ORIGINAL

No. 18-3337

ORIGINAL

In The Supreme Court of the United States

DAVID MICHAEL DECKER,

Petitioner,

v.

ROB PERSSON,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEAL FOR THE NINTH CIRCUIT

APPENDIX

David Michael Decker #16222317
Oregon State Correctional Institution
3405 Deer Park Drive, SE
Salem, Oregon 97301

Petitioner *pro se*

INDEX OF APPENDICS

APPENDIX A– Order denying petition for rehearing en banc filed September 25, 2018

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

DAVID MICHAEL DECKER, Petitioner-Appellant, v. ROB PERSSON, Respondent-Appellee.	No. 17-35152 D.C. No. 6:13-cv-01415-SI District of Oregon, Eugene ORDER

Before: BEA, MURGUIA, and OWENS, Circuit Judges.

The motion of Robert W. Rainwater, Esq., to withdraw as counsel for Petitioner is **GRANTED**.

Judge Murguia votes to grant the petition for rehearing en banc. Judge Bea and Judge Owens vote to deny the petition for rehearing en banc. The full court has been advised of the petition for rehearing en banc and no judge of the court has requested a vote on en banc rehearing. *See* Fed. R. App. P. 35(f). The petition for rehearing en banc is **DENIED**.

APPENDIX B – Ninth Circuit Memorandum Opinion and dissent filed August 16, 2018

NOT FOR PUBLICATION

FILED

AUG 16 2018

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

DAVID MICHAEL DECKER, Petitioner-Appellant, v. ROB PERSSON, Respondent-Appellee.	No. 17-35152 D.C. No. 6:13-cv-01415-SI MEMORANDUM*

Appeal from the United States District Court
for the District of Oregon
Michael H. Simon, District Judge, Presiding

Argued and Submitted March 20, 2018
San Francisco, California

Before: BEA, MURGUIA, and OWENS, Circuit Judges.

Petitioner David Decker ("Decker") appeals from the district court's denial of habeas relief on his conviction and sentence for felony murder, which was based on the predicate felony of burglary. We have jurisdiction under 18 U.S.C. § 1291 and § 2253. We review the district court's denial of a petition for habeas relief *de novo*, *Blair v. Martel*, 645 F.3d 1151, 1154 n.1 (9th Cir. 2011), and we affirm.

* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

In 2006, Decker was convicted by a jury in Oregon state court of felony murder of Kirk Jones ("Jones"). The felony murder charge was based on allegations that Jones died while Petitioner and an accomplice, Justin Starrett ("Starrett"), were committing a burglary and as a result of their conduct in committing that crime. The district court initially granted habeas relief on three of Decker's habeas claims, but this court reversed as to two of those claims and remanded the third. *Decker v. Persson*, 663 F. App'x 520, 521, 523 (9th Cir. 2016) ("*Decker I*"),[1] *cert. denied*, 137 S. Ct. 1232 (2017).

Decker's remaining habeas claim—the sole claim at issue on this appeal—is that his trial counsel rendered ineffective assistance of counsel ("IAC") when he failed to request an instruction on the intent element of the burglary charge that would have clarified to the jury that the burglary charge required the state to prove that Decker formed the intent to assault Jones at the time that Decker "unlawfully remained" in Jones's apartment; that is, when Jones told Decker and Starrett to leave (thus withdrawing their licenses to be in his home) and they did not leave. Because Decker failed to raise this claim in his state post-conviction proceeding, he must establish that his post-conviction-relief counsel ("PCR counsel") was constitutionally defective in failing to raise it in that proceeding. *Martinez v. Ryan*,

[1] The material facts of this case are recounted in this court's previous decision in this case. *See Decker I*, 663 F. App'x at 522–23.

566 U.S. 1, 17 (2012). Then, if that procedural default is excused, Decker must prove both that (1) trial counsel rendered ineffective assistance and (2) Decker was prejudiced thereby because there is a reasonable probability that Decker would have been found not guilty of felony murder had counsel requested a different instruction on intent. *See Strickland v. Washington*, 466 U.S. 668, 687, 694 (1984).

Under Oregon law, a person is guilty of felony murder if, in the course of committing a burglary in the first degree (a felony), a participant in the felony causes the death of another person. Or. Rev. Stat. § 163.115(1)(b)(C). A person is guilty of burglary in the first degree if he "violates ORS 164.215 and the building is a dwelling." Or. Rev. Stat. § 164.225(1). Section 164.215 provides that a person is guilty of burglary under that section if he "enters or remains unlawfully in a building with intent to commit a crime therein." Or. Rev. Stat. § 164.215(1). Remaining unlawfully means "failing to leave after authorization to be present expires or is revoked." *In re JNS*, 308 P.3d 1112, 1117 (Or. Ct. App. 2013). In determining whether the intent element of section 164.215 is satisfied, the "proper focus is on the defendant's intent at the initiation of the trespass." *Id.* at 1118.

At trial, the Oregon court gave the following instruction regarding the elements of the predicate felony of burglary:

> Oregon law provides that a person commits the crime of Burglary in the First Degree if the person enters or remains unlawfully in a dwelling

> with the intent to commit a crime therein. In this case, to establish the crime of Burglary in the First Degree, the state must prove beyond a reasonable doubt . . . [that] *at the time of entering or remaining unlawfully*, David Decker had the intent to commit the crime of assault [in Jones's apartment].

As the district court found below, the jury instruction given at trial correctly explained the law as to when Decker must have formed the intention to commit assault to be guilty of first-degree burglary. The instruction given "provided accurate, if somewhat general, guidance to the jury on what it was required to find," and was therefore adequate under Oregon law. *State v. Pedersen*, 255 P.3d 556, 564 (Or. Ct. App. 2011) ("It is not error for a trial court to refuse to give a requested instruction if the instruction given by the court, although not in the form requested, adequately covers the subject of the requested instruction.").

Decker argues that trial counsel nonetheless rendered IAC by failing to request an instruction more specifically tailored to a defense that Decker did not form the requisite intent "at the time of entering or remaining unlawfully."[2] But this argument cannot overcome the deference applied to the performance of both

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[2] Decker's Opening Brief also argues that trial counsel was ineffective because he failed to object to the prosecution's characterizations of the intent element of the burglary charge, but no separate claim based on failures to object is before us here. *Decker I*, 663 F. App'x at 522 ("Claim 1(C) involves defense counsel's failure to request a jury instruction explaining the intent required for a criminal defendant to be convicted of burglary under Oregon law."); *id.* at 523 (remanding for the district court "to determine in the first instance whether the burglary instructions given by the Oregon trial court to the jury were sufficient or insufficient concerning the intent element of burglary under Oregon law").

PCR and trial counsel. This court held in *Decker I* that Decker's trial counsel's "decision to argue an affirmative defense[3] rather than Decker's lack of intent [to assault Jones at the time he was told to leave] did not constitute ineffective assistance of counsel." *Decker I*, 663 Fed. Appx. at 523. That was a proper application of *Strickland*'s mandate for reviewing courts to "indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." *Strickland*, 466 U.S. at 689. Indeed, all of the cases Decker cites to show the viability of the foregone defense strategy were decided *after* both his trial and his initial state post-conviction proceeding. *State v. Werner*, 383 P.3d 875 (Or. Ct. App. 2016); *State v. Gordon*, 383 P.3d 942 (Or. Ct. App. 2016); *State v. Berndt*, 386 P.3d 196 (Or. Ct. App. 2016); *In re JNS*, 308 P.3d 1112 (Or. Ct. App. 2013). Therefore, trial counsel's failure to seek a more detailed instruction on the timing of Decker's intent to assault Jones—because trial counsel reasonably pursued a different defense—was "within the wide range of reasonable

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[3] Trial counsel argued a statutory affirmative defense based on Or. Rev. Stat. § 163.115(3), which provides:

> It is an affirmative defense to a charge of [felony murder] that the defendant: (a) Was not the only participant in the underlying crime; (b) Did not commit the homicidal act or in any way solicit, request, command, importune, cause or aid in the commission thereof; (c) Was not armed with a dangerous or deadly weapon; (d) Had no reasonable ground to believe that any other participant was armed with a dangerous or deadly weapon; and (e) Had no reasonable ground to believe that any other participant intended to engage in conduct likely to result in death.

professional assistance." *Strickland*, 466 U.S. at 689 ("A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective *at the time*." (emphasis added)).

Moreover, even if we were inclined to depart from the law of the case to hold that trial counsel's failure to raise another defense was unreasonable (and thus that failure to request a jury instruction in service of that other defense was unreasonable as well), we would not be able to say here that *PCR* counsel's failure to raise an IAC claim on that basis was itself unreasonable. *See Decker I*, 663 Fed. Appx. at 523 (holding that trial counsel in this case did not render ineffective assistance in arguing the statutory defense rather than a defense based on the intent element of the burglary charge); *Sexton v. Cozner*, 679 F.3d 1150, 1157 (9th Cir. 2012) ("[Post-conviction] [c]ounsel is not necessarily ineffective for failing to raise even a nonfrivolous claim."). Decker failed to address his procedural default in his Opening Brief and then failed to file a Reply Brief after Respondent raised it in his Answering Brief. Decker has therefore failed to carry his burden to establish grounds for habeas relief.

AFFIRMED.

Decker v. Persson, No. 17-35152

MURGUIA, Circuit Judge, dissenting:

By failing to request a clarifying instruction on the intent element of burglary, David Decker's trial counsel, D. Olcott Thompson, committed an error that rendered his performance at trial constitutionally deficient. This error was fatal to Decker's defense: it permitted the jury to reach a guilty verdict that was unsupported by any evidence at trial, and it resulted in the imposition of a mandatory sentence of life in prison. Because Decker has proven his ineffective assistance of counsel claim, I respectfully dissent.

The question presented by this appeal is whether Thompson deprived Decker of the effective assistance of counsel by failing to request an additional jury instruction on the intent element of burglary, which was the predicate offense for Decker's felony murder charge. In order to prove the ineffective assistance of trial counsel under the Sixth Amendment, Decker must show that (1) Thompson's performance at trial was deficient, which requires showing that Thompson "made errors so serious that [he] was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment," and (2) Decker was prejudiced by the deficient performance, meaning he was deprived of "a trial whose result is reliable." *Strickland v. Washington*, 466 U.S. 668, 687 (1984). Both prongs of the

test are met here.

First, by permitting the jury to reach a verdict based on a misunderstanding of Oregon law, Thompson's performance was deficient. Under Oregon law, "a person commits the crime of burglary in the second degree if the person enters or remains unlawfully in a building with intent to commit a crime therein." Or. Rev. Stat. § 164.215(1). Critical here, the intent to commit a crime must be formed contemporaneously with the decision to enter or remain unlawfully in the building. *In re J.N.S.*, 308 P.3d 1112, 1117–18 (Or. Ct. App. 2013). In fact, intent to commit a subsequent crime must be the *purpose* for the defendant's decision to remain. *See id.*

Where, as here, "the trespass begins when a defendant *remains in a building* after authorization has expired or has been revoked, then we ask whether the defendant possessed the requisite criminal intent at the time of the unlawful *remaining*." *Id.* at 1118 (emphasis in original). As the majority correctly notes, Decker's trespass began when Kirk Jones revoked his permission for Decker to be in the apartment by asking Decker to leave. Following an exchange between Jones and Justin Starrett, Jones stated: "Well, if you're going to act like that, you should leave my apartment." Because this was the moment that Jones revoked his license for Decker to remain in the apartment, it was at this moment, and not after, that

Decker must have formed the intent to commit assault on Jones for the purposes of proving burglary. *See id.*

As Magistrate Judge Janice Stewart correctly found in her original Findings and Recommendation, there was no evidence presented at trial that Decker intended to commit assault when his trespass began. This case was unusual, in that Decker had been invited into Jones's apartment as a guest. When Jones asked Starrett and Decker to leave, Decker had been in the apartment with Jones and Starrett for over five hours, drinking and playing games. During all of that time there was no indication of violence. Jones asked Decker and Starrett to leave because Jones was in a disagreement with Starrett, not with Decker. Decker's assault for the purposes of proving burglary was the single act of throwing a bottle of vodka at Jones. It was not planned, and it did not occur until after Starrett had initiated the violence by hitting Jones over the head with a lamp. Even assuming Decker had an inkling of the events to come at the time his trespass began, this is insufficient under Oregon law, which requires that the defendant act with "a conscious objective to cause the result or to engage in the conduct so described." *State v. Cook*, 335 P.3d 846, 849 (Or. Ct. App. 2014) (quoting Or. Rev. Stat. § 161.085(7)). On these facts, had Thompson made intent the centerpiece of his defense, the prosecution's case would have failed.

Perhaps realizing that there was no evidence to support a burglary charge, the prosecution advanced a theory that Decker's trespass began at a different time—the time of the assault itself. Specifically, the prosecution repeatedly told the jury that Jones "impliedly" revoked his permission for Decker to remain in the apartment when Decker committed the assault on Jones. This theory—that Jones *impliedly* revoked permission for Decker to remain when the assault began—benefitted the prosecution by eliminating the burden of proof on the intent element of burglary. Specifically, the contemporaneity requirement would always be satisfied: Decker's intent to commit the assault on Jones would *necessarily* be contemporaneous with the unlawful remaining because both occurred at the time of the assault itself. In other words, the prosecution's burden of proving the elements of intent and unlawful remaining was met by the very fact of the felony itself.

This theory of burglary has been repeatedly and strongly rejected by Oregon courts. *See State v. Berndt*, 386 P.3d 196, 200 (Or. Ct. App. 2016) (reversing burglary conviction where "the only conduct on which the state relied at trial to assert that defendant had acted outside the scope of his license, and therefore unlawfully remained on the premises, was his commission of a crime."); *State v. Werner*, 383 P.3d 875, 881 (Or. Ct. App. 2016) ("Because it is inconsistent with the legislature's definition of burglary and because it would greatly expand the

crime of burglary despite the absence of any indication that the legislature intended such an expansion, we reject the state's argument that commission of a crime in a building, in and of itself, converts a lawful entry into an unlawful remaining."); *In re J.N.S.*, 308 P.3d at 1118–19 (rejecting the state's theory "that a person may commit second-degree burglary by entering a premises and then forming the intent to commit a crime therein.").[1] The idea that intent can be proved by the very fact of the subsequent felony misconstrues the purpose of the burglary statute, which is to penalize the act of entering a building with the intent to commit a felony. *State v. Chatelain*, 220 P.3d 41, 45 (Or. 2009) (en banc). In fact, the contemporaneity of the unlawful remaining and the intent to commit a felony is critical because it is what distinguishes the crime of burglary both from a criminal trespass and from the subsequently committed felony. *See Berndt*, 386 P.3d at 199 ("[T]he legislature intended burglary to be separate from (and not dependent upon) the subsequent

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[1] The majority dismisses these cases as irrelevant because they were decided after Decker's trial. But these cases did not change the law on burglary in Oregon. Rather, they simply stated what should be obvious: if intent could be proved by the very fact of the subsequent felony, then every single felony committed inside a dwelling would automatically give rise to a burglary charge. As noted herein, this is not the case. *See Chatelain*, 220 P.3d at 45 (discussing 4 William Blackstone, Commentaries on the Laws of England 227 (1769) ("[I]t is clear, that [the] breaking and entry must be with a felonious intent, otherwise it is only a trespass.")).

commission of the intended crime . . . ." (quoting *Werner*, 383 P.3d at 880–81)); *Chatelain*, 220 P.3d at 45 ("Since the time of Blackstone, the defendant's intent to commit a crime in the building has been the characteristic distinguishing burglary from mere trespass."). Erasing this distinction is an error of consequence: it eliminates the state's burden of proof on the intent element of burglary, which is "the essence of the offense." *In re J.N.S.*, 308 P.3d at 1119 (citation omitted). Indeed, under the prosecution's theory, any felony committed inside a dwelling would constitute burglary, which of course makes no sense. Yet, that is what occurred here.

Decker's trial counsel did not argue intent and never objected to the prosecution's theory of the case.[2] Nor did he request an instruction clarifying that intent must have been formed at the time Jones asked Decker to leave, and not sometime thereafter. *See id.* at 1117–18. Armed with a different instruction, the jury might have been forced to arrive at the same conclusion reached by Magistrate

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[2] In his federal habeas petition, Decker also raised a claim that Thompson was ineffective for failing to argue to the jury that Decker lacked the intent required for a criminal defendant to be convicted of burglary under Oregon law. *See Decker v. Persson*, 663 F. App'x 520, 521 (9th Cir. 2016) ("*Decker I*"). The prior Ninth Circuit panel in this case reversed the district court's order granting that claim on the merits. *Id.* at 523. I was not a member of the prior panel, and I do not agree with its disposition.

Judge Stewart—namely, that at the time Jones asked Decker to leave there was no evidence presented at trial that Decker had formed the intent to commit assault on Jones. Instead, by failing to correct the prosecution's misstatement of law, Thompson permitted the jury to reach a verdict on the assumption that Decker's unlawful remaining began at the very moment he assaulted Jones, which required no evidence of intent at all.

The trial court's instruction on the intent element of burglary would be sufficient if there was only one moment in time when Decker might have formed the intent to commit assault. But the jury was incorrectly allowed to believe that there were two times in which Decker might have formed the intent to commit the assault on Jones—either at the time Jones asked Decker to leave, or at the time of the assault itself. This legal error was not corrected in the jury instructions, even though this Oregon burglary offense required intent to have been formed at the time Jones verbally rescinded his permission for Decker to remain and not later. This error was also compounded by the prosecution's repeated misstatements of what the law required during closing statements.

In the absence of this critical information, the jury, not surprisingly, found the elements of burglary had been met and entered a guilty verdict for the felony murder charge. The trial judge subsequently imposed the mandatory life sentence.

Considering all these circumstances, I conclude that Thompson's failure to rectify the prosecution's misstatements of law constituted an "error [] so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment," and that Decker was prejudiced by this error. *Strickland*, 466 U.S. at 687. Therefore, Decker has proven his ineffective assistance of counsel claim with regard to trial counsel.[3]

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[3] Decker would not be able to show prejudice if, even in spite of Thompson's deficient performance, the timing of events could give rise to a reasonable inference that Decker's intent was formed at the time Jones asked him to leave the apartment. *See Cook*, 335 P.3d at 848 ("The state may rely on circumstantial evidence and reasonable inferences flowing from that evidence to establish any element of a charged crime, including intent." (internal quotation marks and citation omitted)). Here, several facts undermine the conclusion that Decker remained unlawfully for the purpose of assaulting Jones at the time Jones asked Decker and Starrett to leave. First, as discussed above, Decker had been in the apartment for at least 5 hours before Starrett assaulted Jones. For those five hours and even up to the time consent was revoked, there was no suggestion of violence on the part of Decker or animosity between Decker and Jones. Earlier in the evening Decker called Jones a "faggot," "fag," and a "punk." However, this was sometime before Michelle Wolf left the apartment, and her testimony was that Decker and Starrett were joking around. When Jones did ultimately ask Decker and Starrett to leave, there was an ongoing dispute between Starrett and Jones, who were lovers—not between Jones and Decker, who had no prior relationship of consequence. The reasonable inference is that the impetus for Starrett's assault was Jones's sexual advances, which were directed at Starrett, not Decker.

Second, when Jones revoked his consent for Decker and Starrett to stay in his apartment, Decker simply remained sitting on the couch as he had been doing for some time. In fact, Decker simply sat and watched as Starrett unscrewed the lamp, while Jones had his back turned, and then hit Jones over the head. This does not suggest Decker had "a conscious objective to cause the result or to engage in

In reaching its conclusion that Thompson's performance was not deficient, the majority does not address all of these facts, but rather cites to the deference that we owe to the performance of trial counsel. To this point, I respectfully disagree with the conclusion reached by the prior panel that Thompson's decision to argue an affirmative defense rather than Decker's lack of intent was a legitimate trial strategy. *Decker I*, 663 F. App'x at 523 ("We find that defense counsel's decision to argue an affirmative defense rather than Decker's lack of intent did not constitute ineffective assistance of counsel."). This conclusion was unsupported by the record. *See United States v. Alexande*r, 106 F.3d 874, 876 (9th Cir. 1997) (a court may depart from the law of the case where the first decision was clearly erroneous). Thompson's statutory affirmative defense, which requires proof of each of five elements, several of which were lacking here, was flimsy at best. *See*

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the conduct so described." *Id.* at 849 (quoting Or. Rev. Stat. § 161.085(7)). It was not until after Starrett used the lamp to assault Jones that Decker demonstrated any intent to assault Jones. In fact, Decker's trial counsel elicited testimony from several witnesses that Decker did not know that Starrett was going to assault Jones or plan the assault in any way.

On these facts, the proximity in time does not give rise to a reasonable inference of intent at the time permission to remain was revoked. *Id.* at 848 ("There is a difference between inferences that may be drawn from circumstantial evidence and mere speculation. Reasonable inferences are permissible; speculation and guesswork are not." (internal quotation marks and citations omitted)). Rather, the evidence suggests that Decker formed the intent to commit assault after Starrett assaulted Jones.

Or. Rev. Stat. § 163.115(3).

More importantly, however, even assuming that the statutory affirmative defense was valid, Thompson is not immunized from constitutional challenge because he had *any* strategy—his decision to abandon an alternative defense that had a high probability of success must have been strategic as well. *See United States v. Alferahin*, 433 F.3d 1148, 1161 (9th Cir. 2006) (Alferahin's counsel did not intend strategically to forego the materiality instruction, but rather "had no idea that such an instruction was available to his client as a matter of right."); *United States v. Span*, 75 F.3d 1383 1387–88 (9th Cir. 1996) (defense counsel's performance was deficient in failing to object to an erroneous instruction on an excessive force defense, even where counsel had three other valid defenses that were asserted at trial). Thompson indicated no such strategy with regard to an intent defense. Rather, Thompson's affidavit suggests that Thompson failed to even identify the prosecution's error, much less comprehend its gravity. *Cf. Butcher v. Marquez*, 758 F.2d 373, 377 (9th Cir. 1985) ("Apparently defense counsel, *with adequate knowledge of the law and the evidence*, abandoned pursuit of an instruction on voluntary manslaughter in accord with the strategy that he believed would procure the most advantageous defense for Butcher. It can be inferred that in taking this course of action counsel believed that such a request

would have been fruitless or even harmful to his client." (emphasis added)). For these reasons, again, I must respectfully depart from the majority's conclusion that Thompson's performance was constitutionally sound.

Finally, in order to win on the merits of his ineffective assistance of counsel claim, Decker must show that his post-conviction relief counsel was ineffective in failing to raise the claim that trial counsel was ineffective. I agree with the district court's original conclusion in this case that under *Martinez v. Ryan*, 566 U.S. 1 (2012), Decker has shown that his claim is substantial, and that he has demonstrated cause and prejudice to overcome procedural default on this claim. *See Atwood v. Ryan*, 870 F.3d 1033, 1059–60 (9th Cir. 2017).

There is no dispute that Decker failed to raise his IAC claim ("Claim 1(C)") before the state courts, which would now find Decker's claim procedurally barred. *See Beaty v. Stewart*, 303 F.3d 975, 987 (9th Cir. 2002). Procedural default may be excused, however, if Decker can show cause and prejudice. *See Coleman v. Thompson*, 501 U.S. 722, 746–47 (1991). In *Martinez*, the Supreme Court held that "[i]nadequate assistance of counsel at initial-review collateral proceedings may establish cause for a prisoner's procedural default of a claim of ineffective assistance at trial." 566 U.S. at 9.

"[T]o establish 'cause' to overcome procedural default under *Martinez*, a

petitioner must show: (1) the underlying ineffective assistance of trial counsel claim is 'substantial'; (2) the petitioner was not represented or had ineffective counsel during the [state post-conviction relief ("PCR")] proceeding; (3) the state PCR proceeding was the initial review proceeding; and (4) state law required (or forced as a practical matter) the petitioner to bring the claim in the initial review collateral proceeding." *Dickens v. Ryan*, 740 F.3d 1302, 1319 (9th Cir. 2014) (en banc) (citing *Trevino v. Thaler*, 133 S. Ct. 1911, 1918 (2013)). Here, the third and fourth elements are met. *See* Or. Rev. Stat. § 138.550(3) ("All grounds for relief claimed by petitioner in a petition [for post-conviction relief] must be asserted in the original or amended petition, and any grounds not so asserted are deemed waived unless the court on hearing a subsequent petition finds grounds for relief asserted therein which could not reasonably have been raised in the original or amended petition."). Therefore, in order to overcome the default, Decker must show that his PCR counsel was ineffective under the standards of *Strickland*, and that his underlying claim of ineffective assistance of trial counsel is "substantial." *Martinez*, 566 U.S. at 14.

Regarding the first requirement, a claim is "substantial" if it has "some merit." *Id.* For the reasons discussed above, Decker's ineffective assistance of counsel claim is meritorious, and the first requirement to show cause under

Martinez is satisfied. *See id.*

Regarding the second requirement, neither the magistrate judge nor the district court made any factual findings on the question of whether Decker's post-conviction relief counsel at the initial collateral review proceeding was deficient in failing to raise the present IAC claim. Ordinarily a remand would be appropriate to determine this "highly fact- and record-intensive analysis." *Woods v. Sinclair*, 764 F.3d 1109, 1138 (9th Cir. 2014) (quoting *Detrich v. Ryan*, 740 F.3d 1237, 1262 (9th Cir. 2013) (Watford, J., concurring)). However, I note that Respondent Persson did not object to the Magistrate Judge's failure to explicitly address the performance of PCR counsel, as he was required to do. Rather, Persson's objection focused wholly on the Magistrate Judge's construction of Oregon law. Therefore, any challenge on this ground was waived long ago, and at this stage in these proceedings remand is neither appropriate nor necessary on the procedural default issue. *See Martinez v. Ylst*, 951 F.2d 1153, 1157 (9th Cir. 1991) (finding the application of waiver doctrine was necessary to prevent inequity).

In sum, I cannot agree with the majority's conclusion that the given instruction was "general[] guidance" that adequately covered the subject of the requested instruction. On the particular facts of this case, it was, rather, an incomplete instruction. *See State v. Bistrika*, 322 P.3d 583, 595 (Or. Ct. App. 2014)

("Instructional error exists where the instructions give the jury 'an incomplete and thus inaccurate legal rule' to apply to the facts . . . ." (quoting *Wallach v. Allstate Ins. Co.*, 180 P.3d 19 (Or. 2008) (en banc)). The court's given instruction failed to convey to the jury a critical piece of information, which, if included, more likely than not would have led the jury to reach a verdict of "not guilty." *See Wallach*, 180 P.3d at 26 (court's instruction constituted reversible error where instruction was "too broad," in that "[i]t permitted the jury to find the defendant . . . guilty for conduct that did not constitute the charged crime, as well as for conduct that did" (discussing *State v. Pine*, 82 P.3d 130 (2003)); *cf. State v. Pedersen*, 255 P.3d 556, 564 (Or. Ct. App. 2011) ("We cannot say the trial court's instruction created an erroneous impression of the law or that defendant was entitled to his requested instruction."). Moreover, no other instruction given by the judge clarified this grievous deficiency. *See State v. Woodman*, 138 P.3d 1, 8 (Or. 2006) (en banc) ("[W]e read the instructions as a whole to determine whether they state the law accurately." (citations omitted)). On the facts of this case, the instruction was erroneous and Thompson's failure to identify or rectify the error violated Decker's rights under the Sixth Amendment.

Because Decker has succeeded on his ineffective assistance of counsel claim, I would remand with instructions to the district court to grant Decker's

petition for writ of habeas corpus. Accordingly, I dissent.

APPENDIX C – District Court's order following remand filed February 1, 2017

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

DAVID MICHAL DECKER,

Petitioner,

v.

ROB PERSSON,

Respondent.

Case No. 6:13-cv-01415-SI

ORDER FOLLOWING REMAND

SIMON, District Judge.

Petitioner filed this 28 U.S.C. § 2254 habeas corpus case on August 13, 2013 wherein he alleged that his trial attorney provided him with ineffective assistance with respect to his felony murder conviction in Marion County. Much of the case focused on whether petitioner intended to commit a crime within the victim's dwelling at the time the victim revoked his permission for petitioner to remain within the dwelling.

On July 30, 2015, Magistrate Judge Stewart recommended that the court grant habeas corpus relief in this case on several bases. She recommended finding ineffective assistance of counsel where petitioner's trial attorney should have: (1) requested a jury instruction on the lesser included offense of assault (Ground 1(B)); (2) requested a jury instruction explaining the intent required for a criminal defendant to be convicted of burglar under Oregon law (Ground 1(C)); and (3) argued during closing argument that petitioner lacked the intent required for a criminal defendant to be convicted of burglary under Oregon law. On October 5, 2015, I adopted the Findings and Recommendations and issued a Judgment granting habeas corpus relief.

On September 8, 2016, the Court of Appeals reversed that decision. Specifically, it concluded that relief was not appropriate as to Grounds 1(B) and 1(F) where the state post-conviction relief court reasonably held that trial counsel's decision not to request an assault instruction was strategic, and counsel's decision to argue a statutory affirmative defense rather than petitioner's lack of intent did not constitute ineffective assistance of counsel. The Court of Appeals did, however, remand the case with instructions for this court to

determine whether the burglary instructions given by the trial court were sufficient concerning the intent element of burglary under Oregon law. The Mandate for that decision issued on December 12, 2016.

The Magistrate viewed Grounds 1(C) and 1(F) as "somewhat related" and therefore considered them together. She determined that counsel had been ineffective for failing to make any legal argument that petitioner's trespass lacked the contemporaneous intent to constitute a burglary, and that he should have also made an accompanying request for a jury instruction focused only on intent to help highlight the issue. The Court of Appeals rejected Ground 1(F) in its entirety, leaving only the now stand-alone issue of the sufficiency of the trial court's jury instruction on intent.

The trial court accurately stated the law in Oregon when it instructed the jury on the intent element of burglary as follows: ". . . and fifth, at the time of entering or remaining unlawfully, David Decker had the intent to commit the crime of assault therein." Trial Transcript, Vol. III, p. 230. Where trial counsel's decision to focus on a statutory affirmative defense to the exclusion of the intent argument was reasonable, and where the trial court's instruction on the intent element

APPENDIX D – Ninth Circuit Memorandum Opinion and dissent filed September 8, 2016

NOT FOR PUBLICATION

FILED

SEP 8 2016

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

DAVID MICHAEL DECKER, Petitioner-Appellee, v. ROB PERSSON, Respondent-Appellant.	No. 15-35854 D.C. No. 6:13-cv-01415-ST MEMORANDUM*

Appeal from the United States District Court
for the District of Oregon
Michael H. Simon, District Judge, Presiding

Argued and Submitted July 8, 2016
Portland, Oregon

Before: PREGERSON, BEA, and OWENS, Circuit Judges.

Respondent-appellant appeals the U.S. District Court's order granting David Decker habeas relief from an Oregon State felony murder conviction with burglary as the predicate felony offense. The District Court granted relief on three claims under *Strickland v. Washington*, 466 U.S. 668 (1984).

Claim 1(B) addresses defense trial counsel's failure to request a jury

* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

instruction on the lesser included offense of assault. The District Court's review of this claim is governed by the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"). 28 U.S.C. § 2254. The District Court held that the Oregon state court decision constituted an unreasonable application of *Strickland* and granted habeas relief on claim 1(B).

The two additional habeas claims on appeal, claims 1(F) and 1(C), deal with defense trial counsel's failure to address the intent element in Oregon's burglary statute. Claim 1(F) involves defense counsel's failure to argue to the jury that Decker lacked the intent required for a criminal defendant to be convicted of burglary under Oregon law. Claim 1(C) involves defense counsel's failure to request a jury instruction explaining the intent required for a criminal defendant to be convicted of burglary under Oregon law.

The District Court excused Decker's procedural default on claims 1(F) and 1(C) under *Martinez v. Ryan*, 132 S. Ct. 1309 (2012) even though Decker failed to raise these claims in the state habeas proceeding as required by Oregon law. *Id.* at 1316 (holding that a federal court may excuse a state habeas petitioner's procedural default if the petitioner can show cause for the failure to raise the claim and prejudice resulting from such failure); *State v. Robinson*, 550 P.2d 758, 25 Or.

App. 675 (1976) (per curiam) (holding that, under Oregon law, a claim of ineffective assistance of counsel must be raised in the initial habeas proceeding). The District Court also granted habeas relief on claims 1(F) and 1(C) upon de novo review.

We have jurisdiction under 28 U.S.C. §§ 1291 and 2253. We review the District Court's decisions de novo. *Crace v. Herzog*, 798 F.3d 840, 846 (9th Cir. 2015).

With respect to claim 1(B), review of which is governed by AEDPA, we reverse a state court's decision if it "was contrary to, or involved an unreasonable application of, clearly established [Supreme Court] law." 28 U.S.C. § 2254(d)(1). In this case, the relevant Supreme Court law is *Strickland*'s ineffective assistance of counsel standard.

Defense counsel provided an affidavit explaining his decision not to request an assault instruction. In light of defense counsel's affidavit, the Oregon state habeas court denied claim 1(B), holding that defense counsel's decision not to request an assault instruction was strategic.

The Oregon state court decision did not constitute an unreasonable application of *Strickland*. *See Harrington v. Richter*, 562 U.S. 86, 103 (2011) (trial

court's ruling must be "so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement"). We thus reverse the District Court's grant of habeas relief on claim 1(B).

Concerning claims 1(F) and 1(C): To be convicted of burglary under Oregon law, a defendant must have intended to commit a crime at the time his permission to remain in the victim's dwelling is revoked. O.R.S. § 164.225 (A person commits the crime of burglary in the first degree if the person "enters or remains unlawfully in a [dwelling] with intent to commit a crime therein.") (incorporating by reference O.R.S. § 164.215, burglary in the second degree); *In re J.N.S.*, 308 P.3d 1112, 1117–18, 258 Or. App. 310, 318–19 (2013) ("[T]he proper focus is on the defendant's intent at the initiation of the trespass. . . . If the trespass begins when a defendant *remains in a building* after authorization has expired or has been revoked, then we ask whether the defendant possessed the requisite criminal intent at the time of the unlawful *remaining*."). In other words, a defendant must have the intent to commit a crime when he becomes a trespasser.

The District Court made the following relevant findings of fact:

> [Kirk] Jones[, the victim,] began making sexual

> advances toward [Justin] Starrett [Jones's and Decker's mutual friend] and asked Starrett to spend the night. This prompted [Decker] to begin teasing Starrett about the overtures, making Starrett angry. According to [Decker], Jones told them, "Well, if you're going to act like that, you should leave my apartment."
>
> At that point, Starrett unscrewed the shade of a nearby lamp, picked up the lamp base with both hands, said to Decker "this is what I think of faggots," and proceeded to hit Jones in the head two or three times. [Decker] then declared it was "my turn" and proceeded to pick up a half-gallon glass liquor bottle and throw it at Jones's head. The bottle bounced off the top of Jones's head, and he began to bleed heavily.
>
> Starrett then picked up a knife and began cutting Jones's neck, telling him "this is what happens to faggots." Believing that Starrett was going to kill Jones, [Decker] left the apartment and waited outside. When Starrett emerged from Jones's apartment, he informed [Decker] that he had killed Jones.
>
> . . . .
>
> The State's medical examiner determined Jones died of blunt force trauma to the head. He opined that the knife wound to Jones's neck was superficial and not fatal. He noted that the injury to the top of Jones's head was consistent with having a bottle thrown at him, but that he did not expect that specific injury was fatal by itself. Thus, the jury could infer that Starrett's blows with the lamp were the likely cause of death.

The District Court found that Jones revoked Decker's permission to remain in the apartment when Jones said, "Well, if you're going to act like that, you should leave my apartment." At trial, defense counsel did not discuss whether Decker had the intent to assault Jones when Decker was told to leave. Defense counsel did not argue that Decker lacked the intent necessary to be convicted of

burglary—the predicate felony for his murder charge. Defense counsel instead argued a statutory affirmative defense. *See* O.R.S. § 163.115(3). We find that defense counsel's decision to argue an affirmative defense rather than Decker's lack of intent did not constitute ineffective assistance of counsel. *See Strickland*, 466 U.S. at 689. We therefore reverse the District Court's grant of habeas relief on claim 1(F).

As for claim 1(C), the Oregon trial court instructed the jury on the statutory requirements of Oregon burglary law. The court's instructions did not specifically address the intent requirement—namely, that intent to commit a crime must exist at the time the defendant's presence in the victim's home becomes unlawful. On claim 1(C), the District Court held that trial counsel's failure to request a jury instruction on burglary's intent requirement constituted ineffective assistance of counsel. We defer our decision on claim 1(C), and remand to the District Court to determine in the first instance whether the burglary instructions given by the Oregon trial court to the jury were sufficient or insufficient concerning the intent element of burglary under Oregon law.

We REVERSE the District Court as to claims 1(B) and 1(F) and REMAND claim 1(C) for the District Court to determine in the first instance whether the burglary instructions given by the Oregon trial court to the jury

were sufficient or insufficient concerning the intent element of burglary under Oregon law.

FILED

SEP 08 2016

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

Decker v. Persson, 15-35854

BEA, J., concurring in part and dissenting in part:

I agree with the majority's reasoning and result as to Decker's claims 1(B) and 1(F). But instead of remanding claim 1(C) to the district court, I would reverse the district court's grant of habeas relief on this claim as well. The record shows that the trial judge *did* instruct the jury that for the state to prove that Decker committed burglary, the jury must find that "*at the time* of entering or remaining unlawfully, David Decker had the intent to commit the crime of assault therein."[1] Because this jury instruction clearly and correctly addressed the intent element of burglary under Oregon law, Decker's 1(C) claim that his trial counsel was constitutionally ineffective for failing to request a jury instruction explaining that requirement is not supported by the record.

I respectfully dissent from the majority's remand of claim 1(C).

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[1] Although the respondent-appellant did not include these jury instructions in his excerpts of record, the instructions appear in the transcript of Decker's state-court trial, which was entered in the district court's docket. Thus, the instructions are part of the appellate record, and we may rely on them to decide this appeal. *See* Ninth Circuit Rule 10-2 ("[T]he complete record on appeal [includes the] original pleadings, exhibits and other papers filed with the district court."); *cf. Bolker v. C.I.R.*, 760 F.2d 1039, 1042 (9th Cir. 1985) (explaining that "we have discretion to address" issues not raised in the district court where "the pertinent record has been fully developed").

APPENDIX E – District court's Order and judgment filed October 6, 2015

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

DAVID MICHAEL DECKER,

Petitioner,

v.

ROB PERSSON,

Respondent.

Case No. 6:13-cv-01415-ST

ORDER ADOPTING FINDINGS AND RECOMMENDATION

Michael H. Simon, District Judge.

United States Magistrate Judge Janice Stewart issued Findings and Recommendation in this case on July 30, 2015. Dkt. 47. Judge Stewart recommended that the Court deny Petitioner's ("Decker") request for an evidentiary hearing, grant Decker's First Amended Petition for Writ of Habeas Corpus (Dkt. 22), and require Respondent ("Persson") to recalculate Decker's sentence without the felony murder conviction within ninety days and, if appropriate under the resulting calculation, either release him from custody or provide him with a new trial with the assistance of constitutionally effective counsel.

Under the Federal Magistrates Act ("Act"), the Court may "accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate." 28 U.S.C. § 636(b)(1). If a party files objections to a magistrate's findings and recommendations, "the court

shall make a de novo determination of those portions of the report or specified proposed findings or recommendations to which objection is made." *Id.*; Fed. R. Civ. P. 72(b)(3).

For those portions of a magistrate's findings and recommendations to which neither party has objected, the Act does not prescribe any standard of review. *See Thomas v. Arn*, 474 U.S. 140, 152 (1985) ("There is no indication that Congress, in enacting [the Act], intended to require a district judge to review a magistrate's report to which no objections are filed."); *United States. v. Reyna-Tapia*, 328 F.3d 1114, 1121 (9th Cir. 2003) (en banc) (holding that the court must review *de novo* magistrate's findings and recommendations if objection is made, "but not otherwise"). Although in the absence of objections no review is required, the Act "does not preclude further review by the district judge[] *sua sponte* . . . under a *de novo* or any other standard." *Thomas*, 474 U.S. at 154. Indeed, the Advisory Committee Notes to Fed. R. Civ. P. 72(b) recommend that "[w]hen no timely objection is filed," the Court review the magistrate's recommendations for "clear error on the face of the record."

Persson timely filed an objection (Dkt. 52), to which Decker responded (Dkt. 53). Persson argues that: (1) the Findings and Recommendation did not give sufficient deference to the post-conviction relief court's finding on Ground 1(B); (2) the Findings and Recommendation unreasonably construed Oregon law on burglary, resulting in an erroneous finding that *Martinez* excused the procedural default of Grounds 1(C) and 1(F); and (3) if the Court finds Decker's defaulted Grounds 1(C) and 1(F) meet the *Martinez* exception, the Court should refer the case back to Judge Stewart for a hearing on the merits of those claims.

For those portions of Judge Stewart's Findings and Recommendation to which neither party has objected, this Court follows the recommendation of the Advisory Committee and reviews those matters for clear error on the face of the record. No such error is apparent.

The Court has reviewed *de novo* those portions of Judge Stewart's Findings and Recommendation to which Persson has objected, as well as Persson's objections, Decker's response, and the underlying briefing. The Court agrees with Judge Stewart's conclusions and ADOPTS the Findings and Recommendation.

The Court agrees with Judge Stewart's reasoning regarding Ground 1(B). Persson's objection that Judge Stewart did not apply the proper level of deference to the post-conviction relief court's decision is rejected. Judge Stewart specifically applied "the required level of deference to the PCR trial court's decision as required by the AEDPA" in finding that trial counsel's performance fell below an objective standard of reasonableness by failing to request a lesser-included instruction on fourth-degree assault.

The Court also agrees with Judge Stewart's reasoning relating to Grounds 1(C) and 1(F) regarding the proper interpretation of burglary under Oregon law. As is evidenced by the Oregon Court of Appeals' 2013 decision *In re J.N.S.*, the proper interpretation of Oregon's burglary statute requires criminal intent to be coterminous with the point at which a defendant unlawfully remains in a building, as was found by Judge Stewart. 258 Or. App. 310, 318-19 (2013) (stating that "the proper focus is on the defendant's intent at the initiation of the trespass" and that the policy behind the burglary statute is "to punish trespass for the purpose of committing a crime"). The Court agrees with Judge Stewart that the *Martinez* exception applies to Grounds 1(C) and 1(F).

Decker's final objection is that if the *Martinez* exception applies, the Court should refer the case back to Judge Stewart for a determination of the merits of Grounds 1(C) and 1(F). Judge Stewart, however, listed the deficiencies of counsel and found that "it is likely Petitioner would not have been convicted of felony murder" had trial counsel properly argued and presented the

intent requirement. Thus, Judge Stewart, although not citing to *Strickland*, made the necessary findings regarding the merits of Decker's ineffective assistance of counsel claims in recommending Decker's habeas petition be granted.

The Court ADOPTS Judge Stewart's Findings and Recommendation, Dkt. 47. Decker's First Amended Petition for Writ of Habeas Corpus (Dkt. 22) is GRANTED. Within ninety days of the date of this Order, the state shall recalculate Decker's sentence without the felony murder conviction. If appropriate under the resulting recalculation, the state must either release Decker or commence a retrial within the ninety day period.

IT IS SO ORDERED.

DATED this 5th day of October, 2015.

/s/ Michael H. Simon
Michael H. Simon
United States District Judge

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

DAVID MICHAEL DECKER, Petitioner, v. **ROB PERSSON,** Respondent.	Case No. 6:13-cv-01415-ST **JUDGMENT**

Based on the Court's ORDER (Dkt. 54),

IT IS ADJUDGED that the petition for habeas corpus is GRANTED. Within ninety days of the date of the Court's ORDER (Dkt. 54), the state shall recalculate Petitioner's sentence without the felony murder conviction. If appropriate under the resulting calculation, the state must either release Decker or commence a retrial within the ninety day period.

DATED this 6th day of October, 2015.

/s/ Michael H. Simon
Michael H. Simon
United States District Judge

APPENDIX F – **Magistrates Judges Findings and Recommendations [adopted by the district court] filed on July 30, 2015**

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

EUGENE DIVISION

DAVID MICHAEL DECKER,

Petitioner,

v.

ROB PERSSON,

Respondent.

Case No. 6:13-cv-01415-ST

FINDINGS AND RECOMMENDATION

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STEWART, Magistrate Judge:

Petitioner, David Decker, brings this habeas corpus case pursuant to 28 U.S.C. § 2254 challenging the legality of his state court convictions for felony murder. For the reasons that follow, the First Amended Petition for Writ of Habeas Corpus (docket #22) should be granted.

BACKGROUND

On January 11, 2006, petitioner, Justin Starrett ("Starrett"), and Michelle Wolf ("Wolf") went to the apartment of Kirk Jones ("Jones") where the four consumed a large quantity of vodka and beer. After Wolf left to make a telephone call, Jones began making sexual advances toward Starrett and asked him to spend the night. Trial Transcript, Vol. II, pp. 183, 185, 188. This prompted petitioner to begin teasing Starrett about the overtures, making Starrett angry. *Id* at 188, 193-94. According to petitioner, Jones told them, "Well, if you're going to act like that, you should leave my apartment." *Id* at 288, 279.

At that point, Starrett unscrewed the shade of a nearby lamp, picked up the lamp base with both hands, said to Decker "this is what I think of faggots," and proceeded to hit Jones in the head two or three times. *Id* at 188-89, 280. Petitioner then declared it was "my turn" and proceeded to pick up a half-gallon glass liquor bottle and throw it at Jones's head. *Id* at 137, 181. The bottle bounced off the top of Jones's head, and he began to bleed heavily. *Id* at 137.

Starrett then picked up a knife and began cutting Jones's neck, telling him "this is what happens to faggots." *Id at* 284. Believing that Starrett was going to kill Jones, petitioner left the apartment and waited outside. *Id* at 285-86. When Starrett emerged from Jones's apartment, he informed petitioner that he had killed Jones. *Id* at 286. The two men walked back to the homeless camp where they determined that

they should clean up the crime scene. As a result, they returned to the apartment the next day where they retrieved the lamp, knife, and liquor bottle and disposed of them in a nearby river. *Id* at 184-85.

In the early morning hours of January 12, 2006, Detective Mark Williamson interviewed petitioner. Detective Williamson smelled alcohol on petitioner's breath, and petitioner said that he had been drinking but was comfortable speaking with him. Trial Transcript, Vol. I, p. 14. Petitioner did not seem visibly impaired to Detective Williamson. *Id*. He never became ill, did not do or say anything unusual and was responsive to the questioning. *Id* at 15.

When petitioner began to make inculpatory statements, Detective Williamson tried to read him his *Miranda* warning, but petitioner cut him off and said he already knew them. *Id* at 17. Detective Williamson nevertheless administered the warning before proceeding. After speaking for 15 to 20 minutes, petitioner agreed to provide police with a taped statement and take a polygraph. *Id* at 20-21. As a result, Detective Williamson scheduled a polygraph for 9:00 a.m. the next morning and put petitioner up in a hotel room overnight. *Id* at 21-23.

At 8:00 a.m. the next morning, Detective Williamson picked petitioner up at the hotel still smelling of alcohol. Petitioner admitted drinking that morning, and his blood-alcohol content was .25. *Id* 24-25. Petitioner was given breakfast, and then went to sleep in a room within the police

department for six hours. *Id* at 61, 74, 75. When he woke up, he ate another meal took and another blood-alcohol test which yielded a result of .11. *Id* at 61, 75-76.

The detectives who accompanied petitioner across the department for a polygraph examination did not notice any problems with petitioner's balance or coordination or any visible signs of intoxication. *Id* at 62, 64, 77. At approximately 3:30 p.m., authorities again read petitioner his *Miranda* rights and proceeded with a polygraph exam without incident. *Id* at 61-62.

Two hours later, after being reminded of his *Miranda* rights, petitioner gave a taped statement lasting approximately 30 minutes. *Id* at 78, 81. According to petitioner's version of events, Starrett apparently became angry over something Jones said (which petitioner claimed he could not hear), but showed no anger as he unscrewed the finial and lampshade before assaulting Jones with the lamp. Respondent's Exhibit 118, p. 232. Petitioner told police that Jones was sober enough to appreciate what was happening to him, but made no move to fight back. "He didn't do anything, he just sat there." *Id* at 235. Petitioner admitted throwing the bottle that hit Jones in the head, but never actually intended to hit Jones. Petitioner was unable to explain why he threw the bottle at all and why he threw it in Jones's general direction. *Id* at 237, 239. When he hit Jones in the head, Jones moaned in pain and asked why the men were assaulting him. At this point, petitioner asked Starrett to

stop, but Starrett retrieved a knife from the kitchen and began to cut Jones as petitioner left the apartment. *Id* at 240-41.

On January 20, 2006, petitioner was indicted in Marion County on charges of felony murder, intentional murder, and burglary in the first degree. Respondent's Exhibit 102. The burglary charge stemmed from the theft of the evidence from Jones's apartment the day following the murder. As explained below, the felony murder charge was based on petitioner participating in Starrett's murder of Jones while committing another burglary in the first degree when he remained unlawfully in Jones's apartment with the intent to commit a crime.

Petitioner proceeded to a jury trial where the prosecution introduced his taped statements, and the defense introduced three post-arrest statements from Starrett admitting that he hit Jones in the head with the lamp and stabbed him with a butcher knife. Trial Transcript, Vol. II, pp. 213, 216. The State's medical examiner determined Jones died of blunt force trauma to the head. *Id* at 258. He opined that the knife wound to Jones's neck was superficial and not fatal. *Id* at 266-67. He noted that the injury to the top of Jones's head was consistent with having a bottle thrown at him, but that he did not expect that specific injury was fatal by itself. *Id* at 262, 268. Thus, the jury could infer that Starrett's blows with the lamp were the likely cause of death.

The jury found petitioner guilty of felony murder and burglary in the first degree (based on the theft of evidence), but not guilty of intentional murder. As a result, the court sentenced him to a mandatory life sentence, with a 300-month minimum. Respondent's Exhibit 101.

Petitioner filed a direct appeal alleging that the trial court should not have admitted his statements to the police due to his intoxication. The Oregon Court of Appeals affirmed the trial court's decision without opinion, and the Oregon Supreme Court denied review. *State v. Decker*, 225 Or. App. 376, 201 P.3d 940, *rev. denied*, 346 Or. 116, 205 P.3d 888 (2009).

Petitioner next filed for post-conviction relief ("PCR") in Umatilla County raising a variety of ineffective assistance of counsel claims. The PCR trial court denied relief on all of those claims. Respondent's Exhibit 141. The Oregon Court of Appeals affirmed the PCR trial court's decision without opinion, and the Oregon Supreme Court denied review. *Decker v. Coursey*, 255 Or. App. 511, 298 P.3d 68, *rev. denied*, 353 Or. 714, 303 P.3d 943 (2013).

Petitioner filed this federal habeas corpus case on August 13, 2013. The First Amended Petition alleges that trial counsel was constitutionally ineffective because he:

> 1(A): Not only [f]ailed to object to the admission of co-defendant, Justin Starrett's, statements to the police after his arrest on the ground that the admission of those statements violated his rights to confrontation and cross-examination under

the Sixth Amendment to the United States Constitution, made applicable to the State of Oregon by the Fourteenth Amendment to the United States Constitution, but moved to admit them as statements against penal interest.

1(B): Failed to request a jury instruction on assault as a lesser-included offense of the felony-murder charge.

1(C): Failed to request a jury instruction that the jury could only find [petitioner] guilty of burglary as the predicate felony for the felony-murder charge in Count One, if the jury found beyond a reasonable doubt that either [petitioner] did not have Mr. Jones's permission to be in his apartment or that he failed to leave the apartment after being lawfully directed to do so by Mr. Jones and that [petitioner] had the specific intent to commit a felony at the time he entered or refused to leave.

1(D): Failed to investigate, interview, and secure the presence of appropriate witnesses, and failed to present adequate evidence at trial on the issue of the voluntariness of [petitioner]'s statements and/or in support of [petitioner]'s motions to exclude his post-arrest statements. His counsel should have called an expert toxicologist to explain to the Court the effect that [petitioner]'s degree of alcohol intoxication had on his ability to waive his rights in connection with those post-arrest statements knowingly, intelligently, and voluntarily. Such expert should also have testified at the trial to the effect of the intoxication on the voluntariness of his statements.

1(E): Failed to investigate, interview, and secure the presence of appropriate witnesses at trial, in support of [petitioner]'s defense that his acts were not the cause of Mr. Jones's death. Counsel should have retained an expert pathologist

> to contest the State's contention [petitioner]'s acts were a cause of Mr. Jones's death, particularly in light of the ambiguous testimony that the State's expert offered on the subject.
>
> 1(F): Failed to argue during the motion for judgment of acquittal or during his final argument to the jury, that the State failed to offer legally sufficient proof that Mr. Jones died during a burglary committed by [petitioner], as a predicate for his conviction for felony murder or to argue that the evidence proved at most [petitioner] was guilty of assault, which could not be the predicate felony for felony murder because [petitioner] did not possess the specific intent to commit a felony (assault) when he entered or remained in Mr. Jones's apartment and because Mr. Jones never revoked [petitioner]'s permission to be in his apartment.
>
> 1(G): Failed to inform and properly advise [petitioner] of the plea deal offered by the State and when it was to expire, such that [petitioner] was unable to make a knowing and intelligent choice in deciding whether to accept the plea offer.
>
> 1(H): Failed to object to the court's imposition of attorney fees upon [petitioner] without any finding, on the record, of his ability to pay such fees. *See* ORS 151.505(4) and ORS 161.665(4).

As Ground Two, petitioner alleges that he was denied a meaningful appellate review because his appellate attorney was ineffective when she failed to raise: (A) the jury instruction issue in Ground 1(B); (B) the jury instruction issue in Ground 1(C); and (C) the attorney fee issue in Ground 1(H). Ground Three alleges a freestanding claim of actual

innocence, and Ground Four alleges that the cumulative nature of all claims entitles petitioner to habeas corpus relief.

Respondent asks the court to deny relief because: (1) petitioner failed to fairly present most of his claims to Oregon's court, such that those claims are now procedurally defaulted; (2) Ground 1(H) fails to state a cognizable claim; and (3) the state court decision denying relief on the remainder of petitioner's claims was not objectively unreasonable.

FINDINGS

I. Failure to State a Claim

As Ground 1(H), petitioner argues that his trial attorney should have objected to the court's imposition of attorney's fees without regard to his ability to pay for them. Pursuant to 28 U.S.C. § 2254, a state prisoner may bring a federal habeas petition "only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States." Because petitioner's claim pertaining to the imposition of attorney's fees does not challenge the legality of his underlying conviction or resulting sentence, it should be dismissed for failure to state a claim.

II. Exhaustion and Procedural Default

A. Standards

A habeas petitioner must exhaust his claims by fairly presenting them to the state's highest court, either through a direct appeal or collateral proceedings, before a federal court will consider the merits of those claims. *Rose v.*

Lundy, 455 U.S. 509, 519 (1982). "As a general rule, a petitioner satisfies the exhaustion requirement by fairly presenting the federal claim to the appropriate state courts . . . in the manner required by the state courts, thereby 'affording the state courts a meaningful opportunity to consider allegations of legal error.'" *Casey v. Moore*, 386 F.3d 896, 915-916 (9th Cir. 2004) (quoting *Vasquez v. Hillery*, 474 U.S. 254, 257, (1986)). If a habeas litigant failed to present his claims to the state courts in a procedural context in which the merits of the claims were actually considered, then the claims have not been fairly presented to the state courts and are not eligible for federal habeas corpus review. *Edwards v. Carpenter*, 529 U.S. 446, 453 (2000); *Castille v. Peoples*, 489 U.S. 346, 351 (1989).

A petitioner is deemed to have "procedurally defaulted" his claim if he failed to comply with a state procedural rule or failed to raise the claim at the state level at all. *Edwards*, 529 U.S. at 451; *Coleman v. Thompson*, 501 U.S. 722, 750 (1991). If a petitioner has procedurally defaulted a claim in state court, then a federal court will not review the claim unless the petitioner shows "cause and prejudice" for the failure to present the constitutional issue to the state court, or makes a colorable showing of actual innocence. *Gray v. Netherland*, 518 U.S. 152, 162 (1996); *Sawyer v. Whitley*, 505 U.S. 333, 337 (1992); *Murray v. Carrier*, 477 U.S. 478, 485 (1986).

///

B. Ground One Claims

Respondent asserts that petitioner failed to fairly present Grounds 1(A), 1(C), 1(E), and 1(F) to the state courts. Petitioner concedes he failed to present Grounds 1(A), 1(C), and 1(F) at any stage of his PCR proceedings. A review of the record reveals that petitioner also failed to raise his Ground 1(E) claim during his PCR appeal in either of his Appellant's Briefs. Respondent's Exhibits 142 & 143. Because petitioner can no longer present these claims to Oregon's courts for consideration, they are procedurally defaulted.

Petitioner argues that the court should excuse his default as to Grounds 1(A), 1(C), and 1(F) because the performance by his PCR trial counsel fell below an objective standard of reasonableness by failing to fairly present his claims. Traditionally, the performance of PCR counsel could not be used to establish cause and prejudice to excuse a procedural default. *Coleman v. Thompson*, 501 U.S. 722, 753-54 (1991) (only the constitutionally ineffective assistance of trial counsel constitutes cause); *Pennsylvania v. Finley*, 481 U.S. 551, 556 (1987) (there is no constitutional right to counsel in a PCR proceeding). However, in *Martinez v. Ryan*, 132 S. Ct. 1309 (2012), the Supreme Court found "it . . . necessary to modify the unqualified statement in *Coleman* that an attorney's ignorance or inadvertence in a postconviction proceeding does not qualify as cause to excuse a procedural default." *Id* at 1315. It held that "[i]nadequate assistance

of counsel at initial-review collateral proceedings may establish cause for a prisoner's procedural default of a claim of ineffective assistance at trial." *Id.* Specifically, it instructed as follows:

> Where, under state law, claims of ineffective assistance of trial counsel must be raised in an initial-review collateral proceeding, a procedural default will not bar a federal habeas court from hearing a substantial claim of ineffective assistance of trial counsel if, in the initial review collateral proceeding, there was no counsel or counsel in that proceeding was ineffective.

Id at 1320.

Oregon law requires that claims of ineffective assistance of trial counsel must be raised in the initial PCR proceeding. *Sexton v. Cozner*, 679 F.3d 1150, 1159 (9th Cir. 2012) (citing *State v. Robinson*, 25 Or. App. 675, 550 P.2d 758 (1976)). Therefore, ineffective PCR counsel may excuse petitioner's procedural default of a substantial claim of ineffective assistance of trial counsel.

1. Ground 1(A): Starrett's Statements

Petitioner claims that that trial counsel was constitutionally ineffective by failing to exclude Starrett's pre-trial statements to police officers under the Sixth Amendment's Confrontation Clause and that PCR trial counsel was ineffective by failing to raise this claim.

In order to prevail on a claim of ineffective assistance of counsel, petitioner must first show that his counsel's

performance fell below an objective standard of reasonableness. *Strickland v. Washington*, 466 U.S. 668, 686-87 (1984). Due to the difficulties in evaluating counsel's performance, courts must indulge a strong presumption that the conduct falls within the "wide range of reasonable professional assistance." *Id* at 689. A petitioner must also show that counsel's performance prejudiced the defense. The appropriate test for prejudice is whether the petitioner can show "that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id* at 694. A reasonable probability is one which is sufficient to undermine confidence in the outcome of the trial. *Id* at 696.

Petitioner believes that the admission of Starrett's statements did nothing to support his case and introduced a variety of prejudicial statements to the jury that: (1) petitioner said Jones deserved to die because he had AIDS and was hitting on Starrett; (2) petitioner made fun of the sound of the bottle bouncing off of Jones's head; (3) petitioner instigated the attack by teasing Starrett about having sex with Jones; (4) just before petitioner threw the bottle at Jones's head, he said "my turn;" (5) petitioner threw the liquor bottle at Jones's head with sufficient force that it landed ten feet away after striking Jones; (6) petitioner wiped fingerprints from Jones's apartment door as he and Starrett were leaving; (7) after the killing, petitioner stated that Jones was swimming with the fishes;

(8) petitioner advocated returning to Jones's apartment after the killing to retrieve the incriminating evidence, including the liquor bottle; and (9) petitioner had an implied criminal history.

Trial counsel gave the following reasons to introduce these statements:

> 5. We wanted Mr. Starrett's statements to the police heard by the jury because Mr. Starrett admitted to hitting Mr. Jones a number of times with the lamp. Those hits were what actually killed Mr. Jones. [petitioner]'s "involvement" was after the blows from the lamp when he threw the bottle at Mr. Jones.
>
> 6. The defense always was that [petitioner] did not participate in the killing of Mr. Jones. He had nothing to do with what Mr. Starrett did.
>
> 7. The statements by Mr. Starrett were needed for this defense. It would have been nice if the throwing of the bottle could have been excluded but it was part of Mr. Starrett's statements and could not be excised.

Respondent's Supplemental Exhibit 153.

Only Starrett and petitioner knew what happened at Jones's apartment on the day of Jones's death. Petitioner's own testimony that Starrett struck the fatal blows, by itself, would have been seen as self-serving and not particularly reliable. While Dennis Flack also testified about the events leading to Jones's death, his account came directly from

petitioner alone. As a result, without Starrett's statements that he had been the one to swing the lamp and inflict the injuries that killed Jones, the jury may have simply found petitioner to not be credible and guilty of intentional murder.

As a result, the court concludes that trial counsel made a reasonable strategic decision to introduce Starrett's statements, even though they painted petitioner in an unflattering light. For these reasons, petitioner's Ground 1(A) claim is not substantial and cannot excuse his procedural default.

2. Grounds 1(C) and 1(F): Failure to Argue Intent

Petitioner raises two somewhat related claims predicated on his assertion that he did not commit a felony murder during the course of a burglary. As Ground 1(C), petitioner alleges that trial counsel failed to request a jury instruction that he could only be found guilty of felony murder if he had no permission to either enter or remain in Jones's apartment and if he had the specific intent to commit a felony at the time he entered or refused to leave the apartment. As Ground 1(F), petitioner asserts that his trial attorney failed to argue during a motion for judgment of acquittal or during closing argument that the State failed to offer legally sufficient proof that Jones died during the course of a burglary, such that he could not be convicted of the felony murder charge.

An understanding of Oregon law is critical to the resolution of both procedural default issues under *Martinez*

and the merits of these claims. In Oregon, a person is guilty of felony murder if, in the course of committing burglary in the first degree, a person or participant causes the death of another person. ORS 163.115(1)(b)(C). A person is guilty of burglary in the first degree if he "violates ORS 164.215 *and* the building is a dwelling." ORS 164.225(1) (emphasis added). Under ORS 164.215, a person is guilty of burglary in the second degree if he "enters *or* remains unlawfully in a building with intent to commit a crime therein." ORS 164.215(1) (emphasis added). The Oregon Court of Appeals has explained that remaining unlawfully is equivalent to "failing to leave after authorization to be present expires or is revoked." *In Re JNS*, 258 Or. App. 310, 318, 308 P.3d 1112, 1117 (2013). The court was careful to explain that whether entering unlawfully or remaining unlawfully after a lawful entry, "burglary requires criminal trespass *for the purpose of committing a crime.* Thus, the proper focus is on the defendant's intent **at the initiation of the trespass**." *Id* at 318-19, 308 P.3d at 1117-18 (italics in original) (bold added).

Petitioner did not unlawfully enter Jones's apartment because he was invited in. Instead, he can only be guilty of burglary under Oregon law if he "remain[ed] unlawfully" in Jones's apartment for the purpose of committing a crime. Thus, the inquiry is whether petitioner had the intent to

assault Jones at the moment Jones asked his guests to leave his apartment.[1] There was no such evidence in this case.

Trial counsel recognized and argued that Starrett's assault on Jones took petitioner by surprise. He elicited testimony from the State's evidence technician that there was no evidence showing that petitioner knew Starrett was going to hit Jones. Trial Transcript, Vol. II, p. 51. During closing argument, he told the jury, "I don't recall that anybody that testified said there was any evidence of any planning. In fact, my recollection was they all said there was no evidence of any planning to even assault or hurt Mr. Jones, much less kill him." Trial Transcript, Vol. III, p. 193. He emphasized that "the evidence is pretty clear that Mr. Starrett is the person who hit Mr. Jones and it's out of the blue." *Id* at 194. At worst, petitioner sat idly by while Starrett began the assault. Trial counsel did not make any legal argument that petitioner's trespass lacked the contemporaneous intent to commit a crime as required under Oregon law to render him guilty of burglary and, thus, felony murder. He did not ask the court for an instruction that in order to convict petitioner of felony murder, the jury would have to find that at the very moment Jones asked them to leave his apartment, petitioner already had formed the intent to assault him.

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[1] It is clear from the record that Jones asked both petitioner and Starrett to leave his apartment as tensions escalated. In addition to Jones's own statements (Trial Transcript, Vol. II, pp. 228, 279), Starrett stated that Jones "had told them both to leave just prior to when he was struck." *Id* at 189.

Similarly, trial counsel did not make this argument in his motion for judgment of acquittal at the close of the State's case or in his closing argument to the jury.

For guidance on Oregon's interpretation of burglary in the context of an unlawful remaining, the State argues that the court should not rely on *In Re JNS* because it was decided approximately seven years after petitioner's trial, and should instead look to *State v. Felt*, 108 Or. App. 730, 816 P.2d 1213 (1991). But *In Re JNS* did not purport to change Oregon law in any way. It merely applied existing law. Even if the court were limited to the *Felt* decision in its assessment of petitioner's claims, the result would be the same.

The Oregon Court of Appeals summarized the facts in *Felt* as follows:

> Defendant and the victim, Laura Stewart, lived together for six months. Stewart then moved out, but continued seeing defendant on a social basis. One evening, they went out for dinner and drinks. Afterward, defendant drove Stewart home. He dropped her off at her house and she went inside, alone. As she began getting ready for bed, defendant knocked on the door and asked to use the phone. Stewart let him in, pointed to the phone, returned to her bedroom and closed the bedroom door. After Stewart was in her nightclothes, defendant walked into her room without knocking and asked for a hug. Stewart hugged him. Defendant then asked for a kiss. Stewart said no. Defendant kissed her anyway and she pushed him away. He began hitting, slapping and yelling at her. He knocked her down, threw her on the bed, threatened her with a pair of scissors and forced her to have sexual intercourse with

> him. Eventually, defendant got dressed, walked into the living room, ripped the phone out of the wall, rummaged through Stewart's purse and left. Stewart dressed and went to a telephone booth outside her apartment. Defendant reappeared, entered the booth and began hitting her. When she started bleeding, he ran away.

Felt, 108 Or. App. at 732, 816 P2d at 1213.

Petitioner was ultimately charged with committing first degree burglary. He moved for a judgment of acquittal on the basis that the State offered no evidence that the defendant had revoked her permission for him to be on the premises where she never asked or told him to leave. The trial court denied the motion, and petitioner appealed. The Oregon Court of Appeals concluded that:

> defendant was privileged to enter and remain in Stewart's home to use the phone and to hug her, because she consented to those acts. However, a reasonable jury could have found that, from the point at which Stewart refused defendant's request for further intimacy, defendant was no longer acting within the limits of the consent given. Additionally, the circumstances of this case would support the inference that, when Stewart reacted against defendant, she impliedly revoked her permission that he remain on the premises.

Id at 733, 816 P2d at 1214.

The State argues that the facts in this case, much like those in *Felt*, show that Jones impliedly revoked petitioner's permission to be in his apartment at the same moment petitioner assaulted him. However, the unlawful remaining began earlier when Jones asked the men to leave. There is no evidence in the record that petitioner developed an intent to

assault Jones until *after* Starrett initiated the assault. Because he had already passed the point of remaining unlawfully in the apartment prior to forming this intent, there could be no burglary under Oregon law. And unlike *Felt* where it was apparent the defendant had the intent to assault Stewart from the moment she allowed him in under the obvious pretense of using the phone, there was no indication in petitioner's case that he went to or remained in Jones's apartment in order to assault him. Accordingly, petitioner could not have been guilty of burglary and, by extension, felony murder.

Trial counsel should have made the intent issue the centerpiece of his sufficiency of the evidence argument during the motion for judgment of acquittal, as well as his closing argument. In addition, he should have requested a specific jury instruction that would have allowed the jury to assess whether petitioner formed the requisite intent to assault Jones at the very moment Jones asked the men to leave his apartment. Had he done so, it is likely petitioner would not have been convicted of felony murder. Because trial counsel did not do so, the jury was left to conclude that petitioner was guilty of felony murder if at any time after the unlawful remaining, he formed the intent to assault Jones (which he obviously did).

The court not only finds that petitioner's claims in Grounds 1(C) and 1(F) amount to substantial claims sufficient to excuse petitioner's procedural default under *Martinez*, but

upon a *de novo* review of the claims, recommends that the court grant habeas corpus relief on them. *See Dickens v. Ryan*, 740 F.3d 1302, 1321 (9th Cir. 2014) (where a petitioner excuses a default under *Martinez*, the appropriate standard of review is *de novo*).

3. **Grounds 2(A), 2(B), and 2(C)**

Petitioner alleges that his attorney on his direct appeal was constitutionally ineffective by failing to raise claims pertaining to the trial court's jury instructions and imposition of attorney's fees. Petitioner concedes that these claims are procedurally defaulted, but seeks to excuse the default pursuant to *Martinez*.

In the Ninth Circuit, the *Martinez* exception to procedural default applies not only to a PCR trial attorney's failure to raise claims of ineffective assistance of trial counsel, but also to any failure to raise claims of ineffective assistance by direct appellate counsel. *Nguyen v. Curry*, 736 F.3d 1287, 1293 (9th Cir. 2013).[2] However, it is uncontroverted that these claims were not preserved during his criminal trial as required by Oregon law. Petitioner had a preserved issue concerning his statements made to law enforcement officials while he smelled of alcohol and displayed varying levels of intoxication. This was a reasonably strong claim, and is precisely the issue appellate counsel opted to raise. It was reasonable appellate strategy

[2] Respondent argues that *Nguyen* is wrongly decided, but concedes that this court must follow *Nguyen*.

for counsel to focus on that claim to the exclusion of unpreserved issues. *See Smith v. Robbins*, 528 U.S. 259, 288 (2000) (appellate attorney "who files a merits brief need not (and should not) raise every non-frivolous claim, but rather may select from among them in order to maximize the likelihood of success on appeal."). Because appellate counsel's performance did not fall below an objective standard of reasonableness, *Martinez* does not provide petitioner with a basis to excuse his default as to Grounds 2(A), 2(B), and 2(C).

III. Merits of Remaining Claims

Following the foregoing analysis, Grounds 1(B), 1(D), 1(G), 3, and 4 remain for consideration on their merits.

A. Standard of Review

An application for a writ of habeas corpus shall not be granted unless adjudication of the claim in state court resulted in a decision that was: (1) "contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States;" or (2) "based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d). A state court's findings of fact are presumed correct, and petitioner bears the burden of rebutting the presumption of correctness by clear and convincing evidence. 28 U.S.C. § 2254(e)(1).

A state court decision is "contrary to . . . clearly established precedent if the state court applies a rule that

contradicts the governing law set forth in [the Supreme Court's] cases" or "if the state court confronts a set of facts that are materially indistinguishable from a decision of [the Supreme] Court and nevertheless arrives at a result different from [that] precedent." *Williams v. Taylor*, 529 U.S. 362, 405-06 (2000). Under the "unreasonable application" clause, a federal habeas court may grant relief "if the state court identifies the correct governing legal principle from [the Supreme Court's] decisions but unreasonably applies that principle to the facts of the prisoner's case." *Id* at 413. The "unreasonable application" clause requires the state court decision to be more than incorrect or erroneous. *Id* at 410. The state court's application of clearly established law must be objectively unreasonable. *Id* at 409.

B. Analysis

1. Ground 1(B): Jury Instruction on Assault

As Ground 1(B), petitioner alleges that his trial counsel was ineffective by failing to request a jury instruction on assault as a lesser-included offense of felony murder. He asserts that without a lesser-included instruction on assault, the jury only had the option of either finding him guilty or acquitting him of felony murder.[3] Trial counsel submitted an

[3] Although petitioner also contends that he was innocent of felony murder because Jones never revoked his permission for petitioner to be in the apartment, Jones asked both petitioner and Starrett to leave his apartment as tensions escalated, as discussed above.

affidavit during the PCR trial explaining his rationale for not seeking an assault instruction:

> 3. *Re: failure to request lesser included offense (LIO) jury instructions.* The prosecutor's theory was that Petitioner committed felony murder when, in the course of a burglary, the victim (Kirk Jones) was killed. The prosecution argued that Petitioner had committed the crime of burglary when he remained at Jones's residence despite Jones's request that Petitioner (and his co-defendant, Justin Starrett) leave, and subsequently assaulted Jones. Petitioner's position, throughout my representation of him, was that he did not aid, assist or help in any way to cause the death of Mr. Jones. Accordingly, there were no LIO instructions that would have been appropriate.
>
> 4. My decision not to request LIO instruction was also strategic. In my professional experience, juries respond negatively to the argument, "My client is not guilty. But if he is, please find him guilty of a lesser offense."

Respondent's Exhibit 122, p. 2.

The PCR trial court found that trial counsel's decision was strategically sound based on his belief that the jury would disfavor an alternative argument of culpability, adding: "I don't think there is a lesser included of the felony murder." Respondent's Exhibit 140, p. 28.

Petitioner contends that the PCR trial court misstated the law because, as the State represented during the PCR

proceedings, assault in the fourth degree is a lesser-included offense of felony murder as applied to this case. *See* Respondent's Exhibit 120, p. 11. He therefore asks the court to refuse to apply the Anti-terrorism and Effective Death Penalty Act's ("AEDPA") standard of review to this claim. While the PCR trial court was unsure what lesser included offenses fall under felony murder, it did not reject petitioner's claim on this basis. Instead, its decision was based on the reasonableness of trial counsel's decision that alternative theories of culpability might alienate the jury. Accordingly, the court should apply AEDPA's standard of review to this claim.

Even applying the required level of deference to the PCR trial court's decision as required by the AEDPA, trial counsel's performance fell below an objective standard of reasonableness by failing to request a lesser-included instruction on assault in the fourth degree. As discussed above, trial counsel did not realize that petitioner could not be found guilty of burglary and, hence, felony murder under Oregon law given the facts of this case. Where petitioner was not guilty of these crimes, trial counsel was obligated to ask the court to issue a lesser-included instruction on assault. By failing to do so, he placed the jury in the position of finding that petitioner's assault on Jones either amounted to felony murder or non-criminal conduct. Had he explained the intent element of burglary as it pertains to an unlawful remaining and had he given the jury a chance to convict

petitioner of assault, there is a reasonable probability that the jury would have convicted him of the lesser offense. Accordingly, the court should grant relief on this claim.

2. Ground 1(D): Voluntariness of Statements to Police

Petitioner next alleges that his trial counsel was ineffective for failing to hire an expert toxicologist to explain the effect of his intoxication on his ability to waive his *Miranda* rights and provide post-arrest statements to police in a knowing, intelligent, and voluntary manner. Where the three interviewing police officers presented substantial evidence of his intoxication, he asserts that it was not a reasonable tactical decision to forego hiring a toxicologist for the defense.

At the PCR trial, petitioner introduced an expert affidavit from Dr. Jerry Larsen who diagnosed him with Attention Deficit Disorder and concluded:

> At the time of the alleged [crime], it certainly appears that [petitioner] was intoxicated.
>
> * * *
>
> [Petitioner]'s description of his condition at the time of the altercation might be described as near stuporous. If we assume that the blood alcohol reported is correct, then at the time of the police interviews he remained intoxicated with the deficiencies described above, both from alcohol and his attention deficit disorder. With reasonable medical certainty, given the above assumptions, at the time of the alleged [crime] he was suffering from both

> mental disease and intoxication which altered his judgement, cognition. This also appears to be true at the time of the questioning by the police. It would be interesting to see the actual polygraph results to see if in[] fact his responses were disorganized, a finding that may be consistent with attention deficit disorder and intoxication.

Respondent's Exhibit 112, pp. 7-8.

In his affidavit, trial counsel explained why he did not retain a toxicologist:

> 5. The police in this case did a good job of dealing with Petitioner's alcoholism. When it was clear that he was under the influence, they let him sleep it off. When he was in a fully coherent state, Petitioner made a number of admissions that placed him at the scene of the crime, assisting co-defendant Starrett. Unfortunately, after the co-defendant started beating up the victim, Petitioner had thrown a vodka bottle that hit him on the head. As a result of his involvement, Petitioner was convicted of felony murder.
>
> 6. *Re: failure to hire expert on alcoholism/voluntariness of confession.* There was no need to hire an expert on alcoholism/voluntariness of confessions to testify at the trial, because the voluntariness of Petitioner's statements to the police

> had already been litigated, pre-trial, through the State's motion to admit three separate statements that Petitioner had made. It is my understanding that Petitioner appealed the trial court decision to grant the State's motion to admit those statements, and the Oregon Court of Appeals affirmed without opinion.

Respondent's Exhibit 122, p. 2.

Rejecting petitioner's claim, the PCR trial court found that: (1) the trial court found his statements to be voluntary based on all of the facts; and (2) an expert witness would not have been helpful. Respondent's Exhibit 141, p. 1.

Trial counsel made his own determination that the police had acted appropriately and taken precautions against obtaining statements that petitioner was not able to voluntarily provide. In light of the record, this was a reasonable determination.

In addition, the affidavit from Dr. Larson at the PCR trial was equivocal as to whether petitioner's alcohol consumption actually affected his statements to police. Thus, it did not constitute strong evidence.

For all of these reasons, the PCR trial court's determination that trial counsel was not ineffective for failing to hire an expert toxicologist is neither contrary to, nor an unreasonable application of, clearly established federal law.

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3. Ground 1(G): Advice Regarding Plea Offer

The State offered petitioner a plea agreement of 188-months if he agreed to plead guilty to Manslaughter in the First Degree and Burglary in the First Degree. Petitioner's Exhibit 123. The offer was intended to result in a global resolution, such that if either defendant rejected his offer, then both offers expired.[4] *Id.* Petitioner alleges that trial counsel was ineffective by failing to inform and properly advise him regarding this plea offer. He maintains that this failure prevented him from making a knowing and intelligent decision as to whether to accept the plea offer.

The *Strickland* test applies to claims that a petitioner did not receive effective assistance in determining whether to accept a guilty plea. *Hill v. Lockhart*, 474 U.S. 52 (1985). Where a petitioner has pled guilty, he demonstrates prejudice if he shows that there is a reasonable probability that, but for counsel's errors, he would not have entered such a plea and would have insisted on going to trial. *Id* at 59. Accordingly, in this case where petitioner claims he was misled into passing on a plea offer, he demonstrates prejudice if he shows that, but for counsel's erroneous advice, he would have insisted on entering a guilty plea.

In his affidavit, trial counsel explained:

> Petitioner consistently maintained the position that he would not plead guilty to

[4] Starrett's plea offer was a life sentence with a mandatory 25-year sentence. Respondent's Exhibit 123.

> *anything*, because it was his belief that he hadn't aided or participated in any manner. Therefore, he rejected the State's 188-month offer, which was dependent upon both Petitioner and his co-defendant's acceptance.

Respondent's Exhibit 122, p. 3 (italics in original).

At the PCR trial, petitioner testified that his trial counsel instructed him not to take any offer the State made and "to wait until the very last moment to get the best deal possible." Respondent's Exhibit 140, p. 11. He claimed that trial counsel never showed him any offer in writing, and he disagreed with trial counsel's characterization that he refused to enter a guilty plea of any kind. *Id* at 12. At the conclusion of the PCR trial, the PCR trial court made the following findings:

> I find insufficient evidence that Petitioner wanted to accept the offer of 188 months. Also, one of the other things about that offer, it was an all or nothing offer. Both co-defendants had to take it, or there was no 188 months.
>
> And there is absolutely no evidence the co-defendant had agreed to take that offer. So that would have thrown the offer out in any event. And I find nothing that says that the Petitioner was willing to take 188 months.

Respondent's Exhibit 140, p. 28.

Petitioner contends that the record contains only evidence that he was interested in the plea offer. However, trial counsel's affidavit clearly constitutes evidence that petitioner was not interested in any plea offer. While

petitioner rejected this notion in conclusory fashion during his PCR trial (*id*, p. 12), he never testified that he would have taken the plea had he been properly advised. Furthermore, petitioner presented no evidence that Starrett was inclined to accept the State's offer of a life sentence with a 25-year minimum, a prerequisite to petitioner's eligibility for the 188-month plea deal. Accordingly, the PCR trial court's decision denying relief on this claim is neither contrary to, nor an unreasonable application of, clearly established federal law.

4. Ground 3: Actual Innocence

Petitioner believes that because insufficient evidence of his guilt was adduced at trial, he is actually innocent of felony murder. In *Herrera v. Collins*, 506 U.S. 390, 417 (1993), the Supreme Court assumed without deciding that "in a capital case a truly persuasive demonstration of 'actual innocence' made after trial would render the execution of a defendant unconstitutional, and warrant federal habeas relief if there were no state avenue open to process such a claim." In *House v. Bell*, 547 U.S. 518 (2006), the Supreme Court again declined to decide whether a capital petitioner may assert a freestanding actual innocence claim. It did, however, state that the threshold for such a claim is "extraordinarily high" and exceeded that of a "gateway" showing of actual innocence to excuse a procedural default under *Schlup v. Delo*, 513 U.S. 298 (1995). *Id* at 555. To prevail on a freestanding innocence claim, a petitioner "must go beyond demonstrating

doubt about his guilt, and must affirmatively prove that he is probably innocent." *Carriger v. Stewart*, 132 F.3d 463, 476 (9th Cir. 1997) (*en banc*). Such claims are only successful where "new facts unquestionably establish [a petitioner's] innocence." *Id* at 478 (citing *Schlup*, 513 U.S. at 317).

Petitioner presents no new evidence of his innocence and instead relies on the existing record to establish that the evidence was insufficient to convict him of felony murder. Therefore, his *Herrera* claim lacks merit.

5. Ground 4: Cumulative Error

As his final claim, petitioner alleges that the cumulative errors detailed in his Grounds for Relief warrant a finding of prejudice. Because the court recommends granting habeas relief as to Grounds 1(C) and 1(F) of petitioner's claims, it need not reach the cumulative error argument.

IV. Alternative Request for Evidentiary Hearing

Petitioner asserts that if the court does not grant relief on his Petition on the existing record, it should conduct an evidentiary hearing in order to receive his testimony as well as testimony from his attorneys and any other witnesses who might be beneficial to his case. The court should grant relief on the existing record and decline to hold an evidentiary hearing.

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RECOMMENDATION

For the reasons identified above, the court should deny petitioner's request for an evidentiary hearing, but grant relief on the First Amended Petition for Writ of Habeas Corpus (docket #22). Accordingly, the court should require respondent within 90 days to recalculate petitioner's sentence without the felony murder conviction and, if appropriate under the resulting calculation, either release him from custody or provide him with a new trial with the assistance of constitutionally effective counsel.

SCHEDULING ORDER

The Findings and Recommendation will be referred to a district judge. Objections, if any, are due August 17, 2015. If no objections are filed, then the Findings and Recommendation will go under advisement on that date.

If objections are filed, then a response is due within 14 days after being served with a copy of the objections. When the response is due or filed, whichever date is earlier, the Findings and Recommendation will go under advisement.

DATED this 30th of July, 2015.

s/ Janice M. Stewart

Janice M. Stewart
United States Magistrate Judge

APPENDIX G – **The district court's order granting a stay of the trial until the conclusion of the appeal process, but releasing Mr. Decker pending the completion of the appeal filed on November 13, 2015.**

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

DAVID MICHAEL DECKER, Petitioner, v. **ROB PERSSON,** Respondent.	Case No. 6:13-cv-1415-ST **OPINION AND ORDER**

Robert W. Rainwater, RAINWATER LAW GROUP, 1327 S.E. Tacoma Street, Suite 239, Portland, OR 97202. Of Attorneys for Petitioner.

Ellen F. Rosenblum, Attorney General, and Samuel A. Kubernick, Assistant Attorney General, Department of Justice, 1162 Court Street N.E., Salem, OR 97301. Of Attorneys for Respondent.

Michael H. Simon, District Judge.

On July 30, 2015, United States Magistrate Judge Janice Stewart issued Findings and Recommendation in this case finding that Petitioner received constitutionally-deficient assistance of counsel and recommending that Petitioner's Petition for Writ of Habeas Corpus be granted. After obtaining an extension of time to do so, Respondent filed objections to the Findings and Recommendation. This Court reviewed *de novo* the portions of the Findings and

Recommendation to which the objections were directed and on October 5, 2015, adopted the Findings and Recommendation.

On October 6, 2015, the Court entered Judgment granting the Petition and directing the State of Oregon to recalculate Petitioner's sentence without the felony murder conviction and, if appropriate under the resulting recalculation, either release Petitioner or commence a retrial within 90 days. Respondent timely filed a Notice of Appeal on October 30, 2015. The Ninth Circuit set a briefing schedule, setting due dates of February 8, 2016 for Respondent's opening brief, March 8, 2016 for Petitioner's response brief, and 14 days after service of the response brief for Respondent's optional reply brief.

On October 30, 2015, Respondent filed a motion to stay the Court's Judgment until the resolution of Respondent's appeal, requesting expedited consideration. The Court set an expedited briefing schedule and held oral argument on November 13, 2015. For the reasons discussed below, the Court grants in part and denies in part Respondent's motion to stay. The Court stays its Judgment requiring Respondent to commence a retrial of Petitioner within 90 days. The Court denies staying its Judgment requiring Respondent to be released within 90 days.

STANDARDS

Federal Rule of Appellate Procedure 23(c) provides that "[w]hile a decision ordering the release of a prisoner is under review, the prisoner must . . . be released on personal recognizance, with or without surety" unless a court orders otherwise. This creates "a presumption of release pending appeal where a petitioner has been granted habeas relief." *O'Brien v. O'Laughlin*, 557 U.S. 1301, 130 S. Ct. 5, 6 (2009); *see also Hilton v. Braunskill*, 481 U.S. 770, 774 (1987) ("Rule 23(c) undoubtedly creates a presumption of release from custody in such cases . . . . "). This presumption may be overcome if an appellate court or judge "orders otherwise." Rule 23(c); *Hilton*, 481 U.S. at 774.

In considering whether to release a petitioner pending appeal, a court should consider the following factors that generally apply to the question of whether to stay a civil judgment:

> (1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies.

Hilton, 481 U.S. at 776. A court may also consider the possibility of flight, whether the petitioner poses a danger to the public, and the State's interest in continuing custody and rehabilitation pending a final determination on appeal. *Id.* at 777. The State's interest in continuing custody "will be strongest where the remaining portion of the sentence to be served is long, and weakest where there is little of the sentence remaining to be served." *Id.* The petitioner's interest in release is "always substantial," but is strongest where the other factors are weakest. *Id.* at 777-78.

A court should consider these factors to see if they "tip the balance" against the presumption of release. *Id.* at 777. This balance depends to a large extent upon the determination of the State's prospects of success on its appeal. Where the State establishes a strong likelihood of success or a "substantial case on the merits," continued custody is permissible if the second and fourth factors militate against release. *Id.* at 778. Where the State's showing of success on the merits falls below a substantial case, "the preference for release should control." *Id.* "[A] district court has broad discretion in conditioning a judgment granting habeas relief, including whether or not to release a prisoner pending appeal." *Stein v. Wood*, 127 F.3d 1187, 1190 (9th Cir. 1997).

DISCUSSION

A. Retrial of Petitioner

The Court agrees that the State may be irreparably injured if the State is required to commence any retrial of Petitioner within 90 days. The Ninth Circuit will likely not resolve the

appeal within this time frame, and it makes little sense to require the State to begin a new trial if there is a possibility that the outcome could be mooted by a reversal of the Court's Judgment on appeal.

Staying the requirement of a retrial, by itself, until after Respondent's appeal is decided will not substantially injure Petitioner. It will permit a determination on the merits of Respondent's appeal before both the State and Petitioner undergo the effort and expense of a retrial. *See, e.g.*, *Franklin v. Duncan*, 891 F. Supp. 516, 520-21 (N.D. Cal. 1995) (concluding that staying the portion of the judgment granting habeas relief that required retrial of the petitioner within 90 days would not harm the petitioner but failure to stay would harm the respondent).

Further, the public interest also arguably favors a stay of retrial to avoid the costs of a possibly unnecessary retrial. A retrial while Respondent's appeal is pending would impose a burden on the parties and may lead to inconsistent verdicts between the first and second trial. Inconsistent verdicts may undermine public confidence in the judicial system if the second trial has a different verdict but then Respondent later is successful on appeal and the original verdict is reinstated. Accordingly, the Court stays its order requiring Respondent to commence the retrial of Petitioner within 90 days of the Court's order granting the habeas petition. Respondent must commence any retrial of Petitioner within 90 days after the mandate issues in the pending appeal (Ninth Circuit Case No. 15-35854), until the time for Respondent to file a petition of writ of certiorari in the U.S. Supreme Court has expired, or, if Respondent files a petition for writ of certiorari, until such time as the petition or any subsequent briefing on the merits are ruled upon by the U.S. Supreme Court, whichever is later.

B. Release of Petitioner

1. Respondent's likelihood of success on appeal

The first factor addresses whether Respondent has a strong likelihood of success on appeal or, failing that, a substantial case on the merits. *Hilton*, 481 U.S. at 778. The Ninth Circuit has not clearly defined "substantial case on the merits." *See Morse v. Servicemaster Global Holdings, Inc.*, 2013 WL 123610, at *3. The Ninth Circuit has, however, generally equated this standard with the sliding-scale standard for evaluating preliminary injunctions; whether "serious legal questions" are raised. *See Leiva-Perez v. Holder*, 640 F.3d 962, 967-68 (9th Cir. 2011). A party meeting this lower threshold is not required to show that it is more likely than not to win on the merit, but if not, must then demonstrate that the balance of hardships under the remaining factors tilts *sharply* in its favor. *Id.* at 968, 970.

Respondent here raises the same arguments that Respondent made to Magistrate Judge Stewart and to this Court in objecting to the Findings and Recommendation. These arguments have been rejected. Respondent points to no new state or federal case law issued after this Court's order that changes the law or is otherwise inconsistent with Judge Stewart's reasoning, adopted by this Court.

Judge Stewart found, and this Court agreed, that Petitioner received constitutionally-deficient assistance of counsel at trial. The facts are set out in the Findings and Recommendation, but in short, Petitioner and Justin Starrett were in the apartment of the victim, Kirk Jones, Mr. Jones asked them to leave, they did not leave, Starrett began hitting Mr. Jones with a lamp base, Petitioner then threw a bottle that hit Mr. Jones's head, Starrett began cutting Mr. Jones with a knife, Petitioner left, and then Starrett killed Mr. Jones. Petitioner was charged with felony murder based on the allegation that Mr. Jones was killed during a burglary. The Court found that Petitioner's trial counsel was ineffective because trial counsel did not:

(1) request a jury instruction that Petitioner could only be found guilty of felony murder if Petitioner did not have permission to either enter or remain in Mr. Jones's apartment and if Petitioner had the specific intent to commit a felony at the time he entered or refused to leave the apartment; (2) argue during a motion for judgment of acquittal or during closing argument that the State failed to offer legally sufficient proof that Mr. Jones died during the course of a burglary, such that Petitioner could not be convicted of the felony murder charge; and (3) request a jury instruction on assault as a lesser-included offense of felony murder, such that the jury was left only with the option of either convicting Petitioner of felony murder or acquitting Petitioner of any criminal conduct, notwithstanding the evidence that Petitioner threw a bottle at the head of Mr. Jones.

a. Claims relating to Petitioner's intent as necessary to constitute burglary

Although Petitioner did not raise the first two arguments before the State court, the Court found this failure excused under *Martinez v. Ryan*, 132 S. Ct. 1309 (2012), and under the requisite *de novo* review determined the habeas petition should be granted on these two claims. On the third argument, the Court considered the claim under the deference required by the Antiterrorism and Effective Death Penalty Act ("AEDPA") and concluded the petition should be granted on this claim.

Respondent continues to argue that the opinion of the Oregon Court of Appeals in *In re J.N.S.*, 258 Or. App. 310 (2013) does not apply to the facts of this case and even if it did, it was decided more than six years after Petitioner was convicted and sentenced. As discussed at length in the Findings and Recommendation, *In re J.N.S.* did not purport to change Oregon law or announce new Oregon law—it simply applied the black-letter law that burglary requires trespass for the purpose of committing a crime and thus requires intent to commit a crime at the initiation of the trespass. The fact that *In re J.N.S.* involved an "entry" trespass as opposed to an "unlawful

remaining" trespass is immaterial—the focus is on the intent at the time of the trespass, whether that time was at entry or at a later period when remaining on the premises became unlawful.

Respondent's argument that *State v. Felt*, 108 Or. App. 730 (1991), governs does nothing to diminish the Court's finding that Oregon law requires that the required intent be at the initiation of the trespass. *Felt* involved whether the defendant, who was given permission to enter the premises, unlawfully remained on the premises at some point, thus creating a trespass. Although the victim never told the defendant to leave, based on the facts of that case, the Oregon Court of Appeals found that the victim had "impliedly" revoked consent for the defendant to remain on the premises and thus the defendant committed trespass by remaining after consent was revoked. The consent was "impliedly" revoked when he victim was pushing the defendant away during an alleged assault. Thus, the issue of whether the defendant had the required intent to commit a crime at the initiation of the trespass was not in dispute and was not discussed by the court. The Oregon Court of Appeals also found that because the victim only gave the defendant permission to come inside to use the phone, when he started physically assaulting the victim, he was no longer acting within the limits of the consent given and was trespassing. Again, the trespass occurred simultaneously with the assault, and whether the defendant had the intent to commit a crime at the initiation of the trespass was not in dispute.

b. Claim relating to the state court's denial of Petitioner's "lesser included offense" claim

Respondent also argues that the Court did not give appropriate deference to the State court as required under AEDPA and did not give appropriate deference under *Strickland v. Washington*. The Court finds, as it did in adopting the Findings and Recommendation, that the appropriate level of deference under AEDPA and *Strickland* was given in considering this claim. In deciding to leave the jury only with the option of convicting Petitioner of felony murder or

acquitting him of all criminal conduct, trial counsel provided constitutionally-defective assistance.

The Court finds that Respondent has not shown a strong likelihood of success on the merits or a substantial case on the merits. Accordingly, this factor does not weigh in favor of a stay of the release of Petitioner, and the "preference for release should control." *Hilton*, 481 U.S. at 778. Even if Respondent did show he had a substantial case on the merits, as discussed below the remaining factors do not tip sharply toward release.

2. Whether the State will be irreparably harmed and the State's interest

For the second factor, the State must show "more than 'some possibility' of irreparable injury;" rather, the State must show "that there is a *probability* of irreparable injury if the stay is not granted." *Lair v. Bullock*, 697 F.3d 1200, 1214 (9th Cir. 2012) (quoting *Nken v. Holder*, 556 U.S. 418, 434–35 (2009) and *Leiva–Perez*, 640 F.3d at 968 (emphasis in original)).

The Court finds Respondent has not shown a probability that the State will be irreparably harmed if Petitioner is released. Respondent may pursue his appeal while Petitioner is released. Respondent's primary argument that it will be harmed relates to the requirement that the State commence a retrial while the appeal is pending, which is addressed by the Court staying that portion of its Judgment.

Respondent also argues that Petitioner is a flight risk because Petitioner was homeless at the time of his arrest ten years ago and does not have ties to Oregon. Respondent offers no evidence, however, that Petitioner "poses an especial flight risk." *O'Brien*, 130 S. Ct. at 7. Petitioner submits three letters from family members attesting that Petitioner has been a model prisoner, has held regular jobs at the prison facilities, has verbalized regret for his past choices, is a changed man, has accepted responsibility for his past actions, has grown from his mistakes, desires to be a part of his daughter and immediate family's lives, and desires to be a contributing

member of society. Petitioner's parents and siblings also pledge love and support, financial resources, and a home for Petitioner if needed. Respondent offers no evidence contradicting these assertions.

The Court appreciates that there is some risk that the State may be harmed in the event the State prevails on appeal and Petitioner is not available to return to custody, or the State does not prevail on appeal, determines to commence a retrial of Petitioner, and Petitioner fails to appear. Although the Court does not believe this risk equates to a probability of irreparable injury, to mitigate concerns regarding Petitioner's risk of flight, the Court releases Petitioner into the custody of Frank and Sallie Decker, his parents, who live in San Antonio, Texas and have committed to helping ensure that Petitioner attends any required court proceedings in Oregon. The Court also directs Petitioner to report to Pretrial Services in the Western District of Texas, and comply with any conditions of supervision directed by his Pretrial Services Officer, including electronic monitoring if so directed. The Court finds in light of all the circumstances of this case and the evidence from Petitioner's family members, that this is sufficient to mitigate any risk of flight by Petitioner.

The State does have a general interest in the continued custody and rehabilitation of the Petitioner. *Hilton*, 481 U.S. at 777. This interest is stronger when the remaining portion of the sentence to be served is long. Here, Petitioner has at least another 16 years to serve on his sentence, and so the State's interest in continued custody and rehabilitation is strong. Balancing all of the factors in considering the State's interest, however, the Court finds that this factor weighs slightly in favor staying the release of Petitioner.

3. Whether any other party will be irreparably harmed

As noted by the Supreme Court, the harm to Petitioner will always be substantial if Petitioner is required to continue to serve a prison sentence based on a conviction that the Court

has found to be unconstitutional. *Hilton*, 481 U.S. at 777. This interest is strongest where the other factors are weakest. Because the Court has found the other factors to be weak in supporting a stay of the release of Petitioner, the Court finds this factor strongly weighs against a stay.

4. The public interest

Respondent offers no specific argument relating to the public interest supporting a stay of the release of Petitioner,[1] other than generally to argue that Petitioner is a flight risk and a danger. The Court has already discussed Petitioner's risk of flight, and finds that Respondent offers no evidence that Petitioner is a danger other than arguing that he admittedly committed assault in the underlying crime and previously committed burglary in Texas. The Court finds this is insufficient to show Petitioner is a danger to the public. *See Elliot v. Williams*, 2011 WL 5080169, at *8 (D. Nev. Oct. 25, 2011).

The Court also notes that there is a strong public interest in ensuring that constitutional rights are protected and that no person "be denied of his [or her] liberty without a trial that meets constitutional standards and observes his [or her] constitutional rights." *Griffin v. Harrington*, 2013 WL 3873958, at *5 (C.D. Cal. Jan. 18, 2013) (citing cases). The Court finds that this factor is at best neutral and does not weigh in favor of staying Petitioner's release.

5. Conclusion

Considering all of the factors, the Court finds that Respondent has not met his burden of overcoming the presumption that Petitioner should be released.

CONCLUSION

Respondent's motion for a stay (Dkt. 58) is GRANTED IN PART and DENIED IN PART. The Court stays the portion of its Judgment requiring Respondent to commence any

[1] Respondent does argue that the public interest supports a stay of retrial, but the Court has already concluded that such a stay is appropriate.

retrial of Petitioner within 90 days from the Court's order granting Petitioner's habeas petition. Respondent must commence any retrial of Petitioner within 90 days after the mandate issues in the pending appeal (Ninth Circuit Case No. 15-35854), until the time for Respondent to file a petition of writ of certiorari in the U.S. Supreme Court has expired, or, if Respondent files a petition for writ of certiorari, until such time as the petition or any subsequent briefing on the merits are ruled upon by the U.S. Supreme Court, whichever is later.

The Court denies staying the portion of its Judgment requiring that Petitioner be released. The Court does, however, impose the following conditions on Petitioner's release:

1. Petitioner shall not commit any offense in violation of federal, state, or local law while on release;

2. Petitioner shall appear at all proceedings as required related to this matter, either in this Court or State court, and a new trial and any related proceedings in State court, if any;

3. Petitioner shall be placed into the custody of his parents, Frank and Sallie Decker, located in San Antonio, Texas, who agree to supervise Petitioner in accordance with all conditions of release, use every reasonable effort to assure Petitioner's timely appearance at all scheduled court proceedings, and promptly notify this Court in the event Petitioner violates any condition of release or disappears;

4. The State shall promptly release Petitioner and shall provide timely notice to Petitioner's counsel of Petitioner's estimated release date. Petitioner shall be released when one or both of his parents appear in Oregon and are available physically to take custody of Petitioner;

5. Petitioner must notify this Court, Respondent, U.S. Pretrial Services in the Western District of Texas, and the State Probation office, in writing, before any change in address or telephone number;

6. Petitioner shall not possess a firearm or ammunition;

7. Petitioner shall report to U.S. Pretrial Services in the Western District of Texas, located at 727 East Cesar E. Chavez Boulevard, Suite 636, San Antonio, Texas 78206, within five days of Plaintiff's release from custody;

8. Petitioner shall be subject to the conditions of release set by U.S. Pretrial Services (or U.S. Probation, if that is the District practice) in the Western District of Texas, including restrictions on travel without prior consent and electronic monitoring, at the discretion of U.S. Pretrial Services or U.S. Probation in the Western District of Texas;

9. Petitioner shall waive extradition to the state of Oregon, if necessary; and

10. Petitioner shall not be subject to any surety or bond.

These conditions shall be in effect until the mandate issues in the pending appeal (Ninth Circuit Case No. 15-35854), until the time for Respondent to file a petition of writ of certiorari in the U.S. Supreme Court has expired, or, if Respondent files a petition for writ of certiorari, until such time as the petition or any subsequent briefing on the merits are ruled upon by the U.S. Supreme Court, whichever is later.

IT IS SO ORDERED.

DATED this 13th day of November, 2015.

/s/ Michael H. Simon
Michael H. Simon
United States District Judge