No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

_____

JOEL JACOBO SANCHEZ,

Petitioner

v.

BRANDON KELLY,

Respondent

_____

On Petition For A Writ Of Certiorari
To United States Court of Appeals For The Ninth Circuit

_____

PETITION FOR WRIT OF CERTIORARI

_____

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QUESTION PRESENTED FOR REVIEW

Was petitioner's post-conviction counsel ineffective for not arguing that petitioner's trial counsel failed object to a "natural and probable consequences" jury instruction issued during his state aggravated murder trial, thereby allowing an unfair reduction of the prosecution's burden to prove beyond a reasonable doubt that petitioner had intended to aid and abet the murders of which he was accused?

LIST OF PARTIES

Petitioner is Joel Jacobo Sanchez, petitioner-appellant below. Respondent is Brandon Kelly, respondent-appellee below. All parties appear in the caption of the case on the cover page.

RELATED CASES

Multnomah County Circuit Court, State of Oregon

State v. Joel Sanchez-Jacobo, No. 060733984

September 3, 2008 (judgment of conviction)

Marion County Circuit Court, State of Oregon

Joel Sanchez Jacobo v. Jeff Premo, No. 14C15247

November 16, 2017 (post-conviction petition)

Oregon Court of Appeals

State v. Sanchez-Jacobo, No. A139993

250 Or. App. 621, 282 P.3d 880 (2012), *rev. denied,* 353 Or. 280, 298 P.3d 30 (Feb. 21, 2013) (direct appeal)

Jacobo v. Kelly, 299 Or. App. 666, 449 P.3d 602 (2019), *rev. denied,* 366 Or. 135, 456 P.3d 648 (2020) (post-conviction relief petition)

United States District Court (D. Oregon)

Joel Jacobo Sanchez v. Brandon Kelly, No. 2:19-CV-02089-SU

(D. Oregon, Oct. 21, 2022) (Magistrate Judge's Findings and Recommendations)

Joel Jacobo Sanchez v. Brandon Kelly, No. 2:19-CV-02089-SU

(D. Oregon, May 1, 2023) (Opinion and Order Adopting Magistrate's Findings and Recommendations)

United States Court of Appeals for the Ninth Circuit

Joel Jacobo Sanchez v. Brandon Kelly, No. 23-35575

(C.A. 9, Apr. 22. 2024) (Order denying motion for certificate of appealability)

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IN THE
SUPREME COURT OF THE UNITED STATES

JOEL JACOBO SANCHEZ,

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On Petition For A Writ Of Certiorari
To The United States Court of Appeals For The Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

Joel Jacobo Sanchez respectfully petitions for a writ of certiorari to review the decision of the United States Court of Appeals for the Ninth Circuit denying his petition for post-conviction relief pursuant to 28 U.S.C. §2254.

OPINIONS BELOW

The Ninth Circuit's order denying petitioner's motion for a certificate of appealability and the judgment and opinion and order of the District Court denying petitioner's habeas corpus petition are unpublished. The Ninth Circuit's order is attached to this petition at Appendix 1a. The District Court's judgment is attached at Appendix 2a and its opinion and order is attached at Appendix 3a. The Magistrate Judge's findings and recommendations are attached at 5a.

JURISDICTION

A Ninth Circuit panel entered the order dismissing petitioner's request for a certificate of appealability on April 22, 2024. App. 1a. This court has jurisdiction under 28 U.S.C. §1254(1), which grants it authority to review decisions of the United States Courts of Appeal by certiorari.

LEGAL PROVISIONS INVOLVED

U.S. Const. Amend. XIV, § 1:

> …No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law…

STATEMENT OF THE CASE

Petitioner, an alleged methamphetamine dealer, was indicted alongside two co-defendants and charged with aggravated murder, coercion, and unlawful use of a weapon. Petitioner was accused of arranging the murder of two people and threatening a third person with a firearm. During the first incident, petitioner allegedly solicited and paid or agreed to pay his two co-defendants to kill someone identified as "Junior" whom petitioner believed had stolen drugs from him. An eyewitness testified that Junior was killed by two gunmen, neither of whom was petitioner. ECF no. 35-2 at 159-163; ECF no. 36-2 at 75. The evidence did not place petitioner at or near the scene of Junior's killing.

The jury did not hear from either of the alleged killers. Instead, the

prosecution introduced a witness's testimony that petitioner had accused the witness and Junior of stealing his drugs and later forced the witness to take a car ride with him, Junior, and the two alleged killers. The witness testified that, during the car ride, petitioner told him and Junior "to speak up, to tell him where [the stolen drugs] were; that he had already paid those guys; that they knew what to do; that he wasn't going to get his hands dirty, like he was going to keep his hands off; and that he wasn't going to have anything to do with it." ECF no. 35-2 at 301-302.

The witness also testified that, during the car ride, he saw petitioner give one of the killers a sum of money. *Id.* at 302. One of the killers advised him to "Speak up, otherwise you know what's going to happen." *Id.* at 304. Despite these threats, and even though the witness did not speak up or give petitioner the drugs he had been accused of stealing, he was later dropped off at his apartment unharmed. *Id.*

About a week later, petitioner "came in a truck [by himself] . . . and said that we should go for a ride." *Id.* at 305. Petitioner drove to a wooded area and parked on the side of an unpaved road, then took the witness for a 10- or 15-minute walk. *Id.* at 305-306. During the walk, petitioner took out a gun, removed all but one of the bullets, and said, "Hey, if somebody killed a dog around here, nobody would find it." *Id.* at 306. The witness was "terrified because of all of it, because of the place that I was in, the pistol, what he said. I was scared of it all." *Id.* at 307. During the walk, he agreed to pay "what I supposedly owed him by giving him a hundred dollars a week." *Id.* at 312. These car rides occurred about a month after petitioner first accused the witness and Junior of stealing drugs and about a month before Junior

was killed.

Petitioner was charged with another count of aggravated murder for soliciting and paying or agreeing to pay one of Junior's killers to kill another individual identified as Alex. ECF no. 27 at 34; ECF no. 36-2 at 140; ECF no. 167. Alex was killed in the early morning hours of July 10, 2006. ECF no. 35-1 at 439; ECF no. 35-2 at 62. Another prosecution witness testified that he and Alex were watching television in Alex's apartment when two men he had never seen before walked in, took out their pistols, and ordered him and Alex not to move. ECF no. 35-2 at 26-27. Petitioner subsequently walked in. The witness recognized petitioner, who he had seen on earlier occasions. *Id.* at 28. The two men and petitioner said something to Alex mostly in English, which the witness did not understand because he was not a fluent English speaker. *Id.* at 30.

After petitioner told the witness that "something would happen to" him if he said anything, petitioner told the two gunmen something in Spanish and English that the witness did not "understand a lot of" and then left. ECF no. 35-2 at 31. Sometime later, one of the gunmen shot and killed Alex. *Id.* at 33-34. The witness did not see the gunmen well enough to identify either.[1] The state presented no evidence that the bullets recovered from the murder of Alex were shot from the same gun as those recovered from the murder of Junior. Further, the witness saw the gunmen run out the back door of Alex's apartment, not the front door through

[1] "One of them was wearing like a brown shirt. And the other one maybe was white. It was hard to see it in the dark." *Id.* at 38-39.

which they had entered. ECF no. 35-2 at 34.

After the killing, the witness went next door to where Alex's brother lived and told him "to come see my brother." ECF no. 35-1 at 483. Alex's brother testified that he rushed to Alex's apartment, saw that Alex had been shot in the head, returned to his own apartment to tell his wife to call 911, and returned to Alex's apartment. After it became clear that Alex wasn't breathing, though, the brother went back to his apartment. *Id.* at 484. Once there, after what must have taken at least a couple minutes to go back and forth between apartments, he saw that his wife was talking with 911 and saw that petitioner "was . . . in his truck" in the parking lot. *Id.* Alex's brother approached petitioner and had the following exchange with him as petitioner sat in his truck:

> And I went up to him and that's when he told me to talk to my brother. And he also told me to talk to two other people were inside there with him. And I asked him if he knew the two other people that were inside there. He said yes. And I told him I didn't know what was going on because he just had been shot. And that's when he left.

ECF no. 35-1 at 484; ECF no. 35-2 at 1. Alex's brother also testified that when he said that Alex had been "shot dead," petitioner reacted by looking "upset, upset and angry" and "just left" by driving away. ECF no. 35-2 at 2.

On July 17, 2006, petitioner was indicted on three counts of aggravated murder, one count of murder, one count of coercion, and one count of illegal use of a weapon alongside Junior's and Alex's alleged killers. ECF no. 27 at 34-36 (indictment). Petitioner was tried separately from the two co-defendants named in his indictment. Petitioner was charged with two counts of aggravated murder for

Junior's murder, one for soliciting and paying and agreeing to pay one of his co-defendants to kill Junior and the other for soliciting and paying and agreeing to pay the other co-defendant to kill Junior. *Id.* at 34.

Petitioner was also charged with the aggravated murder of Alex for soliciting and paying and agreeing to pay one of his co-defendants to kill Alex. *Id.* at 35. Petitioner was further charged with coercion with a firearm and unlawful use of weapon with a firearm for threatening the witness who he believed had stolen his drugs. *Id.* at 35-36.

Petitioner's jury was instructed that an aider and abettor is "criminally responsible for any act or other crimes that were committed as a natural and probable consequences of the planning, preparation, or commission of the intended crime." ECF no. 36-2 at 1541. Petitioner's trial counsel did not object to this instruction at any point during the trial. In its opening and closing arguments, the prosecution asserted that petitioner had aided and abetted the murders of Junior and Alex and, in keeping with the court's "natural and probable consequence" jury instruction, that petitioner was therefore guilty of murder because Junior's and Alex's murders were the natural and probable consequence of the original crimes petitioner had committed. ECF no. 35-1 at 417; ECF no. 36-1 at 679, 684; ECF no. 36-2 at 49). The jury returned guilty verdicts on all the charges against petitioner, except on Count Five for which it convicted petitioner of murder rather than aggravated murder.

On direct appeal, petitioner presented several claims relating to severance,

prosecutorial misconduct, and penalty phase issues. The Oregon Court of Appeals issued an opinion affirming the judgment, and the Oregon Supreme Court denied his petition for review. *State v. Sanchez-Jacobo*, 250 Or. App. 621, 282 P.3d 880 (2012), *rev. den.*, 353 Or. 280 (2013).

In postconviction proceedings, petitioner raised various ineffective assistance of trial counsel claims including the failure to object to improper argument but did not raise a claim objecting to the court's decision to issue the "natural and probable consequences" jury instruction. That instruction would have run afoul of this court's decisions in *Sandstrom v. Montana*, 442 U.S. 510, 520-24, 99 S. Ct. 2450, 61 L. Ed. 2d 39 (1979) and its progeny, which held that similar jury instructions were unconstitutional because they diluted the state's burden of proving a defendant's guilt beyond a reasonable doubt.

The Marion County Circuit Court denied postconviction relief. ECF no. 29 at 74-75 (judgment). The Oregon Court of Appeals affirmed without opinion, and the Oregon Supreme Court denied review. *Jacobo v. Kelly*, 299 Or. App. 666, 449 P.3d 602 (2019), *rev. den.*, 366 Or. 135 (2020). Petitioner timely filed a pro se petition for a writ of habeas corpus, and he later filed an amended pro se petition. ECF no. 1; ECF no. 23. Counsel was appointed after petitioner filed his amended petition.

In the amended petition, petitioner raised two claims for relief. He first asserted that the trial court's jury instructions relieved the prosecution of its burden to prove that petitioner intended that Junior or Alex be killed. Second, petitioner claimed that the Oregon courts lacked subject matter jurisdiction for the

homicide charges. ECF no. 23. In turn, respondent argued that each of petitioner's claims were procedurally defaulted and asked the court deny his claims and dismiss the petition with prejudice. ECF no. 38 at 7-11. A magistrate judge hearing the case issued a set of findings and recommendations which recommended that petitioner's amended petition should be denied. ECF no. 72. The court ultimately adopted the magistrate's analysis in its entirety and issued a judgment dismissing petitioner's case with prejudice. ECF no. 92.

REASONS FOR GRANTING THE PETITION

During petitioner's trial, the court issued the following "natural and probable consequences" jury instruction:

> A person who aids or abets another in committing a crime, in addition to being criminally responsible for the crime that is committed, is also criminally responsible for any act or other crimes that were committed as a natural and probable consequence of the planning, preparation, or commission of the intended crime.

ECF no. 36-2 at 1541. This instruction required the jury to determine that, if petitioner had aided or abetted someone else in committing a crime, petitioner must also be found guilty of any other crime that "was committed as a natural and probable consequence of the planning, preparation, or commission" of that predicate crime.

This court has squarely rejected such burden-diluting instructions in cases such as *Francis v. Franklin*, 471 U.S. 307, 311, 105 S. Ct. 1965, 85 L. Ed. 2d 344 (1985) (in murder case, due process violated by jury instruction that "a person of

sound mind and discretion is presumed to intend the natural and probable consequences of his acts but the presumption may be rebutted") and *Sandstrom,* 442 U.S. at 520-24 (due process was violated by a jury instruction that "the law presumes that a person intends the ordinary consequences of his voluntary acts").

Petitioner's trial counsel's failure to object to the "natural and probable consequences" instruction prejudiced petitioner by allowing him to be convicted based on a standard falling below that of guilt beyond a reasonable doubt. Because petitioner's post-conviction counsel also provided ineffective assistance by failing to raise trial counsel's failure to object to the unconstitutional instruction, any issue of procedural default for failing to raise the matter in state court habeas proceedings can and should be excused.

A. Petitioner's Due Process Right Was Violated When The Trial Court Instructed The Jury That Petitioner Was Presumed To Be Liable For Any Offense That Was "The Natural And Probable Consequence" Of Aiding And Abetting The Intended Crime.

In re Winship, 397 U.S. 358, 364, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970) held that the Fourteenth Amendment "protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." "This bedrock, axiomatic and elementary principle, […] prohibits giving a mandatory presumption jury charge that reliev[es] the State of its burden of persuasion beyond a reasonable doubt of every essential element of a crime." *Francis*, 471 U.S. at 313 (citing *Sandstrom*, 442 U.S. at 520-524) (internal citations omitted). In *Sandstrom*, the court held that instructing a jury that it must

presume that a person intends the ordinary consequences of his voluntary acts "reliev[es] the State of the burden of proof enunciated in *Winship* on the critical question of petitioner's state of mind." 442 U.S. at 521.

In addition to the natural and probable consequences instruction, petitioner's trial court also gave an aid or abet instruction that encompassed both *mens rea* and *actus reus*:

> A person aids or abets another person in the commission of crime if the person, one, with intent to promote or make easier the commission of the crime; two, encourages, procures, advises, or assists by act or advice, the planning or commission of the crime.

ECF no. 36-2. Together, these two instructions required that, if the jury determined that, with intent to promote or make easier the commission of a crime, petitioner encouraged, procured, advised, or assisted by act or advice, the planning or commission of a crime, it must find him guilty of any other crime that is a natural and probable consequence of the initial crime. This presumption is not compatible with the holding in *Sandstrom* because it allowed the jury to find petitioner guilty of any offense that was the natural and probable consequence of some other offense without also requiring a finding that he intended to commit the secondary offense.

The jury instruction in this case is functionally the same as the one given in *Sandstrom*. In that case, the defective instruction charged that "the law presumes that a person intends the ordinary consequences of his voluntary acts." *Sandstrom*, 442 U.S. at 512. In this case, the instruction charged that an aider or abettor is criminally responsible for the "natural and probable consequence" of the planning,

preparation, or commission of any crime the defendant aided or abetted, without a requirement that the aider or abettor intend the secondary crime.

The jury instruction in petitioner's case overreached when it required petitioner to be convicted of murder if the jury determined that he acted to aid and abet a crime where murder could have been a natural and probable consequence of that offense. By instituting that requirement, that jury instruction demanded that the jury presume that petitioner intended to commit the homicide as a natural and probable consequence of his aiding and abetting acts.

Lower courts have relied on the reasoning used in *Sandstrom* when remanding a Washington state case where the trial jury was given a "natural and probable consequences" instruction that was used to find the defendant guilty of committing arson which caused the death of two children. In *Ruff v. Kincheloe*, 843 F.2d 1240 (9th Cir. 1988), the Ninth Circuit agreed with the district court's ruling that the "natural and probable consequences" jury instruction used in Ruff's trial for arson and murder violated *Sandstrom*. (It reversed the district court because it was unable to conclude on the record before it that that error was harmless.) As with *Ruff*, this court should grant relief because the "natural and probable consequences" instruction constituted error under *Sandstrom* and successor cases, particularly because evidence at trial strongly supported the conclusion that petitioner actually intended that no one be killed as a result of his actions.

B. The Erroneous Instruction Prejudiced Petitioner.

When determining whether the "natural and probable consequences" jury instruction prejudiced petitioner, the court must determine whether the instruction had a substantial and injurious effect or influence in determining the jury's verdict. *Brecht v. Abrahamson*, 507 U.S. 619, 638, 123 L. Ed. 2d 353, 113 S. Ct. 1710 (1993). In applying this test, the court should consider whether it has "grave doubts about whether the jury, without having heard the [challenged] instruction would have found [him] guilty beyond a reasonable doubt." *Hall v. Haws*, 861 F.3d 977, 992 (9th Cir. 2017). "Thus, the state must provide us with a fair assurance that there was no substantial and injurious effect on the verdict." *Valerio v. Crawford*, 306 F.3d 742, 762 (9th Cir. 2002) (internal quotation marks and citations omitted).

In petitioner's case, after considering the evidence adduced at trial, the jury could have concluded that petitioner solicited the two gunmen to coerce Junior into returning the allegedly stolen drugs or pay for them, instead of soliciting or paying them to murder Junior. In that event, the jury would nevertheless have been invited to find petitioner guilty of aggravated murder of Junior based on the natural and probable consequences jury instruction, even though petitioner did not actually intend for the gunmen commit murder.

Likewise, the natural and probable consequences instruction required the jury to find petitioner guilty of murdering Alex if they found that murder to be the natural and probable consequence of the initial offense of having aided and abetted

the gunmen to coerce Alex by brandishing their firearms, even if petitioner did not actually intend for the gunmen to kill Alex.

The evidence here is even more strongly in petitioner's favor because witness testimony established that petitioner became upset and angry upon learning of Alex's death, suggesting that petitioner did not intend for Alex to be shot and killed. Without the erroneous natural and probable consequences instruction, this evidence would create a reasonable doubt whether petitioner solicited the gunmen or intended to have the gunmen kill Alex.

C. Petitioner's Post-Conviction Counsel was Ineffective for Failing to Raise the Jury Instruction Claim and That Ineffectiveness Excuses any Procedural Default of Petitioner's Claims.

In *Martinez v. Ryan*, 566 U.S. 1, 132 S. Ct. 1309, 182 L. Ed. 2d 272 (2012), this court held that, where post-conviction counsel provides ineffective assistance by failing to raise trial counsel's ineffectiveness, courts have jurisdiction to consider the merits of the claim. Here, post-conviction counsel should have raised trial counsel's failure to object to the "natural and probable consequences" instruction.

During petitioner's trial, his counsel knew that the jury would be given the "natural and probable consequences" instruction but did not object to the instruction at the jury charge conference or after the court instructed the jury. ECF 36-1 at 663-676; ECF no. 36-2 at 145, 154-158. This failure to object left the error unpreserved for direct appeal and defaulted for federal habeas review purposes. See Oregon Rules of Appellate Procedure, Rule 5.45(1) ("No matter claimed as error will

be considered on appeal unless the claim of error was preserved in the lower court[.]").

Under *Sandstrom* and successor cases, however, the "natural and probable consequences" instruction violated petitioner's right to due process. Trial counsel performed deficiently in failing to object to the erroneous instruction, and it is reasonably likely that but for that failure, the outcome of petitioner's trial would have been different. While it is true that petitioner did not present a trial counsel ineffectiveness claim to the state courts, the default of that claim should be excused under *Martinez* because postconviction counsel was likewise ineffective in failing to raise the trial counsel ineffectiveness claim. "[A]n ineffective-assistance-of-counsel claim asserted as cause for the procedural default of another claim can itself be procedurally defaulted [and may] itself be excused if the prisoner can satisfy the cause-and-prejudice standard with respect to that claim." *Edwards v. Carpenter*, 529 U.S. 446, 453, 120 S. Ct. 1587, 146 L. Ed. 2d 518 (2000).

Just as the petitioner in *Martinez* was allowed to pursue a violation of his equitable right to effective postconviction counsel as a ground to excuse the default of his trial counsel ineffectiveness claim, the court should allow petitioner to pursue the violation of his right to effective trial counsel as a ground to excuse the default of his due process claim. *Edwards*, 529 U.S. at 453.

CONCLUSION

Petitioner's post-conviction counsel failed to raise and pursue the issue of petitioner's trial counsel having failed to object to a deprecated jury instruction which created an improper presumption that the defendant was criminally responsible for "the natural and probable consequences" of a predicate crime. For the foregoing reasons, the court should grant petitioner's writ of certiorari, order full briefing and argument, vacate petitioner's conviction and sentence, provide petitioner with a new trial, and make any other orders beneficial to petitioner and in the interest of justice. The court's decision on this matter will serve to correct an egregious error apparent in petitioner's case and make the applicable law plain nationwide.

Respectfully submitted,

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JULY 2024.

Case: 23-35375, 04/22/2024, ID: 12879140, DktEntry: 6, Page 1 of 1

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED

APR 22 2024

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

JOEL JACOBO SANCHEZ, Petitioner-Appellant, v. BRANDON KELLY, Respondent-Appellee.	No. 23-35375 D.C. No. 2:19-cv-02089-JE District of Oregon, Pendleton ORDER

Before: MILLER and LEE, Circuit Judges.

The request for a certificate of appealability (Docket Entry No. 5) is denied because appellant has not shown that "jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000); *see also* 28 U.S.C. § 2253(c)(2); *Gonzalez v. Thaler*, 565 U.S. 134, 140-41 (2012).

Any pending motions are denied as moot.

DENIED.

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

PENDLETON DIVISION

JOEL JACOBO SANCHEZ,

Petitioner,

v.

BRANDON KELLY,

Respondent.

No. 2:19-cv-02089-JE

JUDGMENT

MOSMAN, J.,

Based on the Opinion and Order of the Court [ECF 91] adopting the Magistrate Judge's Amended Findings and Recommendation [ECF 78] and denying the Amended Petition for Writ for Habeas Corpus [ECF 23], IT IS ORDERED AND ADJUDGED that this action is DISMISSED with prejudice. Pending motions, if any, are DENIED AS MOOT.

DATED this __1__ day of May, 2023.

Michael W. Mosman
MICHAEL W. MOSMAN
Senior United States District Judge

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

PENDLETON DIVISION

JOEL JACOBO SANCHEZ,

Petitioner,

v.

BRANDON KELLY,

Respondent.

No. 2:19-cv-02089-JE

OPINION AND ORDER

MOSMAN, J.,

On October 21, 2022, Magistrate Judge John Jelderks issued his Amended Findings and Recommendation ("F&R") [ECF 78] recommending that I deny Petitioner's Amended Petition for Writ of Habeas Corpus [ECF 23], dismiss this case with prejudice, and decline to issue a certificate of appealability on the basis that Petitioner has not made a substantial showing of the denial of a constitutional right pursuant to 28 U.S.C. § 2253(c)(2). Petitioner filed objections to the F&R [ECF 89], to which Respondent replied [ECF 90]. Upon review, I agree with Judge Jelderks. I DENY Petitioner's Amended Petition for Writ of Habeas Corpus [ECF 23], DISMISS this case with prejudice, and DECLINE to issue a certificate of appealability.

DISCUSSION

The magistrate judge makes only recommendations to the court, to which any party may file written objections. The court is not bound by the recommendations of the magistrate judge but

retains responsibility for making the final determination. The court is generally required to make a de novo determination regarding those portions of the report or specified findings or recommendation as to which an objection is made. 28 U.S.C. § 636(b)(1)(C). However, the court is not required to review, de novo or under any other standard, the factual or legal conclusions of the magistrate judge as to those portions of the F&R to which no objections are addressed. *See Thomas v. Arn*, 474 U.S. 140, 149 (1985); *United States v. Reyna-Tapia*, 328 F.3d 1114, 1121 (9th Cir. 2003). While the level of scrutiny under which I am required to review the F&R depends on whether or not objections have been filed, in either case, I am free to accept, reject, or modify any part of the F&R. 28 U.S.C. § 636(b)(1)(C).

CONCLUSION

Upon review, I agree with Judge Jelderks's recommendation, and I ADOPT the F&R [ECF 78] as my own opinion. Petitioner's Amended Petition for Writ of Habeas Corpus [ECF 23] is DENIED, and this case is DISMISSED with prejudice. I DECLINE to issue a certificate of appealability on the basis that Petitioner has not made a substantial showing of the denial of a constitutional right pursuant to 28 U.S.C. § 2253(c)(2).

IT IS SO ORDERED.

DATED this __1__ day of May, 2023.

Michael W. Mosman
MICHAEL W. MOSMAN
Senior United States District Judge

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

JOEL JACOBO SANCHEZ,

Petitioner,

v.

BRANDON KELLY,

Respondent.

Case No. 2:19-cv-02089-JE

AMENDED FINDINGS AND RECOMMENDATION[1]

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[1] The original Findings and Recommendation (#77) is hereby amended only to add footnote 2 on page 4.

JELDERKS, Magistrate Judge.

Petitioner brings this habeas corpus case pursuant to 28 U.S.C. § 2254 challenging the legality of his Multnomah County convictions dated September 3, 2008. For the reasons that follow, the Amended Petition for Writ of Habeas Corpus (#23) should be denied.

BACKGROUND

On November 16, 2006, the Multnomah County Grand Jury indicted Petitioner and two co-defendants on a variety of charges stemming from the murders of Rodelfo Romero-Lopez, Jr. and Alejandro Sanchez-Hernandez. Respondent's Exhibit 102. Petitioner initially faced two counts of Aggravated Murder as to Romero-Lopez (Counts 1-2), two counts of Aggravated Murder with respect to Sanchez-Hernandez (Counts 5-6), one count of Coercion with a Firearm (Count 9), and one count of Unlawful Use of a Weapon with a Firearm (Count 10). *Id.* The theory underlying Counts 1, 2, 5, and 6 was that Petitioner intentionally paid two individuals to murder Romero-Lopez and Sanchez-Hernandez, and that the contract killers intentionally caused the deaths of the victims. *Id* at 1-2. Before Petitioner's jury trial commenced, the State successfully moved to amend the indictment to dismiss Count 6 and to convert Count 5 to allege intentional Murder in lieu of Aggravated Murder. Trial Transcript, p. 1128. The State's theory was that Petitioner aided and abetted the perpetrators of Sanchez-Hernandez's death.

At the conclusion of the trial, the judge instructed the jury that an aider and abettor is "criminally responsible for

any act or other crimes that were committed as a natural and probable consequence[] of the planning, preparation, or commission of the intended crime." Trial Transcript, p. 4006. The jury convicted Petitioner on all counts and, while it declined to impose the death penalty on the Aggravated Murder charges pertaining to Romero-Lopez, it also did not find any significant mitigating circumstances to justify a sentence that included the possibility of parole. *Id* at 4392-93. As a result, the trial court sentenced Petitioner to life imprisonment without parole on Count 1 (which merged with Count 2), life imprisonment with a 25-year mandatory minimum with respect to the amended intentional Murder charge in Count 5, five years of imprisonment on Count 9, and two years in prison on Count 10. Respondent's Exhibit 101.

Petitioner took a direct appeal raising claims not at issue in this case. The Oregon Court of Appeals affirmed the trial court's decision in a written opinion, and the Oregon Supreme Court denied review. *State v. Sanchez-Jacobo*, 250 Or. App. 621, 282 P.3d 880 (2012), *rev. denied*, 353 Or. 280, 298 P.3d 30 (2013).

Petitioner next filed for post-conviction relief ("PCR") in Marion County where the PCR court denied relief on all of his claims. Respondent's Exhibit 137. The Oregon Court of Appeals affirmed the PCR court's decision without issuing a written opinion, and the Oregon Supreme Court denied review. *Jacobo v. Kelly*, 299 Or. App. 666, 449 P.3d 602 (2019), *rev. denied*, 366 Or. 135, 456 P.3d 648 (2020).

On May 26, 2020, Petitioner filed a *pro se* Amended Petition for Writ of Habeas Corpus (#23) which presents one ground for relief. He asserts that his convictions are unconstitutional because they were "solely based on accomplice liability theory (aiding and abetting) and natural and probable consequences." Amended Petition (#23), p. 5. In his Petition, he asserts that he did not exhaust his state court remedies as to this claim because his trial and direct appellate attorneys failed to argue that for "common law murder intent crimes[,] non-shooters cannot be convicted of crime of murder . . . based on non-conduct participant, accomplice liability theory." *Id.* Respondent asks the Court to deny relief on the Amended Petition because: (1) Petitioner's argued claims are not pled in the Amended Petition, thus they are not properly before the Court for its consideration; (2) Petitioner did not fairly present his argued claims to Oregon's state courts, leaving them procedurally defaulted and ineligible for habeas corpus review; and (3) Petitioner's claims lack merit.

DISCUSSION

I. Amended Petition Claims

Once the State filed the record and the Court had an opportunity to review it, it became apparent that this case could benefit from the appointment of counsel.[2] Appointed counsel

[2] The Court appointed the Federal Public Defender on July 31, 2020. Assistant Federal Public Defender Oliver Loewy entered an appearance substituting for the Federal Defender on August 24, 2020. Mr. Loewy was the attorney who, on February 22, 2022, filed the 17-page memorandum referenced herein. Petitioner's current counsel, Chief Deputy Federal Defender Stephen R. Sady, substituted for Mr. Loewy on March 10, 2022, and Assistant Federal Public Defender Julie Vandiver entered an appearance on August 9, 2022.

did not seek to amend the Amended Petition. Instead, counsel requested (and was granted) a series of extensions of time before finally filing Petitioner's supporting memorandum more than 16 months after the State had filed its Answer and Response. In the counseled Memorandum in Support (#60), Petitioner argues two claims: (1) the trial court violated Petitioner's right to due process when it instructed the jury with the natural and probable consequences instruction which diluted the State's burden of proof; and (2) Oregon's state courts lacked subject-matter jurisdiction because solicitation, an element of the charged homicide defenses, violates the Oregon Constitution's prohibition against restraint on the right to speak.[3]

A habeas corpus petition must "specify all the grounds for relief which are available to the petitioner." Rule 2(c), Rules Governing Section 2254 Proceedings, 28 U.S.C. foll. § 2254. A court need not consider claims that are not raised in the petition. *Greene v. Henry*, 302 F.3d 1067, 1070 n.3 (9th Cir. 2002). Although the court is obligated to liberally construe *pro se* filings, *Haines v. Kerner*, 404 U.S. 519 (1972), the Court appointed the Federal Public Defender to represent Petitioner precisely to avoid confusion on matters such as which claims are actually at issue.

[3] As will be discussed later, Petitioner also argues that his trial attorney was ineffective for failing to argue these claims, and that his post-conviction attorney was ineffective for failing to fault trial counsel for not arguing them. He does not raise these as additional grounds for relief, but as arguments to excuse procedural deficiencies with the two grounds for relief he argues in his briefing.

Although Petitioner directs the court to the Fifth Circuit for the proposition that it accords "state and federal habeas petitions a broad interpretation, notwithstanding the later appointment of counsel," *Bledsue v. Johnson*, 188 F.3d 250, 253 (5th Cir. 1999), this is neither controlling precedent nor does it clearly delineate how "late" an appointment must be so as to effectively ignore the fact that Petitioner in this case has enjoyed the assistance of appointed counsel for more than two years. *See Harwood v. Hall*, 2017 WL 3709068 at *2 (D. Or. Aug. 28, 2017) ("it was incumbent upon appointed counsel to review the Petition and file an amended pleading if appropriate so as to avoid the unnecessary confusion that has resulted").

This Court appointed counsel for Petitioner only two days after the State filed the record in this case, and approximately two months after Petitioner filed his *pro se* Amended Petition. Appointed counsel then spent well over a year drafting a 17-page memorandum without attempting to amend the opaque Amended Petition that sets forth a single ground for relief which reads: "Due Process Grounds 14th Amendment violations Ex-Post Facto violation AND Misrepresentation (lack of subject matter)." Amended Petition (#23), p. 5. Where Petitioner enjoyed the benefit of appointed counsel almost immediately after the State filed the record in this case, and where counsel makes no representation that the Amended Petition could not have been further amended in a timely fashion. Petitioner is not entitled to the liberal construction he seeks.

The *pro se* Amended Petition raises a single due process claim that Petitioner's convictions for Aggravated Murder and intentional Murder are unlawful because these are common law crimes that can only be committed by the person who actually shot the victims, not a person who aided and abetted the actual murderer. He maintains that he did not present this issue to the state courts because his trial attorney was ineffective in failing to preserve the issue, and his direct appellate attorney was ineffective for failing to pursue the issue on appeal. Even under a liberal construction of the Amended Petition (to which Petitioner is not entitled), Petitioner can be said to raise claims of trial court error, ineffective assistance of trial counsel, and ineffective assistance of appellate counsel all predicated on the fact that he did not personally shoot the victims in this case.

However, Petitioner, through appointed counsel, does not argue these claims. Instead, as mentioned above, he pursues: (1) a due process claim of trial court error based upon the "natural and probable consequence" jury instruction the trial judge gave that allegedly diluted the standard of proof the State was obligated to meet; and (2) a claim that Article I, section 8 of the Oregon Constitution protecting the free speech of individuals deprived the Multnomah County Circuit Court of jurisdiction over him. These are altogether different claims that cannot reasonably be discerned from the Amended Petition, even under a liberal construction. Where Petitioner has not alleged the claims he argues, and where he does not argue the

claims he has alleged, he is not entitled to habeas corpus relief. *See Greene v. Henry*, 302 F.3d 1067, 1070 fn 3 (9th Cir. 2002) (a court need not consider claims not raised in the petition); *see also Silva v. Woodford*, 279 F.3d 825, 835 (9th Cir. 2002) (Petitioner bears the burden of proving his claims).

II. The Merits

Even if Petitioner had pled the claims he argues in his briefing, he would not be entitled to habeas corpus relief. He concedes that his argued claims are procedurally defaulted because he did not first present them to Oregon's state courts for consideration, but he attempts to excuse his default by showing that: (1) his trial attorneys were ineffective for failing to raise these issues at trial; and (2) his PCR counsel was ineffective for not pursuing ineffective assistance claims against his trial lawyers for not raising the argued claims. *See Martinez v. Ryan*, 566 U.S. 1 (2012) (ineffective assistance of post-conviction counsel as to a substantial claim of ineffective assistance of criminal trial counsel will excuse a procedural default); *Edwards v. Carpenter*, 529 U.S. 446, 453 (2000) (an ineffective assistance of counsel claim can be asserted as cause to excuse a procedural default of another claim only if it, too, is not procedurally defaulted or so long as the default of the ineffective assistance claim has been excused). Petitioner will only be successful in his attempt to excuse his procedural default in this manner if he can establish that his argued claims were "substantial" and had "some merit." *Martinez*, 566 U.S. at 14. He is unable to meet this burden.

Petitioner's primary claim is predicated on his contention that the "natural and probable consequences" jury instruction lessened the State's burden of proof because it allowed the jury to presume intent where none existed.[4] He maintains that the natural and probable consequences instruction permitted the jury to find him guilty of an offense without actually determining that he intended that offense. He points to *Sandstrom v. Montana*, 442 U.S. 510 (1979) to support his claim.

In *Sandstrom*, the defendant was facing a murder charge. The trial court instructed the jury that "the law presumes that a person intends the ordinary consequences of his voluntary acts." *Id* at 513. The Supreme Court determined that where the defendant's mental state was "the lone element of the offense at issue[,]" the jury "could have concluded that upon proof by the State of the slaying, and of additional facts not themselves establishing the element of intent, the burden was shifted to the defendant to prove that he lacked the requisite mental state." *Id* at 520-21, 524. Petitioner contends that, like *Sandstrom*, the natural and probable consequences instruction in this case told the jury that it must find him guilty of an offense without the opportunity to consider his intent to commit that crime.

Unlike *Sandstrom*, Petitioner's jury instruction did not ask the jurors to presume intent. To the contrary, the jurors were

[4] Petitioner cannot excuse his procedural default as to his due process claim based upon his right to free speech under the Oregon Constitution where he provides no authority for the proposition that a murder statute that criminalizes murder-for-hire plots offends a criminal defendant's right to free speech.

instructed that in order to convict Petitioner, they needed to find him guilty of aiding and abetting criminal activity beyond a reasonable doubt.[5] Only if the jurors found the elements of that crime proven did the natural and probable consequence instruction come into play to establish the scope of Petitioner's criminal liability. In this respect, Petitioner's case is not analogous to *Sandstrom* where "the Court did not have before it the question of an aider and abettor's liability for the acts of a confederate that were not originally agreed upon, but which are the natural and probable consequences of such conduct." *Windham v. Merkle*, 163 F.3d 1092, 1104 (9th Cir. 1998). Instead, his case is most like *Windham* where the Ninth Circuit concluded that a "natural and probable consequence" instruction is not unconstitutional if a jury has already found the requisite elements to convict a criminal defendant of aiding and abetting a crime:

> [Windham's] reliance on *Sandstrom* is misplaced. Windham has confused the requirement that an aider and abettor intend to commit the contemplated crime, with the vicarious liability imposed on an aider and abettor for the acts of his cohorts that are the natural and probable consequences of the crime originally contemplated. . . . The

[5] It appears that Petitioner's only conviction under an aiding and abetting theory was for intentional Murder in Count 5 of the amended Indictment pertaining to Sanchez-Hernandez. Trial Transcript, p. 3910-11 ("He clearly, by definition, aided and abetted at a minimum."). The same theory did not apply to his convictions for Aggravated Murder as to Romero-Lopez where Petitioner was charged as the principal person who paid the contract killers to murder Romero-Lopez, and the State did not argue an aiding and abetting theory. *Id* at 3842 (Petitioner "solicited and paid and agreed to pay" two individuals "to kill Rodelfo Romero-Lopez" whereas he "committed the intentional murder of Alejandro Sanchez-Hernandez by aiding and abetting the other two gentlemen in committing that murder.").

> jury was properly instructed that if it was persuaded beyond a reasonable doubt that Windham was guilty as an aider and abettor of the contemplated [felonies], he would also be liable for the natural and probable consequences of those acts.

Id at 1104.

Petitioner argues that, to the extent his instruction is akin to that in *Windham*, *Windham* is directly contrary to an earlier Ninth Circuit decision, *Ruff v. Kincheloe*, 843 F.2d 1240 (1988). He implies that because *Ruff* predates *Windham*, and as *Ruff* was not an *en banc* decision, *Windham* cannot overrule *Ruff*. However, *Ruff* is readily distinguishable from *Windham* insofar as *Ruff* involved an instruction very similar to that in *Sandstrom*. Specifically, the trial court in *Ruff* instructed the jury that "the law presumes that every man intends the natural and probable consequences of his own acts[.]" 843 F.2d at 1241. It did so, not in setting the scope of aiding and abetting liability, but directly to charges of Arson and Murder. In this respect, *Ruff* is distinguishable both from *Windham* and the case at bar.

Because the "natural and probable consequences" jury instruction the trial judge gave in Petitioner's case did not run afoul of the Due Process Clause, even if he had pled the claims he argues in this case, he could neither excuse the procedural default as to those claims nor prevail on the merits. For all of these reasons, the Court should deny habeas corpus relief.

///

RECOMMENDATION

For the reasons identified above, the Amended Petition for Writ of Habeas Corpus (#23) should be denied and a judgment should be entered dismissing this case with prejudice. The Court should decline to issue a Certificate of Appealability on the basis that Petitioner has not made a substantial showing of the denial of a constitutional right pursuant to 28 U.S.C. § 2253(c)(2).

SCHEDULING ORDER

This Findings and Recommendation will be referred to a district judge. Objections, if any, are due within 17 days. 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.

October 21, 2022
DATE

John Jelderks
John Jelderks
United States Magistrate Judge

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

JOEL JACOBO SANCHEZ,

Petitioner

v.

BRANDON KELLY,

Respondent

CERTIFICATE OF COMPLIANCE

As required by Supreme Court Rule 33.1(h), I certify that the petition for a writ of certiorari contains 3,735 words, excluding the parts of the petition that are exempted by Supreme Court Rule 33.1(d).

I declare under penalty of perjury that the foregoing is true and correct.

Executed on July 22, 2024.

Respectfully submitted,

BEAR WILNER-NUGENT
620 SW 5th Avenue, Suite 1008
Portland, Oregon 97204
(503) 351-2327
Counsel for the Petitioner

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

JOEL JACOBO SANCHEZ,

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Respondent

PROOF OF SERVICE

I, Bear Wilner-Nugent, a member of the Bar of this Court, do declare and certify that on July 22, 2024, as required by Supreme Court Rule 29, I have served the PETITION FOR A WRIT OF CERTIORARI and a copy of this Certificate upon the following entity by mailing them first-class, postage prepaid to: Nick M. Kallstrom, Assistant Attorney General, Oregon Department of Justice, 1162 Court Street NE, Suite 400, Salem, Oregon 97301-4096. I further certify all parties required to be served have been served.

Respectfully submitted,

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