

No. _____

IN THE SUPREME COURT
OF THE UNITED STATES

BENJAMIN ALLEN TOLLE,

Petitioner,

v.

RYAN LEGORE,

Respondent.

On Petition for Writ of Certiorari to
the United States Court of Appeals
for the Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

May a federal court look to surrounding circumstances to deem a state court opinion's otherwise explicit reliance on a procedural violation ambiguous, and thus apply *Harris v. Reed*, 489 U.S. 255, 263 (1989) to presume that the state court decided a federal question?

PARTIES TO THE PROCEEDINGS

Benjamin Tolle, Petitioner/Appellant below.

Ryan LeGore, Respondent, succeeded Troy Bowser, Appellee below, as the Superintendent of the Two Rivers Correctional Institute. *See* Sup. Ct. R. 35.3.

RELATED PROCEEDINGS

Tolle v. Bowser, No. 24-5862, United States Court of Appeals for the Ninth Circuit (denying petitions for rehearing and rehearing en banc on March 30, 2026).

Tolle v. Bowser, No. 24-5862, United States Court of Appeals for the Ninth Circuit (affirming denial of habeas petition on February 19, 2026).

Tolle v. Bowser, No. 2:18-cv-01996, United States District Court for the District of Oregon (adopting in part the Magistrate Judge's findings and recommendations and issuing a certificate of appealability on August 20, 2024).

Tolle v. Bowser, No. 2:18-cv-01996, United States District Court for the District of Oregon (findings and recommendation that the writ of habeas corpus should be denied on September 21, 2023).

Tolle v. Franke, No. S065876, Oregon Supreme Court (denying petition for review on June 7, 2018).

Tolle v. Franke, No. A162138, Oregon Court of Appeals (affirming denial of postconviction relief without opinion on March 7, 2018).

Tolle v. Franke, No. CV-110522, Umatilla County Circuit Court (denying petition for postconviction review, May 10, 2016).

Tolle v. Franke, No. A151417, Oregon Court of Appeals (remanding for further proceedings on one claim and otherwise affirming, March 19, 2014).

Tolle v. Franke, No. CV-110522, Umatilla County Circuit Court (granting motion for judgment on the pleadings, and dismissing petition for postconviction relief, May 8, 2012).

State v. Tolle, No. S058715, Oregon Supreme Court (denying petition for review on November 10, 2010).

State v. Tolle, No. A139960, Oregon Court of Appeals (affirming convictions without opinion on July 21, 2010).

State v. Tolle, No. 06-CR-0325, Josephine County Circuit Court (two jury trials with verdicts returned on October 25, 2007, and June 18, 2008, and judgment entered on June 26, 2008).

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The petitioner, Benjamin Allen Tolle, respectfully requests that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit entered on February 19, 2026, affirming the denial of habeas corpus relief.

Opinions Below

The Ninth Circuit affirmed the denial of habeas corpus relief in an unpublished memorandum on February 19, 2026. Appendix to Petition (App.)

1–4. That opinion affirmed the United States District Court for the District of Oregon, which on August 20, 2024, denied the habeas petition in an unpublished opinion and granted a certificate of appealability. App. 5–13. The district court’s opinion adopted in part the Findings and Recommendation of a United States Magistrate Judge. App. 14–27. The Ninth Circuit denied panel and en banc rehearing on March 30, 2026. App. 28. In the state proceedings at issue in the above habeas matters, the Umatilla County Circuit Court granted the Respondent’s motion for judgment on the pleadings and dismissed the petition for postconviction relief on May 8, 2012. App. 31–33. The Oregon Court of Appeals affirmed that judgment in relevant part on March 19, 2014. App. 29–30.

Jurisdictional Statement

The Ninth Circuit affirmed the denial of Mr. Tolle’s habeas petition on February 19, 2026. App. 1–4. The Ninth Circuit denied rehearing on March 30, 2026. App. 28. Justice Kagan granted an extension of time in which to file this Petition up to and including July 28, 2026. 25A1412. The Court has jurisdiction under 28 U.S.C. §1254(1).

Relevant Statutory and Constitutional Provisions

The Sixth Amendment provides “[i]n all criminal prosecutions, the accused shall . . . have the Assistance of Counsel for his defence.”

The Double Jeopardy Clause of the Fifth Amendment provides “nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb . . .”

Oregon Revised Statute § 138.580 Petition (2011) provides in relevant part: “Affidavits, records or other documentary evidence supporting the allegations of the petition shall be attached to the petition. Argument, citations and discussion of authorities shall be omitted from the petition but may be submitted in a separate memorandum of law.”

Oregon Revised Statute § 138.620 Hearing (2011) provides in relevant part: “(2) If the petition states a ground for relief, the court shall decide the issues raised and may receive proof by affidavits, depositions, oral testimony or other competent evidence. The burden of proof of facts alleged in the petition shall be upon the petitioner to establish such facts by a preponderance of the evidence.”

Oregon Revised Statute § 138.640(1) Judgment; enforcement (2011) provides in relevant part: “(1) After deciding the issues raised in the proceeding, the court shall enter a judgment denying the petition or granting the appropriate relief. . . The judgment must clearly state the grounds on which the cause was determined, and whether a state or federal question was presented and decided.”

Oregon Rule of Civil Procedure 21b Motion for Judgment on the Pleadings provides “[a]fter the pleadings are closed, but within such time as not to delay the trial, any party may move for judgment on the pleadings.”

Oregon Rule of Civil Procedure 47b Summary Judgment for defending party provides “[a] party against whom any type of claim is asserted or a declaratory judgment is sought may, at any time, move with or without supporting affidavits or declarations, for a summary judgment in that party’s favor as to all or any part of any claim or defense.”

Introduction

This Court strictly monitors the boundaries of the federal court’s jurisdiction over state court decisions, recognizing that “doctrinal consistency . . . is required when sensitive issues of federal-state relations are involved.” *Michigan v. Long*, 463 U.S. 1032, 1039 (1983). As the case below demonstrates, the Ninth Circuit requires clear direction regarding that boundary. The Oregon trial court deciding Mr. Tolle’s postconviction review (PCR) petition explicitly invoked the violation of a state procedural rule to reject the claim that his trial attorney unreasonably failed to object to a re-trial on double jeopardy grounds. A procedural default bars federal habeas review, absent a showing of cause and prejudice. Mr. Tolle argued that because the procedural

default occurred at the initial stage of PCR, he was eligible for the *Martinez v. Ryan*, 566 U.S. 1 (2012) exception.

The Ninth Circuit’s holding that the claim was procedurally defaulted at a later stage at which the *Martinez* exception did not apply was predicated on an overly expansive interpretation of *Harris v. Reed*, 489 U.S. 255, 265 (1989). The Ninth Circuit deemed the PCR decision “ambiguous” by looking beyond the written opinion’s plain invocation of a procedural bar, finding that the opinion “referenced” the procedural rule but not “clearly embrace” it. App. 3. The panel below held that the decision was “ambiguous,” because it interpreted the state court judge’s oral comments as “appear[ing] to accept” arguments made under the summary judgment standard. App 3.

In reading beyond the words of the opinion to decide that the state court did not clearly “embrace” the state procedural basis that *did* appear in its opinion and deciding that it instead “appeared to accept” a federal law basis that *did not* appear in its opinion, the Ninth Circuit drastically departed from this Court’s refrain that although a state court need not explain the basis for its opinion, when it does so, it will be honored by the federal courts. *Coleman v. Thompson*, 501 U.S. 722, 738–39 (1991) (explaining that state courts need not explain the basis for their decision but encouraging them to “express plainly . . . the grounds on which their judgments rest”); *Harrington v. Richter*,

562 U.S. 86, 100 (2011) (noting that the state courts can alter their practices to “elaborate more fully” on their decisions).

The disregard for the state court’s invocation of a state procedural rule was particularly grievous because, as Mr. Tolle argued below, Oregon law does not permit ambiguous PCR opinions and requires a PCR opinion to explicitly state if it addressed a federal question. *See* Oregon Revised Statute § 138.640(1) *supra* at 3; C.A. Reply Br. at 5–8 (citing *Datt v. Hill*, 227 P.3d 714, 720–21 (Or. 2010) (explaining that Oregon’s Postconviction Hearing Act includes a requirement that the decision make clear whether a petition was denied for failing to comply with state procedure or for failure to prove the merits of a federal claim)).

Accordingly, the Court should grant certiorari to caution that, when a state court opinion includes a plain statement that a claim was denied on state procedural grounds, a federal court may not second-guess the state court’s rationale by looking elsewhere in the record. In the alternative, the Court should grant certiorari, summarily reverse the Ninth Circuit’s decision that the claim at issue was not defaulted at the initial stage of postconviction review, and remand to the Ninth Circuit for further proceedings.

Statement of the Case

- A. Mr. Tolle was tried for murder, arson, and burglary on a theory that he set fire to a trailer, killing the occupant. The jury could not reach a decision on the murder and arson charges but acquitted him of causing physical injury in the course of burglary.**

Benjamin Tolle was tried in Josephine County, Oregon on charges of aggravated murder, arson in the first degree, and burglary in the first degree. C.A. 2-ER-270–72. The prosecution alleged that he entered the trailer of Curtis Willie with the intent to commit theft, and while there started the fire that killed Willie. *Id.* The prosecution alleged a sentencing enhancement factor that Mr. Tolle caused physical injury in the course of burglary. C.A. 2-ER-271. The prosecutor urged the jury to find the factor if it believed that Mr. Tolle set the fire that caused Willie’s death. C.A. 4-ER-576. The jury convicted Mr. Tolle of burglary but answered “no” to the enhancement factor. C.A. 9-ER-1893. A poll of the jury showed that the necessary ten jurors agreed on that verdict.¹ C.A. 9-ER-1894–1901. As to the arson and aggravated murder charges, the jury was unable to reach a verdict, resulting in a mistrial. C.A. 9-ER-1906.

¹ At the time of Mr. Tolle’s trials, Oregon law only required the jury to reach a unanimous verdict on the Aggravated Murder charge. The other charges required ten jurors to agree. C.A. 8-ER-1853–54; see *Watkins v. Ackley*, 523 P.3d 86, 104–05 (Or. 2022) (Baldwin, J. concurring) (recounting the history of Oregon’s non-unanimous jury rule).

B. Mr. Tolle's counsel did not object to a second trial on double-jeopardy grounds and he was found guilty of felony murder and arson.

Mr. Tolle was retried by a jury on the aggravated murder and arson counts. C.A. 1-ER-37–38. Mr. Tolle's attorney did not challenge the trial on double jeopardy grounds. After fractious jury deliberations and an initial inconsistent verdict, the jury found Mr. Tolle guilty of arson and the lesser-included offense of felony murder. C.A. 12-ER-3010–24; 1-ER-37–38. Mr. Tolle was sentenced to life in prison. C.A. 2-ER-250–56.

C. In postconviction proceedings, Mr. Tolle raised a claim that trial counsel deficiently failed to challenge his second trial on double jeopardy grounds, but his attorney failed to attach supporting documents, resulting in dismissal on procedural grounds.

Mr. Tolle sought postconviction review. His appointed PCR counsel filed an amended petition raising two claims for relief, which were identified by the paragraph numbers which they appeared within the petition: 15a) trial counsel was ineffective for failing to challenge the prosecution on double jeopardy grounds; and 15b) trial counsel failed to present evidence that neighbor Daniel Chandler started the fire that killed Willie. C.A. 2-ER-277–280. The state moved for judgment on the pleadings, arguing that Mr. Tolle failed to support the allegations in the petition as required by Oregon Rule of Civil Procedure (ORCP) 21B and the Oregon Postconviction Hearing Act, (Oregon Revised

Statute (ORS) § 138.580). The state argued that because the first amended petition failed to assert “facts” or submit a “legal memorandum,” Mr. Tolle failed to show that he was *prima facie* entitled to relief. C.A. 2-ER-61. The state further argued that it was impossible to state facts or a legal basis supporting relief on claim 15a. The state argued that the postconviction statute required, without exception, the petitioner to “attach admissible, written papers—such as affidavits, court records, hearing transcripts, or other documents—that substantiate or corroborate the allegations that are necessary to his or her claims for relief.” C.A. 2-ER-68–72. In the prayer for relief in the motion, the warden asked that the allegations in paragraph 15 be dismissed because they were “unsupported by appropriate documentation” and thus failed to state a claim for relief. C.A. 2-ER-74.

The PCR attorney admitted that he failed to respond to the motion and did not find any basis to support the double-jeopardy-ineffectiveness claim. C.A. 13-ER-3191. He did not refer to the record from the first trial. *Id.* He resisted the dismissal of claim 15b, arguing that he had filed affidavits in support of that claim. C.A. 13-ER-3196–99. The state attorney explained that he had “brought this as a motion for judgment on the pleadings under OCRP 21B . . . [b]ut . . . it could also be analyzed under OCRP 47 as, essentially, a summary judgment motion.” C.A. 13-ER-3191. The state argued that the

petition needed to state some “ultimate facts” warranting relief or to “set forth, in some sort of memorandum, ... [the] reasonable argument” that should have been made in support of a motion for acquittal based on double jeopardy. C.A. 13-ER-3192.

The PCR trial court granted the state’s motion for judgment on the pleadings on both claims, stating on the record that the motion would be granted “for all the reasons cited by [the state]” and directed the state’s attorney to prepare the order. C.A. 13-ER-3202. That order dismissed claim 15a on the following grounds:

1. Under ORS 138.620, petitioner has the burden of proving his claims in ¶¶ 15a and 15b by a preponderance of evidence;
2. Petitioner did not allege any ultimate facts in the Formal Petition or the Amended Formal Petition demonstrating what reasonable argument petitioner’s criminal defense counsel could have made in support of moving to dismiss the Aggravated Murder and Arson I charges after the jury was unable to reach a verdict on those counts at petitioner’s first trial;
3. Petitioner did not submit any affidavit from petitioner’s post-conviction counsel, nor any memorandum of points and authorities, setting forth what reasonable argument petitioner’s criminal defense counsel could have made in support of moving to dismiss the Aggravated Murder and Arson I charges at petitioner’s first trial;
4. During the oral argument on defendant’s motion, petitioner indicated that despite diligent research, petitioner had been unable to find legal authority to oppose defendant’s arguments in support of dismissing the claim in ¶ 15a;

5. There is no genuine issue of material fact that petitioner has been unable to provide supporting documentation, as required by ORS 138.580, showing that petitioner has a *prima facie* entitlement to relief on the grounds alleged in ¶ 15a;
6. Because petitioner has failed to support his claim in ¶ 15a, even viewing the record before the Court in the manner most favorable to the petitioner, no objectively reasonable factfinder could find in petitioner's favor on the claim in ¶ 15a[.]

App. 32.

The PCR court also dismissed claim 15b, finding that the affidavits filed in support of that claim were not admissible and thus did not satisfy the attachment requirement. App. 33.

D. The Oregon Court of Appeals affirmed without opinion the PCR trial court's dismissal of the double-jeopardy-ineffectiveness claim.

Mr. Tolle appealed, arguing that sufficient facts were pleaded for the double-jeopardy-ineffectiveness claim (15a) to withstand dismissal. C.A. 2-ER-299–301. He also appealed the dismissal of 15b. C.A. 2-ER-301–07.

On appeal, the state characterized the motion before the PCR trial court as requesting judgment on the pleadings based on failure to abide by the attachment requirement. C.A. 2-ER-322. The state also argued that motion was essentially a summary judgment motion, which the appellate court “may” treat the same way. *Id.* The state also contended on appeal that although PCR counsel argued the claim below, he did so without legal support. C.A. 2-ER-

323. The state conceded that the postconviction court had erred in dismissing claim 15b. C.A. 2-ER-325.

The Oregon Court of Appeals reversed and remanded the case for further proceedings on claim 15b and otherwise affirmed the dismissal of the double-jeopardy-ineffectiveness claim. App. 29–30.

E. Mr. Tolle sought habeas relief on his double-jeopardy-ineffectiveness claim, and the district court found the claim inexcusably procedurally defaulted.

Mr. Tolle initiated federal habeas proceedings under 28 U.S.C. § 2254. He raised as ground one that his trial counsel was ineffective for failing to move to dismiss the charges of aggravated murder and arson on double jeopardy grounds. C.A. 3-ER-338–42. In the state’s initial response to the habeas petition, it characterized the dismissal of the first amended petition at the initial stage of PCR review as: “[t]he PCR court dismissed the petition for failure to meet the attachment requirement in Or. Rev. Stat. § 138.580.” C.A. 2-ER-234. After Mr. Tolle invoked the *Martinez* exception, the state contended for the first time that the PCR trial court decided the claim on the merits, that the Oregon Court of Appeals also decided the claim on the merits, and that Mr. Tolle procedurally defaulted the claim by not petitioning for review to the Oregon Supreme Court. C.A. 2-ER-53–55. The state argued that the only thing

necessary to satisfy the attachment requirement would have been the transcripts from the first trial. C.A. 2-ER-54.

The United States Magistrate Judge recommended denying the petition on grounds that the claim was defaulted for failing to seek a petition for review and thus was not eligible for the *Martinez* exception. App. 22–23. Mr. Tolle objected to the procedural default ruling. C.A. 1-ER-4. The District Court adopted the Magistrate Judge’s recommendation, finding that the double-jeopardy-ineffectiveness claim was argued and decided on the merits at the initial stage of PCR review, that it was defaulted on appeal, and was thus ineligible for the *Martinez* exception. App. 7–8. The district court granted a certificate of appealability on the question of whether the petitioner established cause and prejudice to excuse the default of the double-jeopardy-ineffectiveness claim. App. 12–13.

On appeal, Mr. Tolle argued that the PCR trial court clearly rested its opinion on the violation of a state procedural rule, thus making the claim eligible for the *Martinez* exception, and asked for remand to the district court to determine the remainder of the *Martinez* factors. C.A. Appellant Br. at 27–35, 39–49. In its responsive briefing, the state did not contest that the PCR trial court’s written opinion rested on procedural grounds but argued that the court incorporated by reference the merits arguments of the state’s attorney.

C.A. Appellee Br. at 7–9. In reply, Mr. Tolle pointed to the clear-statement rule within Oregon’s Postconviction Hearing Act, which was designed to aid a federal court’s review of judgments, and which prohibits incorporation by reference of a party’s arguments. C.A. Reply Br. at 5–6 (citing *Soderstrom v. Premo*, 360 P.3d 1272, 1275–76 (Or. Ct. App. 2015) (describing purpose of clear-statement rule) and *Asbill v. Angelozzi*, 365 P.3d 587, 590 n.1 (Or. Ct. App. 2015) (prohibiting incorporation by reference of a party’s arguments because “[a]rguments by lawyers are not rulings by courts”)).

The Ninth Circuit affirmed, holding that the state PCR trial court opinion was ambiguous because “the state urged the court to dismiss the claim under the summary judgment standard because Tolle did not provide adequate facts or evidence to support his double jeopardy theory,” and the PCR court “appeared to accept” this argument. App. 3. Despite the state PCR opinion invoking a violation of the attachment provision as the basis for the dismissal, and Oregon law requiring a clear statement for the reason of dismissing a postconviction petition, the panel applied the *Harris v. Reed*, 489 U.S. 255, 263 (1989), presumption that a state court adjudication rests on federal law grounds absent a plain statement that a decision is based on a procedural ground. App. 3.

Mr. Tolle sought panel and en banc rehearing, which was denied. App.

28.

Reasons for Granting the Petition

- I. This Court should grant certiorari to clarify that a federal court inquiry into whether the state court reached the merits of a federal claim should stop when the state court opinion includes a plain statement that it rested on state procedural grounds.**

In *Michigan v. Long*, this Court held that a federal court may review the judgment of a state court “when it is not clear *from the opinion itself* that the state court relied upon an adequate and independent state ground and when it fairly appears that the state court rested its decision primarily on federal law.” 463 U.S. at 1042 (emphasis added). The Court held that a federal court had jurisdiction to review a claim “in the absence of a plain statement that the decision below rested on an adequate and independent state ground.” *Id.* at 1044.

Likewise, this Court held that a clear invocation of an adequate and independent state ground will bar federal habeas review, absent a showing of cause and prejudice. *Wainwright v. Sykes*, 433 U.S. 72, 81, 87 (1977); *Coleman*, 501 U.S. at 737–38. This rule applies when “the last state court rendering a judgment in the case ‘clearly and expressly’ states that its judgment rests on a state procedural bar.” *Harris*, 489 U.S. at 263. When the last court to review

the claim did so in an unexplained decision, a federal court presumes that the opinion rested on the same ground as the last reasoned opinion. *Wilson v. Sellers*, 584 U.S. 122, 132 (2018). Overcoming this presumption requires “strong evidence that one of the subsequent courts reached the merits of the federal claim.” *Ylst v. Nunnemaker*, 501 U.S. 797, 806 (1991).

The panel decision sidestepped these limitations by disregarding the plain, written invocation of a procedural rule (Or. Rev. Stat. § 138.580) and finding ambiguity based on the panel’s perception of how the state court judge received merits arguments, even though the merits rationale did not appear in the state court’s written opinion.

As this Court has recognized, “[o]pinion-writing practices in state courts are influenced by considerations other than avoiding scrutiny by collateral attack in federal court.” *Richter*, 562 U.S. 86, 100 (2011). But Oregon drafted its Postconviction Hearing Act in order “to produce judgments that will be easily understood by a federal court reviewing the judgment under 28 USC section 2254.” *Soderstrom*, 360 P.3d at 1275–76 (citing *Datt*, 227 P.3d at 722–23). The Act “imposes a clear-statement rule on judgments in post-conviction proceedings,” requiring the judgment to “clearly state the grounds on which the cause was determined” by (1) identifying the claims for relief that the court considered and making separate rulings on each claim; (2) declaring whether

each claim was denied on procedural or merits grounds, and (3) making apparent the legal bases for denial. *Id.* at 1273 (citing *Datt*, 227 P.3d at 722). Oregon’s clear statement rule and opinions interpreting it require a court to explicitly state that it reached the merits of the claim, and to explain “the particular elements that the court found were not met,” a task that Oregon courts have held may not be accomplished by referencing arguments by lawyers. *Soderstrom*, 360 P.3d at 1274–75. The PCR opinion here expressly relied on the failure to support the claim as required by state procedure and did not address the ineffective assistance of counsel or double-jeopardy standards, nor did it, as required by Oregon’s clear-statement rule, state that it decided an issue of federal law.

The Ninth Circuit decision characterizes the PCR trial opinion as ambiguous, despite that opinion clearly invoking a violation of a state procedural rule and in full awareness of Oregon law which prohibits ambiguous opinions. The Ninth Circuit’s opinion departed so dramatically from this Court’s precedent and disregarded state precedent, that this is the rare case where certiorari would benefit the petitioner, while also having broad implications for ensuring respect for state procedure. Absent this Court’s intervention, the Ninth Circuit’s interpretation of *Harris* imposes a burden on state courts to not just plainly state that they are relying on a state procedural

rule, but if a party has argued a federal basis, to include in their written opinion that they are *not* ruling on the merits or on an issue of federal law. This Court has attempted to craft its habeas jurisprudence to avoid burdening the state courts in this way. The Court should grant certiorari to police this boundary.

II. Summary reversal is warranted because the opinion below ignored this Court’s precedent and Oregon law by reading a merits rationale into a state court decision that clearly rested on procedural grounds, denying Mr. Tolle of merits review of his substantial claim.

Ineffective assistance of PCR counsel, and the panel’s misattribution of a merits decision to the PCR trial opinion, means no court has given de novo merits review to Mr. Tolle’s double-jeopardy-ineffectiveness claim. *Martinez* is predicated on the idea that “[t]he right to effective assistance of counsel at trial is a bedrock principle of our justice system,” and that “without [PCR] counsel or with ineffective [PCR] counsel” a “substantial claim” of ineffective assistance of trial counsel may not receive sufficient consideration. *Martinez*, 566 U.S. at 12–14. The double-jeopardy-ineffectiveness claim did not receive merits consideration by the state court because the PCR attorney failed to follow state procedure and attach supporting documentation to the petition. If the Court finds that full review is unnecessary, it should summarily reverse the Ninth Circuit’s holding that the claim was procedurally defaulted at a stage not

eligible for the *Martinez* exception and remand the case for the lower courts to determine whether the claim qualifies for the exception.

On remand, there is ample reason for a court to find that the default was caused by the PCR attorney's unreasonable performance, and that the underlying claim is substantial. As already discussed, the PCR trial court dismissed the claim, finding that the PCR lawyer failed to satisfy the state law attachment requirement. A minimally competent PCR attorney would have attached documents supporting the claim, both to satisfy the rule and to substantiate the claim.

This is not a claim that requires extra-record facts. A court considering collateral estoppel in an individual case must "examine the record of a prior proceeding . . . and conclude whether a rational jury could have grounded its verdict upon an issue other than that which the defendant seeks to foreclose from consideration." *Currier v. Virginia*, 585 U.S. 498, 500 (2018) (quoting *Yaeger v. United States*, 557 U.S. 110, 127 (2009)). Yet, Mr. Tolle's PCR counsel did not take the basic step of transcribing and attaching the first trial to the amended PCR petition.

Had he done so, he would have argued that trial counsel should have objected to the second trial on double-jeopardy grounds. At the time of Mr. Tolle's trial, Oregon courts interpreted enhancement factors as "part and

parcel of a jury trial” and “similarly to a jury’s decision to acquit or convict,” to which “the constitutional principles of former and double jeopardy” apply. *State v. Sawatzky*, 125 P.3d 722, 726 (Or. 2005). The first jury answered the enhancement factor in the negative, acquitting Mr. Tolle of causing physical injury in the course of the burglary.

When a jury “necessarily decided [an] issue in [the defendant’s] favor,” he is protected “from prosecution for any charge for which that is an essential element.” *Yeager*, 557 U.S. at 123. The indictment on the murder charge alleged that Mr. Tolle “personally and intentionally caused the death of Curtis Willie.” C.A. 2-ER-270. The second jury acquitted Mr. Tolle of aggravated murder but found him guilty of felony murder. C.A. 1-ER-37. The jury was instructed that to sustain that verdict they had to find that “[i]n the course of and in furtherance of the crime of arson in the first degree . . . Benjamin Tolle caused the death of Curtis Willie who was not a participant in the crime.” C.A. 12-ER-2994–95.

A reasonable attorney would have argued that the prosecution’s framing of the burglary enhancement factor meant that the jury’s rejection of that factor amounted to a finding that Mr. Tolle did not set the fire that killed Willie. The prosecution theory at the first trial was that Willie’s death *was* the physical injury that established the enhancement factor for the burglary

charge. As the prosecutor told the jury in opening statement at the first trial: “he caused physical injury. He did more than that. He caused the death of Curtis Willie.” C.A. 4-ER-576. And in closing, the prosecutor argued that the question of physical injury was co-extensive with the murder charge:

Did Benjamin Tolle cause physical injury to Curtis Willie during the commission of the burglary in the first degree? If you find that he committed arson, you found that he did aggravated murder, your answer is going to be flat out yes on this. Again, here he murdered him. A lot worse than physical injury.

C.A. 8-ER-1772. Reasonable PCR counsel would have attached these transcripts and argued that the jury’s rejection of the enhancement factor precluded the second trial on double jeopardy grounds.

PCR counsel’s cursory treatment of this claim was unreasonable, and on remand, a lower court will likely find the claim was substantial, and that Mr. Tolle was prejudiced by his PCR counsel’s failure to point to evidence in the record supporting the claim.

Conclusion

For the foregoing reasons, the Court should issue a writ of certiorari.

Dated this 28th day of July, 2026.



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