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

PETITIONER'S BRIEF ON THE MERITS

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

Opinion Filed: February 12, 2014
Before: Armstrong, P.J., Nakamoto, J., and Egan. J.

Continued…

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases Cited

Constitutional and Statutory Provisions

PETITIONER'S BRIEF ON THE MERITS

STATEMENT OF THE CASE

A jury convicted petitioner of sex offenses against nine different victims following a joint trial. In his post-conviction case, petitioner alleged that his trial counsel was constitutionally inadequate by not requesting an instruction to limit the jury's consideration of the evidence about each individual victim to charges about that victim. The post-conviction court rejected that claim, but the Court of Appeals reversed, holding that trial counsel's failure to request the instruction was deficient and that petitioner proved prejudice. That holding was error in light of the high burden for claims of inadequate assistance of counsel.

To establish that a trial attorney performed in a deficient manner, a post-conviction petitioner is required to prove historical facts showing that counsel did not exercise reasonable professional skill and judgment. If the petitioner does not offer evidence showing the specific basis for counsel's act or omission, he or she can show deficient performance only if, on the face of the record, no reasonable attorney would have performed as counsel did. Petitioner did not meet that high burden here. He submitted no evidence about counsel's reason for not requesting a limiting instruction. And given counsel's trial strategy—which emphasized the links between various victims, and suggested that

petitioner engaged in a pattern of consensual sex with victims—the record does not show that all reasonable attorneys would have wanted the instruction.

Petitioner also failed to meet the high burden necessary to prove prejudice. To carry that burden, a petitioner's evidence must show that counsel's error would have tended to result in a different decision by the jury. That standard requires more than a "conceivable" possibility that counsel's error *may* have resulted in a different outcome; it requires a substantial likelihood that the result would have been different. In this case, petitioner's evidence did not satisfy that standard.

First Question Presented

When a post-conviction petitioner alleges that his trial counsel provided constitutionally inadequate assistance under the state and federal constitutions by not requesting an instruction that limits the jury's use of evidence, what must the petitioner show to establish that counsel's performance was deficient?

First Proposed Rule of Law

The petitioner must prove facts showing that trial counsel's conduct fell below an objective standard of reasonableness. Specifically, the petitioner must prove that, given the facts and circumstances that trial counsel faced at the time of trial, no reasonable attorney would have decided against requesting the instruction. If any reasonable attorney could have decided against the

instruction, then the petitioner has not established that trial counsel's performance was constitutionally deficient.

Second Question Presented

Assuming that all reasonable attorneys would have requested a limiting instruction, what must a post-conviction petitioner prove to establish that trial counsel's failure to request the instruction prejudiced his case?

Second Proposed Rule of Law

To prove prejudice, the petitioner must show that the lack of the limiting instruction tended to affect the verdict. A petitioner does not meet that burden by showing only a conceivable possibility of what the jury *may* have inferred in the absence of a limiting instruction. Instead, the petitioner must present evidence establishing a substantial likelihood that, if counsel had requested the instruction, the result of the trial would have been different.

Statement of Facts

A. Petitioner was convicted of sex offenses committed against nine different victims, following a joint trial.

The state charged petitioner with committing sex crimes against nine victims, over the course of about five years. (Ex 4; Ex 5 [Indictments]).[1] The

[1] In particular, petitioner faced seven counts of first-degree rape, two counts of third-degree rape, eight counts of second-degree sexual abuse, three counts of third-degree rape, and one count of contributing to the sexual delinquency of a minor.

victims were all underage girls, ranging in age from 12 to 16 years old; petitioner was 4 to 5 years older than each victim at the time of the crimes. (*See, generally,* Exs 4, 5, and Ex 6). Some of the charges were based on sexual contact that, although "consensual" in a colloquial sense, was unlawful due to the age of the victims (in particular, the charges involving victims and (Ex 4; *see* Ex 6 [Trial Transcript] at 486, 502, 606). But the majority of the crimes required proof of forcible compulsion or a lack of consent, or were otherwise based on a theory of force (specifically, the charges involving victims and (Ex 4; Ex 5; Ex 6 at 620-29).

David Viuhkola (trial counsel), a defense attorney with 35 years' experience at the time, represented petitioner in the criminal proceedings. (Ex 101 [Viukola Affidavit]; Ex 6). By the time of trial, trial counsel knew that petitioner had made statements to police and to his underage girlfriend that he had, in fact, had sex with some of the victims. (Ex 101 at 2, 3; Ex 102 at 2; *see* Ex 6 at 280). Petitioner also had told his counsel that he had sex with several of the victims. (*See* Ex 101 at 2; Ex 101, Attached Memo; Ex 102 at 2). Petitioner said, however, that his sexual encounters with the victims were consensual, not forcible. (Ex 101 at 2 and Attached Memo; Ex 102 at 2; Ex 6 at 285).

Given that information, petitioner's counsel did not believe that he could mount a plausible defense to the charges involving "consensual" sex—that is,

the charges that were based solely on the victims' ages. (*See* Ex 101 at 5; Ex 6 at 827-28). Thus, he decided to concede to the jury that petitioner had committed the crimes against and (*See* Ex 6 at 827-28). Counsel planned to focus the defense, instead, on the crimes involving the other victims, all of which depended on allegations that petitioner had forced them to engage in sexual contact.[2] (Ex 101 at 5). Counsel's theory on the majority of those charges was that, although petitioner may have had sex with several of the girls, he did so only with their consent. (*See* Ex 6 at 826, 828, 830, 832, 833-34). Counsel did not concede, however, that petitioner had sex with or His defense to those charges was that no sexual contact occurred. (Ex 6 at 829, 833-34; *see* Ex 6 at 710).

At trial, the state called each of the victims to testify about their interactions with petitioner and about the sexual acts that he committed against them. (Ex 6 at 375, 422, 447, 484, 494, 509, 548, 600, 620). The state also called police detectives, and others, to testify about statements that the victims had made to them. (Ex 6 at 144, 166, 258, 561, 612). Three of the victims

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[2] All of the sexual-abuse charges (except those against victim were based on a lack of consent. But the prosecution did not pursue the theory that those victims did not "consent" by virtue of being underage. *See State v. Ofodrinwa*, 353 Or 507, 532, 300 P3d 154 (2013) ("does not consent" refers to both lack of capacity to consent due to age and lack of actual consent). Instead, the prosecution's theory was lack of consent due to the use of force. (*E.g.* Ex 6 at 847).

described consensual sex with petitioner, and the other six said that petitioner forcibly touched their sexually intimate parts, forced them to touch his, or forced them to have sexual intercourse while they either resisted or told him to stop.

In pursuit of the defense that any sexual contacts in which petitioner engaged was, in fact, consensual, trial counsel cross-examined the victims and other witnesses in an attempt to highlight testimony showing consent. (Ex 6 at 160, 236, 332, 339, 342, 537, 540-41, 576-77). He emphasized that type of evidence on cross-examination even if the charge was otherwise not in dispute. (Ex 6 at 489, 505, 610).[3] Counsel also cross-examined witnesses, and offered evidence, to highlight aspects of the victims' stories that appeared to conflict with allegations of forcible compulsion. (Ex 6 at 338-39, 346, 354, 357-58, 365, 413, 416, 576, 578, 664-67, 688-93).

A related aspect of trial counsel's strategy was to emphasize for the jury that several of the victims were connected to each other and, to some degree, that the evidence about their allegations should be considered together. Counsel did that in two primary ways. First, he pointed out that several of the victims knew each other, either in general or in how they came to report their

[3] For example, counsel cross-examined victims and to ensure that the jury heard that the encounters were consensual, even though counsel conceded petitioner's guilt on those charges. (Ex 6 at 489, 505, 610).

allegations to police. (Ex 6 at 141, 224, 345, 361, 418, 829). During his opening statement, for example, counsel told the jury:

> [TRIAL COUNSEL]: * * * I think detectives are going to testify that Detective Fryett was making one investigation and Detective Young was making another investigation over here, *but the majority of these girls really do know each other.*
>
> And it's - - it started out that here were two victims, and then [petitioner] was on TV, and all of a sudden there's now nine victims. [*The prosecutor*] *said he thinks the evidence is going to show that these people didn't know each other; these girls didn't know each other very much. But I think the testimony is going to come out that they really did know each other, a lot of them.*

(Ex 6 at 141-42; emphasis added).[4] Counsel picked up the same theme in his closing argument, in an attempt to give the jury a reason why a particular victim (might have lied about being raped:

> [TRIAL COUNSEL]: Does [allegation] make any sense? I submit that it does not, because the rape of her did not happen. *I don't know why she's lying. I don't have any idea. But I can tell you whether all these girls knew each other before, they all know each other now.* And if you don't think the detectives and the Victims' Assistance [office] have talked to these people, that's nonsense. They've talked to these girls, they've gotten them ready for trial, and they came and testified.

(Ex 6 at 829; emphasis added).

The second way in which trial counsel connected the evidence about multiple victims was by comparing the allegations about certain victims when

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[4] The evidence, in fact, showed that several of the victims did know each other (or at a minimum, knew about each other). (Ex 6 at 298, 404-06, 439, 440, 441, 443, 461, 462, 487, 503, 559, 528, 556, 573, 608).

they did not fit what other victims had reported. (Ex 6 at 352, 361). For example, counsel elicited differences between the circumstances that victims and reported (Ex 6 at 352), and he noted how the reports of some victims did not fit the "pattern" of what other victims reported. (Ex 6 at 361, 464, 833-34). And again, counsel argued that theme during closing arguments, telling the jury that the report of was "out of the pattern of what some of these other folks have said." (Ex 6 at 833-34).

Notwithstanding counsel's efforts at trial, the jury convicted petitioner of all of the charges, including the charges based on petitioner's use of force. (Exs 122, 123).

B. The post-conviction court rejected petitioner's claim that his trial counsel was inadequate for failing to request a jury instruction limiting the jury's use of evidence.

Petitioner sought post-conviction relief, alleging several claims of inadequate assistance of trial counsel. The only claim that is pertinent on review is the claim that trial counsel should have requested a jury instruction limiting the jury's consideration of the evidence at trial. In particular, petitioner alleged:

> (12) Trial counsel failed to request that the trial court instruct the jury that it was required to consider the evidence concerning each alleged victim separately and only as that evidence related to a specific charge or charges relating to that specific alleged victim.

(TCF 36; boldface removed).

In response to petitioner's claims, defendant obtained two affidavits from petitioner's trial counsel.[5] Counsel construed petitioner's claim about jury instructions as referring generically to the sufficiency of the instructions about "each and every count that the State must prove," and he opined (using the first rape charge as an example) that the instructions were sufficient. (Ex 102 at 3). Specifically, petitioner's counsel explained that the trial court read "each and every count" to the jury, and told them what they had to find on every one. (Ex 102 at 3). Beyond that, counsel averred, "I don't know what [petitioner's post-conviction] counsel is saying." (Ex 102 at 3).

Petitioner's trial memorandum later clarified that his claim about counsel's failure to request a jury instruction actually relied on a more specific legal theory than trial counsel had addressed in his affidavit. In particular, petitioner's theory was that his counsel should have requested an instruction to prevent the jury from convicting him based on "propensity" evidence under OEC 404. (TCF 91-92). In support of *that* assertion, petitioner proffered an instruction that he derived from the Court of Appeals' decision in *State v. Kitzman*, 129 Or App 520, 529, 879 P2d 1326 (1994), *aff'd and rev'd in part on other grounds*, 323 Or 589 (1996). Although *Kitzman* did not actually address propensity evidence or OEC 404, petitioner believed that a partial instruction

[5] The second affidavit responded to petitioner's supplemental claims.

quoted in that decision for a different purpose would still apply. (*See* TCF 91-92).[6]

At the subsequent post-conviction hearing, petitioner did not call trial counsel as a witness, or present any sworn statement from him, to explore or explain why he did not request a "separate consideration" limiting instruction like the one in *Kitzman*. And petitioner did not mention that claim at the hearing, instead focusing on some of his other claims for relief. (*See, generally*, Tr 17-18).

At the conclusion of the post-conviction hearing, the court rejected all of petitioner's claims. With respect to the claim about counsel's failure to request a limiting instruction, the court ruled that counsel's performance did not fall below a standard of objective reasonableness under either the state or federal constitutions. (Tr 25). The court also ruled that petitioner did not suffer

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[6] The instruction quoted in *Kitzman* provided:

> [Defendant] has been charged with several unrelated counts in a single indictment. A separate crime is charged in each count of the Indictment. Each charge and the evidence pertaining to it must be considered separately by the jury.
>
> * * * * *
>
> In other words, it is your duty to consider the evidence solely for the charge it pertains to and no other charge.

Kitzman, 129 Or App at 529 (ellipses in original).

prejudice because "I don't think the - - the result would have been any different." (Tr 25).

C. The Court of Appeals reversed, concluding that, under two recent decisions, trial counsel was constitutionally inadequate for not requesting the instruction.

Petitioner appealed from the post-conviction court's judgment denying relief. The Court of Appeals affirmed with respect to the majority of petitioner's claims, but it reversed on the claim about the failure to request a limiting instruction like the one in *Kitzman*. *Green v. Franke*, 261 Or App 49, 323 P3d 321 (2014). Two recent decisions—neither of which the parties had cited in their briefs to the Court of Appeals—were central to the court's holding: *State v. Leistiko*, 352 Or 172, 282 P3d 857, *adh'd to on recons*, 352 Or 622 (2012), and *Pereida-Alba v. Coursey*, 252 Or App 66, 284 P3d 1280 (2012), *rev allowed*, 363 Or 410 (2013).

Starting with the general principle from *Leistiko* that evidence of other sexual crimes is not admissible to prove propensity under OEC 404(3), the court held that petitioner's trial counsel should have identified the "great and obvious danger" that the jury would rely on impermissible propensity inferences in his case. *Green*, 261 Or App at 57, 58. That danger, the court held, came from comments that the prosecutor made during closing arguments

that hinted at propensity purposes for the evidence. *Id.* at 57-58.[7] The court then concluded that counsel performed deficiently because, under the rationale from its previous decision in *Pereida-Alba*, "there was no evident downside to requesting such an instruction[.]" *Id.* at 58 (quoting *Peredia-Alba*, 252 Or App at 71). The court arrived at that conclusion without considering how the limiting instruction would have meshed, or potentially conflicted, with counsel's strategy at trial.

Turning to prejudice, the Court of Appeals—again, using *Leistiko* as an example—noted the importance of instructions limiting a jury's use of evidence in "joined proceedings." *Id*. at 59 (citing, among other cases, *Leistiko*). The court then concluded that the absence of a limiting instruction like the one in *Kitzman* prejudiced petitioner on all of his convictions, except the ones on which admitted his guilt. Without a limiting instruction, the court reasoned, the jury "may well have," was "permitted" to, or was "invited to" make improper inferences about petitioner's propensity based on the evidence of the various other charges. *See id.* at 63, 64, 65, 66, 67. On that basis, the Court of Appeals

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[7] Chiefly, the court relied on the prosecutor's statement during 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?" *Green*, 261 Or App at 57-58. In another part of the opinion, the court also referred to the prosecutor's statements about petitioner's "predatory nature," and about three "patterns of sexual assault" by petitioner. *Id.* at 54.

held that petitioner had proved that counsel's performance prejudiced him. This court allowed review.

Summary of Argument

Petitioner alleged that his trial counsel provided constitutionally inadequate assistance by failing to request an instruction to limit the jury's consideration of the evidence about the various victims in the case. According to petitioner, counsel should have asked for a limiting instruction telling the jury that petitioner had been "charged with several unrelated counts" and that "[e]ach charge and the evidence pertaining to it must be considered separately by the jury." Without that instruction, petitioner argued, the jury was permitted to consider the evidence about various victims together, for a propensity purpose. The post-conviction court correctly rejected that claim under the high standards for proving that counsel performed deficiently and that petitioner was prejudiced.

To establish that a trial attorney performed deficiently, the petitioner must prove historical facts showing that counsel failed to exercise reasonable professional skill and judgment. That generally requires a petitioner to offer evidence extraneous to the trial-court record, which explains counsel's reason for taking, or not taking, some specific action. In the absence of that type of evidence, the petitioner can show deficient performance only if, on the face of

the record, no reasonable attorney would have made the same decision. Here, petitioner failed to make that showing.

Initially, petitioner did not offer evidence from trial counsel explaining why he chose not to request a limiting instruction. And on the face of the record, a reasonable attorney could have made a strategic decision not to request it. Counsel's strategy was to acknowledge petitioner's guilt to the charges involving *consensual* sexual contact, but to defeat the charges involving *forcible* sexual contact. Given that strategy, a reasonable attorney may have wanted the jury members to consider the evidence from the several victims together in hopes that they would find *all* of petitioner's conduct to be consensual. Indeed, trial counsel expressly argued that, in at least two respects, the jury should consider the evidence about various victims together. Because a limiting instruction would have conflicted with those arguments, the record did not rebut the strong presumption that counsel performed reasonably by not requesting one.

Petitioner also failed to prove prejudice, or that counsel's decision not to request the instruction would have tended to result in a different verdict. To satisfy that weighty standard, the evidence must convince the court that counsel's error undermined the confidence in the result of the proceeding and denied the petitioner a fair trial. Evidence in a post-conviction case does not meet that standard if it shows only a conceivable possibility of a different result.

Rather, the record must show a substantial likelihood that the result would be different. In this case, the record did not show a substantial likelihood that the jury's verdict was based on propensity such that a limiting instruction would have prompted a different result.

First, the jury did not need to base its decision on propensity inferences because the record contained ample evidence from which it could resolve the central issue of the victims' credibility without resorting to those inferences. Second—and unlike the circumstances in cases like *Leistiko*—none of the evidence in petitioner's case was offered for the *express purpose* of establishing petitioner's propensity. Rather, all of the evidence was independently admissible to prove a specific, charged offense. Finally, the state's theory of the case did not depend on establishing petitioner's guilt by propensity. Although the prosecutor made a few comments that may have invited the jury to consider the evidence about several victims for a propensity purpose, they comprised an insignificant part of his lengthy closing argument. For those reasons, petitioner did not show that a limiting instruction would have prompted the jury to render different verdicts.

ARGUMENT

A. Success on a claim of inadequate assistance requires the petitioner to meet a high burden, sufficient to undermine the adversarial process and deny the petitioner a fair trial.

To obtain post-conviction relief based on a claim of inadequate assistance of counsel under the state or federal constitutions, the petitioner must establish a "substantial" denial of his constitutional rights that resulted in his conviction, and that "rendered the conviction void." ORS 138.530(1)(a). This court recently explained that the standards applicable to a claim of inadequate or ineffective assistance of counsel are "functionally equivalent." *Montez v. Czerniak*, 355 Or 1, 6, 322 P3d 487, *adh'd to as modified*, 355 Or 598 (2014). To succeed on a claim under either constitution, the petitioner must allege, and ultimately prove by a preponderance of the evidence, "facts showing both [1] that counsel failed to exercise reasonable professional skill and judgment and [2] that the petitioner suffered prejudice as a result." *Ogle v. Nooth*, 355 Or 570, 579, ___ P3d ___ (2014) (citing *Trujillo v. Maass*, 312 Or 431, 435, 822 P2d 703 (1991), and *Strickland v. Washington*, 466 US 668, 688, 694, 104 S Ct 2052, 80 L Ed 2d 674 (1984)).

The issues in this case pertain to the application of those general standards to a claim that trial counsel should have requested a particular jury instruction. A similar question is currently before this court in *Pereida-Alba v. Coursey*, which also addressed a claim that trial counsel should have requested

a particular jury instruction. Given the similarity of the issues in *Pereida-Alba*, many of the legal principles on which defendant relied in that case also apply here. Rather than reproduce the entirety of defendant's legal discussion in *Pereida-Alba*, defendant has distilled it into four salient points.

First, the starting place for a collateral attack on a conviction is a presumption of regularity. *Schram v. Gladden*, 250 Or 603, 605, 444 P2d 6 (1968). Thus, the petitioner in a post-conviction case must affirmatively prove facts that *rebut* a presumption that his or her counsel provided adequate assistance of counsel. *See Cullen v. Pinholster*, 563 US__, 131 S Ct 1388, 1403, 179 L Ed 2d 557 (2011) ("[C]ounsel 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."); *see also* ORS 138.620(2) (placing burden of proof on petitioner).

Second, and relatedly, the presumption of regularity and competence means that a post-conviction petitioner usually cannot prevail based solely on the record of the criminal proceeding. *See Yarborough v. Gentry*, 540 US 1, 8, 124 S Ct 1, 157 L Ed 2d 1 (2003) (per curiam) (the presumption of competent performance "has particular force" where a petitioner bases his claim on the trial-court record, "creating a situation in which a court 'may have no way of

knowing whether a seemingly unusual or misguided action by counsel had a sound strategic motive.'"); *Trujillo*, 312 Or at 435 (mere fact that trial counsel did not pursue a procedure for guilty pleas was insufficient, standing alone, to establish deficient performance where record did not show what discussions counsel had with the petitioner about the procedure and "what reasons, if any, counsel might have had for not pursuing [it]"). Thus, a post-conviction petitioner who supplies only the trial-court record can demonstrate deficient performance only if, on the face of the record, no reasonable attorney could have performed as trial counsel did. *See, e.g., Cullen*, 131 S Ct at 1407 (evaluating the reasonableness of counsel's performance in light of potential strategies that counsel may have employed); *Strickland*, 466 US at 689 (requiring the petitioner to overcome the presumption that the challenged action "might" be considered sound trial strategy).

Third, although post-conviction courts review an attorney's actual performance, reviewing courts evaluate that performance under the standard of "objective reasonableness." *Montez*, 355 Or at 8 (quoting *Harrington v. Richter*, 562 US ___, 131 S Ct 770, 777, 178 L Ed 2d 624 (2011)). That principle has particular significance with respect to counsel's decisions that may have been strategic. That is, "[t]he relevant question is not whether counsel's choices were strategic, but whether they were reasonable." *Roe v. Flores-Ortega*, 528 US 470, 481, 120 S Ct 1029, 145 L Ed 2d 985 (2000).

Finally, the standard for inadequate and ineffective assistance of counsel is ultimately a weighty one, and will be met "only if [counsel's error] so undermined the proper functioning of the adversarial process" that the criminal defendant was denied a fair trial. *Richter*, 131 S Ct at 791 (quoting *Strickland*, 466 US at 686, internal quotation removed). The applicable prejudice inquiry echoes that high standard. As discussed in more detail below, it requires the petitioner to show "a reasonable probability"—or a probability that is "sufficient to undermine confidence in the outcome"—that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 US at 694-95. *See also* ORS 138.530(1)(a) (allowing relief on claim of constitutional violation only if the error renders the conviction "void").

Application of the foregoing principles in this case shows that petitioner did not carry the heavy burden of proof on either element necessary to his claim of inadequate assistance of counsel.

B. Petitioner did not prove facts showing that his trial counsel's decision not to request a limiting instruction was objectively unreasonable.

The claim at issue on appeal is that petitioner's trial counsel performed inadequately by failing to request a limiting instruction like the one quoted in the *Kitzman* opinion. That instruction would have told the jury that petitioner had been "charged with several unrelated counts" and that "[e]ach charge and the evidence pertaining to it must be considered separately by the jury."

According to petitioner, an instruction like that was necessary to prevent the jury from considering evidence about the crimes against the various victims together, as propensity evidence with respect to the crimes against individual victims. That claim fails, first, because petitioner did not prove facts showing that counsel failed to exercise reasonable professional skill and judgment.

As an initial matter, petitioner did not offer in the post-conviction proceeding any evidence from his trial counsel about *why* he did not request a limiting instruction. And even though *defendant* offered affidavits from counsel responding to petitioner's claims for relief, counsel's response to the claim about the jury instruction shows that he did not understand the claim to pertain to the jury's use of propensity evidence. Instead, counsel understood petitioner's claim to involve a more generic challenge to the instructions on each individual offense, and that otherwise, "I don't know what [petitioner's post-conviction] counsel is saying." (Ex 102 at 3).

Thus, because the post-conviction record contains no evidence from trial counsel about his actual reason for not requesting an instruction like the one in *Kitzman*, the presumption that he acted competently has "particular force." *Yarborough*, 540 US at 5, *supra*; *see Trujillo*, 312 Or at 435, *supra* (fact that counsel did not take some action, by itself, does not establish inadequacy). As a result, petitioner would be entitled to relief only if, on the face of the record, all reasonable attorneys would have requested the instruction. *See Cullen*, 131

S Ct at 1407, *supra*; *Strickland*, 466 US at 697-98, *supra*. The record does not compel that conclusion here. 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.

As noted earlier, 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. To that end, counsel portrayed petitioner in opening and closing arguments as a man with the poor judgment to have sex with minors, but not through the use of force. (*E.g.* Ex 6 at 140-41, 832). And during the trial, counsel emphasized for the jury the evidence about consensual sex, while attempting to impeach the plausibility of the evidence showing forcible compulsion.

Given counsel's overall strategic approach to the case, a reasonable attorney could have chosen to avoid instructing the jury that "[e]ach charge and the evidence pertaining to it must be considered separately by the jury." In light of counsel's unified strategy to portray *all* of the sexual encounters in which petitioner engaged as consensual, a reasonable attorney may have wanted the

jury to consider them together, in hopes that it would strengthen the overall defense. In other words, a reasonable attorney might have wanted the jury to infer that the fact that petitioner had consensual sex with some victims made it more likely that sex with other victims was also consensual. A limiting instruction like the one in *Kitzman* would have eliminated that possibility.

Moreover, a limiting instruction would have conflicted with some of the concrete strategic choices that counsel made for the defense. As noted earlier, trial counsel expressly argued to the jury that it should consider the evidence about various victims together. First, he argued (during both opening and closing statements) that the majority of the victims knew each other, or that they had come to know about each other during the investigation. (Ex 6 at 141-42, 829). He planted that seed for the apparent purpose of giving the jury some reason to find that several of the victims were biased or angry against petitioner, or that they otherwise had some basis on which to match their allegations to that of other witnesses. Second, counsel elicited testimony, and argued to the jury, that the allegations of certain victims were actually *dissimilar* to accounts of other victims. (Ex 6 at 352, 361, 464). One account, counsel argued, was "out of the pattern" of the rest of the charges, and thus, should be disbelieved. (Ex 6 at 833-34). Because a limiting instruction would have nullified counsel's strategy and arguments in those respects, a reasonable attorney could have chosen not to request it.

In sum, petitioner did not present historical facts sufficient to rebut the strong presumption that his trial counsel provided reasonable professional skill and judgment not to request a limiting instruction. *See Yarborough*, 540 US at 8 ("When counsel focuses on some issues to the exclusion of others, there is a strong presumption [under *Strickland*] that he did so for tactical reasons rather than through sheer neglect."). Petitioner did not show that, on the face of the record, all reasonable attorneys would have requested it under the circumstances. On that basis alone, his claim for relief fails.

C. 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.

Even assuming that all reasonable attorneys would have requested a limiting instruction, petitioner failed to prove that he suffered prejudice as a result.

To establish prejudice, petitioner was required to present a record sufficient to compel the legal conclusion that trial counsel's error would have tended to result in a different verdict. That standard sets a high bar. It requires a record sufficient to "undermine confidence in the ultimate outcome" of the case, such that the result of the trial is no longer reliable and the conviction is "void." *Cullen*, 131 S Ct at 1403*; Richter,* 131 S Ct at 788 (quoting *Strickland*; internal quotations omitted). *See* ORS 138.530(1)(a) (relief available only if the error renders the conviction "void"). A petitioner does not meet that standard

by showing only a "conceivable" likelihood that counsel's error affected the result. Rather, the likelihood of a different result must be "substantial." *Cullen*, 131 S Ct at 1403; *Richter*,131 S Ct at 792.

Before addressing the application of that prejudice inquiry in this case, defendant pauses to point out that the Court of Appeals applied a different standard. Rather 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. In particular, the court held that petitioner suffered prejudice because, under the circumstances, the jury "may well have," "was permitted to," or was "invited to" draw improper inferences from the evidence about the various victims. *E.g., Green*, 261 Or App at 63, 64, 65, 66, 67. As noted above, however, a merely "conceivable" effect on the verdict is insufficient to establish prejudice.

Under the correct prejudice standard, 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. Petitioner's evidence did not satisfy that standard. For three reasons, the record does not show that the jury's guilty verdicts depended on inferences about petitioner's propensity such that an instruction like the one in *Kitzman* would have changed the result.

First, the jury did not need to rely on propensity inferences to make its determination about petitioner's guilt with respect to the various victims. 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. The jury had ample, admissible evidence on which to make that determination without resort to mixing and matching evidence about the various other victims. Most notably, the jury saw each of the victims testify, in person, about the particular allegations that pertained only to them. Consequently, the jury had a first-hand opportunity to evaluate each victim's demeanor, credibility, and consistency with their previous statements to others.

Second, none of the evidence at petitioner's trial was offered or received for the express purpose of proving petitioner's propensity. All of the evidence was admissible, instead, to prove a specific, charged offense. That distinguishes this case from cases like *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 the unrelated, charged rapes. *Leistiko*. 352 Or at 176-77. Under those circumstances—where the very reason for the evidence is to establish the defendant's guilt to factually unrelated charges—a reviewing court might be hard pressed to conclude that the evidence did not affect the jury's decision. That is not the case here, where all of the

evidence was admissible to prove a charged offense, and the court presented each charge to the jury separately, in a separate instruction.

Third, the state's theory of petitioner's guilt did not depend on the jury evaluating the evidence for a propensity purpose. The prosecutor understood that the ultimate question for the contested charges was the credibility of the individual victims. (Ex 6 at 774). Thus, the prosecutor spent much of his closing argument methodically addressing the testimony and prior statements of each victim and their individual credibility—separately and one at a time. (Ex 6 at 774-91). He also addressed the petitioner's credibility and the credibility of the witnesses that petitioner called in his case-in-chief. (Ex 6 at 794-98, 801-06).

Although the Court of Appeals correctly noted that the prosecutor made comments during closing arguments about petitioner's "predatory nature" (Ex 6 at 810), his three "patterns" of conduct for the forcible rapes (Ex 6 at 811-12), and the "chances" that nine separate victims would all make allegations against petitioner (Ex 6 at 814), those comments were insignificant in the context of the entire case. They comprised only 26 lines of the prosecutor's 55-page closing argument. Thus, those comments did not so infiltrate the state's theory of the case that the jury necessarily relied on them in making its determination about petitioner's guilt.

Conversely, those types of propensity themes were actually central to *the defense's* theory of the case. As explained above, trial counsel expressly relied on evidence and argument about connections between the victims and the differences between their stories to bolster his defense theories—that petitioner committed only *consensual* sexual acts against any of the victims, and that he had no sexual contact with some of them. A limiting instruction would have effectively prevented the jury from considering those defense theories, making it even more difficult for counsel to persuade the jury to acquit on the forcible-compulsion counts. Thus, a limiting instruction would have actually harmed petitioner's case.

For the foregoing reasons, the record in this case does not compel the conclusion that a limiting instruction like the one in *Kitzman* would have ultimately resulted in any different verdicts for petitioner. Even if all reasonable attorneys would have requested the instruction, the record does not show that its absence "undermine[s] the confidence in the ultimate outcome" such that the result of the trial is no longer reliable. Petitioner did not suffer prejudice.

CONCLUSION

This court should reverse the Court of Appeals' decision concluding that petitioner's trial counsel provided constitutionally inadequate and ineffective assistance, and affirm the judgment of the post-conviction court rejecting petitioner's claims for relief.

Respectfully submitted,

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NOTICE OF FILING AND PROOF OF SERVICE

I certify that on August 8, 2014, I directed the original Petitioner's Brief on the Merits to be electronically filed with the Appellate Court Administrator, Appellate Records Section, and electronically served upon Jason Edward Thompson, attorney for appellant/respondent on review, by using the court's electronic filing system.

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

I certify that (1) this brief complies with the word-count limitation in ORAP 5.05(2)(b) and (2) the word-count of this brief (as described in ORAP 5.05(2)(a)) is 6,465words. I further certify that the size of the type in this brief is not smaller than 14 point for both the text of the brief and footnotes as required by ORAP 5.05(2)(b).

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