviews post-conviction proceedings for errors of law. *Peiffer v. Hoyt*, 339 Or 649, 660, 125 P3d 734 (2005). This court is bound by a post-conviction court's "findings of historic facts that are supported by evidence in the record." *Lichau*, 333 Or at 359. Further, "'if findings are not made on all such facts, and there is evidence from which such facts could be decided more than one way, we will presume that the facts were decided in a manner consistent with the [post-conviction court's] ultimate conclusion.'" *Id.* (quoting *Ball v. Gladden*, 250 Or 485, 487, 443 P2d 621 (1968)). However, "[i]f an implicit factual finding is not necessary to a trial court's ultimate conclusion or is not supported by the record, then the presumption does not apply." *Pereida-Alba v. Coursey*, 356 Or 654, 671, 342 P3d 70 (2015).

b. The state cannot ask the jury to infer a defendant's guilt based on his invocation of the right to remain silent.

The right to remain silent is protected by both the Oregon and United States Constitutions. *State v. Wederski*, 230 Or 57, 62, 368 P2d 393 (1962) (Article I,

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section 12); *Griffin v. California*, 380 US 609, 615, 85 S Ct 1229, 14 L Ed 2d 106 (1965) (Fifth and Fourteenth Amendments). "[T]he Oregon Constitution does not permit a prosecutor to draw the jury's attention to a defendant's exercise of the right to remain silent." *State v. Larson*, 325 Or 15, 22, 933 P2d 958 (1997). The federal constitution also prohibits a prosecutor from commenting on a defendant's invocation of the right to remain silent. *Griffin*, 380 US at 615.

i. Article I, section 12, prohibits comments on a defendant's invocation of his right to remain silent that would deprive the defendant of a fair trial.

In *Wederski*, this court addressed a denial of a motion for mistrial based on improper closing argument. 230 Or at 59. The prosecutor argued, "You know that there are certain rules of evidence and certain requirements before we can use an expert witness. Mr. Clair Alderson, if any of you are familiar, sat through the entire trial and the right situation didn't present itself so that we could get his testimony on. You recall there was no denial by Mr. Wederski that that was his handwriting or perhaps we might have used our expert witness." *Id.* at 60. The court denied the defendant's motion for mistrial based on the prosecutor both asking the jury to consider evidence a state's witness might have testified to, and because the prosecutor "at least indirectly commented upon the defendant's failure to take the stand." *Id.*

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On appeal, this court held that the prosecutor's comment unlawfully infringed on the defendant's right to remain silent:

> "The state's reference to the defendant's failure to deny the forgeries, innocently though it may have been intended, could not have gone unnoticed by a jury which had waited in vain through two days of trial for the defendant to take the stand so they could hear what he had to say about the case. Article I, § 12, of the Oregon Constitution guarantees the privilege of the defendant to remain silent. The privilege is meaningless if the state may refer to the defendant's silence with impunity."

Id. at 62.

In *State v. Smallwood*, 277 Or 503, 561 P2d 600 (1977), this court set forth a standard of review for a trial court's denial of a mistrial motion based on a prosecutor's reference to the defendant's invocation of his right to remain silent:

> "There is no doubt that it is usually reversible error to admit evidence of the exercise by a defendant of the rights which the constitution gives him if it is done in a context whereupon inferences prejudicial to the defendant are likely to be drawn by the jury. If, however, there was no likelihood of prejudicial inferences in this case, the evidence would be relevant and admissible * * *. The prosecution did not argue to the jury that any particular inference should have been drawn, and the trial court specifically cautioned the jury not to draw any inference as to defendant's guilt or innocence. Nonetheless, it is our duty to inquire whether it was likely that the jury would draw an inference prejudicial to defendant."

Id. at 505-06.

In *Smallwood*, the defendant was charged with murder and asserted the defense of extreme mental or emotional disturbance. *Id.* at 505. The state had the

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defendant examined by a psychiatrist, and during trial the psychiatrist testified that the defendant had invoked his right to have an attorney and not answer questions. *Id.* This court noted that the "usual inference" to be drawn – that the defendant asserted his rights because he "must have performed the actions charged" – did not prejudice the defendant, because from the outset the defendant had admitted committing "the act of killing." *Id.* at 506-07. Another negative inference – that the defendant was afraid "the psychiatrist would find that he was shamming in his claim of mental disturbance" – did not seem likely, because the defendant submitted "to an otherwise complete psychiatric interview and later to examination on the witness stand." *Id.* at 507. Thus, on the facts of that case, this court concluded that the mistrial motion was properly denied because "it is unlikely that any inferences adverse to defendant were drawn from the testimony which disclosed that he asserted his constitutional rights." *Id.* at 509.

In *State v. White*, 303 Or 333, 336, 736 P2d 552 (1987), the defendant had previously been called as a witness in a co-defendant's trial, but he invoked his right to not be compelled to be a witness against himself and did not testify. At his own trial, the defendant's counsel told the jury the defendant would testify. *Id.* During opening statement, the prosecutor said, "Well during that [co-defendant's] trial the Defendant – you have heard he is going to testify here – the Defendant

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testified, or was called to testify but refused to do so." *Id.* The trial court denied the defendant's timely motion for a mistrial, but gave a curative instruction to the jury. *Id.* at 336-38.

On review, this court noted that the prosecutor "deliberately chose to offend the rules." *Id.* at 341. This court also noted the "'presumably harmful effect'" of prosecutorial misconduct. *Id.* at 342 (quoting *Wederski*, 230 Or at 60). This court reversed the convictions, finding the prosecutorial misconduct prevented the defendant from receiving a fair trial. *Id.* at 343-44.

In *State v. Farrar*, 309 Or 132, 786 P2d 161 (1990), the prosecutor argued during closing argument that a defense alibi witness, Oliver, was not credible:

> "But even more than that, does it make sense? Does it violate your own common sense that this story that Mr. Oliver in the penitentiary in June of 1986 now sees his old buddy, the defendant. Only seen each other on February 25th and then back in 1980, '81. We know that's a lie. But he sees his old buddy. And now he knows his old buddy has been indicted for Aggravated Murder; but not just that, he's facing the death penalty.
>
> "Well, does the defendant say all right, you know, I've got my alibi witness, they made a mistake. Let me go send that to the Grand Jury or let me send that to the District Attorney; show them that this -- they made a mistake. Did they do that?
>
> "Didn't do it in June, didn't do it in July, didn't do it in August, didn't do it in September. And you remember, Mr. Oliver got kind of angry; I didn't do it the rest of the month either."

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Id. at 165. This court held that the defendant's timely motion for mistrial was properly denied, because "the prosecutor's inadvertent reference to defendant, rather than Oliver," was not likely to prejudice the defendant's right to a fair trial: "The focus of the prosecutor's argument, both immediately before and after the objectionable comments, was to attack Oliver's credibility and Oliver's failure until January 1987, to tell anyone that he had been with defendant on the night of [the victim's] murder. The prosecutor properly cross-examined Oliver on this topic and properly commented on it in closing argument." *Id.* at 167. This court also described the prosecutor's statement as "[o]bviously" a "non-prejudicial slip of the tongue." *Id.*

In *State v. Larson*, 325 Or at 17, the defendant was representing himself *pro se* in a jury trial. During the defendant's examination of a witness, the prosecutor objected based on hearsay, and the defendant noted that he had given notice of the intent to rely on an alibi defense. *Id.* at 20. The prosecutor responded, "[Defendant] can always get up and testify himself if he wants to establish alibi." *Id.* The trial court denied the defendant's motion for a mistrial based on the prosecutor's comment. *Id.* at 22.

This court reviewed the error under an abuse-of-discretion standard. *Id.* at 22. This court held that the "prosecutor's comment on defendant's failure to

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testify was improper," and therefore granting a mistrial would have been a "permissible" choice. *Id.* at 23. However, on the facts of that case, this court concluded it was "closer to *Farrar* and *Smallwood* than to *White* and *Wederski*":

> "[T]he context of the prosecutor's improper comment was not one in which inferences prejudicial to defendant were likely to have been drawn by the jury. The prosecutor made only a single reference to defendant's ability to testify. Although the jury was present, the comment was directed to the judge, not to the jury. The prosecutor made that comment apparently in frustration, in the context of objecting to defendant's repeated attempts to introduce inadmissible hearsay. Under those circumstances, the trial court was faced with a question that it could decide either way."

Id. at 24-25.

In short, this court's cases recognize that a prosecutor's comment on a defendant's exercise of the right to remain silent – whether by invoking or choosing to not address the jury – is improper. However, on review under an abuse-of-discretion standard, the outcome depends on the circumstances of the individual case, including the apparent motive of the prosecutor in making the comment and the importance of the invocation to the facts of the case.

ii. The Fifth Amendment prohibits comments on a defendant's invocation of his rights if the purpose is to suggest evidence of guilt.

The United States Supreme Court has referred to the privilege against self-incrimination as "one of the great landmarks in man's struggle to make himself

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civilized." *Ullmann v. United States*, 350 US 422, 426, 76 S Ct 497, 100 L Ed 511 (1956). The privilege reflects "our preference for an accusatorial rather than an inquisitorial system of criminal justice." *Murphy v. Waterfront Comm'n*, 378 US 52, 55, 84 S Ct 1594, 12 L Ed 2d 678 (1964). In *Griffin*, the Supreme Court noted that commenting on the refusal to testify "is a penalty imposed by courts for exercising a constitutional privilege" and "cuts down on the privilege by making its assertion costly." 380 US at 614. The court held that the Fifth Amendment "forbids either comment by the prosecution on the accused's silence or instructions by the court that such silence is evidence of guilt":

> "It is said, however, that the inference of guilt for failure to testify as to facts peculiarly within the accused's knowledge is in any event natural and irresistible, and that comment on the failure does not magnify that inference into a penalty for asserting a constitutional privilege. What the jury may infer, given no help from the court, is one thing. What it may infer when the court solemnizes the silence of the accused into evidence against him is quite another."

Id. at 614-15 (citation omitted). *See Baxter v. Palmigiano*, 425 US 308, 319, 96 S Ct 1551, 47 L Ed 2d 810 (1976) ("*Griffin* prohibits the judge and prosecutor from suggesting to the jury that it may treat the defendant's silence as substantive evidence of guilt.").

Despite that prohibition, however, "prosecutorial comment must be examined in context." *United States v. Robinson*, 485 US 25, 33, 108 S Ct 864, 99

L Ed 2d 23 (1988). For instance, in *Robinson* the court held that a prosecutor may "advert[]" to a defendant's silence if he or she is "fairly responding to an argument of the defendant." *Id.* at 34. *See also United States v. Martinez-Larraga*, 517 F3d 258, 268 (5th Cir 2008) (recognizing the "open the door" exception but also "recognizing that it does not permit the prosecution to argue" that a jury should infer the defendant's guilt based on post-arrest silence); *United States v. Gant*, 17 F3d 935, 941 (7th Cir 1994) ("[T]he government may use [a] defendant's silence for the limited purpose of impeaching his testimony; it may not argue that the defendant's silence is inconsistent with his claim of innocence."). Courts also draw a distinction between commenting on a defendant's silence, which is improper, and commenting on the defense more generally, which is proper. *See United States v. Mayans*, 17 F3d 1174, 1185 (9th Cir 1994) (noting that "courts have maintained a distinction between comments about the lack of explanation provided by the *defense*, and comments about the lack of explanation furnished by the *defendant*") (emphasis in original).

II. A criminal defense trial attorney exercising reasonable professional skill and judgment would object when a prosecutor improperly comments on the defendant's invocation of his right to remain silent.

This case arises in the context of a post-conviction relief claim, in which the first question is whether a criminal defense attorney, exercising reasonable professional skill and judgment would have objected to the prosecutor's closing

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argument. The analysis should consider not only the potential merit of the argument, but also the duties that a trial attorney owes to the defendant. "There is no single, succinct, clearly defined standard for determining adequacy of counsel." *Stevens v. State*, 322 Or 101, 108, 902 P2d 1137 (1995). However, this court has provided guidance as to general principles that apply to trial counsel's performance.

A criminal defense attorney must "prepare himself on the law to the extent appropriate to the nature and complexity of the case." *Krummacher*, 290 Or at 875. Such preparation would entail, at the least, being able to recognize when a prosecutor's argument is violating the defendant's constitutional rights.

A failure to raise a meritorious objection is not *per se* ineffective assistance of counsel, because it must be viewed in light of the overall defense strategy. *Green*, 357 Or at 319-20 ("[E]ven where a cost-benefit inquiry suggests that counsel's failure to seek a limiting instruction was deficient, the question remains whether the omission constituted inadequate assistance of counsel, particularly when viewed in light of the strategy that counsel did pursue."). However, the failure to even consider raising an issue can constitute ineffective assistance of counsel. *See Pereida-Alba*, 356 Or at 674 ("[W]hether the failure to consider an issue constitutes inadequate assistance will turn on, among other things, whether

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the strategy that defense counsel did employ was reasonable, the relationship between the evidence or theory that defense counsel failed to consider and the strategy that counsel did pursue, and the extent to which counsel should have been aware of the strategy that petitioner now identifies."). "Errors which result from a failure to use the professional skill and judgment for which the lawyer is employed cannot be characterized as tactical choices." *Krummacher*, 290 Or at 875.

Trial attorneys also have a duty to (in some cases) raise unsettled issues of law, to preserve the defendant's rights for appeal. *See Burdge v. Palmateer*, 338 Or 490, 499, 112 P3d 320 (2005) ("In at least some cases, a lawyer's failure to present an unsettled question may be inadequate assistance of counsel"); *Davis v. Sec'y for the Dep't of Corr.*, 341 F3d 1310, 1313-17 (11th Cir 2003) (holding that trial counsel was ineffective under *Strickland* for failing to preserve a meritorious issue that would have been successful on appeal had it been properly preserved). Similarly, appellate counsel has a duty to raise properly preserved, meritorious issues on appeal. *See Guinn v. Cupp*, 304 Or 488, 496, 747 P2d 984 (1987) (holding that appellate counsel is inadequate if the petitioner establishes "that a competent appellate counsel would have asserted the claim" and that the petitioner "was prejudiced"); *Suggs v. United States*, 513 F3d 675, 679-80 (7th Cir 2008) (holding that appellate counsel was ineffective for failing to raise properly

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preserved, meritorious issue). Together, these principles suggest a duty of trial attorneys to not only raise meritorious issues before the trial court, but also to properly preserve them for appellate counsel to raise.

In this case, the foregoing principles should have led petitioner's trial counsel to object to the prosecutor's closing argument. Petitioner testified that the police eventually contacted him for a DNA sample, after six months of "not hearing anything." Ex 12 at Tr 323-24. The cross-examination of petitioner by the prosecutor emphasized three points: (1) petitioner had no contact with the police until six months after the incident, (2) three months after the incident petitioner's lawyer wrote a letter to the police, and (3) essentially the first anyone heard of petitioner's version of events was his testimony at trial. Ex 12 at Tr 374-77.

As a rebuttal witness, the state called Officer Scott, who testified that he made several attempts to contact petitioner after the incident, and that he received a message from petitioner after taking the DNA sample that petitioner had retained counsel and did not want to talk to the police. Ex 12 at Tr 413-14.

The prosecutor's closing argument emphasized petitioner's decision to not talk to police:

> "Who do we know that lied for sure? Who can we say without any doubt told – got caught in one big fat whopper today? The defendant. He, for reasons unknown, decided that he was going to adamantly insist that he never was contacted by the police in the days

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> and weeks following this incident. 'No, I didn't get – they never tried to contact me, I never – I never talked to them, absolutely not.'
>
> "He wasn't trying to avoid anybody or avoid giving a statement in this case. That's not true, he spoke to the detective on the phone. He contacted an attorney and had the attorney write letters. This young man knew he was under active police investigation in the early part of December 2008 and early 2009. He didn't want to talk to the police; he was refusing to give a statement, and he told Detective Scott that. Now, he apparently forgot or lied about it, and I suggest to you that he lied because you're not going to forget something like that.
>
> "* * * * *
>
> "* * * [T]his is different than a full confession case, this is a case where we have a young man facing a – a young man in a pickle because he's facing a very credible sexual assault allegation, and a young man who for reasons known only to him, refuses to give a statement to the police, and – and that's his right, but he refused to give one and so we're left with sort of cobbling together what we can[.]"

Ex 12 at Tr 520, 522.

Petitioner's testimony may have opened the door to cross-examination about the fact of his invoking the right to remain silent. However, the prosecutor was only allowed to "fairly respond" to petitioner's argument. Therefore, in the first portion of the prosecutor's argument excerpted above, the prosecutor permissibly discussed petitioner's testimony about invoking his rights, because it was factually divergent from the testimony of Officer Scott. That is, there was a dispute about whether the police attempted to contact petitioner after the incident was initially

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reported. In that context, the prosecutor's argument fairly responded to petitioner's testimony.

The second portion of the prosecutor's argument exceeded the bounds of acceptable argument and impermissibly commented on petitioner's invocation. The prosecutor did not respond to petitioner's testimony, but instead suggested that petitioner should be found not credible because of his decision to not talk to the police. The prosecutor pointed out that petitioner was "a young man in a pickle because he's facing a very credible sexual assault allegation," and yet he "for reasons known only to him, refuses to give a statement to the police." Ex 12 at Tr 522. The prosecutor then attempted to point out that petitioner was exercising his rights, but in doing so highlighted that petitioner's invocation got in the way of the jury fairly judging his credibility: "[T]hat's his right, but he refused to give one and so we're left with sort of cobbling together what we can[.]" Ex 12 at Tr 522. The prosecutor's reasoning was tantamount to arguing that petitioner's refusal to speak to the police was evidence of his guilt. To be sure, the prosecutor's argument did not explicitly argue that petitioner's invocation meant he was guilty. However, this court's cases instruct that it is impermissible to *refer* to the invocation in circumstances that suggest the jury should use the invocation to infer guilt. *See Wederski*, 230 Or at 59 (holding that the prosecutor's closing was improper for

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including a "reference" to the defendant's invocation). Further, the prosecutor did not comment on the *defense's* failure to offer an explanation, but rather on *defendant's* failure personally to provide an earlier account of what had happened.

The prosecutor's comments were similar to those that were improper in *Wederski* and *White*. In *Wederski*, the prosecutor improperly referred to the defendant's silence by arguing to the jury that "there was no denial by" the defendant. 230 Or at 60. In *White*, the prosecutor exceeded the bounds of acceptable argument by informing the jury that the defendant had "refused" to testify at a prior trial, and the prosecutor's reference was "deliberate[]." 303 Or at 336, 341. Here, the prosecutor similarly highlighted petitioner's refusal to give an account of events to police until trial and suggested that his failure to earlier talk to police should weigh against his credibility.

Where the prosecutor's argument was deliberate and did more than fairly respond to petitioner's testimony, trial counsel was ineffective and inadequate for failing to object. Trial counsel should have known that the comment clearly violated Article I, section 12, and the Fifth Amendment, and that he had a duty to protect petitioner's interest in a fair trial by keeping the jury's consideration of the case to permissible evidence and argument. Further, trial counsel had a duty to preserve meritorious issues for appeal, which required an objection and either a

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request for a curative instruction or motion for mistrial. All of these concerns support a finding that trial counsel in this case was ineffective and inadequate.

At the post-conviction trial, the state offered a declaration from trial counsel, who described why he did not object to the prosecutor's closing argument:

> "I did not object to the Deputy District Attorney's closing argument on the grounds that that he was impermissibly commenting on [petitioner's] right to remain silent because I did not believe there was a basis for such an objection. If I had believed that the Deputy District Attorney was making impermissible comments on [petitioner's] right to not give a statement to law enforcement, I would have objected."

Ex 105 at 5. In other words, trial counsel did not have a strategic reason to not object to the improper closing argument. Instead, trial counsel failed to recognize the improper closing. In those circumstances, trial counsel's inaction cannot be supported on the basis of a possibly reasonable strategic decision. *See Pereida-Alba,* 356 Or at 673-74 (remanding for consideration of whether the trial counsel made a strategic choice to not request a lesser-included instruction, and outlining the different considerations that apply depending on whether the failure to request the instruction was a tactical choice or not).

III. The failure to object prejudiced petitioner.

A petitioner is prejudiced under Article I, section 11, if counsel's deficient performance "could have tended to affect" the outcome of the case. *Lichau,* 333

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Or at 365. *See Green*, 357 Or at 322 ("[B]ecause many different factors can affect the outcome of a jury trial, in that setting, the tendency to affect the outcome standard demands more than mere possibility, but less than probability."). A petitioner is prejudiced under the Sixth Amendment if he establishes "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 US at 694.

Where a trial counsel's inadequacy involved failing to discover evidence that could have been used at trial, the prejudice inquiry does not require the petitioner to establish that the results of the trial definitely would have been different. For example, in *Stevens*, this court found prejudice where the failure to investigate "denied petitioner highly valuable impeaching evidence from disinterested witnesses that would have called into question pivotal testimony of the complaining witness." 322 Or at 110. Similarly, in *Lichau*, this court rejected the state's argument that the petitioner had to prove his claim with "certainty" and that the evidence had to be "conclusive." 333 Or at 364. Instead, the petitioner established prejudice if the evidence at issue "could have tended to affect the jury's consideration" of the testimony at trial. *Id.* at 365.

Similarly, where a claim of ineffective assistance depends on the result of a legal argument, the petitioner must establish "the likely result" if the argument had

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been raised. *Guinn*, 304 Or at 499. For example, in *Guinn* this court described a claim against appellate counsel as a "'suit within a suit' situation," where the court must "determine what the probable result on appeal would have been, had the issue been raised." *Id.* at 497-98. With respect to an argument that trial counsel was ineffective for failing to litigate a motion to suppress evidence, the petitioner must establish that the motion was "meritorious." *Kimmelman v. Morrison*, 477 US 365, 375, 106 S Ct 2574, 91 L Ed 2d 305 (1986) ("Where defense counsel's failure to litigate a Fourth Amendment claim competently is the principal allegation of ineffectiveness, the defendant must also prove that his Fourth Amendment claim is meritorious and that there is a reasonable probability that the verdict would have been different absent the excludable evidence in order to demonstrate actual prejudice.").

Here, the error was failing to object to closing argument, which could have led to a curative instruction or a motion for mistrial. *See Montez*, 309 Or at 601 (holding that the defendant failed to preserve an objection to a prosecutor's improper closing argument where the defendant "made no timely objection on this ground, nor did he ask for a mistrial, or for a curative instruction, or that the prosecutor's statement be stricken"). As demonstrated above, the objection was meritorious and could have led to some relief from the trial court.

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No matter what relief the court provided – whether striking the argument, instructing the jury, or granting a mistrial – the results of the proceeding could have been different. Jurors are presumed to follow a court's instructions. *State v. Smith*, 310 Or 1, 26, 791 P2d 836 (1990) ("[J]urors are assumed to have followed their instructions, absent an overwhelming probability that they would be unable to do so."); *Greer v. Miller*, 483 US 756, 766 n 8, 107 S Ct 3102, 97 L Ed 2d 618 (1987) ("We normally presume that a jury will follow an instruction to disregard inadmissible evidence inadvertently presented to it, unless there is an 'overwhelming probability' that the jury will be unable to follow the court's instructions, and a strong likelihood that the effect of the evidence would be 'devastating' to the defendant." (citations omitted)). Therefore, the jury presumably considered the prosecutor's improper argument, as the court did not instruct the jury to ignore it. *See State v. Milbradt*, 305 Or 621, 632, 756 P2d 620 (1988) ("[T]he inadmissible testimony was received and the jury heard it. The trial judge did not tell the jury to disregard the expert's opinion. Its admission and the trial judge's failure to instruct the jury to disregard the testimony * * * were reversible errors."). The prosecutor's improper argument during closing likely affected the jury's deliberations, as it invited the jury to infer petitioner's guilt from the exercise of his constitutional rights. *See State v. Pitt*, 352 Or 566, 582,

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293 P3d 1002 (2012) (holding that an evidentiary error was not harmless where it "created a risk" that the jury would use the evidence for an "impermissible" purpose).

In this court's cases in the direct appeal context, the court has analyzed the trial court's decision under an abuse-of-discretion standard. Under that framework, in *Larson* this court recognized the prosecutor's comments were improper, but nevertheless held that in the circumstances of that case the trial court could have permissibly denied the motion for mistrial. 325 Or at 23-25. Where a post-conviction petitioner only needs to establish that the results at trial *could have* been different, the petitioner does not need to establish that the result of the appeal would have been in his favor. Instead, the proper standard of review only requires petitioner to demonstrate that the trial court could have permissibly granted relief, such as a mistrial motion, if he had raised the argument. On the facts of this case, granting such a motion would have been a legally permissible choice, and therefore the results of the proceedings could have been different.

CONCLUSION

For the foregoing reasons, this court should reverse the decision of the Court of Appeals and remand to the trial court for a new trial.

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DATED October 6, 2016.

Respectfully Submitted,

/s/ Jed Peterson

_____

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

Brief Length

I certify that (1) this brief complies with the word-count limitation in ORAP 5.05(2)(b) and (2) that the word count of this brief (as described in ORAP 5.05(2)(a)) is 8,078 words.

Type Size

I certify that the size of the type in this brief is not smaller than 14 point font for both the text of the brief and footnotes as required by ORAP 5.05(4)(f).

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NOTICE OF FILING AND PROOF OF SERVICE

I certify that I directed the original Appellant's Opening Brief to be filed with the Appellate Court Administrator, Appellate Courts Records section, 1163 State Street, Salem, OR 97301.

I further certify that, upon receipt of the confirmation email stating that the document has been accepted by the eFiling system, this Appellant's Opening Brief will be eServed pursuant to ORAP 16.45 (regarding electronic service on registered eFilers) on Peenesh Shah, #112131, attorney for Defendant-Respondent.

DATED October 6, 2016.

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