IN THE SUPREME COURT OF THE STATE OF OREGON

KYLE JAMES GREEN, Petitioner-Appellant, Respondent on Review, v. STEVE FRANKE, Superintendent, Two Rivers Correctional Institution, Defendant-Respondent, Petitioner on Review.	Umatilla County Circuit Court No. CV110230 CA A150877 SC S062231

RESPONDENT'S BRIEF ON THE MERITS

Review of the Decision of the Court of Appeals
on an Appeal from a Judgment
of the Circuit Court for Umatilla County
Honorable RICK J. MCCORMICK, Judge

Opinion Filed: February 12, 2014
Author of Opinion: Judge Egan
Concurring Judges: Presiding Judge Armstrong and Judge Nakamoto

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STATEMENT OF THE CASE

In this post-conviction case, the state petitioned this court to address what a petitioner must demonstrate to constitute inadequate assistance of counsel in failing to request a limiting instruction, and, secondly, what must a petitioner show to establish prejudice in such a circumstance. The state requests that this court reverse the court of appeals, which determined that some of petitioner's convictions must be reversed due to trial counsel's failure to request "a jury instruction prohibiting the jurors from finding that petitioner had acted in conformity with his apparent propensity to sexually assault minors." Green v. Franke, 261 Or App 49, 51 (2014).

The issues presented are whether under the peculiar facts of this case - - namely a case concerning nine different alleged sexual abuse victims with different defenses to them - - trial counsel performed inadequately, from a constitutional standpoint, in failing to request a proper limiting instruction to insure that the jury did not find petitioner guilty of particular counts based on petitioner's propensity to sexually abuse young women. Relatedly, if this court does not dismiss this petition as improvidently allowed, this court must confront whether that failure prejudiced petitioner.

The state, subtly, requests that this court alter what a petitioner must prove in post-conviction matters generally, and also how he or she must prove those points. The arguments for why this court should do so are not preserved, and should not be considered by this court in the first instance.

QUESTIONS PRESENTED AND PROPOSED RULES OF LAW

(1) Under federal and state constitutional law, does an attorney inadequately represent a criminal defendant charged with sexually abusing nine separate victims, where different defenses are presented, when that attorney fails to insure that the court instruct the jury that it must not find defendant guilty based on his propensity to commit sexual offenses against young women?

Proposed Rule of Law. Yes. In a case involving multiple alleged victims, where different defenses apply to a variety of the charges, adequate counsel would insure that the court instruct the jury that to find defendant guilty it must not "mix-and-match" testimony from the several alleged victims in arriving at the conclusion that defendant had acted in conformity with his propensity to commit a particular sexual offense against any particular young woman.

(2) What must a post-conviction petitioner prove to establish "prejudice" in such a circumstance where his trial attorney failed to request a limiting instruction to insure that the trial court instruct the jury that it could not find defendant guilty based on his propensity to commit sexual offenses against young women generally?

Proposed Rule of Law. To establish "prejudice" based on an attorney's failure to request a limiting instruction to insure that a jury would be instructed that it was not to find a defendant guilty based on his propensity to commit sexual offenses against young women, a post-conviction petitioner must establish that the lack of such a limiting instruction, given how the case was litigated before the jury, had a "tendency to affect the result of the prosecution," or that it is "reasonably likely" that the result of the trial would have been different.

FACT SUMMARY

The state prosecuted petitioner for sexually abusing nine different young female women. The court of appeals presented the factual background as follows:

> "The facts are not in dispute. In case number 07–01306, a grand jury indicted petitioner on 20 counts arising out of alleged sexual contacts– some consensual and some nonconsensual– between petitioner and eight different victims over a period of several years. In case number 08–00213, defendant was accused of one count of first-degree rape and one count of second-degree sexual abuse arising from one incident with a ninth victim. The two cases were joined for

trial.[1] Each of the incidents allegedly occurred at a place and time distinct from each of the others. Each of the victims was under 18 at the time of the alleged crimes.

> "At the beginning of the trial, among other instructions, the court told the jury that '[y]ou may draw any reasonable inference from the evidence, but you must not engage in guesswork or speculation.' Each of the nine victims testified at trial. Although we discuss the specific charges in more detail below, it is helpful to briefly outline the contours of the state's case and petitioner's defense with regard to each victim.
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> **"A.** *The charges and defenses*
>
> **"1. RM**
> Petitioner was charged with one count of first-degree rape by forcible compulsion and one count of second-degree sexual abuse; both charges arose from a single incident. The state's evidence on those counts consisted of RM's account of petitioner forcibly raping her and witness testimony corroborating that RM had been alone with petitioner. In closing argument, petitioners counsel suggested that petitioner and RM had not engaged in any sexual conduct.
>
> **"2. JA**
> Petitioner was charged with one count of first-degree rape by forcible compulsion and one count of second-degree sexual abuse relating to a single incident. The state's only evidence was JA's account of the incident. Petitioner called witnesses whose testimony contradicted JA's account in significant respects. In closing argument, petitioner's counsel maintained that petitioner and JA never had any sexual contact.
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[1] "The state moved to dismiss four of the charges before trial. Defendant went to trial on the remaining 18 counts: five counts of first-degree rape, ORS 163.375; six counts of second-degree sexual abuse ORS 163.425; two counts of third degree rape, ORS 163.55; three counts of third-degree sexual abuse, ORS 163.415; one count of third-degree sodomy, ORS 163.385; and one count of misdemeanor contributing to the sexual delinquency of a minor. In this opinion, references to counts refer to case number 07–01306 unless otherwise noted."

"3. BB
Petitioner was charged with two counts of third-degree sexual abuse arising from a single incident. The state's only direct evidence of the incident was BB's testimony. At trial, petitioner called a witness who testified that BB had admitted to fabricating the allegations against petitioner. Petitioner's counsel did not specifically address the charges pertaining to BB in his closing argument.

"4. SB
Petitioner was tried on two counts of first-degree rape and two counts of second-degree sexual abuse arising out of two separate incidents. The state's evidence was based on SB's testimony about the incidents. At trial, petitioner's counsel called a witness that stated she had heard sounds consistent with consensual sex between SB and petitioner during one of the incidents. In closing argument, petitioner's counsel conceded that petitioner had engaged in sexual contact with SB, but denied that petitioner had forcibly compelled SB to have sex.

"5. KH
Petitioner was tried on one count of first-degree rape by forcible compulsion and one count of second degree sexual abuse. In closing argument, petitioner's counsel admitted that there had been sexual contact between petitioner and KH, but denied that petitioner had forcibly compelled her to have sex.

"**6. DH**
Petitioner was charged with one count of second-degree sexual abuse and one count of third-degree sexual abuse relating to a single incident. Petitioner's counsel put no evidence to counter DH's testimony that petitioner had sexually touched her without her consent; counsel also did not make any specific arguments to the jury about the charges pertaining to DH.

"7. MZ
Petitioner was charged with one count of third-degree sodomy and one count of third-degree rape. In closing argument, petitioner's counsel specifically conceded that petitioner had committed the charged crimes with respect to MZ. The charges pertaining to MZ were the only ones for which the state introduced physical evidence inculpating petitioner.

"8. KN
Petitioner was charged with one count of third-degree rape; petitioner's counsel conceded to the jury that defendant was guilty of that charge.

"9. CO
Petitioner was charged with one count of contributing to the sexual delinquency of a minor, the only misdemeanor charge in the combined as. As with the charge pertaining to KN, petitioner conceded his guilt at trial.

"B. ***Closing argument and jury instructions***

"As noted, all of the charges were tried to the jury in a single trial. In its closing argument, the state acknowledged that the determination of the disputed factual questions revolved around assessments of credibility:

> 'Now, in hearing from many of the victims, it's a matter of assessing credibility. And when you go into the jury room to deliberate, we're not asking you to leave your common sense outside the door. We ask you to draw upon your experience as human beings in assessing credibility.'

"After explaining generally why the jury should find the victims credible, the state also explained, one by one, why the jury should find each victim credible. Referring to evidence that petitioner had attempted to influence the testimony of certain witnesses, the state argued that, 'when you look at [petitioner's] statements during the course of this trial, and of the investigation, and his tampering with witnesses, they really give you insight into his sexual assaults. And they parallel his predatory nature.' The state continued:

> 'This is all an issue of power and control. That is the overwhelming thing is power and control on behalf of [petitioner].'
>
> 'Now, look at the patterns of sexual assault by the [petitioner]. He's assaulting victims while they're sleeping and vulnerable. [SB] and [DH].
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> 'He takes the victims by swift attack. [RM], [JA], and [KH].
>
> 'He takes the victims through manipulation or subtle forms of coercion. [BB] and [KN].
>
> 'He offers reassurance to each victim, or tries to make them believe that they want it.

"After listing the dates of the alleged attacks, the state argued, 'now, during his–you know, he had a little break here in 2004 and 2005, but he's pretty consistent otherwise.' Finally, the state also argued, 'What are the chances you're going to have nine people coming before you, six disclosing nonconsensual sexual touching, with the varied backgrounds, with the same theme of manipulation, deceit, and coercion? What are the chances?'

"At the conclusion of closing arguments, the trial court gave, among others, the following jury instructions:

> 'And there are two types of evidence. One is direct evidence, such as the testimony of an eyewitness. And the other is circumstantial evidence, which is the proof of a chain of circumstances pointing to the existence or nonexistence of a certain fact. You may base your verdict on direct evidence or on circumstantial evidence, or on both.
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> '*****
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> 'In deciding this case, you may draw inferences and reach conclusions from the evidence, if your inferences and conclusions are reasonable and are based on your common sense and experience."

"The jury convicted petitioner on all 18 counts, and the trial court sentenced him to 400 months in prison. He appealed the resulting judgement to this court and we summarily affirmed it. The Supreme Court denied review.

"In the present action, petitioner sought post-conviction relief, alleging, *inter alia*, that he received constitutionally inadequate counsel based on the failure to request a jury limiting instruction; the post-conviction court denied his petition. This timely appeal followed."

Green v. Franke, 261 Or App 49, 51-55 (2014).

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SUMMARY OF ARGUMENT

Trial counsel provided petitioner ineffective and inadequate assistance of counsel in failing to request a limiting instruction in petitioner's jury trial. The unique circumstances of petitioner's case - - namely nine young, female alleged victims with an assortment of defenses particular to each one - - meant that trial counsel needed to insure that the court instruct the jury that it could not convict petitioner based on his propensity to sexually abuse young females. Without any instruction, counsel's ineffectiveness and inadequateness had a tendency to affect the verdicts. The court of appeals agreed.

The state disagreed, and petitioned this court for review. This court allowed review. However, several arguments now presented by the state as to why the court of appeals erred were never presented to that court or the post-conviction trial court. Hence, this court should dismiss the petition for review in this case as improvidently allowed.

If this court disagrees, then this court should affirm the court of appeals due to trial counsel's ineffective and inadequate representation of petitioner at trial. Counsel should have requested that the court limit, in some way, the jury's use of propensity evidence in arriving at any verdict. Because counsel did nothing to insure of that, in light of the court's other instructions and the prosecutor's closing arguments, counsel's failure prejudiced petitioner in this particular case.

ARGUMENT

I. Overview: Issues Presented and Responses

Under Article I, section 11, of the Oregon Constitution, which provides, among other things, that "in all criminal prosecutions the accused has the right * * * to be heard by himself and counsel," a post-conviction claim of ineffective assistance of counsel requires that this court:

> "[f]irst * * * determine whether petitioner demonstrated by a preponderance of the evidence that [petitioner's lawyer] failed to exercise reasonable professional skill and judgment. Second, if [this court] conclude[s] that petitioner met that burden, [this court] must determine whether he proved that counsel's failure had a tendency to affect the result of his trial."

Lichau v. Baldwin, 333 Or 350, 359 (2002). Evaluating the constitutional adequacy of an attorney's performance requires a fact-specific endeavor, and a "search for a single, succinctly-stated standard, objectively applicable to every case, is a fool's errand." Krummacher v. Gierloff, 290 Or 867, 873-74 (1981). Similarly, the Sixth Amendment to the United States Constitution provides that "the accused shall enjoy the right * * * to have the Assistance of Counsel for his defence." In Strickland v. Washington, 466 US 668, 688, (1984), the United States Supreme Court held that that provision entitles a criminal defendant to "Reasonably effective assistance" of counsel. This court has historically treated the scope of both protections similarly; hence, "inadequate" and "ineffective" refer to the similar right to counsel under both provisions. Krummacher v. Gierloff, 290 Or 867, 871 (1981); State v. Davis, 350 Or

440, 461-77 (2011).

In this case, the issue presented remains whether trial counsel should have requested a limiting instruction, and, if so, whether counsel's failure had a tendency to affect the underlying verdicts. Green v. Franke, 261 Or App at 55. The court of appeals concluded that, "at the point that the trial court issued its final jury instructions, the risk that the jury would improperly rely on impermissible propensity inferences was so great and so apparent that defense counsel's failure to request a proper limiting instruction reflected an absence of professional skill and judgment." Id. at 57. Furthermore, that court concluded that counsel's failure did not affect each verdict or sentence equally. Id. at 68-69. To that end, the court of appeals reversed a number of petitioner's convictions and sentences, yet let others stand. Id.

Before this court, the state disagrees, arguing, essentially, two points: (1) that "Petitioner did not prove facts showing that his trial counsel's decision not to request a limiting instruction was objectively unreasonable"; and (2) that "Petitioner did not prove facts sufficient to show that the lack of a limiting instruction had a tendency to change the result of the trial." (Pet. Br. 19, 23). However, the state never preserved the first argument, and, thus, this court should decline to address it. If this court disagrees, then this court should deny it, along with the second point.

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II. Response to State's Opening Brief

II.(A): First Argument Not Preserved

The state never argued below that "petitioner did not prove facts showing that his trial counsel's decision not to request a limiting instruction was objectively unreasonable." Typically, for this court to reach a particular issue, that issue must be preserved below. ORAP 5.45(1) ("No matter claimed as error will be considered on appeal unless the claim of error was preserved in the lower court[.]"). In State v. Haynes, 352 Or 321, 336 (2012), this court declined to reach a particular argument that the state presented to this court because before the trial court, the state only made passing references to the argument presented. So too here.

In this case, before the trial court, the state argued, in its trial memorandum that, "an additional jury instruction would not have altered the jury verdicts." (Def. Trial Memo. 18). Obviously, that argument relates to the state's second point on appeal concerning "prejudice." Before the trial court, the state incorporated, by reference, trial counsel's "two affidavits." (Def. Trial Memo. 18). In those affidavits, trial counsel mentioned nothing in regards to why his failure to request such a limiting instruction was not objectively unreasonable. (Def. Ex. 101-102). He averred that,

> "The Judge read each and every count and told the jury they had to find on every count, so I don't know what counsel is saying. The Judge instructed the jury on each and every count in the Indictment. Based on my personal observations, I saw no indication that jurors failed to follow the Court's instructions."

(Def. Ex. 102, pg. 3). That response is much different than the state's argument before this court, nor did it fail to actually address the claim before the post-conviction trial court that counsel failed to request a limiting instruction - - that is, an additional instruction which would have been utilized by the jury in deliberations, not when counsel would have been in a position to observe the jurors.

Also, before the court of appeals, the state only focused on the lack of "prejudice" in not requesting such an additional instruction. The state argued:

> "Here, the trial court instructed the jury separately as to each count and each victim, and provided them with separate verdict pages for each victim. The court instructed the jury that the state must prove beyond a reasonable doubt each element as to each count. Moreover, because the jury verdicts were not unanimous on several of the counts, it appears that the jury understood that it must consider each count separately. Thus, petitioner's interest in a fair trial was adequately protected, and the post-conviction court correctly found that petitioner was not prejudiced by any purported error by trial counsel."

(Resp. Br. 30) (citations omitted). For those reasons, this court should confine its review to the state's "prejudice" argument, because the state failed to preserve the issue of whether trial counsel acted reasonably in not requesting the limiting instruction. Further, this court should not consider several of the state's arguments regarding "prejudice" given they were never made below either. However, if this court disagrees, this court should reject the state's arguments for the following reasons.

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II.(B): Petitioner Need Not Present Any Particular Type of Evidence

ORS 138.620(2) provides, in part:

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

The plain text of that statute - - and contrary to the state's assertion that petitioner must obtain evidence from trial counsel explaining why trial counsel failed to request such an instruction - - allows petitioner to rely on the trial court record alone to establish his case for why the instruction was necessary in this particular case. (Pet. Br. 20).

Again, however, before reaching the merits of that argument, this court should not consider it because the state never raised it at anytime until this court. "Rules of preservation in court proceedings serve several purposes, including encouraging the parties to sharpen the issues and to present them fully and fairly to the trial court in the first instance, so that the trial court has an opportunity to make an informed ruling and develop an adequate record and the opposing party and the reviewing court are not taken by surprise later." O'Hara v. Board of Parole, 346 Or 41, 47 (2009).

If the state had presented this argument to the post-conviction trial court, then the record could have been developed differently. Petitioner could have requested that the court leave the record open to either subpoena trial counsel as a witness, obtain his affidavit or declaration, and actually make either part of this record.

As discussed above, to obtain post-conviction relief, a petitioner must establish two elements: (1) that trial counsel performed inadequately by failing to exercise reasonable professional skill and judgment, and (2) that "petitioner suffered prejudice as a result." Trujillo v. Maass, 312 Or 431, 435 (1991); Strickland v. Washington, 466 US 668 (1984). In this case, petitioner chose to rely on the transcripts from the proceedings before the trial court to prove this particular claim. (Pet. Ex. 6). Nothing required more.

The state seems to argue - - for the first time before this court - - that petitioner cannot prevail on this claim because he did not introduce evidence of why trial counsel failed to request the instruction. That argument misapplies the burden of proof and persuasion.

As ORS 138.620(2) makes clear, petitioner may rely on any "competent evidence" to prove his claims. And, certainly, the transcript from the underlying criminal trial that resulted in the claims of post-conviction relief would be "competent evidence." If the state wanted to respond that counsel's performance was not inadequate due to counsel's reasons for not acting in a particular fashion, then certainly that would be relevant evidence for the state to present in defense to petitioner's claims. However, that is not an obligation of petitioner under ORS 138.620(2). For that reason, this court should reject this argument. Just as a party may want to establish "bias" or "motive" of a particular person or witness at trial to bolster that party's case, to prove an asserted legal claim, that party need not present

that type of evidence. See generally State v. Rose, 311 Or 274, 283 (1991) (state need not present evidence of defendant's motive in criminal case to prove its case).

II.(C): Failure to Request Limiting Instruction Unreasonable

As petitioner argued before the trial court and court of appeals, trial counsel performed inadequately in failing to request a limiting instruction. This court has recognized for years that "trial courts have the authority to give limiting instructions to juries that require them to consider evidence only for a particular purpose or in regard to a particular element." State v. Moore/Coen, 349 Or 371, 391 (2010) (citing State v. Thompson, 328 Or 248, 271 (1999)). As this court previously noted:

> "When a trial court declines to sever joined offenses, and evidence relating to one offense is not admissible to prove another joined offense, a trial court ordinarily will instruct the jury to consider the evidence on each offense separately to prevent the jury from using the evidence offered to prove one offense to decide another joined offense."

State v. Leistiko, 352 Or 172, 178 (2012) (citing State v. Miller, 327 Or 622, 626-33 (1998) ("recognizing the risk that a jury may use evidence admitted to prove one count in deciding whether the state has proved a joined count")). That "ordinary instruction" was never given in petitioner's trial.

Petitioner provided the instruction that the trial court gave in State v. Kitzman, 129 Or App 520, 529 (1994), as an example that petitioner could have utilized. (Pet. Trial Memo. 51). Never did petitioner argue that trial counsel needed to request that exact instruction. Petitioner stressed that without a similar instruction - - coupled with the other instructions actually given by the court and arguments made by the

prosecutor - - counsel never made certain that the court made clear to the jury that it must consider the testimony of each alleged victim independently to prove the allegations, and not cross-reference testimony in concluding that defendant was guilty of certain offenses given his propensity for sexually abusing young minor females. (Pet. Trial Memo. 52). The court of appeals agreed.

That court noted that:

> "the following facts are of particular significance: the trial court had initially instructed the jurors that they could 'draw any reasonable inference from the evidence'; the state had asked the jurors, in its closing argument, 'What are the chances that you're going to have nine people coming before you, six disclosing nonconsensual sexual touching, with the varied backgrounds, with the same theme of manipulation, deceit, and coercion? What are the chances?'; and the trial court told the jurors, immediately before they began deliberations on 18 counts of sexual misconduct relating to nine different underage women,[2] that, 'you may draw inferences and reach conclusions from the evidence, if your inferences and conclusions are reasonable and are based on your common sense and experience.' Although the charges involved discrete incidents of conduct that, standing apart, did not involve particularly complex factual determinations, constitutionally adequate counsel would have recognized the great and obvious danger that the jury would rely on impermissible inferences about petitioner's evidently venal propensities in its deliberations."

Green v. Franke, 261 Or App at 57-58. For those reasons, that court concluded that, "petitioner has demonstrated, by a preponderance of the evidence, that asking for a proper limiting instruction was 'reasonably necessary to diligently and consciously

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[2]At this point in the opinion, the court of appeals provided footnote number 4, which stated, "The jury had also heard evidence that petitioner had engaged in uncharged sexual contact with at least two other underage women."

advance the defense.'" Id. at 58 (citing Krummacher v. Gierloff, 290 Or 867, 874 (1981)).

The state disagrees. The state argues that "given counsel's overarching strategy at trial, a reasonable attorney could have chosen not to request a limiting instruction; and indeed, the record contains evidence showing that the instruction would have conflicted with counsel's specific strategic decisions." (Pet. Br. 21). That is inaccurate.

First, counsel made no specific strategic decision not to request a limiting instruction. In fact, as outlined above, in counsel's supplemental affidavit, counsel responded to the claim "regarding jury instructions," indicating that, "The Judge read each and every count and told the jury they had to find on every count, so I don't know what counsel is saying." (Def. Ex. 102, pg. 3). That is hardly strategic, and was counsel's sole response to petitioner's sole contention regarding jury instructions in the amended petition for post-conviction relief. (Amended Petition for Post-Conviction Relief, pg. 5). Clearly, trial counsel never even considered the need to insure that the court instruct the jury not to "mix-and-match" testimony in arriving at its conclusion that petitioner must be guilty of any given charge given his apparent strong propensities to sexually abuse young females.

In this case, the court would have had to provide the limiting instruction if requested. OEC 404(3) provides:

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> "Evidence of other crimes, wrongs or acts is not admissible to prove the character of a person in order to show that the person acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident."

And, OEC 105 provides,

> "When evidence which is admissible as to one party or for one purpose but not admissible as to another party or for another purpose is admitted, the court, upon request, shall restrict the evidence to its proper scope and instruct the jury accordingly."

The evidence would have been admissible for one purpose, namely to establish whether defendant committed the particular act alleged against that particular alleged victim. See State v. Leistiko, 352 Or 172, 180, adh'd to as modified on recons, 352 Or 622 (2012)(OEC 404(3) prohibits evidence that a defendant acted in a certain fashion with one woman to prove that he, similarly, acted with the same propensity with another woman).

Second, the proposed instruction would not have been inconsistent with counsel's tendered defense. Again, in this case, the state prosecuted petitioner for sexually abusing nine young female victims. At trial, petitioner maintained through counsel, essentially, that (1) he never had sexual contact with RM, JA, BB, and DH[3];

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[3]As the court of appeals noted, counsel made no mention as to DH in opening statements or closing arguments, nor did he present any evidence regarding DH. Green v. Franke, 261 Or App at 65. Hence, because counsel did not did not explicitly acknowledge petitioner's guilt as it related to DH, as he did regarding MZ, KN, and CO, then, as a matter of law, petitioner denied the allegations by DH and the prosecutor was required to prove petitioner's guilt beyond a reasonable doubt.

that (2) he engaged in "consensual" sexual contact with SB and KH, but that no "force" was used; and that (3) he was guilty of the charges relating to MZ, KN and CO. Green v. Franke, 261 Or App at 52-53. Before this court, the state argues that,

> "trial counsel believed that petitioner had no plausible defense to the charges that were based on consensual sexual contact with the victims. Thus, he focused his overarching trial strategy on creating doubt about the more serious charges that depended on forcible sexual contact. He wanted the jury to believe that, although petitioner had sexual contact with several of those victims, it was – like the offenses to which he had admitted – consensual."

(Pet. Br. 21). That argument, however, completely disregards petitioner's main defense to the charges that concerned RM, JA and BB; namely that no sexual contact took place at all. Furthermore, the state's argument fails to differentiate "substantive evidence" from "impeachment evidence."

Petitioner needed to insure primarily, for example, that the jury would not convict him of the charges related to a particular alleged victim based on the "substantive testimony" of a separate alleged victim. The fact that petitioner sought to "impeach" a particular victim's testimony with evidence that that person knew one of the other alleged victim-witnesses would not have precluded trial counsel from requesting a limiting instruction to insure that the court instructed the jury that it could not convict petitioner for allegations concerning one victim based on another victim's testimony about what she alleged petitioner did to her (i.e. "substantive evidence"). The Kitzman instruction certainly could have been modified. As the court of appeals noted, petitioner referenced the Kitzman instruction "as of the sort

that his counsel should have requested." Green v. Franke, 261 Or App at 56 n. 2. The point remains: by the time "the trial court issued its final jury instructions, the risk that the jury would improperly rely on impermissible propensity inferences was so great and so apparent that defense counsel's failure to request a proper limiting instruction reflected an absence of professional skill and judgment." Green v. Franke, 241 Or App at 57.

By that time, as the court of appeals noted, counsel heard the prosecutor argue:

> "This is all an issue of power and control. That is the overwhelming thing is power and control on behalf of [petitioner].
>
> "Now, look at the patterns of sexual assault by the [petitioner]. He's assaulting victims while they're sleeping and vulnerable. [SB] and [DH].
>
> "He takes the victims by swift attack. [RM], [JA], and [KH].
>
> "He takes the victims through manipulation or subtle forms of coercion. [BB] and [KN]."

Green v. Franke, 261 Or App at 54. And, for example, as indicated above, the problem with those arguments without a limiting instruction is that counsel allowed the prosecutor to insinuate to the jury that, even though petitioner claimed to have not engaged in any sexual contact with BB, his propensity to sexually assault victims such as KN - - a person he agreed he sexually abused - - meant he must have acted in a similar "pattern" or with similar "manipulation" with BB as he did with KN.

Finally, coupling the lack of a limiting instruction after such arguments by the prosecutor, along with the court's other instructions directing the jury "to consider all

the evidence you find worthy of belief" and to utilize testimony by any witness to "prove any fact in dispute," illuminates the unreasonableness of failing to request any limiting instruction in this case. (Def. Ex. 6, pgs. 87; 842-44). "The facts in dispute" differed depending upon alleged victim and tendered defense; yet, the court's instructions actually invited the jury to cross-reference testimony by utilizing "any witness" "to prove any fact in dispute." So, without a limiting instruction, counsel failed to insure that the jury would convict petitioner for his acts, as opposed to his propensities. And, a limiting instruction would not have prohibited counsel from impeaching any witness with personal biases.

For those unique factual reasons presented in this case, counsel performed deficiently in failing to request a limiting instruction under those circumstances. That failure also "prejudiced" petitioner.

III. Reasons Why Counsel's Inadequate Performance Prejudiced Petitioner

Under Article I, section 11, "prejudice" results from "those acts or omissions * * * [that had] a tendency to affect the result of the prosecution." Krummacher, 290 Or at 883. Under its federal counterpart, petitioner must show that it is "reasonably likely" that the result of the trial would have been different had counsel acted differently. Harrington v. Richter, 562 US 86 (2011).

In this case, without a limiting instruction, counsel allowed the jury to convict petitioner because, as counsel averred, petitioner "certainly was a sociopath who apparently believed that he could have sex with anybody at any time." (Def. Ex. 102,

pg. 4). If any juror believed - - as apparently petitioner's own counsel did and the prosecutor insinuated - - that petitioner viewed himself as someone who could, and would, have sex with any minor female that he so desired at any time, under any circumstances, then certainly, by a preponderance of the evidence, counsel's failure to request a limiting instruction had a tendency to bolster the state's case against petitioner. Also, for the following reasons, it is "reasonably likely" that the result of the trial would have been different had counsel requested a limiting instruction, and, without question, counsel's failure to request one, had a "tendency to affect the result of the prosecution." The court of appeals agreed.

That court determined:

> "We further note that there are two distinct types of impermissible propensity inferences that the jury was invited to rely upon in the absence of a limiting instruction. The first is that, because petitioner had apparently engaged in sexual contact with several other minor victims, it was more likely that he had engaged in sexual contact with the particular victim under consideration. The second pertains to the first-degree rape charges; the jury was invited to infer that, because petitioner had forcibly compelled other young women to have sex, he had also employed forcible compulsion on the particular occasion in question."

Green v. Franke, 261 Or App at 62-63. To that end, the court of appeals concluded that petitioner was prejudiced as to all counts where any factual issue was in dispute, or where petitioner's sentence was affected by one of those prior convictions. Id. at 63-68. As to count 20, a charge concerning CO, because petitioner admitted guilt, and the sentence was not affected, the court of appeals concluded that petitioner was not prejudiced by counsel's failure to request a limiting instruction. Id. at 68-69.

The court of appeals rejected the state's argument that

> "petitioner cannot show any prejudice because the court instructed the jury separately as to each count and provided the jury with verdict forms that clearly delineated the different victims and charges. Defendant also contends that the fact that the jury returned nonunanimous verdicts on some of the same counts demonstrates that it considered each count separately, notwithstanding the lack of a limiting instruction."

Green v. Franke, 261 Or App at 67. That court noted that,

> "[t]hat fact, however, goes nowhere toward showing that the jury did not improperly rely on inferences about petitioner's apparent propensity to engage in illicit sexual contact with young women and – in some instances – to forcibly compel young women to submit to that contact."

Id. The court of appeals also recognized that the trial court urged the jurors to "draw inferences and reach conclusions from the evidence, if your inferences and conclusions are reasonable and are based on your common sense and experience." Id. at 68. Coupling that with the prosecutor's reliance in closing argument on petitioner's "predatory nature," "patterns" of sexual assault, and unlikeliness that nine separate victims would make similar allegations against him, the court of appeals concluded:

> "the prejudice that petitioner suffered was not that the jury improperly failed to consider each of the distinct charges separately, but rather that the jury was affirmatively encouraged – by the prosecutor's closing argument – and permitted – by the lack of a limiting instruction – to improperly draw and rely on propensity inferences in making its distinct determinations on each of those charges."

Id. For those reasons, the court of appeals concluded trial counsel's failure to request a limiting instruction prejudiced petitioner.

The state disagrees, arguing before this court the following points: (1) the court of appeals utilized the wrong standard of "prejudice," (2) "the jury did not need to rely on propensity inferences to make its determination about petitioner's guilt with respect to the various victims," (3) "none of the evidence at petitioner's trial was offered or received for the express purpose of proving petitioner's propensity," and (4) "the state's theory of petitioner's guilt did not depend on the jury evaluating the evidence for a propensity purpose." (App. Br. 24-26).

This court should reject those arguments. First, again, the arguments made by the state before this court - - compared to those made before the post-conviction court and court of appeals concerning "prejudice" - - are fundamentally different. Given the fundamental differences, this court should not address the state's arguments, as outlined above, because they are unpreserved. See State v. Wilson, 323 Or 498, 512 (1996) (citing State v. Isom, 313 Or 391, 406 (1992)) (this court declining to reach unpreserved arguments not raised below because an objection on one ground not sufficient to preserve objection on another ground).

Prior to this court, the state had argued that petitioner was not prejudiced because petitioner could not establish (1) that "the one additional instruction would have altered any juror's vote," and (2) that "the one additional instruction would have caused enough jurors to change their votes so that the jury verdicts would have been different." (Def. Tr. Memo. 18). And, before the court of appeals, the state again contained its argument concerning "prejudice" to: "Moreover, because the jury

verdicts were not unanimous on several of the counts, (Def Ex 117), it appears that the jury understood that it must consider each separately." (Resp. Br. 30). As discussed above, that is the argument the court of appeals addressed, and rejected.

Now, before this court, for the first time the state makes fundamentally different arguments concerning "prejudice"; namely that, (1) "the jury did not need to rely on propensity inferences to make its determination about petitioner's guilt with respect to the various victims," (2) "none of the evidence at petitioner's trial was offered or received for the express purpose of proving petitioner's propensity," and (3) "the state's theory of petitioner's guilt did not depend on the jury evaluating the evidence for a propensity purpose." (App. Br. 24-26). As depicted above, those arguments are fundamentally different than those raised before any court below. To that end, this court should not consider them, and confine its analysis to whether, as the state argued below, petitioner was prejudiced because he could not establish that the instruction would have altered any particular juror's vote. As to that argument, the state is incorrect for the reasons argued by petitioner below, namely, that the way the prosecutor argued the case, coupled with the court's instructions and the absence of a limiting instruction had a tendency to affect the verdicts. However, for the following reasons, if this court entertains the state's new arguments, this court should reject those as well.

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First, whether the jury needed to "rely on propensity inferences to make its determination about petitioner's guilt with respect to the various victims" misses the mark. The issue is not whether the jury "needed" to; the issue is whether it was reasonably likely, as this case was litigated, that the jury did rely on those propensity inferences. And, as discussed above, given the prosecutor's comments, and the court's other instructions, more likely than not the jury did use the propensity evidence in determining petitioner's guilt.

As this court recognized in State v. Clegg, 332 Or 432, 442 (2001), "[g]enerally, once evidence has been admitted without restriction, it can be used by the jury for any purpose." As articulated above, it is not necessarily true, as the state argues, that "the core factual question at trial boiled down to whether each of the victims was telling the truth about what petitioner had done to them." (Pet. Br. 25). Again, that is because petitioner argued, in regards to several of the alleged victims, that he "had done" nothing to them at all, and, as to others he argued that he had not forcibly compelled them to do anything. So, it is accurate that each alleged victim's credibility was important, but so was petitioner's. And, without instructing the jury, in some fashion, to not consider petitioner's propensity, then petitioner's counsel made it easier for the prosecutor to obtain a conviction against petitioner for allegations he denied. That constitutes prejudice, especially in a case where the prosecutor must prove each and every element beyond a reasonable doubt.

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Next, whether any of the "the evidence at petitioner's trial was offered or received for the express purpose of proving petitioner's propensity" again misses the mark. As Clegg makes clear, evidence admitted without restriction may be used by the jury for "any purpose." The prosecutor urged the jury to use the evidence for propensity purposes, and counsel did nothing to insure that the court instruct the jury not to.

Certainly, the prosecutor introduced the evidence for some other purpose than propensity. That, according to the state, makes this situation distinguishable, for example, from Leistiko, "where the state offered evidence about an unrelated and uncharged incident of rape for the express purpose of establishing that the defendant was guilty of unrelated, charged rapes." (Pet. Br. 25). Again, that is imprecise at best. In Lesitiko, the prosecutor admitted the prior bad act evidence not to prove that defendant was therefore guilty in that case - - which would certainly be inadmissible "character" or "propensity" evidence - - but to prove that the charged victims did not consent, similar to the prior bad act evidence. State v. Leistiko, 352 Or at 174, 180 n. 6. And, before this court, the state argued that the prior bad act evidence was relevant in that case to prove the three victims' states of mind, the defendant's intent, and the defendant's plan. Id. at 181, 187. So, clearly, even in Lesitiko the state argued that the other evidence was admissible not "for the express purpose of establishing that the defendant was guilty of unrelated, charged rapes."

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Third, the state argues that "the state's theory of petitioner's guilt did not depend on the jury evaluating the evidence for a propensity purpose." (Pet. Br. 26). That simply makes no sense. Never is evidence admissible for the sole purpose of proving conformity on a particular occasion, so never could the state's theory of petitioner's guilt "depend on the jury evaluating the evidence for a propensity purpose." However, where, as here, the prosecutor insinuated that petitioner must be guilty given the number of victims, the court instructed the jury to consider any evidence to prove any fact in dispute, and counsel failed to request that the court limit the use of any evidence, then certainly counsel's failure, by a preponderance of the evidence, had a tendency to affect the verdict, even if the state's case relied on other evidence too.

Finally, the state argues that the court of appeals applied the incorrect legal standard in assessing "prejudice." (Pet. Br. 24). The state maintains, "[r]ather than evaluating what likelihood a limiting instruction would have had on the jury's verdict, the Court of Appeals evaluated what likelihood it could have had." (Pet. Br. 24).[4]

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[4]The state also maintains that ORS 138.530(1)(a) provides that, "relief [is] available only if the error renders the conviction 'void.'" (Pet. Br. 23). That is inaccurate as well. ORS 138.530(1)(a) provides, in pertinent part:

> "(1) Post-conviction relief pursuant to ORS 138.510 to 138.680 shall be granted by the court when one or more of the following grounds is established by the petitioner:
>
> "(a) A substantial denial in the proceedings resulting in petitioner's conviction * * * of petitioner's rights under the Constitution of the

In essence, without explicitly requesting it, the state urges this court to heighten the "prejudice" standard, making it more similar to that required under its federal counterpart. Again, the state never requested that before any court below, and, therefore, this court should not entertain such a novel, new argument at this stage in these proceedings. In any event, the court of appeals did not apply the incorrect legal standard, and this court should not alter the standard of prejudice under Article I, section 11, of the Oregon Constitution on this record.

Since at least 1981 this court has recognized that not all acts or omissions by criminal defense counsel that are inadequate result in prejudice. In Krummacher v. Gierloff, 290 Or 867, 883 (1981), this court held that, "only those acts or omissions by counsel which have a tendency to affect the result of the prosecution can be regarded as of constitutional magnitude[.]" And, that standard has been cited

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> United States, or under the Constitution of the State of Oregon, or both, and which denial rendered the conviction void."

(Emphasis added). Hence, that provision mandates in certain situations when the post-conviction court must grant relief to a petitioner, and gives as an example when petitioner proves the conviction "void."

ORS 138.530(1)(a) does not limit the post-conviction court's discretion at all as to when it may provide relief; however, in some situations it must provide relief. For that reason, a petitioner does not need to prove, as the state maintains, that his or her counsel provided inadequate assistance that "rendered the conviction void." If a petitioner proves that, then the court "must" provide relief. If petitioner does not prove that, then the post-conviction "may" provide "other relief as may be proper and just." See ORS 138.520 (providing "relief which a court may grant or order under ORS 138.510 to 138.680").

thousands of times by courts in this state since. This court will not overrule its prior decisions "simply because the personal policy preferences of the members of this court may differ from those of [its] predecessors who decided the earlier case." Engweiller v. Persson, 354 Or 549, 559 (2013) (citing Farmers Ins. Co. v. Mowry, 350 Or 686, 698 (2011)). So, the state must present important reasons why this court should alter precedent because "[s]tability and predictability are important values in the law." Id.

More importantly, however, contrary to the state's argument, "prejudice" can be established by showing that "the jury 'may well have,' 'was permitted to,' or was 'invited to' draw improper inferences from the evidence about various victims." (Pet. Br. 24). The state cites two federal cases - - Cullen v. Pinholster, 563 US __, 131 S Ct 1388, 1403 (2011), and Harrington v. Richter, 562 US __, 131 S Ct 770, 792 (2011) - - for the proposition that a post-conviction petitioner must establish that "the likelihood of a different result must be 'substantial.'" (Pet. Br. 24). To that end, the state maintains, "petitioner's claim of prejudice in this case required proof of a substantial likelihood that, if counsel had asked for and received a limiting instruction, the jury would have rendered a more favorable verdict." (Pet. Br. 24).

Again, never before at any court below did the state urge for an identical standard of prejudice under both constitutions. And, to the contrary, even before the post-conviction trial court, petitioner pointed out the differences. For example, before that court, without objection from the state, petitioner maintained:

> "However, the standards for determining whether petitioner was prejudiced by trial counsel's performance differ significantly under the state and federal constitutions. See Ashley v. Hoyt, 139 Or App 385, 395-96 (1996) (post-conviction court erred in applying more onerous Strickland standard of prejudice); see also Warren v. Baldwin, 140 Or App 318, 325 (1996); [State v. Stevens, 322 Or 101, 110 (1995)] (court of appeals erred in describing Krummacher standard of prejudice as 'omission by trial counsel that 'would have affected the outcome of the case").
>
> "Under Article I, section 11, 'prejudice' consists of those acts or omissions 'which would have a tendency to affect the result." Stevens, 322 Or at 110 n 5 (quoting Krummacher, 290 Or at 883). On the other hand, under the Sixth Amendment, to demonstrate prejudice a petitioner must establish that "[trial] counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." Strickland, 466 US at 687.

(Pet. Trial Memo 28-29). Thus, clearly, since the beginning of these proceedings petitioner has maintained the differences in the standards, without objection from the state.

Those differences are why the court of appeals did not err in utilizing the words it did when assessing "prejudice" in this case. That court concluded "that under Article I, section 11, of the Oregon Constitution, petitioner was prejudiced by his trial counsel's deficient performance with respect to his convictions" for a variety of the offenses. Green v. Franke, 261 Or App at 68. To that end, and for those reasons, that court concluded that counsel's failure to request a limiting instruction in this particular case enhanced the prosecutor's ability to prove his case, given how the case was litigated and the court's other instructions.

CONCLUSION

For those reasons, this court should dismiss the state's petition for review in this matter as improvidently allowed. See State v. Beason, 289 Or 215, 217 (1980) (if after allowing a petition for review this court is of the opinion that this court cannot reach the issues presented by the appellant based on a more thorough review of the record, then this court will dismiss the petition for review). Several of the arguments that the state presents before this court were never presented to either the post-conviction trial court, or court of appeals. The state acknowledges that Pereida-Alba v. Coursey, 252 Or App 66 (2012), rev allowed, 363 Or 410 (2013), presents many of the legal issues the state wants addressed by this court in these types of cases; so, this court can address those issues in that case on a clean procedural record. (Pet. Br. 17). This case does not provide that procedural posture.

If this court disagrees, then, for the reasons discussed that are particular to this case, this court should affirm the court of appeals' decision given petitioner proved by a preponderance of the evidence this claim. If this court further disagrees, then this court must remand to the court of appeals to confront the issues presented in this case that the court of appeals did not address based on its disposition. See Green v. Franke, 261 Or App at 56 n. 3 ("In light of our disposition, we need not – and do not – address petitioner's argument concerning the failure to object during closing statement.").

Dated: October 2, 2014

FERDER CASEBEER FRENCH & THOMPSON, LP

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CERTIFICATE OF FILING AND SERVICE

I hereby certify that I directed that the foregoing BRIEF ON THE MERITS OF RESPONDENT ON REVIEW be e-filed on October 2, 2014, by submitting the electronic form in Portable Document Format (PDF) that allows texts searching and allows copying and pasting text into another document to

http://appellate.courts.oregon.gov

I further certify that, on October 2, 2014, I directed the foregoing BRIEF ON THE MERITS OF RESPONDENT ON REVIEW to be electronically served by using the court's electronic filing system to:

Ryan Kahn
Assistant Attorney General
Department of Justice
1162 Court Street NE
Salem OR 97301

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)(i) and (2) the word-count of this brief (as described in ORAP 5.05(2)(a)) is 8,522 words.

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

DATED: October 2, 2014

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