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Appellate Court Records

IN THE SUPREME COURT OF THE STATE OF OREGON

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

BRIEF ON THE MERITS OF RESPONDENT ON REVIEW, MARK NOOTH

Review of the Decision of the Court of Appeals
on Appeal from a Judgment
of the Circuit Court for Malheur County
Honorable LINDA L. BERGMAN, Judge

Opinion Filed: March 23, 2016
Affirmed Without an Opinion
Before: Ortega, P.J., Lagesen, J., and Garrett, J.

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STATEMENT OF THE CASE

Petitioner seeks post-conviction relief from his convictions for first-degree rape and first-degree sexual abuse. He contends that his trial counsel was inadequate for not objecting when the prosecutor referred, in closing argument, to petitioner's invocation of his right to remain silent. Petitioner concedes that *some* discussion of the invocation was permissible as a fair response to petitioner's trial strategy and arguments. He nonetheless argues that the prosecutor's permissible discussion became impermissible in one particular portion of closing argument.

But petitioner's argument ignores a crucial fact: that when petitioner's own closing argument faulted the state for failing to produce a "full-blown confession," he opened the door to the argument at issue. In those circumstances, and particularly in light of petitioner's own testimony regarding his invocation, the argument was permissible. At a minimum, the argument was not one that all reasonable counsel would have objected to in the heat of trial, nor was it one that was likely to have influenced the jury in a way that required a supplemental curative instruction beyond the general instructions that the jury did receive.

Questions Presented and Proposed Rules of Law

FIRST QUESTION PRESENTED

What must a petitioner establish to show that trial counsel performed deficiently (under both the state and federal guarantees of a right to effective and adequate counsel) by not objecting to a prosecutor's closing argument that commented on the petitioner's invocation of the right to remain silent?

FIRST PROPOSED RULE OF LAW

The petitioner must establish that, in the heat of trial, all reasonable counsel both would have identified the objection as meritorious and would have concluded that the objection was worth making in view of the potential remedies that the trial court could grant.

SECOND QUESTION PRESENTED

If a petitioner proves that counsel acted unreasonably by not objecting to a comment on his invocation of his right to remain silent, what must the petitioner establish to show that counsel's conduct prejudiced him?

SECOND PROPOSED RULE OF LAW

The petitioner must establish that an objection would have had a tendency or likelihood of affecting the outcome of the trial. To meet that standard, the petitioner must establish both that the objection would have been meritorious, and that the objection would result in affirmative relief that would

have had some tendency or likelihood of affecting the jury's deliberations under the circumstances of the petitioner's case.

Summary of Argument

In this post-conviction case, petitioner argues that his trial counsel was inadequate for failing to object that a particular portion of the state's closing argument amounted to an impermissible comment on petitioner's invocation of his right to remain silent. But petitioner established neither deficient performance nor prejudice.

Petitioner did not establish deficient performance, initially, because the challenged portions of the prosecutor's closing argument were permissible as a fair response to petitioner's argument, in his closing statement, that the state had not produced a "full-blown confession" from him. And even if that argument was impermissible, not all reasonable counsel would have recognized as much and viewed an objection as worthwhile. Any impropriety is not clear, and it requires a careful application of a legal rule to a unique set of facts. Given the context in which trial counsel was operating—deciding whether to instantaneously object in the heat of trial, during closing argument—not all reasonable counsel would have identified the issue that petitioner has, in hindsight, identified on a cold record. Nor would all counsel have viewed that objection as worthwhile—that is, as one that could result in any affirmative

remedy that would advance his interests. For those reasons, trial counsel did not perform deficiently.

And petitioner cannot establish prejudice because any impropriety in the challenged argument had a limited effect in light of petitioner's own testimony about his invocation, and in light of other portions of the state's closing argument in which—as petitioner concedes—the prosecutor permissibly discussed the invocation. Because any impropriety was so limited in effect, it was unlikely to have influenced the jury in a way that required a supplemental curative instruction beyond the general instructions that the jury did receive.

Supplemental Statement of Facts

The superintendent accepts petitioner's statement of facts as accurate, but supplements them to include a portion of defendant's closing argument that faulted the state for failing to produce a "full-blown confession," as well as the facts relevant to that argument.

As petitioner accurately recounts, the state charged him with first-degree rape and first-degree sexual abuse, based on evidence that petitioner had engaged in sexual intercourse with a sleeping and intoxicated woman and that, when the woman woke up, petitioner had "sucked on [her] left breast" before running out of the room. (Pet Br 4–11). And petitioner accurately recounts how his trial testimony—in which petitioner asserted that police had failed to ask him about the allegations for six months—allowed the state to impeach him

with evidence that police *had* contacted him, but that he had refused to talk with them about his crime. (Pet Br 6–10). Petitioner omits, however, the following facts relevant to the parties' arguments about the scope of petitioner's admissions or confessions, as explained in more detail below.

At trial, the prosecutor told the jury in opening argument that, in addition to testimonial and DNA evidence supporting the rape and sexual abuse charges at issue, the evidence would also include admissions from petitioner that he made during recorded jail telephone calls:

> There's absolutely no question that the evidence will show that his – [petitioner's] saliva was on [the victim's] breast and, in fact, he's admitted it since that time. And he's admitted it on telephone calls that he's made.

(Trial Tr 31–32[1]). The state went on to summarize the contents of those recorded calls, including one in which petitioner admitted to some sexual contact with the victim:

> he's talking to his grandmother and on the phone to his grandmother for the first time admits to have – *directly admits to having fooled around with [the victim]*. This is his words and he basically characterizes the encounter with [the victim] to his grandmother as, "Two silly kids who've had a couple too many drinks getting a little – getting a little crazy," he doesn't use those exact words, but that's the [gist] of the telephone call. And he laments the fact that the investigators and others in the case

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[1] A transcript of petitioner's criminal trial is contained in the record as the superintendent's exhibit 102. All citations to "Trial Tr" refer to that transcript.

> apparently believe the victim and that we have based our case against him on her statement, it's a common thread with [petitioner's] telephone statements.

(Trial Tr 34–35 (emphasis added)). Petitioner responded with an opening statement in which he denied any sexual intercourse with the victim, (Trial Tr 39), but contended that he and the victim had engaged in substantial consensual kissing, (Trial Tr 44).

Consistently with the preview made in its opening statement, the state played for the jury a tape of petitioner's conversation with his grandmother while he was in jail, where he admitted some sexual contact with the victim. In particular, petitioner told his grandmother:

> I wasn't denying that I was like, "Yeah," you know, because we were both a little intoxicated and we were fooling around, but it's not what she says this was.

(Trial Tr 198). Petitioner testified in his defense. He admitted, consistently with his opening statement, that he and the victim had been kissing consensually when he "lifted up her shirt" and "started to suck on her breast." (Trial Tr 320–21). But he denied even being able to have intercourse with the victim. (Trial Tr 332).

At closing arguments, after the state emphasized the evidence of petitioner's statements during his telephone calls from jail, (Trial Tr 456,463–64), petitioner's counsel responded by trying to diminish the significance of those calls as being less than a "full-blown" confession:

> State's burden of proof: I think the jail calls in this case are illustrative of kind of how this case has gone. We've got these four little snippets of months of time and they're kind of ambiguous, and they're kind of out of context, and *they really don't say what [the prosecutor] is saying they say. And the State is asking you to treat that like a full-blown confession*. They've got 300 jail calls of 15 minutes or longer, and they pick these four little snippets to basically try to (indiscernible) a confession, and I encourage you to read each one of those transcripts because it's not there. They've taken out of context, [defendant's] words when he was talking to various people and they're trying to add it up, they're trying to get you to infer the worst about him. *They're trying to get you to think that this is a full-blown confession on there when, when you read it it's not even close*.

(Trial Tr 505–06 (emphases added)).

In rebuttal, the prosecutor responded by explaining that he had never promised a "full confession," and that the state's evidence was sufficient without one. In providing that explanation, the prosecutor made a reference to petitioner's decision not talk to police, which had already been discussed before the jury:

> Well, I was going to talk about what was said about my opening statement. I didn't – *I don't think I told you there was a full confession in this case because this is not a full confession case. This is a – this is different than a full confession case*, this is a case where we have a young man facing a – a young man in a pickle because he's facing a very credible sexual assault allegation, and a young man who for reasons known only to him, refuses to give a statement to the police, and – and that's his right, but he refused to give one and so we're left with sort of cobbling together what we can, and he likes to talk, he made 300 and some odd 15 minute telephone calls while he was in the Washington County Jail, and each one of those calls contains a warning that his call is being recorded.

(Trial Tr 522 (emphasis added)).

Thereafter, a jury convicted petitioner and his post-conviction proceedings unfolded as petitioner accurately describes in his brief. (Pet Br 11–13).

ARGUMENT

Petitioner claims that his trial counsel provided constitutionally inadequate assistance by failing to object to the prosecutor's reference, during his rebuttal closing argument, to petitioner's invocation of his right to silence.[2] But, under legal principles that petitioner does not challenge, any objection would have been meritless. And even if an objection might have been meritorious, that conclusion requires a careful application of law to fact, in an analysis that not all reasonable counsel would perform the same way, particularly in the heat of trial. Finally, even if all reasonable counsel would have objected, petitioner must establish more—such as some affirmative relief that the objection would have produced—to satisfy the prejudice element of his

[2] Petitioner refers in his brief both to his right to remain silent (under Article I, section 12, of the Oregon Constitution, and under the Fifth Amendment to the United States Constitution) and to his right to counsel (under Article I, section 11, of the Oregon Constitution, and under the Sixth Amendment to the United States Constitution). (*See, e.g.*, Pet Br 2, 16, 21). But his arguments pertain factually to an invocation of the right to remain silent and rely legally on principles relevant to that right. The superintendent therefore confines his analysis to that right, which was in any event, the issue raised in the controlling petition for post-conviction relief. (*See* Appellant's Brief to the Court of Appeals, at ER 5).

claim. For all those reasons, this court should reject petitioner's claims.

A. Petitioner cannot prevail without showing both deficient performance and prejudice.

To obtain post-conviction relief on his claims of inadequate assistance of trial counsel, petitioner must show deficient performance and prejudice. To prove inadequate assistance of counsel under the Oregon Constitution, he must prove: (1) that counsel failed to exercise reasonable professional skill and judgment; and (2) that prejudice resulted. *Stevens v. State of Oregon*, 322 Or 101, 108, 902 P2d 1137 (1995) (quoting *Trujillo v. Maass*, 312 Or 431, 435, 822 P2d 703 (1991)). Similarly, to prevail on a claim under the United States Constitution, petitioner must show that counsel's performance was deficient, and that the deficient performance resulted in prejudice. *Strickland v. Washington*, 466 US 668, 687, 104 S Ct 2052, 80 L Ed 2d 674 (1984). The state and federal standards pertaining to the constitutional adequacy and effectiveness of counsel are "functionally equivalent." *Montez v. Czerniak*, 355 Or 1, 6–7, 322 P3d 487, *adh'd to as modified on recons*, 355 Or 598, 330 P3d 595 (2014).

The ultimate analysis requires assessing "the reasonableness of counsel's representation from counsel's perspective at the time of the alleged error and in light of all the circumstances." *Id*., 355 Or at 8 (internal quotation marks omitted). That standard of review is "*highly deferential*," and requires inquiring

"into the objective reasonableness of counsel's performance," not "into counsel's subjective state of mind." *Id*. (emphasis added; internal quotation marks omitted).

B. Petitioner failed to prove that counsel's conduct reflected deficient performance.

Petitioner argues that his counsel performed inadequately for not objecting to a single portion of the prosecutor's otherwise permissible discussion of petitioner's invocation of the right to remain silent. But because even that portion of the prosecutor's argument was permissible under the circumstances, such an objection would have been meritless and no reasonable counsel would have raised it. Moreover, even if that portion of argument was impermissible, not all reasonable counsel would—in the heat of trial—have recognized that impropriety and concluded that an objection was worthwhile.

1. Petitioner's proposed objection would have been meritless.

The first question in this case turns on the permissibility of the prosecutor's argument, in rebuttal, that:

> This is a – this is different than a full confession case, this is a case where we have a young man facing a – a young man in a pickle because he's facing a very credible sexual assault allegation, and a young man who for reasons known only to him, refuses to give a statement to the police, and – and that's his right, but he refused to give one and so we're left with sort of cobbling together what we can * * *.

(Trial Tr 522). Petitioner argues that the quoted argument "exceeded the bounds of acceptable argument and impermissibly commented on petitioner's invocation" of his right to remain silent. (Pet Br 28). As explained below, petitioner is mistaken.

Both the federal and state constitutions allow a prosecutor to comment on silence for certain purposes or once a defendant opens the door to that subject. *See United States v. Robinson*, 485 US 25, 33–34, 108 S Ct 864 (1988) (explaining the "principle that prosecutorial comment must be examined in context," and further explaining that, although a "prosecutor may not treat a defendant's exercise of his right to remain silent at trial as substantive evidence of guilt," a prosecutor may yet "fairly respond[] to an argument of the defendant by adverting to that silence"); *State v. Smallwood*, 277 Or 503, 505–06, 561 P2d 600, *cert den*, 434 US 849 (1977) (explaining that, although "it is usually reversible error to admit evidence of the exercise by a defendant of the rights which the constitution gives him if it is done in a context whereupon inferences prejudicial to defendant are likely to be drawn by the jury," the evidence would be "relevant and admissible" if "there was no likelihood of prejudicial inferences"); *see also State v. Miranda*, 309 Or 121, 128, 786 P2d 155, *cert den*, 498 US 879 (1990) ("A defendant's own inquiry on direct examination into the contents of otherwise inadmissible statements opens the

door to further inquiry on cross-examination relating to those same statements.").

Here, petitioner first opened the door to the state's discussion of his exercise of the right to remain silent. He opened that door by saying that police had failed for six months to speak with him about the victim's allegations, suggesting that they had failed to conduct a thorough investigation. (*See* Trial Tr 323–24 (petitioner's testimony that officers contacted him "[s]ix months later, after not hearing anything"); *see also* Pet Br 6–7 (quoting relevant portions of petitioner's cross-examination, in which he was adamant on that issue, denying any contact from police and specifically denying that he ever left a message for the detective investigating the case)).

Because petitioner's suggestion implied that the police's investigation had not been thorough—and, potentially, that it had been one-sided in favor of the victim—the state was entitled to respond. The state did so by calling a detective to testify that he had in fact had made "efforts to contact and interview" petitioner "within the month" following the victim's report, but had ceased those efforts only after petitioner had—contrary to his testimony—left the detective a message stating that he "didn't wish to speak" with the detective and that he had "retained legal counsel." (Trial Tr 412–14). Petitioner acknowledges that the impeachment testimony recounted in this paragraph—as well as his own testimony that he had told police that he did not wish to speak

and that he had retained counsel, (Trial Tr 324, 377)—was properly presented to the jury.

And having so impeached petitioner, the state was entitled to point to that impeachment evidence and discuss petitioner's invocation in its closing argument:

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

(Trial Tr 520 (emphasis added)).

Petitioner disputes none of that. (*See* Pet Br 2 (proposing a context-specific rule that, consistently with authorities cited above, allows prosecutors to comment on the invocation of the right to remain silent when the defendant makes that comment necessary); Pet Br 27 (agreeing that his own testimony "may have opened the door" the state's "fair[] respon[se]" of "permissibly discuss[ing] petitioner's testimony about invoking his rights.")). Thus,

petitioner does not argue that his trial counsel could have or should have objected to any of the argument quoted above.

What petitioner objects to, however, is the prosecutor's further argument that petitioner, "for reasons known only to him, refuses to give a statement to the police, and – and that's his right, but he refused to give one and so we're left with sort of cobbling together what we can." (Pet Br 28; Trial Tr 522). In his view, that argument was not a fair response to any of petitioner's arguments, and it impermissibly suggested that the jury should infer guilt from petitioner's invocation. (Pet Br 28).

But when viewed in full context, the challenged argument was a fair and permissible response to petitioner's closing argument, which suggested that the state could not carry its burden of proof without the "full-blown confession" that the state had purportedly promised to the jury. Specifically, petitioner's attorney argued:

> I think the jail calls * * * really don't say what [the prosecutor] is saying they say. And the State is asking you to treat that like a full-blown confession. * * * They're trying to get you to think that this is a full-blown confession on there when, when you read it it's not even close.

(Trial Tr 505–06).

In light of petitioner's closing argument, the prosecutor was permitted to provide an explanation that: (1) he had not promised the jury a full confession; (2) the state cannot obtain a full-blown confession when a defendant

permissibly invokes his right to remain silent; and (3) the state can nevertheless carry its burden of proof—and the jury can nevertheless convict—without one. To those ends, the state framed the challenged argument as a direct response to petitioner's improper closing arguments:

> *Well, I was going to talk about what was said about my opening statement*. I didn't – *I don't think I told you there was a full confession in this case because this is not a full confession case. This is a – this is different than a full confession case,* this is a case where we have a young man facing a – a young man in a pickle because he's facing a very credible sexual assault allegation, and a young man who for reasons known only to him, refuses to give a statement to the police, and – and that's his right, but he refused to give one and so *we're left with sort of cobbling together what we can, and he likes to talk, he made 300 and some odd 15 minute telephone calls while he was in the Washington County Jail*, and each one of those calls contains a warning that his call is being recorded.

(Trial Tr 522 (emphases added)).

Rather than suggesting that the jury should infer guilt from petitioner's invocation, the prosecutor's reference to that invocation appears in the middle of a single sentence that begins and ends with permissible arguments, and which expressly recognizes a defendant's right to remain silent. After referencing the invocation, the prosecutor did nothing more than acknowledge that the state needed to prove guilt by "cobbling together" other types of evidence. And before referencing petitioner's invocation, the prosecutor began by explicitly declining to identify or even to suggest any inference that the jury should draw from that invocation, asserting that petitioner was motivated by

"reasons known only to him," without speculating further. Those comments expressly avoided the sort of impermissible suggestions that petitioner ascribes to them. *Contrast State v. Ragland*, 210 Or App 182, 186, 149 P3d 1254 (2006) (concluding that, in a DUII case where the defendant contended that she had started drinking only after parking her car, the state impermissibly responded: "Wouldn't a reasonable person, if there was an alternative explanation for what was going on that night, especially after you were told you were being arrested for DUII, say, 'Hey, there's also some beer about 30 feet over there. If you go look, that's what I've been drinking.'").

In short, the challenged portions of the prosecutor's closing argument were permissible for the same reasons that the state was permitted—as petitioner concedes—to refer to petitioner's invocation in other portions of the closing argument. In light of trial counsel's argument that the state had failed to produce a "full-blown confession," the state was permitted to argue that any such failure was due to petitioner's invocation. Because that argument was permissible, any objection to it would have been overruled, and the failure to raise it does not amount to deficient performance.

2. Even if petitioner's proposed objection would have been sustained, not all reasonable counsel would have recognized and raised it in the heat of trial.

Even if the challenged argument here was improper, not all reasonable counsel would have objected to it. That is, the question for this court is not

whether—in hindsight, on a cold record—all reasonable counsel would now see a basis for objection. Rather, trial counsel performed deficiently only if all reasonable counsel would have (1) recognized a basis for such an objection at the time that the state made the challenged argument—that is, in the heat of trial—and (2) raised that objection at that time. *See Montez*, 355 Or at 7 (explaining that, in assessing a lawyer's performance, a court should consider "the lawyer's perspective at the time, without the distorting effects of hindsight"). But neither of those circumstances is true here.

a. Not all reasonable counsel would, in the heat of trial, have recognized any merit in petitioner's proposed objection.

For the reasons set forth above, trial counsel was not just reasonable, but correct, to conclude that an objection would be baseless. At the very least, those arguments reflect—as do the post-conviction court and Court of Appeals rulings in this case—that the question is close enough that not all reasonable counsel would recognize any impropriety in the state's argument, and certainly not instantly enough to raise it in the middle of closing argument.

Given the complexity of applying the relevant legal principle to the facts of this case not all reasonable counsel would have seen a basis for objecting to the prosecutor's closing argument. *Cf. Burdge v. Palmateer*, 338 Or 490, 497, 112 P3d 320 (2005) (explaining that "issues do not recognize themselves; the task of identifying and evaluating potential issues rests on the skills of the

lawyer," and that adequacy of counsel depends on whether "a lawyer exercising reasonable professional skill and judgment would have recognized" a particular issue).

Although Oregon appellate courts have occasionally reversed convictions based on a prosecutor's impermissible reference to a defendant's invocation of the right to silence, they have never done so in a case involving the precise factual circumstances at issue here. Unlike in the cases that petitioner cites, (Pet Br 16–21), in this case the jury had already learned of petitioner's invocation in his own testimony, (Trial Tr 324, 377), and the prosecutor prefaced the comments at issue with undisputedly proper references to that invocation. Moreover, when making those comments, the prosecutor did not expressly invite any improper inference and instead reiterated that petitioner was entitled to avoid talking to police. (*See* Trial Tr 522 ("and that's his right")). This is not a case in which any existing appellate decision had held that—under circumstances identical to those confronting trial counsel here—a prosecutor's argument was impermissible.

And even if all reasonable counsel would, when given the time and resources available for spotting and analyzing issues during pre-trial investigation or motion practice, have recognized a basis for objecting to the prosecutor's argument, that is not the inquiry. Rather, counsel's performance must be assessed, as noted, in the heat of trial.

Here, to timely object, trial counsel would have needed to instantaneously recognize that a permissible reference to petitioner's invocation had, as petitioner argues, strayed beyond the bounds of a fair response to petitioner's arguments. And to do that, trial counsel would have needed to perform an on-the-spot application of fact-specific case law to the unique facts of this case—from memory, without the ability to research and closely read the relevant cases.

Not all reasonable counsel performing that complex analysis would immediately recognize a meritorious basis for objecting. For that reason, trial counsel here performed reasonably when not objecting to the prosecutor's argument, even if a meritorious objection was available. *See Phyle v. Leapley*, 66 F3d 154, 159 (8th Cir 1995) (when reviewing a trial attorney's decisions such as "repeated, instantaneous decisions about whether to object * * * the ineffective assistance standard is high – they are 'virtually unchallengeable' – in part because appellate judges cannot recreate from a cold transcript the courtroom dynamics that are an essential part of evaluating the effectiveness of counsel's performance."); *see also Martinez v. Baldwin*, 157 Or App 280, 289, 972 P2d 367 (1998), *rev den*, 329 Or 10 (1999) (refusing to "second-guess" a decision that was necessarily "made in the heat of battle"); *cf. Slagle v. Bagley*, 457 F3d 501, 527 (6th Cir 2006), *cert den*, 551 US 1134 (2007) (recognizing

that "the prosecution may well not have realized its improper comments in the heat of argument").

b. Even if all reasonable counsel would have recognized a basis for objecting, not all reasonable counsel would have concluded that raising that objection would be helpful.

The foregoing legal analysis, complex as it is, would not be the only one required before trial counsel could have raised petitioner's proposed objection. In deciding whether to object, trial counsel also would have needed to immediately perform a further assessment of the remedy to be gained if successful.

But, as explained in more detail when assessing prejudice below, the prosecutor's challenged argument was not, in the context of other evidence and permissible arguments, so improper as to warrant any greater remedy than a curative instruction. And reasonable counsel would likely have viewed a curative instruction as not particularly useful. Given the concededly admissible evidence and argument regarding the fact of petitioner's invocation, the only possible marginal effect of the challenged argument was to implicitly invite some sort of negative inference from that invocation. Even assuming that such an inference was implicit in the challenged argument, a curative instruction would have—in admonishing the jury not to draw such an inference—made that inference explicit. Moreover, reasonable counsel might fear that, though meritorious, an objection might yet be denied, suggesting that the jury was

permitted to draw precisely the inference that would be explicitly identified in any objection. In short, reasonable counsel could have viewed an objection as carrying a near certain risk of harming petitioner's case, but only a negligible chance of benefitting it.

And even if reasonable counsel might see a curative instruction as desirable—and would therefore have raised petitioner's proposed objection upon recognizing it—not all reasonable counsel would make that same decision in the heat of trial. That analysis is consistent with the approach taken by courts that are usually reluctant to second-guess such on-the-spot decisions about whether to object during closing arguments. *See, e.g.*, *United States v. Necoehea*, 986 F2d 1273, 1281 (9th Cir 1993) ("Because many lawyers refrain from objecting during opening statement and closing argument, absent egregious misstatements, the failure to object during closing argument and opening statement is within the 'wide range' of permissible professional legal conduct.").

For all those reasons, trial counsel performed reasonably.

C. Petitioner failed to prove that counsel's conduct prejudiced him.

Deficient performance aside, petitioner also failed to establish the necessary prejudice. To establish prejudice on account of an omitted objection, petitioner must establish that such an objection would have had a reasonable likelihood or tendency to change the result of his criminal trial. *See Stevens*,

322 Or at 108–10 & n 5 (in addition to establishing trial counsel's failure "to exercise professional skill and judgment," petitioner must show "that petitioner suffered prejudice as a result," meaning that the deficiency had "a tendency to affect the result of the prosecution"); *Strickland*, 466 US at 694 (petitioner must show that, absent the deficient performance, there was a "reasonable probability that * * * the result of the proceeding would have been different").

To satisfy that standard, petitioner must establish both that the objection would have been sustained as meritorious *and* that, in sustaining the objection, the trial court would have provided a remedy that would have had a tendency or likelihood of affecting the outcome of the criminal trial. The post-conviction court correctly concluded that petitioner did not establish either.

Here, petitioner failed to establish prejudice first because, as explained above, his proposed objection would not have been sustained as meritorious. But even if the objection would have been meritorious, the prejudice inquiry requires asking what affirmative relief might have been available to petitioner and what effect that relief would have had on petitioner's trial. *See, e.g.*, *Cunningham v. Wong*, 704 F3d 1143, 1159 (9th Cir), *cert den*, 134 S Ct 169 (2013) ("Under *Strickland*'s second prong, even if [counsel] should have objected, there is no reasonable likelihood that the outcome of * * * trial would have been different had [the prosecutor's] statement been stricken from the record. The comments were a single paragraph of a twenty-page argument and

the trial judge explained to the jury that closing arguments are not evidence."); *Featherstone v. Estelle*, 948 F2d 1497, 1507 (9th Cir 1991) ("Petitioner's trial counsel erred when he failed to object to the prosecutor's manifestly improper statistical argument. * * * However, we are satisfied that the mistake was not of such a magnitude that it is reasonably possible that had it not occurred, petitioner would have been acquitted.").

Here, petitioner argues that a meritorious objection would have entitled him to either a mistrial or a curative instruction. (Pet Br 32). But the effect of the challenged argument, even if improper, was too minimal to require a mistrial. The jury had already heard testimony—from petitioner himself—that he had "made a choice * * * to not talk to the police." (Trial Tr 377 (cross-examination of petitioner); *see also* Trial Tr 324 (similar on direct examination)). And, as petitioner concedes, the state was permitted to discuss that invocation in closing argument because petitioner had opened the door to that subject. (Pet Br 27). The state was thus permitted to point, as it did to impeach petitioner, to evidence that petitioner "didn't want to talk to the police" and "told Detective Scott that." (Trial Tr 520).

In those circumstances, any impropriety in the argument at issue would have had limited marginal effect, and the trial court was unlikely to have granted a mistrial on account of any such impropriety. *State v. Smith*, 310 Or 1, 24, 791 P2d 836 (1990) ("Even if we find the prosecutor's remarks to be

improper, tasteless, or inappropriate, we will not find an abuse of discretion in the trial court's denial of the motion for a mistrial unless the effect of the prosecutor's remarks is to deny a defendant a fair trial.").

In fact, the trial court was unlikely to have provided anything more than a curative instruction in response to an objection, particularly given that the Court of Appeals has repeatedly admonished that "a mistrial is a drastic remedy to be avoided if possible, consistent with fairness." *See State v. Middleton*, 256 Or App 173, 182, 300 P3d 228, *rev den*, 354 Or 62 (2013) (internal quotation marks omitted).

Thus, at most, a meritorious objection would have required the trial court to consider whether a curative instruction was necessary. But the trial court was unlikely to view any further curative instruction as necessary when the jury was already going to be advised that the "lawyers' statements and arguments are not evidence." (Trial Tr 528). That instruction was likely sufficient to dispel the effect of any implicit inference suggested by the prosecutor's closing argument.

Moreover, even if the trial court had allowed a further curative instruction, such an instruction would have done no more than inform the jury not to draw an adverse inference from petitioner's invocation. But such an instruction would not have had any tendency or likelihood of changing the outcome at trial, at least not in the absence of any reason to believe that the jury

drew that adverse inference. As noted above, the state never suggested or invited that inference.

For that reason, petitioner cannot establish any likelihood that the outcome of his trial would have been different even in the face of a sustained objection to the challenged argument.

CONCLUSION

For the foregoing reasons, this court should affirm the judgment of the trial court and the Court of Appeals.

Respectfully submitted,

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NOTICE OF FILING AND PROOF OF SERVICE

I certify that on December 6, 2016, I directed the original Brief on the Merits of Respondent on Review, Mark Nooth to be electronically filed with the Appellate Court Administrator, Appellate Records Section, and electronically served upon Jed Peterson, attorney for appellant, 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 5,969 words. I further certify that the size of the type in this brief is not smaller than 14 point for both the text of the brief and footnotes as required by ORAP 5.05(2)(b).

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