IN THE SUPREME COURT OF THE STATE OF OREGON

FELIPE PEREIDA-ALBA, Petitioner- Respondent, Respondent on Review	)	Umatilla County Circuit Court CV090464
v.	)	A146174
RICK COURSEY, Superintendent, Eastern Oregon Correctional Institution, Defendant-Appellant, Petitioner on review.	)	S060846

RESPONDENT'S BRIEF ON THE MERITS

Reviewing the August 29, 2012 decision of the Court of Appeals
Before Armstrong, Presiding Judge and opinion author,
and Haselton, Chief Judge, and Duncan, Judge.

Appeal from the Judgment of the Umatilla County Circuit Court.
James R. Hargreaves, Judge

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BRIEF ON THE MERITS OF FELIPE PEREIDA-ALBA RESPONDENT ON REVEW

STATEMENT OF THE CASE

In his post-conviction relief case, petitioner Felipe Pereida-Alba sought a new trial following his conviction for robbery in the first degree. He argued that his trial counsel had been constitutionally defective in failing to seek a lesser-included-offense instruction.

The post-conviction trial court agreed with Mr. Pereida-Alba and granted relief, the state appealed, and the Court of Appeals affirmed. *Pereida-Alba v. Coursey*, 252 Or App 66, 284 P3d 1280 (2012), *review allowed*, 353 Or 410 (2013).

The post-conviction trial court rejected the state's argument that trial counsel's failure to request the instruction was a tactical choice. In affirming, the Court of Appeals reasoned that the post-conviction court could reasonably infer that trial counsel's failure to request a lesser-included offense instruction was an inadvertent error rather than a deliberate tactical choice. The Court of Appeals further concluded that counsel's deficient performance had prejudiced petitioner because, if the jury had been instructed on the lesser offense, its deliberations could have been affected, even as to the offense of conviction. This court allowed review.

First question presented

When a post-conviction petitioner argues that trial counsel was inadequate, must the petitioner prove that no reasonable counsel would have acted similarly, or, rather, must the petitioner prove that this particular trial counsel was unreasonably ineffective under the facts of the particular case? If the latter, was the evidence before the post-conviction court sufficient to prove counsel's inadequacy?

First proposed rule of law

A post-conviction petitioner is entitled to relief upon proving that counsel was constitutionally inadequate under the circumstances of the case and petitioner was prejudiced. Petitioner need not prove that counsel's conduct would have been ineffective in every case, because myriad facts and circumstances affect counsel's responsibilities.

Evidence that a criminal defendant would have been entitled to a lesser-included-offense instruction and counsel did not request one is *prima facie* proof of counsel's inadequacy, sufficient to satisfy petitioner's burden of both production and persuasion. In the alternative, the facts of this case constituted *prima facie* proof of counsel's inadequacy. In either event, either party could have offered additional evidence on that point, and the finder of fact could have given that evidence such weight as it chose.

Second question presented

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?

Second proposed rule of law

No party in a post-conviction proceeding ever has the burden of production or of persuasion to establish that an action or inaction by trial counsel was the result of a tactical judgment; that fact is not an element of post-conviction relief. It is an historical fact which, if proved or disproved to the post-conviction trial judge, is pertinent to whether relief should be granted.

Third question presented

Where the evidence in a criminal trial would support a conviction for either a greater or a lesser offense, counsel is ineffective in failing to seek a jury instruction on the lesser offense and no such instruction is given, and the jury convicts of the greater offense, is counsel's error harmful?

Third proposed rule of law

A jury's verdict is invalid if the jury is not correctly instructed on the

law, including applicable lesser-included-offenses. Even if a jury is instructed to consider the greater offense before considering a lesser offense, the existence of the lesser offense can affect the jury's deliberation as to the greater offense. Therefore, the failure to give a lesser-included-offense instruction when the evidence supports it is harmful and prejudicial.

Summary of facts

The Court of Appeals summarized the facts as follows:

> "The undisputed facts * * * are as follows. While in a grocery store, petitioner placed milk and snack cakes into his backpack and left the store without paying for them. The store security guard[,Schmitz,] and another store employee[, Garcia,] confronted petitioner outside of the store. Petitioner turned and ran from the employees, but the security guard tackled him, restrained him, and ultimately forced him to return to the store. There, with the interpretive assistance of the other employee, who could communicate with petitioner in Spanish, the guard questioned petitioner about the theft of the milk and snack cakes.
>
> "What happened after the security guard brought defendant back to the store was disputed at the criminal trial. The security guard testified that, as he was reaching to take petitioner's backpack from him, petitioner ripped the backpack open, pulled a gun from it, and pointed the gun at the security guard for approximately five seconds. The guard testified that he told petitioner to go ahead and leave, at which point petitioner fled with the gun and the merchandise.
>
> The other employee testified that the security guard told petitioner to empty his backpack. After petitioner was asked several times to do that, petitioner opened the backpack and removed the gun. According to the employee, petitioner pointed the gun at the security guard for a moment before aiming it at the ceiling. The employee further testified that petitioner did not appear to be threatening to harm anyone.
>
> "Petitioner testified that he was asked to show the security guard what was in his backpack but that he did not want to open the backpack because he knew that there was a gun in it. He testified that, after the security guard insisted on seeing what was in the backpack, he opened it and removed the gun. He explained that the security guard and the other employee became frightened upon seeing the gun and asked him to leave. He clarified, however, that he did not take the gun out of the backpack with the intention of threatening anyone and that he never pointed it at anyone."

Pereida-Alba v. Coursey, 252 Or App 66, 67-68, 284 P3d 1280 (2012)

In the post-conviction court, petitioner offered the following evidence about the trial proceedings:

After the close of evidence, the court discussed proposed jury instructions with the parties. Trial counsel asked the court to give the jury the definition of "knowingly." [1] When the court expressed concern over that request and noted that the offense required intent, counsel maintained that the instruction was appropriate because the indictment used the word "knowingly." Ex 5 (trial transcript) at 170-71. The jury returned a 10-2 verdict of guilty. Ex 17 (verdict form).

Nine days after the verdict, a juror, , contacted the trial judge by letter. Ex 8 (Mr. letter). Mr. wrote that while he was standing outside the courtroom, another juror "wept openly" and told him that she had changed her vote because she felt intimidated and afraid. Mr. wrote also that one of the other jurors had been "belligerent and hostile" from the moment deliberations began and that the belligerent juror

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[1] The indictment alleges in part that petitioner "unlawfully and knowingly while in the course of committing theft, with the intent of overcoming resistance to defendant's taking of the property and retention of the property after the taking, used and threaten the immediate use of physical force upon Schmitz and use a dangerous weapon." Ex 3 (indictment).

was in favor of convicting petitioner. Ex 8 at 1. The female juror who changed her vote told Mr. that she was the belligerent juror's coworker and stated, "I have to work with him." Ex 8 at 1.

Mr. also wrote that yet another juror noted that she had a relationship with someone in law enforcement. This juror told the other jurors that if they did not convict petitioner, "he would walk out of the courtroom a free man. At least once, [this juror] stated, 'they could not charge him again', making some reference to double jeopardy." Ex 8 at 1-2.

Petitioner's trial counsel moved to reconvene the jury, and the criminal court allowed a hearing and heard testimony from Mr. Although that testimony is not part of this record, in the order issued following that hearing, the court noted that there was evidence in the record that one juror was "loud, obnoxious, inappropriate and bullying in the jury room." Ex 11 at 1. The denied petitioner's request for a new trial. Ex 11 at 2.

Summary of argument

A post-conviction petitioner alleging trial counsel's inadequacy bears the burden of establishing that trial counsel failed to exercise reasonable professional skill and judgment. Where the claim for relief is based on the failure to request a jury instruction on a lesser-included offense, the

petitioner can satisfy that burden by showing that trial counsel's failure to request such an instruction was unreasonably deficient.

The record before the post-conviction court supported multiple inferences about the reason for counsel's failure to request the instruction. In sitting as finder of fact, the post-conviction court properly chose between those inferences and determined that counsel's failure to request the instruction was not a tactical choice. The court concluded that counsel had been unreasonably deficient and relief was warranted.

Appellate review of factual determinations is deferential to the finder of fact. The trial court's factual determination, that counsel's failure to seek a limiting instruction was not a tactical choice, is adequately supported by evidence in the record. There is evidence that trial counsel was not aware of the elements of the offense of first-degree robbery; counsel asked the court to instruct on a mental state of 'knowingly,' which was less than required by the law and which reduced the state's burden. Further, a lesser-included instruction was particularly appropriate under the facts of this case. The state's evidence was compelling in proving that petitioner was guilty of something, but was weak as to petitioner's use of force or of a firearm. One of the state's witnesses supported petitioner's testimony that he removed the gun from the backpack only in response to the security guard's request.

Further, the difference in possible sentences is tremendous. Robbery in the First Degree is a Measure 11 offense with a 90-month mandatory prison term, and Robbery in the Third Degree carries a presumptive probation sentence. Those facts provide an adequate factual basis for the post-conviction court to decide that the failure to request the instruction was not a tactical choice, but rather was a lapse of professional judgment on the part of trial counsel.

Finally, the post-conviction court and the Court of Appeals correctly concluded that petitioner was prejudiced as a result of counsel's error. An instruction on the elements of third-degree robbery and the inclusion of that offense on the verdict form would have alerted the jury to the possibility of convicting petitioner of an alternate offense. Even though the jury would have been directed to acquit petitioner of first-degree robbery before considering third-degree robbery, the jury's awareness of the lesser-included-offense would have affected its deliberation. Further, the 10-2 verdict and the evidence relating to the jury's deliberation in this record establish that this was a close verdict and a small change would have made a big difference.

As this court has already held, failure to give a lesser-included-offense instruction gives the jury an incomplete understanding of the law and has a

tendency to affect the outcome of the trial. Therefore, the decision of the post-conviction court was correct and this court should affirm.

ARGUMENT

Mr. Pereida-Alba was convicted of the Measure 11 offense Robbery in the First Degree, when the evidence would also have supported a conviction for the much less serious crime Robbery in the Third Degree. As the post-conviction court and the Court of Appeals both found, counsel was ineffective in failing to ask for a jury instruction on the less-serious offense.

I. Mr. Pereida-Alba is entitled to a new trial, because incomplete instructions were provided to the jury that convicted him.

The instructions given to the jury are crucial to its decision, and so the jury should have a complete statement of the law applicable to its decision. Because the jury did not have that in this case, Mr. Pereida-Alba should receive a new trial.

A. Counsel was ineffective in failing to seek a lesser-included-offense instruction.

Mr. Pereida-Alba was convicted of the Measure 11 offense Robbery in the First Degree and received a mandatory 90-month prison term, when the evidence would also have supported a conviction for the much less serious crime Robbery in the Third Degree carrying a presumptive probation term.

Under the circumstances of this case, no reasonable attorney would have failed to request an instruction on third-degree robbery. As discussed above, there were many facts supporting petitioner's theory that he had not used a gun in the course of the robbery, and, in light of the issue on appeal, those facts are viewed in the light most favorable to petitioner. *Carter v. Mote*, 285 Or 275, 279, 590 P2d 1214 (1979) (party complaining about failure to give a jury instruction on appeal is entitled to have the evidence viewed in the light most favorable to the establishment of the facts necessary to require the requested instruction).

In the light most favorable to the instruction, petitioner stole two snack cakes and some flavored milk because he was hungry. He completed the offense by placing the stolen items into a Tweety Bird backpack and leaving the store. Ex 5 (transcript) at 63. When encountered by store security, he resisted but did not attempt to use the gun. Petitioner and Garcia both testified that petitioner did not take out the gun when he was initially brought into the office. Rather, he resisted giving the backpack to Schmitz because he did not want Schmitz to see that there was a gun inside the pack. He removed the gun only when he was instructed to take out whatever he had in the backpack.

From that evidence, a trial attorney exercising reasonable professional

skill and judgment would have known that there was a substantial question whether petitioner had "use[d] a dangerous weapon," as alleged in the indictment. A reasonable trial attorney also would have known that petitioner had clearly committed some crime and that the jury would likely want to see petitioner punished for that crime. Finally, a reasonable trial attorney would also know that the jury would be unaware that a conviction for first-degree robbery carries a mandatory minimum sentence of 90 months, while a third-degree robbery conviction, for a person with a criminal history score of I, carries a presumptive probation term. OAR 213–004–0001; OAR 213–017–0007(20). Petitioner's criminal history score is I. EX 14 (judgment of conviction).

In other words, there was a significant risk that the jury would have been uncomfortable acquitting petitioner outright and would have been inclined to convict him of something. There was also a significant risk that a conviction would result in a 90-month prison term, while the presumptive term of the lesser offense was probation. Under those circumstances, the only reasonable option was to request an instruction on third-degree robbery.

A post-conviction petitioner is entitled to relief if the conviction was

the result of the inadequate assistance of counsel. ORS 138.530(1)(a). To represent a defendant adequately under the Oregon Constitution,[2] a trial lawyer must "do those things reasonably necessary to diligently and conscientiously advance the defense." *Krummacher v. Gierloff*, 290 Or 867, 874, 627 P2d 458 (1981). The Sixth Amendment to the United States Constitution also guarantees the effective assistance of counsel.[3] The Sixth and Fourteenth Amendments require an analysis similar to that employed under the Oregon Constitution. *Krummacher*, 290 Or at 871.

To prevail on a claim of inadequate assistance of counsel, a petitioner in a post-conviction proceeding must prove two things: first, he must show "by a preponderance of the evidence, facts demonstrating that trial counsel failed to exercise reasonable professional skill and judgment," and second, he must prove that "petitioner suffered prejudice as a result." *Trujillo v. Maass*, 312 Or 431, 435, 822 P2d 703 (1991); *Strickland v. Washington*, 466

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[2] Article I, section 11, of the Oregon Constitution provides, in part, "In all criminal prosecutions, the accused shall have the right * * * to be heard by himself and counsel[.]"

[3] The Sixth Amendment, which is applicable to the states through the Due Process Clause of the Fourteenth Amendment, *Gideon v. Wainwright*, 372 US 335, 342-45, 83 S Ct 792, 9 L Ed 2d 799 (1963), provides, in part, "In all criminal prosecutions the accused shall * * * have the assistance of counsel for his defense.

US 668, 104 S Ct 2052, 80 L Ed 2d 674 (1984)

Applying those standards, counsel's performance was unreasonably deficient. In light of the evidence that would have supported a jury verdict for the lesser offense, and in light of the difference between a mandatory 90-month prison term for one offense and probation for the other, reasonably adequate counsel would have sought a lesser-included-offense instruction.

B. Counsel's failure to request a lesser-included-offense instruction was not a tactical decision.

In granting the petition, the post-conviction court rejected the state's argument that counsel might have made a tactical choice in failing to seek a lesser-included-offense instruction. The evidence in the record, including the weakness of the state's case, the advantages for the defendant in seeking a lesser-included-offense instruction and defense counsel's apparent misunderstanding of the elements of the offense, was sufficient for the post-conviction judge to find, as a matter of fact, that counsel's omission was not tactical.

1. The post-conviction court implicitly found that counsel's failure to request a lesser-included jury instruction was not a tactical choice, and that finding is supported by the record.

In reviewing the decision of the post-conviction court, this court is bound by its findings of fact if they are supported by evidence in the record.

Lichau v. Baldwin, 333 Or 350, 359, 39 P3d 851 (2002). Where the post-conviction court does not make express findings of fact on all relevant issues, and where there is evidence in the record from which such facts could be decided more than one way, this court must presume that the facts were decided in a manner consistent with the post-conviction court's conclusions of law. *Peiffer v. Hoyt*, 339 Or 649, 660, 125 P3d 734 (2005) (citing *Ball v. Gladden*, 250 Or 485, 443 P2d 621 (1968)).

There was no direct evidence indicting why counsel did not request a jury instruction on the elements of third-degree robbery. There was abundant circumstantial evidence from which the post-conviction court could infer that counsel's failure to request the instruction was not a tactical choice.

Counsel apparently had an imperfect grasp on the material elements of first-degree robbery. She asked the court to instruct the jury on the definition of "knowingly," which was not the correct mental state. Ex 5 at 170. The commission of robbery requires a showing of the defendant's specific intent for the element of use or threatened use of physical force in preventing or overcoming resistance to the theft. ORS 164.395; ORS 164.415; *State v. Farrar*, 309 Or 132, 164, 786 P2d 161, *cert den*, 498 US 879 (1990) (so stating). *See also* Ex 3 (indictment). Thus, there was no basis

for an instruction on the definition of "knowingly," and such an instruction would have been harmful to petitioner's case, because it would have allowed a conviction on proof of a lower degree of culpability.

At the conclusion of the post-conviction trial, while addressing a claim for relief concerning the use of the term "knowingly" in the indictment, the post-conviction court stated, "I found it to be very interesting in looking at the indictment. And whoever thought that was a great way to plead a case obviously needed to go back to some basic law." Tr. 21. The post-conviction court went on to conclude that trial counsel had been inadequate by requesting an instruction on "knowingly," although the court also found that the failing was not prejudicial. Tr. 23-24.

Further, the evidence in this case provided compelling reasons to request an instruction on third-degree robbery. As discussed above, the sentence for one offense is 90 months in prison, and the sentence for the other is probation. The jury was not likely to see petitioner as an armed robber. Unlike the stereotypical armed robber, there was no evidence that petitioner brandished the gun before or during the theft of the snack items. He did not verbally or physically threaten Schmitz or Garcia as they tried to apprehend him. The items he took were of little value, and his theft was motivated by hunger. Moreover, Garcia testified that petitioner pulled out

the gun because Schmitz told him to empty his backpack. The facts of the offense more closely resemble third-degree rather than first-degree robbery, and the jury would likely have seen it that way.

Finally, during the post-conviction court, the defendant represented that trial counsel was no longer a member of the bar and asked the court to take judicial notice of that fact. Tr 11. Defendant's post-conviction counsel represented that she had been unable to obtain an admissible statement from trial counsel. Tr 11. Petitioner similarly represented that trial counsel "wouldn't talk to us either." Tr 16. The post-conviction court could have inferred that counsel's unwillingness to answer questions was evidence that she was aware she had made a mistake during her representation.

In sum, there was ample evidence from which the post-conviction court could have inferred that trial counsel's failure to request a lesser-included-offense instruction was not a deliberate tactical choice. Thus, when the post-conviction court stated that it could not "imagine why defense counsel would not have at least asked for at least a Robbery III * * * instruction," it was not impermissibly shifting the burden of production to defendant. It was finding that counsel's action was not based on a reasoned decision or even any decision at all. Because that finding is supported by the record, it is binding on this court.

Defendant argues that there were several valid reasons why an attorney might choose to forgo an instruction on a lesser-included offense in favor of an "all or nothing strategy." Opening Brief on the Merits at 27-29.

Defendant's argument about the proper interpretation of the evidence was properly addressed to the post-conviction court. But the post-conviction court rejected that argument, and, appellate review is highly deferential to that ruling. *See, e.g.*, *Peiffer*, 339 Or at 660. *See also State v. Sarich*, 352 Or 600, 602 n 1, 291 P3d 647 (2012) (noting, under *Ball*, the court's deference to the trial court's factual findings to the extent the findings are supported by "any evidence in the record.")

Defendant speculates on appeal that trial counsel might have discussed deportation consequences with petitioner and notes that robbery is an aggravated felony and a crime of moral turpitude, which could render petitioner deportable. Opening Brief on the Merits at 28-29. The record does not show that petitioner is not a citizen, although it does show that he was originally from Mexico. Ex 5 (trial transcript) at 147. The record does not show, and defendant does not explain, what defenses would have been available to petitioner in a deportation proceeding or how that would have affected a competent attorney's tactical choices. Of course, a different fact record could change the correctness of the post-conviction court's ruling,

and, for that reason, this court should reject the state's argument that the issue now is whether it could ever be reasonable not to request a lesser-included-offense instruction. The issue now is whether counsel was unreasonable under the evidentiary record of this case and the findings of the post-conviction court.

Further, defendant relies on the 2010 decision in *Padilla v. Kentucky*, 559 US 356, 130 S Ct 1473, 1480, 176 L Ed 2d 284 (2010), which held that adequate defense counsel was ineffective in failing to advising a criminal defendant that a plea bargain would lead to deportation. *Padilla*, however, was decided several years after petitioner's trial. Prior to that decision, generic advice that a criminal conviction might lead to deportation was regarded as adequate. *Lyons v. Pearce*, 298 Or 554, 567, 694 P2d 969 (1985); *Gonzalez v. State*, 340 Or 452, 134 P3d 955 (2006). Accordingly, there is no basis to believe that petitioner is subject to deportation or that trial counsel's conduct met the higher *Padilla* standard established several years after trial.[4]

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[4] Defendant did not argue to the post-conviction court that counsel or petitioner considered immigration or other collateral consequences, or that petitioner is at risk of immigration consequences as a result of his conviction. Had defendant done so, petitioner could have

Finally, trial counsel did not request an instruction on theft in the third degree, which the post-conviction court found would also have been appropriate. Third-degree theft requires proof that the person took, appropriated, or obtained property from an owner thereof and that the total value of the property is less than $100. ORS 164.043; ORS 164.015. Although petitioner did not seek relief based on that failure, counsel's failure to request an instruction on third-degree theft is significant because it indicates that counsel was not motivated by any concern over collateral consequences. Had counsel been so concerned, she would have concluded that the gravity of the consequences of a conviction for first-degree robbery far outweigh the consequences of a conviction for third-degree theft, which is a Class C misdemeanor, ORS 164.043. In sum, counsel did not make a tactical decision to forgo the benefits of requesting a lesser-included instruction.

2. The post-conviction court correctly concluded that, even if counsel had made a tactical decision, such decision was unreasonable.

There was no direct evidence that counsel had made a deliberate decision not to request a lesser-included instruction. The circumstantial

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offered rebutting evidence.

evidence suggests, and the post-conviction court held, that it was not a deliberate tactical choice. The post-conviction court's implicit finding that the decision was not tactical should end the discussion. But, even without such a finding, the court's ultimate conclusion would still be correct. On this evidentiary record, a tactical choice to risk a conviction for robbery in the first degree would not be reasonable. Accordingly, even if it were a 'tactical' choice, it was not a reasonable choice, and thus relief is still warranted.

Post-conviction courts "will not second-guess a lawyer's tactical decisions in the name of the constitution unless those decisions reflect an absence or suspension of professional skill and judgment." *Gorham v. Thompson*, 332 Or 560, 567, 34 P3d 161 (2001). In other words, a reasonable tactical choice is not a basis for post-conviction relief, even if the tactic is not successful. .The "[a]dequacy of assistance of counsel * * * allows for tactical choices that backfire, because, by their nature, trials often involve risk." *Krummacher*, 290 Or at 875.

However, tactical decisions regarding trial preparation must involve "a conscious choice by a lawyer either to take or to omit some action on the basis of an evaluation of the nature and complexity of the case, the likely costs and potential benefits of the contemplated action, and other factors." *Lichau*, 333 Or at 359 (quoting *Stevens*, 322 Or at 109) (internal quotation

marks omitted). For example, where the claim for relief concerns a failure to investigate, "each decision to limit investigation of a particular defense itself must be a reasonable exercise of professional skill and judgment under the circumstances." *Lichau*, 333 Or at 360. Accordingly, a tactical choice that was not, itself, a reasonable and deliberate choice is still a proper basis for post-conviction relief. *See also Ryan v. Palmateer*, 338 Or 278, 293 *et seq*, 108 P3d 1127 (2005) (explaining that "reasonable" tactical choices are not a basis for post-conviction relief.") Even if counsel made a tactical choice in some sense, that would have been an unreasonable choice on this record, for the reasons appearing above. That unreasonable tactical choice would still entitle petitioner to relief.

C. No party has any burden of proof regarding whether counsel's failure to seek a lesser-included-offense instruction was a tactical choice.

In order to prevail on a claim of inadequate assistance of counsel, the petitioner must prove, by a preponderance of the evidence, that trial counsel failed to exercise reasonable professional skill and judgment and that petitioner suffered prejudice as a result. See ORS 138.620(2)[5]; *Stevens v.*

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[5] ORS 138.620(2) provides, in part, "The burden of proof of facts

State, 322 Or 101, 108, 902 P2d 1137 (1995) (identifying elements for an inadequate assistance claim in the post-conviction context); *Lichau*, 333 Or at 358 *et seq.* (same). *See also* OEC 305 (a party has "has the burden of persuasion as to each fact the existence or nonexistence of which the law declares essential to the claim for relief * * * the party is asserting.") *See also State v. James*, 339 Or 476, 123 P3d 251 (2005) (regarding burdens of production and persuasion).

Thus, a post-conviction petitioner bears the burdens of both production and persuasion as to the elements of a the post-conviction claim; those are the facts "the existence or nonexistence of which the law declares essential to the claim." As noted above, a post-conviction claim based on the inadequate assistance of counsel has two elements: petitioner must prove that trial counsel failed to exercise reasonable professional skill and judgment, and second, that petitioner suffered prejudice as a result. *Stevens*, 322 Or at 108 (citing *Trujillo* 312 Or at 435 and *Krummacher*, 290 Or at 872.) Thus, those are the two facts for which petitioner bears the burden of production and persuasion.

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alleged in the petition shall be upon the petitioner to establish such facts by a preponderance of the evidence."

Whether counsel was making a tactical choice is not an element of the claim, and, thus, no party has a burden relating to that fact. That fact is relevant, and either party may offer evidence of it. Similarly, although 'motive' is not an element of an assault prosecution, and the prosecution does not have a burden to prove motive, it may offer evidence of motive. *E.g., State v. Hampton,* 317 Or 251, 257, 855 P2d 621, 624 (1993). If the prosecution did not offer evidence of motive in a murder prosecution, it would bear the risk that the jury would not be persuaded; in other words, it might lead to a failure to carry the burden of persuasion. For example, if a middle-aged woman with no criminal record were accused of a senseless murder of an apparent stranger, the state's case would be much stronger upon showing that the victim was having an affair with the defendant's husband. However, no court would hold that the prosecution had failed to carry its burden of production on the basis that it did not offer evidence of motive,[6] because motive is not an element of murder.

Once the petitioner offered such evidence, the defendant had two

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[6] Defendant implies that a petitioner generally may not meet his burden of production by relying solely on the record before the criminal court. Opening Brief on the Merits at 18-19. Defendant cites no authority requiring that the petitioner present evidence outside of the record before the criminal court.

responses available; he could have 1) offered no evidence and hoped the trial court did not accept the plaintiff's evidence; or 2) produced evidence to counter the petitioner's evidence. Defendant selected the first option, and, to defendant's regret, the finder of fact was persuaded by petitioner's *prima facie* case.

In offering evidence establishing the factual elements of his claim for relief, the petitioner need only establish his *prima facie* case. That is, petitioner's burden of production does not require him to disprove every possible reason for trial counsel's failure. *Cf James*, 339 Or at 491 (discussing a party's right and obligation to present evidence based on who has the burden of production or persuasion.)

Because the evidence in this case supported an inference that counsel's omission was not tactical, either party could have presented evidence on that point.. But that was not required, because the evidence was adequate to satisfy petitioner's burden of production and because, as the post-conviction court found, it was also enough to satisfy the burden of persuasion.

Often, claims of inadequate assistance of counsel turn on a decision that may have been tactical. For example, the decisions not to object to certain evidence, to present certain testimony, or to make certain arguments

may all be valid tactical decisions. The "[a]dequacy of assistance of counsel * * * allows for tactical choices that backfire, because, by their nature, trials often involve risk." *Krummacher*, 290 Or at 875. Post-conviction courts "will not second-guess a lawyer's tactical decisions in the name of the constitution unless those decisions reflect an absence or suspension of professional skill and judgment." *Gorham v. Thompson*, 332 Or 560, 567, 34 P3d 161 (2001). However, tactical decisions regarding trial preparation must involve "a conscious choice by a lawyer either to take or to omit some action on the basis of an evaluation of the nature and complexity of the case, the likely costs and potential benefits of the contemplated action, and other factors." *Lichau v. Baldwin*, 333 Or 350, 359, 39 P3d 851 (2002) (quoting *Stevens*, 322 Or at 109) (internal quotation marks omitted). For example, where the claim for relief concerns a failure to investigate, "each decision to limit investigation of a particular defense itself must be a reasonable exercise of professional skill and judgment under the circumstances." *Lichau*, 333 Or at 360.

Under the Sixth Amendment analysis, *Strickland* advises that "[j]udicial scrutiny of counsel's performance must be highly deferential." More recently, in *Cullen v. Pinholster*, __ US__, 131 S Ct 1388, 1403, 179 L Ed 2d 557 (2011), the Court stated:

> "Counsel should be strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. To overcome that presumption, a defendant must show that counsel failed to act reasonabl[y], considering all the circumstances."

(Internal quotations and citations omitted; brackets original).

Whether counsel made a deliberate tactical choice is relevant to whether counsel's performance was adequate, but this court's decisions emphasize that *reasonable* tactical choices are entitled to deference, *Lichau*, 333 Or at 360, and do not involve the absence or suspension of professional judgment, *Gorham* 332 Or 567. As the record demonstrates and the post-conviction court found, failure to seek a lesser-included-offense instruction in this case was not reasonable.

II. Under this court's caselaw, the failure to give an instruction on a lesser-included-offense is prejudicial.

As noted above, a post-conviction petitioner bears the burden of proving by a preponderance of the evidence that the acts or omissions of counsel caused prejudice. Because the jury's deliberations would likely be affected by a possible lesser verdict, and because the state had compelling evidence that petitioner was guilty of something, the lack of a lesser-included-offense instruction in this case prejudiced petitioner.

Petitioner satisfied his by showing that he was entitled to a jury

instruction and that there was a chance, on this record, that the jury could find that he had not used a gun in the course of taking the snack cakes and flavored milk.

A. This court has already held that an error in failing to instruct on a lesser-included-offense is harmful, regardless of whether the jury also receives the the "acquittal first" instruction.

Defendant argues that, because the jury received the "acquittal-first" instruction any error in failing to give a lesser-included-offense instruction did not prejudice him. Defendant is wrong, and this court has already said so.

In rejecting defendant's argument, the post-conviction trial court and Court of Appeals both relied on *Trotter v. Santos*, 212 Or App 473, 157 P3d 1233 (2007). *Trotter* addressed a similar issue. In rejecting the state's argument in that that failure to give a lesser-included-offense instruction was harmless, the *Trotter* court cited *State v. Naylor*, 291 Or 191, 629 P2d 1308 (1981). *Naylor* is discussed further below.

ORS 136.460 provides for the acquittal-first instruction. It says:

> "(1) Upon a charge for a crime consisting of different degrees, the jury may find the defendant not guilty of the degree charged in the accusatory instrument and guilty of any degree inferior thereto or of an attempt to commit the crime or any such inferior degree thereof.
>
> "(2) The jury shall first consider the charged offense. Only if the jury finds the defendant not guilty of the charged offense may the jury consider a lesser included offense. If there is more than one lesser

> included offense, the jury shall consider the lesser included offenses in order of seriousness. The jury may consider a less serious lesser included offense only after finding the defendant not guilty of any more serious lesser included offenses.
>
> "(3) When a jury finds a defendant guilty of a lesser included offense, the court, upon a request by the state or defendant, shall poll the jury on the original charge. If fewer than the required number of jurors vote to find the defendant not guilty on the original charge, the court shall not receive the verdict and shall instruct the jury to continue deliberations.
>
> "(4) If the jury is unable to reach a decision on the original charge, the state and defendant may stipulate that the jury may consider any lesser included offense."

Sections 2-4, including the "acquittal-first" requirement of section 2, were added in 1997. 1997 Or Laws ch. 511. But some form of an acquittal-first instruction has existed in Oregon law for over a hundred years.

The Court of Appeals explained the history of the instruction in *State v. Horsley*, 169 Or App 438, 8 P3d 1021 (2000). An acquittal-first instruction had been approved as early as 1896. *State v. Steeves*, 29 Or 85, 43 P 947 (1896). In *State v. Ogden,* 35 Or App 91, 580 P2d 1049 (1978), the Court of Appeals disapproved the instruction, and this court did so in *State v. Allen*, 301 Or 35, 717 P2d 1178 (1986). In *Horsley,* the Court of Appeals decided that the 'acquittal-first' instruction mandated by ORS 136.460 was lawful, returning Oregon to its earlier practice.

Before rejecting the acquittal-first instruction in 1986 in *Allen*, this court this court considered whether giving an acquittal-first instruction

rendered harmless an erroneous failure to give a lesser-included-offense instruction. *State v. Naylor*, 291 Or 191, 197-98, 629 P2d 1308 (1981) ("The failure of the trial court to give the [lesser-included-offense] instruction resulted in the case being submitted to the jury without the complete statement of the law necessary for the jury to properly exercise its function in the trial of this defendant.") The *Naylor* court explained that ORS 136.465,[7] providing that the defendant could be convicted of a lesser-included-offense, was a legitimate legislative choice that would be rendered meaningless if the failure to instruct on a lesser-included-offense could never be harmless.

As the *Naylor* court explained, a jury presented with such an all-or-nothing choice might believe the defendant to be guilty of an offense but not the charged offense. Faced with the choice of freeing guilty man and convicting him of an uncharged offense, the jury might choose to convict the defendant of an uncharged offense. The court concluded: "By statute the legislature provides the means for avoidance of this Hobson's choice."

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[7] ORS 136.465 provides: "In all cases, the defendant may be found guilty of any crime the commission of which is necessarily included in that with which the defendant is charged in the accusatory instrument or of an attempt to commit such crime."

Naylor, 291 Or at 199.

See also State v. Williams, 270 Or 152, 158, 526 P2d 1384 (1974) (*O'Connell, Chief Justice, dissenting*). The majority opinion in *Williams* held that, on the facts of that case, the trial court did not err in failing to instruct on a lesser-included offense. Chief Justice O'Connell dissented. His dissent as to the merits is not material to this case. But his argument for reversal was made in 1975 when the acquittal-first instruction was part of standard Oregon practice. If he believed the acquittal-first instruction had rendered the error harmless, then Chief Justice O'Connell would not have dissented. *See also State v. Williams*, 270 Or at 158 (*Homan, Justice, dissenting*) (samel). Chief Justice O'Connell and Justice Holman dissented to the same effect in *State v. Washington*, 273 Or 829, 543 P2d 1058 (1975).

Naylor, Williams, and *Washington* were direct appeals, but that argument applies with equal force in this post-conviction case. The prejudice analysis in post-conviction court is the same as the harmlessness analysis applied on appeal. *Ryan v. Palmateer*, 338 Or 278, 295, 108 P3d 1127 (2005) *citing State v. Davis*, 336 Or 19, 27-35, 77 P3d 1111 (2003). That only makes sense; there is no reason why a trial error caused by a judge should have a different result for the defendant than a trial error caused by court-appointed counsel; in either case, the public policy in favor of fair

trials should be dispositive.

The standard for prejudice is not a strict one. Trial counsel's error during a criminal trial is prejudicial if it "had a tendency to affect the result." *E.g.*, *Krummacher*, 290 Or at 883. Under the Sixth Amendment, the petitioner must make a similar showing. He or she must show that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different," with "reasonable probability" defined as "a probability sufficient to undermine confidence in the outcome." *Strickland*, 466 US at 694. For the reasons explained in *Naylor*, and because of the weakness in the state's case, the failure to seek a less-satisfactory-evidence instruction had a tendency to affect the jury's verdict.

B. There was reason, in this particular case, to think the jury might have acquitted on the primary offense.

The jury apparently had difficulty reaching a verdict in this case, strengthening the conclusion that the error was prejudicial. Only ten jurors voted to convict. As the parties learned later, one juror intimidated another to change her vote. Thus, without that interference from the bullying juror, the jury's vote would have been 9-3 to convict. Had the jurors known that it had another charge to consider after considering the primary charge, they may very well have voted to acquit on the first charge with the hope that

they could reach a better consensus on the next offense.

There was also evidence that at least one juror had advocated for conviction on the basis that, if they did not convict petitioner, he would walk out of the courtroom a free man and could not be charged again. Ex 8 at 2. As a result, there was ample reason to believe that the inability to consider a lesser offense had a tendency to affect the verdict.

CONCLUSION

The post-conviction court found that trial counsel did not make a tactical choice, because that finding is supported by evidence in the record, it is binding on this court. In light of that finding, the post-conviction court was correct to hold that counsel had been constitutionally inadequate. In addition, petitioner established that he was prejudiced by showing that the jury might have decided that he did not use a gun in the course of taking the snack cakes and flavored milk.

Even though a jury may not consider a lesser offense unless it first acquits on the great offense, the jury's awareness of the possibility of a lesser offense can affect the manner in which it deliberates. Such a possibility does not rely on a lawless decisionmaker but rather is a regular, expected part of a jury's deliberative process. Any error which eliminates that possibility is prejudicial, particularly where there was evidence that the jury was reluctant to convict the petitioner of the greater offense.

Because Mr. Pereida-Alba's conviction was obtained through the ineffectiveness of his counsel, he is entitled to a new trial, and this court should affirm.

Respectfully Submitted,

/s/ Rankin Johnson IV
Rankin Johnson IV

CERTIFICATE OF SERVICE

I certify that I filed the Brief on the Merits with the State Court Administrator's Office, and served it on opposing counsel, Attorney General Ellen Rosenblum and Solicitor General Anna Joyce, by e-filing the brief on August 1, 2013. Because the Oregon Attorney General's Office is a registered e-filer, filing constitutes service. *See* ORAP 16.45.

Respectfully Submitted,

/s/ Rankin Johnson IV
Rankin Johnson IV

CERTIFICATE OF COMPLIANCE WITH BRIEF LENGTH AND TYPE-SIZE REQUIREMENTS

I certify that (1) this brief complies with the 14,000 word limitation in ORAP 5.05(2)(b) and ORAP 9.17(c) and contains 7,325 words, and (2) 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(4)(f).

Respectfully submitted,

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