

Filed: June 27, 2013

IN THE SUPREME COURT OF THE STATE OF OREGON

FRANK EDWARD GABLE,

Petitioner on Review,

v.

STATE OF OREGON,

Respondent on Review.

(CC 95C12041; CA A134838; SC S059686)

On review from the Court of Appeals.*

Argued and submitted September 17, 2012; resubmitted January 7, 2013.

Harrison Latto, Portland, and Nell Irene Brown, Pro Hac Vice, Assistant Federal Public Defender, Portland, argued the cause and filed the brief for petitioner on review.

Carolyn Alexander, Assistant Attorney General, Salem, argued the cause and filed the brief for respondent on review. With her on the brief were Mary H. Williams, Deputy Attorney General, and Anna M. Joyce, Solicitor General.

Before Balmer, Chief Justice, and Walters, Landau, and Baldwin, Justices.**

LANDAU, J.

The decision of the Court of Appeals and the judgment of the circuit court are affirmed.

Walters, J., dissented and filed an opinion.

*Appeal from Marion County Circuit Court,
Frank J. Yraguen, Judge.
243 Or App 389, 256 P3d 1099 (2011).

**Kistler, Linder, and Brewer, JJ., did not participate in the consideration or decision of this case.

1 LANDAU, J.

2 This is a post-conviction case in which petitioner contends that he received
3 inadequate assistance of counsel at his criminal trial. Specifically, he contends that
4 counsel did not inform him that he had the right to object, on *ex post facto* grounds, to the
5 application of a new sentencing law to his case and that, as a result, his sentence is
6 invalid. It is undisputed that counsel should have informed petitioner of his right to
7 object to the application of the new law to his case. The issue before us is whether the
8 failure to provide that advice prejudiced petitioner, that is, whether receiving the correct
9 advice would have made any difference to his decision not to object. The post-conviction
10 court found, as a matter of fact, that petitioner did not establish that the advice would
11 have made such a difference. Petitioner appealed, and the Court of Appeals affirmed
12 without opinion. *Gable v. State of Oregon*, 243 Or App 389, 256 P3d 1099 (2011). We
13 affirm.

14 The following facts are not in dispute. In 1989, petitioner was arrested for
15 the killing of Oregon Department of Corrections director Michael Francke in January of
16 that year. At the time of the offense, Oregon law provided two sentencing options for
17 aggravated murder: death or life with the possibility of parole, known as "ordinary life."
18 Specifically, under the law in effect at the time of the offense, a jury could make findings
19 requiring a defendant to be put to death; if it did not, the trial court was required to
20 impose a sentence of life imprisonment with the possibility of parole after a minimum of
21 30 years of imprisonment. ORS 163.105(1)(e) (1987).

22 Later in 1989, however, the Oregon legislature amended the law to provide

1 a third, middle option of life *without* the possibility of parole, known as "true life." ORS
2 ORS 163.105(a). The new law provides that true life is the presumptive sentence if the
3 jury does not return findings requiring the death penalty and allows the imposition of a
4 sentence of ordinary life only when 10 members of the jury agree that there are sufficient
5 mitigating circumstances. ORS 163.150(2)(a). *See State v. Wille*, 317 Or 487, 502-04,
6 858 P2d 128 (1993) (explaining effect of amendment).

7 In April 1990, defendant was indicted with multiple charges of murder and
8 aggravated murder based on the Francke killing. The case went to trial, and, in June
9 1991, the jury returned a verdict of guilty on all counts.

10 The penalty phase of the criminal trial began on July 2, 1991. At
11 defendant's criminal trial counsel's request, the jury was instructed on the basis of the
12 sentencing law in existence at the time of the trial; that is to say, the trial court instructed
13 the jury that it had three sentencing options: death, true life, or ordinary life. (Criminal
14 trial counsel later explained that the defense team had a concern that the jury might have
15 returned a sentence of death if it had been given only the two choices of death and
16 ordinary life.) The jury determined that petitioner should not be sentenced to death, but
17 also should never be eligible for parole. The trial court then sentenced petitioner to life
18 imprisonment without the possibility of parole. The conviction and sentence were
19 affirmed on direct appeal. *State v. Gable*, 127 Or App 320, 873 P2d 351, *rev den*, 319 Or
20 274 (1994).

21 Petitioner filed a petition for post-conviction relief. He contended that he
22 had been denied adequate assistance of counsel at trial because, among other things,

1 counsel failed to meet with him and advise him about the case investigation; counsel
2 failed to assert an alibi defense, even though he had always denied being at the scene of
3 the killing; counsel failed to read certain reports and other discovery furnished by the
4 state; and counsel failed to object, on *ex post facto* grounds, to the application of the new
5 sentencing law to his case.

6 At the hearing in 2000, petitioner testified at length on his various
7 contentions. On the matter of the failure to object to the sentencing instruction, he
8 testified that, had counsel told him about the possibility of objecting to the true life
9 instruction, he would have done so. He explained that, "to me, it's always been the same
10 thing: I'm wrongfully indicted, I'm wrongfully convicted, and it's an all-out situation
11 that's either the death penalty or freedom, you know. There was no in between for me."

12 The post-conviction court issued 104 pages of findings of facts and
13 conclusions of law. The court noted that, under applicable federal and state case law,
14 petitioner was required to establish both that counsel failed to exercise professional skill
15 and judgment and that petitioner was prejudiced as a result. The court explained that,
16 with respect to the issue of prejudice, petitioner was required to prove that "there is a
17 reasonable probability that, but for counsel's errors, the result of the proceeding would
18 have been different." Throughout those findings, the court found petitioner to be less
19 than credible. It pointed out numerous inconsistencies in petitioner's testimony. It also
20 noted that petitioner had exhibited behavior during the investigation of the case that
21 suggested that he thought that "his mouth allowed him to handle anything he
22 encountered" and that, during the post-conviction proceeding, petitioner similarly

1 believed that "his mouth will set him free in these proceedings."

2 On the specific issue of the failure of counsel to object to the sentencing
3 instruction, the court concluded that petitioner waived any such objection and dismissed
4 the petition for post-conviction relief. The court explained that, "[i]t seems clear from
5 recent case law that a defendant facing the imposition of the death penalty can waive or
6 relinquish the protection of the State and Federal *ex post facto* Constitutional protections
7 against a retroactive application of the true life option." The court explained that "[t]he
8 true life option affords an additional alternative to a jury considering a death penalty case
9 short of imposing the death penalty, particularly when a jury may be of an opinion that
10 the convicted defendant should never be released into society." The post-conviction
11 court noted that the criminal trial judge had testified that it was "his impression that the
12 choice of the Defense was to go with the life without parole as a defense strategy to give
13 jurors a viable choice other than the death penalty or life with parole." The post-
14 conviction court found that petitioner had every opportunity to raise an *ex post facto*
15 challenge to allowing the jury to consider three possible sentencing options, instead of
16 two, but he never asserted that right. Accordingly, the court concluded, petitioner waived
17 that right.

18 Petitioner appealed to the Court of Appeals. That court concluded that
19 there had been no waiver and that criminal trial counsel should have advised petitioner of
20 his right to object to the application of the new sentencing law to his case. *Gable v. State*
21 *of Oregon*, 203 Or App 710, 726, 126 P3d 739 (2006). The court remanded the case for
22 the post-conviction court to make a finding about whether receiving that advice would

1 have made a difference to petitioner in deciding not to object to the application of the law
2 to his case. *Id.* The court explained:

3 "If petitioner would, in fact, have waived his *ex post facto* rights in these
4 circumstances (as have many similarly situated criminal defendants), then
5 petitioner was not prejudiced by his counsel's default. That is, petitioner
6 might have waived those protections in all events because it was to his
7 practical, tactical benefit to do so."

8 *Id.* at 735 (citations omitted).

9 On remand, the post-conviction court permitted petitioner to supplement
10 the record with additional testimony. The record on the issue is as follows:

11 "The Court: I would be interested though, I guess, in the bottom
12 line. And that is if we can get to that, I wonder if [petitioner's] position has
13 changed. And, of course, in reviewing the case law, generally those
14 defendants who have faced the death penalty have been prone to view that
15 three options being presented to the jury [is] better than the two, and I
16 wonder if his position is the same. Because the reason we're here [is]
17 because his testimony at the trial level when we had the trial in 2000
18 basically ran something like this[:]

19 "If I had my choice, I would have said to the court, to the attorneys,
20 that I want either death or life with the possibility of parole, and not this
21 middle option of true life.' And I am wondering whether his position
22 remains the same today. If it's like as has happened in the past --
23 particularly in one case -- where this very issue was the same -- went back,
24 and then the defendant changed his mind and said, 'Well, I really do want
25 true life after all.' And then that went up on appeal, and they determined
26 well, he really does have the right to -- even though he argued something
27 differently at the appellate level and won on that -- prevailed -- he still has
28 the right to change his mind later and then say, 'Well I really do want that
29 option.'

30 "You said, 'I'm not guilty; therefore, I want death or life with the
31 possibility of getting out -- parole in essence.' Is that still -- well, I'll leave
32 it to you Mr. Hadley [counsel for petitioner]. I am interested in whether his
33 position changed though.

34 "Mr. Hadley: Yeah. And I don't have any problem having Mr.
35 Gable answer that * * *. But, Mr. Gable, you understand that question

1 clearly, I hope?

2 "Mr. Gable: Yes.

3 "* * * * *

4 "Mr. Hadley: You understand what the Judge was just about to ask
5 you?

6 "Mr. Gable: Yes.

7 "* * * * *

8 "Mr. Hadley: Are you still wanting to go forward today and ask that
9 your sentence be modified and that you either be given life with parole --
10 even if you're risking a chance of facing the death penalty down the line?

11 "Mr. Gable: Yes.

12 "Mr. Hadley: You clearly understand?

13 "Mr. Gable: Yes.

14 "The Court: You realize the jury found against you -- the original
15 jury that heard this case in the penalty phase[.] * * * I wonder if it is -- is
16 there any reason why you would take that sort of a risk -- realizing that that
17 was the result the last time around?

18 "Mr. Gable: Well, Your Honor, I've claimed innocence since this
19 started -- the nightmare. And I figure I'd rather just -- if the State chooses
20 to give me the death penalty, I'd rather have that instead of life without
21 parole for a crime I didn't commit."

22 The post-conviction court again provided detailed findings and conclusions,
23 which incorporated the findings from the 2000 post-conviction proceeding. The court
24 began by noting that petitioner bears "the burden of establishing prejudice by a
25 preponderance of the evidence. ORS 138.620(2)." The court then found that petitioner
26 had failed to meet that burden. The court explained that,

27 "[p]etitioner feels that since he is innocent, if the jury only had the options
28 of death or life with parole, everyone (including the jury, the trial court, the

1 trial counsel and the appellate courts) would have paid closer attention to
2 his case and would therefore somehow reach the conclusion that he is
3 innocent. Petitioner concludes that a potential death penalty would have
4 resulted in greater scrutiny, and yet, the death penalty was always a
5 possibility in the case."

6 In the court's view, petitioner's case "doesn't make sense." The court added that
7 petitioner, "was *not* a credible witness during [the] trial of this matter and is *not* a credible
8 witness with respect to this issue. Petitioner's position on the 'true-life' issue appears to
9 simply be one more example of a false bravado which is part of the character of the
10 [p]etitioner," and which led him to indulge in falsehoods in other aspects of the
11 proceeding. (Emphasis in original.) "Without resorting to speculation," the court
12 continued,

13 "no evidence (Petitioner's testimony is *not* credible) of prejudice resulting
14 from the 'true-life' option being presented to the jury has been shown by the
15 Petitioner. Petitioner Gable has failed to carry his burden by a
16 preponderance of the evidence. There is no evidence other than the
17 Petitioner's testimony, and the testimony is simply not credible."

18 (Emphasis in original.) The court then entered judgment dismissing petitioner's petition
19 for post-conviction relief. As noted, the Court of Appeals affirmed without opinion.

20 On review, petitioner now argues that the post-conviction court erred in
21 finding that he failed to meet his burden of establishing prejudice. Petitioner's arguments
22 appear to be threefold: (1) he argues that the post-conviction court "applied an incorrect
23 and more burdensome standard of proof" when it stated that petitioner must establish
24 prejudice by a preponderance of the evidence, (2) that the post-conviction court erred in
25 finding that petitioner's argument did not "make sense," and (3) that, in any event, it is
26 inappropriate even to inquire about what he would have done had he received proper

1 advice from criminal trial counsel. We address each of those three arguments in turn and
2 conclude that none is persuasive.

3 Post-conviction relief is warranted when there has been a "substantial
4 denial" of a petitioner's "rights under the Constitution of the United States, or under the
5 Constitution of the State of Oregon, or both, and which denial rendered the conviction
6 void." ORS 138.530(1)(a). The state-based right to adequate assistance of counsel
7 derives from Article I, section 11, of the Oregon Constitution, which provides, in part,
8 that "in all criminal prosecutions, the accused shall have the right * * * to be heard by
9 himself and counsel." The federal right to effective assistance of counsel derives from
10 the Sixth Amendment's guarantee that "[i]n all criminal prosecutions, the accused shall
11 enjoy the right * * * to have the Assistance of Counsel for his defence." This court has
12 said that, although those provisions are "worded differently," they "embody similar
13 objectives." *Krummacher v. Gierloff*, 290 Or 867, 871, 627 P2d 458 (1981).

14 Under Oregon law, a petitioner seeking post-conviction relief based on
15 inadequate or ineffective assistance of counsel must demonstrate two things: that his trial
16 counsel failed to exercise reasonable professional skill and judgment and that he suffered
17 prejudice as a result. *Lichau v. Baldwin*, 333 Or 350, 359, 39 P3d 851 (2002). In other
18 words, even if petitioner proves that his trial counsel failed to exercise reasonable
19 professional skill and judgment, he still must prove that he suffered prejudice as a result
20 of that failure. *Stevens v. State of Oregon*, 322 Or 101, 110, 902 P2d 1137 (1995).

21 In establishing a right to post-conviction relief, "[t]he burden of proof of
22 facts alleged in the petition shall be upon the petitioner to establish such facts by a

1 preponderance of the evidence." ORS 138.620(2). That burden of proof applies to facts
2 related to both prongs of the test for inadequacy of counsel. *Trujillo v Maass*, 312 Or
3 431, 435, 822 P2d 703 (1991) ("The burden is on petitioner to show, by a preponderance
4 of the evidence, facts demonstrating that trial counsel failed to exercise reasonable
5 professional skill and judgment and that petitioner suffered prejudice as a result.").

6 The legal standard that applies to the prejudice prong entails demonstrating
7 that, based on the facts that the petitioner has established by a preponderance of the
8 evidence, the acts or omissions of counsel "had a tendency to affect the result of the
9 trial." *Burdge v. Palmateer*, 338 Or 490, 492, 112 P3d 320 (2005) (quoting *Lichau*, 333
10 Or at 359); *see also Trujillo*, 312 Or at 435 ("only those acts or omissions by counsel
11 which have a tendency to affect the result of the prosecution can be regarded as of
12 constitutional magnitude").

13 A petitioner must make a similar showing under the Sixth Amendment.
14 According to *Strickland v. Washington*, 466 US 668, 694, 104 S Ct 2052, 80 L Ed 2d 674
15 (1984), a petitioner seeking post-conviction relief must show that "there is a reasonable
16 probability that, but for counsel's unprofessional errors, the result of the proceeding
17 would have been different," with "reasonable probability" defined as "a probability
18 sufficient to undermine confidence in the outcome." *Id.*

19 In reviewing the decision of the post-conviction court, we are bound by its
20 findings of fact if they are supported by evidence in the record. *Lichau*, 333 Or at 359. If
21 the post-conviction court fails to make findings of fact on all relevant issues, and there is
22 evidence from which such facts could be decided more than one way, we will presume

1 that the facts were decided in a manner consistent with the post-conviction court's
2 conclusions of law. *Peiffer v. Hoyt*, 339 Or 649, 660, 125 P3d 734 (2005).

3 With that background in mind, we turn to petitioner's first argument, that
4 the post-conviction court applied an "incorrect and more burdensome" standard of proof.
5 As we have noted, ORS 138.620(2) expressly provides that a post-conviction petitioner
6 must establish any facts "by a preponderance of the evidence." And this court has stated
7 that that burden of proof applies to facts relevant both to the questions whether counsel
8 exercised adequate professional skill and judgment and whether any prejudice resulted.
9 *Trujillo*, 312 Or at 435.

10 Petitioner insists that, at least as to his federal claim of ineffective
11 assistance, the preponderance standard that the post-conviction court mentioned is at odds
12 with what he contends is a less demanding standard of "reasonable probability" required
13 in *Strickland*. That contention, however, is answered by the United States Supreme
14 Court's decision in *Holland v. Jackson*, 542 US 649, 124 S Ct 2736, 159 L Ed 2d 683
15 (2004). In that case, the petitioner had been convicted of murder and sentenced to life
16 imprisonment. He sought state post-conviction relief, claiming that his criminal trial
17 counsel was constitutionally inadequate in failing to investigate the case. The state post-
18 conviction court denied relief, finding that, among other things, the petitioner had failed
19 to meet his burden of establishing prejudice by a preponderance of the evidence. That
20 decision was affirmed on appeal. The petitioner then sought federal habeas relief. The
21 trial court denied relief, but the Court of Appeals for the Sixth Circuit reversed, holding
22 that the state court had erred in assessing prejudice under a preponderance-of-the-

1 evidence standard. *Id.* at 650.

2 The United States Supreme Court reversed, explaining that "[t]he Sixth
3 Circuit * * * erred in holding that the state court acted contrary to federal law by
4 requiring proof of prejudice by a preponderance of the evidence rather than by a
5 reasonable probability." *Id.* at 654. The Court noted that the state post-conviction court
6 actually had cited the correct legal standard under *Strickland*. *Id.* Moreover, the Court
7 explained, there is nothing incorrect about stating that the preponderance-of-the-evidence
8 standard generally applies to any factual contentions in a post-conviction proceeding. *Id.*
9 The Court said that there was no reason to assume that the state court had applied the
10 preponderance-of-the-evidence standard in a way that conflicted with *Strickland*. *Id.*

11 In this case, as in *Holland*, the post-conviction court set out the correct
12 legal standard in its 2000 findings and conclusions, which actually quoted the reasonable-
13 probability language from *Strickland*. That standard was expressly incorporated into the
14 court's 2006 findings and conclusions. And in this case, as in *Holland*, the post-
15 conviction court cited -- accurately -- the statutory requirement that a post-conviction
16 petitioner establish all facts alleged in the petition by a preponderance of the evidence.
17 Under the circumstances, as in *Holland*, there is no reason for us to assume that the court
18 applied the statutory burden of proof in a manner that conflicted with the *Strickland*
19 standard.

20 We turn, then, to petitioner's second argument, that the post-conviction
21 court erred in finding that petitioner's argument did not "make sense." Petitioner cites no
22 authority for the proposition that it is reversible error for a post-conviction court to

1 comment that a particular argument does not make sense, and we are aware of none.

2 Petitioner insists that the trial court erred for two, apparently inconsistent, reasons.

3 Petitioner begins by asserting that the post-conviction court, in effect,
4 "strayed from the appropriate objective analysis and, instead, substituted its judgment for
5 that of petitioner." But if the post-conviction court's task is, as petitioner suggests, to
6 evaluate the objective reasonableness of petitioner's assertion that, given proper advice,
7 he would have insisted that the jury be given only two sentencing options and not three,
8 then we do not understand why assessing whether that assertion "makes sense" to the
9 post-conviction court is out of bounds.

10 Next -- and apparently in the alternative -- petitioner contends that the
11 objective reasonableness of what he would have done if presented with correct advice
12 actually is irrelevant, because a decision not to waive his *ex post facto* rights is purely
13 personal, "regardless of the reasonableness of his choice." Assuming for the sake of
14 argument that petitioner is correct about that, there remains the question whether he
15 persuaded the post-conviction court that that was, in fact, what he would have done. In
16 this case, the post-conviction court expressly, and repeatedly, found that petitioner was
17 not a credible witness on that point. On review, petitioner does not contend that the trial
18 court lacked a basis in the record to make such a finding. That is dispositive. *Lichau*,
19 333 Or at 359; *see also Alcorn v. Gladden*, 237 Or 106, 111, 390 P2d 625 (1964) (trial
20 court's finding that post-conviction petitioner "was not worthy of belief" was
21 "conclusive").

22 Finally, we address petitioner's contention that, in any event, it is

1 inappropriate even to inquire about what he would have done had he received proper
2 advice from criminal trial counsel. According to petitioner, because he did not receive
3 proper advice regarding the possible *ex post facto* objection, the post-conviction court
4 "engaged in pure speculation regarding what would have happened with correct advice."
5 In petitioner's view, but for the lack of proper advice, he would have received a lawful
6 sentence, as demonstrated by this court's decision in *Wille*, in which this court remanded
7 for entry of a sentence of ordinary life when, as in this case, the jury in an aggravated
8 murder case had been improperly instructed on all three sentencing options.

9 *Wille*, however, was a direct appeal. The only issue in that case was the
10 lawfulness of the sentence. This case, in contrast, is a post-conviction case in which the
11 sole question is the constitutional adequacy of counsel. As we have noted, in such cases,
12 state and federal law require that a petitioner establish that counsel failed to exercise
13 reasonable and professional skill, and that such failure prejudiced petitioner. Petitioner's
14 argument that he was obviously prejudiced because of the unlawful sentence that resulted
15 amounts to question-begging; it assumes the very issue in contention, namely, whether
16 the receipt of correct advice would have made a difference to petitioner -- that is to say,
17 whether he would have waived his *ex post facto* objection anyway.

18 That question cannot be assumed away. It is a critical issue in any post-
19 conviction case when the claim of inadequate assistance turns on the propriety of trial
20 counsel's advice; the court always must determine whether the receipt of correct advice
21 would have made a difference. In that regard, this court's decision in *Moen v. Peterson*,
22 312 Or 503, 824 P2d 404 (1991), is directly on point. In that case, the petitioner

1 contended that he had received inadequate assistance of counsel at his criminal trial
2 because trial counsel failed to advise him of the possibility of a minimum sentence before
3 he agreed to plead no contest. The petitioner argued that the receipt of incorrect advice
4 rendered his sentence *per se* unlawful. This court rejected that argument:

5 "There are many reasons why a criminal defendant might wish to make a
6 plea agreement, even though aware of the potential imposition of a
7 minimum sentence. The possibility of a minimum is not necessarily
8 determinative in a criminal defendant's decision to enter a plea. And, if a
9 petitioner would not have changed the plea of guilty or no contest even
10 with knowledge of a possible minimum sentence, there is no reason to set
11 aside the conviction."

12 *Id.* at 512. Accordingly, the court held that, "[i]n order to prevail in this case, petitioner
13 must show by a preponderance of the evidence that, had counsel informed him of the
14 possibility of a minimum sentence, or had he otherwise been aware of it, he would not
15 have pleaded no contest." *Id.* at 513.

16 Likewise in this case, there are many reasons why petitioner might have
17 wanted to waive his *ex post facto* rights under the circumstances of this case. *See, e.g.,*
18 *State v. McDonnell*, 329 Or 375, 381-82, 987 P2d 496 (1999) (trial court erred in refusing
19 to accept capital defendant's waiver of *ex post facto* objection and present true life option
20 to jury). As petitioner's own criminal trial counsel explained, presenting the jury with
21 three sentencing options instead of two could be viewed as advantageous by a criminal
22 defendant facing the death penalty. Therefore, the controlling question in this post-
23 conviction proceeding, as in *Moen*, is whether the receipt of correct advice about a
24 possible *ex post facto* objection would have made a difference to petitioner in this case.
25 The only evidence on that point is petitioner's assertion that he would have insisted on

1 exercising his *ex post facto* rights and have the jury instructed on only two sentencing
2 options. As we have noted, the post-conviction court did not believe petitioner. There is
3 no suggestion that the post-conviction court lacked a basis in the record for making that
4 finding as to petitioner's credibility. To the contrary, throughout the course of the post-
5 conviction proceeding, the court detailed inconsistencies in petitioner's testimony that led
6 it to conclude -- repeatedly -- that petitioner simply was not credible. That ends the
7 matter.

8 The dissent contends that we have improperly framed the issue and that we
9 should instead address whether petitioner was prejudiced by his lawyer's failure *to object*
10 to the later-enacted sentencing law. That issue, however, is not before us. The Court of
11 Appeals concluded that counsel breached the standard of constitutionally adequate
12 representation in failing *to advise* petitioner of his right to object. It then remanded for
13 findings on "whether petitioner is entitled to post-conviction relief because of his
14 attorney's default in failing to confer with him" regarding his *ex post facto* rights. 203 Or
15 App at 735. The post-conviction court made findings on that issue and that issue alone.
16 The sufficiency of those findings is the only issue properly before us now.

17 Petitioner advances other arguments, which we reject without discussion.

18 The decision of the Court of Appeals and the judgment of the circuit court
19 are affirmed.

1 WALTERS, J., dissenting.

2 As the majority's opinion makes evident, to frame an issue is to decide it.

3 Having framed the issue as whether petitioner was prejudiced by his lawyer's *failure to*
4 *advise him* of his right to object, the majority focuses on what petitioner would have done
5 had he received the requisite advice. However, had the majority framed the issue as
6 whether petitioner was prejudiced by his lawyer's *failure to object* to the application of
7 the later-enacted, more-onerous sentencing law, the majority would have been compelled
8 to focus on the consequences of the lawyer's failure to protect petitioner's rights.¹

9 Correctly framed, the majority could have resolved the issue without speculation; we
10 know with certainty that counsel's failure to object prejudiced petitioner.

11 We know that because of this court's decision in *State v. Wille*, 317 Or 487,

¹ The majority contends that this issue is not before the court. ___ Or at ___
(slip op at 15). I do not agree. The Court of Appeals decision was not limited to
counsel's failure to advise petitioner. As the Court of Appeals understood, the two issues
are interrelated, and, ultimately, as the Court of Appeals held, it was counsel's failure to
object that was constitutionally inadequate:

"Petitioner contends that, because he did not waive his *ex post facto*
rights, his counsel provided constitutionally deficient assistance in failing to
advise him of those rights and, ultimately, *in failing to raise the ex post*
facto objection to submission of the 'true life' option. We conclude that
counsel did breach the standard of constitutionally adequate representation
in that regard."

203 Or App at 734 (emphases added). Petitioner includes, in his brief to this court, the
argument that, because he did not waive his *ex post facto* rights, counsel was required to
raise the *ex post facto objection* and that petitioner was prejudiced by that failure. The
state does not contend that petitioner's argument is barred; the state responds. Although
we may not be *required* to discuss petitioner's argument, I do not understand the
majority's unwillingness to do so.

1 858 P2d 128 (1993). Like petitioner, Wille committed aggravated murder in 1989, when
2 the law provided two sentencing options for aggravated murder: death, or, if not death,
3 "ordinary life" -- life with the possibility of parole. At the conclusion of Wille's trial, the
4 jury returned findings that precluded the imposition of the death penalty. Thus, had the
5 trial court correctly applied the law that was in effect in 1989, the only lawful sentence
6 that it could have imposed was ordinary life. *See Wille*, 317 Or at 504 ("If the jury did
7 not agree on the death penalty, the trial court was required to impose a sentence of
8 ordinary life."). The trial court did not do so. Instead, it erroneously applied the law that
9 was in effect at the time of trial and sentenced Wille to "true life"; that is, life without the
10 possibility of parole. Wille appealed, and the Court of Appeals reversed. *State v. Wille*,
11 115 Or App 47, 61, 839 P2d 712 (1992).

12 This court affirmed the Court of Appeals' decision and required that Wille
13 be resentenced to life with the possibility of parole. *Wille*, 317 Or at 505. The court
14 reasoned that the application of the later-enacted law violated the constitutional
15 prohibition on *ex post facto* laws because, at the time of Wille's crime, when a jury did
16 not return findings that supported the death penalty, the presumptive sentence for
17 aggravated murder was ordinary life. True life, the court held, "clearly is a more
18 burdensome punishment than ordinary life," and "[t]he fact that a jury, by a vote of 10,
19 affirmatively could have found mitigating circumstances sufficient to warrant reducing
20 the true life sentence to ordinary life does not alter the calculation." *Id.* Consequently,
21 the court remanded Wille's case to the trial court for resentencing under the less
22 burdensome law, and Wille was sentenced to ordinary life.

1 In this case, the jury also returned findings that precluded the imposition of
2 the death penalty, and the trial court also applied the law that was in effect at the time of
3 trial. Petitioner, like Wille, appealed. Petitioner's case came before the Court of Appeals
4 after this court had decided *Wille*, and, following the reasoning in that case, the Court of
5 Appeals could have reversed petitioner's sentence and required that the trial court
6 sentence petitioner, like Wille, to ordinary life. Instead, the Court of Appeals declined to
7 address petitioner's *ex post facto* claim, because his lawyer had failed to raise that claim
8 before the trial court. *State v. Gable*, 127 Or App 320, 332, 873 P2d 351 (1994), *rev den*,
9 319 Or 274 (1994) ("The claim of error is unpreserved and we decline to address it.").
10 Thus, we need not speculate to conclude that petitioner was prejudiced by his lawyer's
11 failure to object. Petitioner's true life sentence was affirmed because his lawyer failed to
12 preserve his *ex post facto* argument.

13 Rather than reaching that conclusion, the majority considers the different
14 question of whether petitioner would have waived his right to object to the application of
15 the later-enacted law had his lawyer informed him that he could do so. In reasoning as it
16 does, the majority discusses the fact that the trial court rejected petitioner's testimony that
17 he would not have waived his constitutional right and the trial court's finding that that
18 position did not "make sense." ___ Or at ___ (slip op at 11). With respect, it is the
19 question that the court asked and not the answer that petitioner gave that does not make
20 sense.

21 Petitioner's answer that he would not have waived his constitutional right is
22 consistent with both the nature of that right and this court's decision in *Wille*. A

1 constitutional right is a defendant's shield against oppressive state action, and courts are
2 reluctant to find that a defendant has waived a fundamental constitutional right. *State v.*
3 *Meyrick*, 313 Or 125, 131-33, 831 P2d 666 (1992). In *Wille*, this court decided that the
4 law that was in effect in 1989 when Wille and petitioner committed their crimes was less
5 burdensome than the later-enacted law that was in effect at the time of their trials. It
6 makes logical sense that petitioner would not waive his constitutional right against the
7 application of the more-burdensome law.

8 But, more importantly, the majority misses the mark when it focuses solely
9 on whether petitioner's testimony about what he would have done was credible. We
10 know for a fact that petitioner did not waive his constitutional right. As a result, his
11 lawyer had an obligation to assert and protect that right. To ask whether petitioner would
12 have made the same decision had his lawyer discussed the matter with him -- a
13 circumstance that did not occur -- instead of whether petitioner was prejudiced by his
14 lawyer's failure to object -- the circumstance that did in fact occur -- does not make sense
15 to me. For the majority, the trial court's finding that petitioner was not credible "ends the
16 matter." ___ Or at ___ (slip op at 15). For me, it does not. Accordingly, I respectfully
17 dissent.