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U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

BENJAMIN ALLEN TOLLE, Petitioner - Appellant, v. TROY BOWSER, Respondent - Appellee.	No. 24-5862 D.C. No. 2:18-cv-01996-YY MEMORANDUM*

Appeal from the United States District Court
for the District of Oregon
Adrienne C. Nelson, District Judge, Presiding

Argued and Submitted February 5, 2026
Portland, Oregon

Before: BEA, CHRISTEN, and DESAI, Circuit Judges.

Benjamin Tolle ("Tolle") appeals the district court's denial of his petition for a writ of habeas corpus under 28 U.S.C. § 2254. Tolle was prosecuted for burglary, arson, and murder in Oregon state court. After his first trial, he was found guilty of burglary, but the jury could not reach a verdict on the other two charges. After a second trial, he was found guilty of arson and felony murder. In the instant habeas

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

petition, Tolle argues that his trial counsel was ineffective for failing to argue that the second trial was barred by double jeopardy. The district court held that Tolle's claim is procedurally defaulted because the Oregon post-conviction relief ("PCR") trial court denied it on the merits, the Oregon Court of Appeals affirmed, and Tolle's counsel failed to appeal to the Oregon Supreme Court.

We have jurisdiction under 28 U.S.C. §§ 1291, 2253. We review the denial of a habeas petition de novo. *Stanley v. Schriro*, 598 F.3d 612, 617 (9th Cir. 2010). We affirm.

A federal habeas petitioner must show that he provided "the state courts one full opportunity to resolve any constitutional issues by invoking one complete round of the State's established appellate review process." *O'Sullivan v. Boerckel*, 526 U.S. 838, 845 (1999). Failure to do so results in procedural default, and a petitioner must demonstrate cause and prejudice to overcome the default. *Gray v. Netherland*, 518 U.S. 152, 162 (1996). Tolle asserts that he can satisfy the cause requirement here under *Martinez v. Ryan*, because ineffective assistance of PCR trial counsel caused the procedural default at the initial stage of state collateral review. *See* 566 U.S. 1, 9 (2012). But a petitioner cannot establish cause under *Martinez v. Ryan* if his "claims . . . were not procedurally defaulted, but were, rather, adjudicated on the merits in state court." *See Detrich v. Ryan*, 740 F.3d 1237, 1246 (9th Cir. 2013) (en banc), *overruled in part on other grounds by Shinn v. Ramirez*, 596 U.S. 366 (2022).

The basis for the PCR trial court's order dismissing Tolle's state PCR petition is ambiguous. We thus construe it as a decision on the merits of Tolle's claim. *See Harris v. Reed*, 489 U.S. 255, 263 (1989). While the order references Oregon's rule requiring a petitioner to attach evidence to his petition that demonstrates a prima facie claim for relief, Or. Rev. Stat. § 138.580, it does not clearly embrace this ground as the basis for its decision. And 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, an argument that the PCR trial court appeared to accept. We thus conclude that the "state court decision fairly appears to rest primarily on federal law, or to be interwoven with . . . federal law."[1] *Caldwell v. Mississippi*, 472 U.S. 320, 327 (1985).

The Oregon Court of Appeals dismissed Tolle's claim without opinion, and we thus assume its dismissal rested on the same grounds as the last reasoned state court decision. *See Ylst v. Nunnemaker*, 501 U.S. 797, 803 (1991) ("Where there has been one reasoned state judgment rejecting a federal claim, later unexplained orders upholding that judgment or rejecting the same claim rest upon the same ground.").

[1] We decline to apply judicial estoppel to bind the state to its purported assertions that the claim was procedurally defaulted at the initial stage of PCR review. This argument rests on the conclusion that the state's arguments before the PCR trial court and the PCR trial court's ruling were purely procedural. Because we conclude the state's arguments and the PCR trial court's ruling were merits-based, we reject Tolle's judicial estoppel argument.

Tolle did not appeal to the Oregon Supreme Court, and his failure to do so procedurally defaulted the claim. *See Robinson v. Schriro*, 595 F.3d 1086, 1100 (9th Cir. 2010). Because Tolle does not show cause to excuse his procedural default, the district court properly denied his habeas petition. *Martinez*, 566 U.S. at 9; *Detrich*, 740 F.3d at 1246.

AFFIRMED.

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

BENJAMIN ALLEN TOLLE,

Petitioner,

v.

TROY BOWSER,

Respondent.

Case No.: 2:18-cv-01996-YY

OPINION AND ORDER

Adrienne Nelson, District Judge

United States Magistrate Judge Youlee Yim You issued Findings and Recommendation ("F&R"), ECF [95], in this case on September 21, 2023, in which she recommended that petitioner's Petition for Writ of Habeas Corpus, ECF [2], be denied. Petitioner timely filed objections to the F&R. This matter is now before the Court pursuant to 28 U.S.C. § 636(b)(1)(B) and Federal Rule of Civil Procedure 72(b).

A district court judge may "accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate judge." 28 U.S.C. § 636(b)(1). If any party files objections to a magistrate judge's proposed findings and recommendations, "the court shall make a de novo determination of those portions of the report." *Id.* No standard of review is prescribed for the portions of the report for which no objections are filed, and no review is required in the absence of objections. *Thomas v. Arn*, 474 U.S. 140, 152-54 (1985). A district court judge is not, however, precluded from *sua sponte* review of other portions of the report, under a *de novo* standard or otherwise. *Id.* at 154. The Advisory Committee notes to Federal Rule of Civil Procedure 72(b) recommend that, when no objection is filed, the recommendations be reviewed for "clear error on the face of the record." Fed. R. Civ. P. 72(b) advisory committee's note to 1983 amendment.

DISCUSSION

Petitioner makes three objections to the F&R: (1) it improperly finds procedural default on his first ground for relief; (2) it improperly finds procedural default on his second ground for relief; and (3) it improperly recommends that this Court should decline to issue a certificate of appealability. These objections are addressed in turn.

A. Ground One

1. *Procedural Default*

Petitioner objects to the F&R's finding that there is no cause and prejudice for the procedural default of the claim that counsel was ineffective for failing to move to dismiss the murder charge on the ground of double jeopardy. Pet'r Objs. to F&R ("Pet'r Objs."), ECF [107], at 2. Petitioner argues that cause and prejudice are present under *Martinez v. Ryan*, 566 U.S. 1 (2012), because post-conviction relief ("PCR") trial counsel effectively abandoned petitioner's double jeopardy claim during the PCR hearing. *Id.* at 14.

Generally, when a petitioner brings a claim before a federal habeas court that he did not raise before the appropriate state courts, that claim is procedurally defaulted. *Casey v. Moore*, 386 F.3d 896, 915-16 (9th Cir. 2004). That is true even where the petitioner's failure to raise a claim before the appropriate state courts is the result of ineffective assistance of counsel during initial-review collateral proceedings in state court. *Maples v. Thomas*, 565 U.S. 266, 280-81 (2012) (discussing *Coleman v. Thompson*, 501 U.S. 722 (1991)). A petitioner's claim of ineffective assistance of counsel during trial is not procedurally defaulted, however, if state law does not permit a defendant to raise ineffective assistance of counsel on direct appeal,[1] and petitioner's failure to raise ineffective assistance of trial counsel during his initial-review collateral proceeding was the result of ineffective assistance of counsel during petitioner's initial-review collateral proceeding. *Martinez*, 566 U.S. at 8-9. This exception—based on principles of equity, *id.* at 16—is "necessary to ensure that a meritorious trial error . . . receives review." *Davila v. Davis*,

[1] Oregon law does not permit defendants to bring ineffective assistance of counsel claims on direct appeal. *State v. Robinson*, 25 Or. App. 675, 675 (1976).

582 U.S. 521, 530 (2017).

Petitioner's double jeopardy claim was raised and adequately plead before the PCR trial court. Resp't Exs., ECF [17], Ex. 125, at 2. At the PCR hearing on the state's motion for judgment on the pleadings, however, PCR trial counsel informed the PCR court:

> "I would agree, for the most part, with [respondent's] position on one of the claims, the one relating to the judgment of acquittal. I have done some research on the matter and can't find anything in – contrary to what [the state] says in [its motion]."

Id., Ex. 124, at 11:12-17. Petitioner argues that PCR trial counsel's agreement with respondent's legal position—that the claim be denied—constituted abandonment of the claim. Pet'r Objs. 3. Because of PCR trial counsel's abandonment, petitioner argues that no meaningful postconviction adjudication took place on this specific issue, resulting in an inadequate record for meaningful appellate review. *Id.* at 4-5.

To the contrary, the claim was raised in petitioner's PCR petition, and after PCR trial counsel's alleged "abandonment," counsel still argued the claim at the PCR hearing. Resp't Exs., Ex. 124, at 9-8. Indeed, PCR trial counsel stated:

> "There were some aggravating factors charged with the Burglary and the jury actually found that those aggravating factors were not met in relationship to [petitioner]. [ ] [I]t's [petitioner's] position that because those aggravating factors were not found, namely that [petitioner] had caused physical injury to [the victim] during the course of the burglary, which was not contested seriously, that he could not have been found guilty of the Aggravated Murder."

Id. at 16:10-21. (cleaned up). Because the PCR trial court was apprised of the legal question and the relevant authority provided by the state, *see* Pet'r Exs., ECF [81], Ex. A, at 4-7, and reached a decision on the merits,[2] the narrow exception provided in *Martinez* does not apply. *See Sandgathe v. Maass*, 314 F.3d 371, 376-77 (9th Cir. 2002) ("[T]here is no point in asking whether a state court had a full and fair opportunity to resolve

[2] The PCR trial court found that "[p]etitioner did not allege any ultimate facts . . . 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" and "[b]ecause petitioner has failed to support his claim . . . even viewing the record before the Court in the manner most favorable to petitioner, no objectively reasonable factfinder could find in petitioner's favor on the claim." Resp't Exs., Ex. 125, at 2, ¶¶ 2, 6.

federal constitutional claims when the state court in fact did so." (Internal quotation marks and citation omitted.)).

Moreover, on appeal, petitioner once again brought the double-jeopardy issue, which the state responded to on the merits. Resp't Exs., Ex. 126, at 18-20; *id.*, Ex. 127, at 6-9. The Oregon Court of Appeals issued a written opinion granting relief on another claim but affirmed the dismissal of the double jeopardy claim without discussion. *Tolle v. Franke*, 261 Or. App. 639, 640, 322 P.3d 571 (2014). While there is a world in which the Oregon Court of Appeals' silent decision was based on an inadequate record preventing meaningful appellate review due to the alleged "abandonment," that is not the case here. The record shows that petitioner plainly presented the issue to the PCR trial court and that the state responded on the merits. The Oregon Court of Appeals' silence, therefore, can only be considered a decision on the merits. *See Harrington v. Richter*, 562 U.S. 86, 99 (2011) ("When a federal claim has been presented to a state court and the state court has denied relief, it may be presumed that the state court adjudicated the claim on the merits in the absence of any indication or state-law procedural principles to the contrary."). The real point in the PCR proceeding where the procedural default occurred, and where the issue lies for petitioner, was petitioner's failure to seek further review of the claim in the Oregon Supreme Court. Consequently, petitioner cannot excuse his procedural default of this claim under *Martinez.*

2. *Double Jeopardy*

Even assuming petitioner could excuse his procedural default, he would still be unable to prevail in this case. The Fifth Amendment's Double Jeopardy Clause provides that no person shall be "subject for the same offence to be twice put in jeopardy of life or limb . . . ." U.S. Const. amend. V. This protection is made applicable to the states through the Fourteenth Amendment. *Benton v. Maryland*, 395 U.S. 784, 794 (1969). The Double Jeopardy Clause "protects against successive prosecutions for the same offense after acquittal or conviction and against multiple criminal punishments for the same offense." *Monge v. California*, 524 U.S. 721, 727-28 (1998); *United States v. Ursery*, 518 U.S. 267, 273 (1996).

The rule of collateral estoppel is "embodied in the Fifth Amendment guarantee against double jeopardy." *Ashe v. Swenson*, 397 U.S. 436, 445 (1970); *see Harris v. Washington*, 404 U.S. 55, 56

(1971) ("[C]ollateral estoppel in criminal trials is an integral part of the protection against double jeopardy guaranteed by the Fifth and Fourteenth Amendments."). Collateral estoppel "means simply that when an issue of ultimate fact has once been determined by a valid and final judgment, that issue cannot again be litigated between the same parties in any future lawsuit." *Ashe*, 397 U.S. at 443. To determine whether issue preclusion applies, courts "examine the record of a prior proceeding, taking into account the pleadings, evidence, charge, and other relevant matter, 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." *Id.* at 444 (footnote and internal quotation marks omitted).

The defendant bears the burden of demonstrating that the issue was actually decided in the first proceeding. *Dowling v. United States*, 493 U.S. 342, 350 (1990). "If there is more than one rational conclusion that can be drawn from the first jury's verdict, then collateral estoppel cannot apply because the issue was not necessarily decided by the jury's verdict." *Sivak v. Hardison*, 658 F.3d 898, 919 (9th Cir. 2011) (citation and internal quotation marks omitted). "The failure to return a verdict does not have collateral estoppel effect, however, unless the record establishes that the issue was actually and necessarily decided in the defendant's favor." *Schiro v. Farley*, 510 U.S. 222, 236 (1994).

In petitioner's first trial, the jury convicted him of burglary without the enhancement factor of causing physical injury to the victim and hung on the charges of aggravated murder and arson. Pet'r Br. in Supp. of Habeas Pet. ("Pet'r Br."), ECF [75], at 1. The state's theory was that the subject injury was the death of the victim as a result of the burglary and arson. *Id.* at 1-2. The state retried petitioner on aggravated murder and arson charges and he was convicted of arson and the lesser-included offense of felony murder. *Id.* at 2.

Petitioner argues that, in the first trial, because the jury "necessarily decided" that petitioner did not cause physical injury to the victim on the burglary enhancement charge, the jury acquitted petitioner of the murder charge. In support, petitioner points to the prosecution's closing argument in which it argued to the jury on the enhancement charge:

> "Did [petitioner] cause physical injury to [the victim] during the commission of 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."

Pet's Exs., Ex. B, 1243:17-23. It follows, petitioner argues, that because the only physical injury asserted by the state was the death of the victim, and the jury found that petitioner did not cause physical injury to the victim, the issue of whether petitioner caused the death of the victim was estopped from being brought in the second trial.

Respondent, however, argues that, on the enhancement charge, the jury was instructed that it could return a finding of "yes" only if at least ten of the same jurors who found him guilty of burglary agreed that the state proved that petitioner caused physical injury to the victim. Resp't Reply to Pet'r Br. in Supp. of Habeas Pet. ("Resp't Reply"), ECF [85], at 9. The jury, however, did not need to agree that the state failed to prove that petitioner caused physical injury to the victim to answer "no." In turn, the jury's finding on the enhancement fact could rationally have been based on a vote that would not supply a valid verdict on the counts of arson and aggravated murder, and thus the enhancement fact verdict is not equivalent to an acquittal. *Id.*

Petitioner, however, argues that the trial court record indicates a *de facto* acquittal of the subject enhancement fact. Pet'r Sur-Reply, ECF [88], at 10. At the first trial, the judge conducted a poll of eleven jurors on their guilty burglary verdict and on both of their enhancement factor votes. *Id.* Of the eleven jurors who voted to convict petitioner of burglary, nine of those jurors voted "no" on the enhancement factor involving physical injury. *Id.* (citing Pet'r Exs., Ex. B, at 1373-81). Petitioner argues that "presumably, the one juror who was not polled voted to acquit [petitioner] of burglary." *Id.* at 10-11.

The Court is not convinced the record establishes that the issue was actually and necessarily decided in petitioner's favor. The jury was asked whether petitioner caused physical injury to the victim during the commission of the burglary. Resp't Exs., Ex. 114, at 1-2. The indictment alleged that petitioner committed the burglary with the intent to commit theft—not arson, assault, or homicide–within the victim's dwelling. *Id.*, Ex. 102, at 2. The evidence presented at trial supported an inference that petitioner made multiple trips between the victim's dwelling and car to transport various items he was stealing. Pet'r Exs., Ex. A, at 23, 25, 28, 66-82; Ex. B., 1243:1-10. The only apparent injury to the victim in this case was smoke inhalation caused by the fire, resulting in the victim's death.

Given this evidence, a rational jury could have found that the fire and the victim's death occurred after the burglary was complete, and, therefore, could have answered the enhancement fact in the negative without necessarily deciding that petitioner never caused physical injury to the victim that night. Moreover, the fact that the jury hung on the arson charge supports the inference that the jury did not affirmatively decide whether petitioner caused the fire, and ultimately whether he caused the victim's death. Consequently, because the Court draws more than one rational conclusion from the first jury's verdict, the Court cannot find that the issue was necessarily decided by the jury's verdict.

Accordingly, even if the procedural posture of this case permitted the Court to decide the action on its merits, the PCR court's decision is neither contrary to, nor an unreasonable application of, clearly established federal law.

B. Ground Two

Petitioner objects to the F&R's finding that his second ground for relief is procedurally defaulted, and that relief should, therefore, be denied. Pet'r Objs. 5-6. On this ground, petitioner argues that trial counsel was ineffective in failing to include the juror intimidation issue in their written motions for authorization to question jurors and motion for a new trial. Petitioner, however, failed to properly bring that claim before the PCR trial court, which resulted in a denial of that claim. *See* F&R 11-13. While petitioner acknowledges that he failed to properly bring this claim before the PCR trial court, he argues that the issue is not procedurally defaulted because it was also resolved on the merits.

Petitioner is misguided. The PCR trial court specifically concluded that "[p]etitioner attempts to argue other matters in his trial memo but [p]etitioner's claims are limited to those plead in his Petition." Resp't Exs., Ex. 154, at 3. Because the PCR trial court concluded that the claim was not properly before the court, it applied a procedural bar that was independent of the federal question and adequate to support its judgment. Thus, the PCR trial court's alternative finding on the merits does not save petitioner from procedural default. *See Harris v. Reed*, 489 U.S. 255, 264 n.10 (1989) ("[A] state court need not fear reaching the merits of a federal claim in an *alternative* holding. By its very definition, the adequate and independent state ground doctrine requires the federal court to honor a state holding that is a sufficient basis for the state court's judgment, even when the state court also relies on federal law." (Emphasis in original.)).

C. Certificate of Appealability

Finally, petitioner objects to Judge You's recommendation that this Court decline to issue a Certificate of Appealability ("COA"). Pet'r Objs. 6-7. A COA should be issued when "jurists of reason" would find it "debatable" that a petition states a "valid claim of the denial of a constitutional right." *Martinez v. Shinn*, 33 F.4th 1254, 1261 (9th Cir. 2022), *cert. denied*, 143 S. Ct. 584 (2023); *see Slack v. McDaniel*, 529 U.S. 473, 478 (2000) ("[W]hen the district court denies a habeas petition on procedural grounds without reaching the prisoner's underlying constitutional claim, a COA should issue . . . if the prisoner shows, at least, 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."). The petitioner must show that "'the issues are debatable among jurists of reason; that a court could resolve the issues in a different manner; *or* that the questions are adequate to deserve encouragement to proceed further.'" *Martinez*, 33 F.4th at 1261 (quoting *Lambright v. Stewart*, 220 F.3d 1022, 1025 (9th Cir. 2000)) (emphasis in original).

Jurist of reason could find debatable the Court's ruling that petitioner did not establish cause and prejudice to excuse default under *Martinez* as to his first ground for relief. Accordingly, the Court grants petitioner's request for a COA on this issue. For petitioner's second ground for relief, the Court declines to issue a COA for the reasons set forth in the instant order.

CONCLUSION

For the foregoing reasons, the Court ADOPTS Judge You's Findings and Recommendation, ECF [95], in part, but declines to adopt the recommendation that this Court not issue a Certificate of Appealability on petitioner's first ground for relief. Accordingly, petitioner's Petition for Writ of Habeas Corpus, ECF [2], is DENIED and this case is dismissed. The Court issues a Certificate of

Appealability on petitioner's first ground for relief.

IT IS SO ORDERED.

DATED this 20th day of August, 2024.

Adrienne Nelson
____
Adrienne Nelson
United States District Judge

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

PENDLETON DIVISION

BENJAMIN ALLEN TOLLE,

Plaintiff,

v.

TROY BOWSER,

Respondent.

Case No. 2:18-cv-01996-YY

FINDINGS AND RECOMMENDATION

YOU, Magistrate Judge.

FINDINGS

Petitioner, an adult in the custody of the Oregon Department of Corrections, brings this habeas corpus action pursuant to 28 U.S.C. § 2254. For the reasons that follow, the Petition for Writ of Habeas Corpus should be DENIED.

I. Background

On April 28, 2006, a Josephine County grand jury indicted Petitioner on charges of aggravated murder (committed personally and intentionally in the course of and in furtherance of arson), arson in the first degree, burglary in the first degree, unauthorized use of a vehicle, and unlawful possession of methamphetamine. Respondent's Exhibit ("Resp. Exh.) 102, ECF No. 17. Petitioner and the victim, Curtis Dylan Willie, were both engaged in romantic relationships with the same woman, and disliked each other. Petitioner and Willie ran into each other at a bar, where Willie made rude comments to Petitioner. A few hours later, Willie's trailer was destroyed by a fire and he died from smoke inhalation. Petitioner was found by police the next day in Willie's car on the side of a road some distance away, and he initially claimed to have no idea how he ended up there. Petitioner later admitted to breaking into Willie's trailer and taking various items and the keys to Willie's car, but he denied having anything to do with the fire or with Willie's death.

Petitioner pleaded guilty to the charges of unauthorized use of a vehicle and unlawful possession of methamphetamine, and proceeded to a jury trial in 2007 on the remaining three charges. The jury found Petitioner guilty of burglary, but was unable to reach a verdict on the counts of aggravated murder and arson, and the trial court declared a mistrial on those counts. As to the burglary charge, the indictment included a sentence enhancement allegation that "in the commission of" the burglary, Petitioner "caused physical injury to the victim." Resp. Exh. 102, p. 2. The jury's verdict form included the question, "Did [Petitioner] cause physical injury to Curtis Willie during the commission of the above Burglary in the First Degree?" Resp. Exh. 114, p. 1. The jury acquitted Petitioner on the sentence enhancement allegation. *Id.*

In June of 2008, Petitioner was retried before a new jury on the charges of aggravated murder and arson in the first degree. At the end of the second trial, the jury initially returned inconsistent verdicts. The jury unanimously found Petitioner not guilty of aggravated murder and unanimously found him guilty of the lesser-included charge of felony murder, but returned a non-unanimous verdict of guilty on the charge of arson in the first degree. Because the only predicate felony presented to the jury in the instruction for felony murder was arson, it was not possible as a matter of law for a juror to find petitioner to be both guilty of felony murder and not guilty of arson. The trial judge explained the problem with the verdicts to the jurors and sent them back for further deliberations. The jury then returned a unanimous verdict of guilty on both felony murder and arson in the first degree.

The evening after the verdict was entered, one of the jurors encountered the defense attorneys at a restaurant and spoke to them about the case. Following the encounter, defense counsel moved to question the jurors, arguing that statements made by the juror to them "involve[d] potential jury misconduct during the jury selection process and deliberation." Resp. Exh. 104, pp. 43-45. Following a hearing on the motion, the trial court denied the motion. Tr. 1318.

At the sentencing hearing about a week later, the prosecutor informed the court and defense counsel that the same juror who was the subject of the prior motion had contact with a detective who had been involved in Petitioner's case. The purpose of the contact was to report vandalism at the juror's place of business, but she also discussed Petitioner's case with the detective. Defense counsel filed a motion for new trial that same day, alleging that information "revealed possible jury misconduct during the deliberation process." Resp. Exh. 104, p. 58. After receiving and reviewing the recording of the detective's conversation with the juror, defense counsel subsequently filed an amended motion adding an argument of "possible misconduct on the part of the prosecution following the reading of the verdict." Resp. Exh. 104, p. 61. The trial court conducted a hearing, and denied Petitioner's request for a new trial. Resp. Exh. 104, p. 68. The trial court ultimately sentenced Petitioner on the murder charge to life imprisonment with the possibility of parole after 25 years, merged the arson conviction with the murder conviction, and otherwise imposed concurrent sentences. Resp. Exh. 101, pp. 3-9.

Petitioner filed a direct appeal, assigning error to the trial court's denial of his motions to question jurors and for a new trial. Resp. Exh. 104. The Oregon Court of Appeals affirmed without opinion, and the Oregon Supreme Court denied review. *State v. Tolle*, 236 Or. App. 269, *rev. denied*, 349 Or. 246 (2010).

Petitioner then sought state post-conviction relief ("PCR"). Petitioner, who was represented by counsel, alleged that trial counsel was ineffective in failing to move to dismiss the murder and arson charges on double jeopardy grounds under the Fifth Amendment and in failing to introduce evidence in the second trial suggesting that another person had a motive to commit the crimes, and that appellate counsel was ineffective in failing to raise the double jeopardy issue. Resp. Exh. 122. The PCR trial court dismissed the petition on the state's motion for judgment on the pleadings under Or. Rev. Stat. § 138.580. On appeal, the state conceded that petitioner had satisfied the attachment requirement of § 138.580, at least as to his claim that trial counsel was ineffective in failing to call certain witnesses. Resp. Exh. 127. The Oregon Court of Appeals agreed, and the Oregon Court of Appeals issued the following per curiam opinion:

> Petitioner appeals a judgment dismissing his amended petition for post-conviction relief. We write only to address petitioner's contention that the court erred in dismissing his claim that trial counsel was inadequate for failing to call certain witnesses and reject his remaining contentions without discussion. Petitioner assigns error to the post-conviction court's dismissal of that claim because petitioner failed to attach "[a]ffidavits, records or other documentary evidence supporting the allegations of the petition[,]" as required by ORS 138.580. The state concedes that the attached documentation satisfied the requirements of ORS 138.580, as explained in *Ogle v. Nooth*, 254 Or. App. 665, 298 P.3d 32, *rev. allowed*, 353 Or. 747, 304 P.3d 38 (2013). Having reviewed the petition, we agree with the state and accept its concession that the claim should not have been dismissed on grounds that petitioner failed to attach sufficient documentation to the petition.
>
> Reversed and remanded for further proceedings on petitioner's claim that he was denied adequate assistance of trial counsel because of the failure to call certain witnesses, otherwise affirmed.

Tolle v. Franke, 261 Or. App. 639 (2014). Petitioner did not seek review from the Oregon Supreme Court.

On remand, Petitioner filed an amended PCR petition alleging that trial counsel was ineffective in failing to: (1) timely raise the motion for new trial; (2) preserve the argument that the trial court abused its discretion in denying the motion for new trial; (3) object to the trial court's instruction to the jury in the second trial to deliberate further following its inconsistent verdict; (4) request instructions on the lesser included offenses of second-degree manslaughter and criminally negligent homicide; (5) ask specific questions in cross-examining one of the state's witnesses; (6) investigate and present evidence that another person was responsible for the murder; and (7) argue in closing that certain testimony was inconsistent with the timeline established at trial. Resp. Exh. 130. Following an evidentiary hearing, the PCR trial court denied relief in a written decision. Resp. Exh. 155. On appeal, Petitioner assigned error only to the denial of his claim that trial counsel was ineffective in failing to timely raise the motion for new trial. Resp. Exh. 156. The Oregon Court of Appeals affirmed without opinion, and the Oregon Supreme Court denied review. *Tolle v. Franke*, 290 Or. App. 720, *rev. denied*, 363 Or. 119 (2018).

Petitioner then filed his Petition for Writ of Habeas Corpus pursuant to 28 U.S.C. § 2254 in this court. In his Petition, he alleges seven claims for relief:

> **Ground One:** Trial counsel was ineffective in failing to move to dismiss the charges of aggravated murder and arson after the first trial on the ground of double jeopardy.
>
> **Ground Two:** Trial counsel was ineffective in failing to argue in the motions to question jurors and for new trial that some jurors intimidated and threw things at jurors who were holding out for an acquittal.
>
> **Ground Three:** The court instructing the jury to continue deliberating was "judicial misconduct" in light of the juror intimidation that had also taken place, and trial counsel was ineffective in failing to object to that instruction.

> **Ground Four:** Given the juror who contacted trial counsel and the deputy's statements, the evidence was insufficient to find petitioner guilty beyond a reasonable doubt.
>
> **Ground Five:** Trial counsel was ineffective in failing to call certain witnesses, and post-conviction appeal counsel was ineffective in failing to raise that issue.
>
> **Ground Six:** Trial counsel was ineffective in failing to request a lesser-included-offense instruction of second-degree manslaughter and criminally negligent homicide.
>
> **Ground Seven:** Post-conviction counsel was ineffective in various respects.

Respondent argues that (1) the claims alleged in Grounds One through Six are all procedurally defaulted, (2) to the extent the claim alleged in Ground Two was properly exhausted, the PCR court denied it in a decision that is entitled to deference, and (3) the claim alleged in Ground Seven does not state a claim cognizable in this proceeding. In his Brief in Support, Petitioner addresses only the claims alleged in Grounds One and Two. Petitioner acknowledges the claim alleged in Ground One is procedurally defaulted, but argues that the procedural default was caused by the ineffective assistance of post-conviction trial counsel and that he has therefore shown cause and prejudice excusing the procedural default. As to the claim alleged in Ground Two, Petitioner argues he did not procedurally default the claim, and that the state court decision denying relief is not entitled to deference.

II. Legal Standards

A habeas petitioner must exhaust all 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); 28 U.S.C. § 2254(b)(1)(A). "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, 915-16 (9th Cir. 2004) (quoting *Vasquez v. Hillery*, 474 U.S. 254, 257 (1996)). If a habeas litigant failed to present a claim to the state courts in a procedural context in which the merits of the claim were actually considered, the claim has not been fairly presented to the state courts and therefore is not eligible for federal habeas corpus review. *Edwards v. Carpenter*, 529 U.S. 466, 453 (2000); *Castille v. Peoples*, 489 U.S. 346, 351 (1989).

A petitioner is deemed to have "procedurally defaulted" a claim if the petitioner failed to comply with a state procedural rule or failed to raise the claim at the state level. *Carpenter*, 529 U.S. at 451; *Coleman v. Thompson*, 501 U.S. 722, 750 (1991). A federal court is precluded from reviewing the merits of a claim when the state court has denied relief on the basis of an independent and adequate state procedural rule. *Coleman*, 501 U.S. at 731-32; *Vansickel v. White*, 166 F.3d 953, 957 (9th Cir. 1999). A state procedural rule constitutes an "independent" bar only if it is not interwoven with federal law or dependent upon a federal constitutional ruling. *Ake v. Oklahoma*, 470 U.S. 68, 75 (1985); *La Crosse v. Kernan*, 244 F.3d 702, 704 (9th Cir. 2011). A state procedural rule constitutes an adequate bar to federal court review if it was "firmly established and regularly followed" at the time it was applied by the state court. *Ford v. Georgia*, 498 U.S. 411, 424 (1991).

If a petitioner has procedurally defaulted a claim in state court, a federal court will not review the claim unless the petitioner shows "cause and prejudice" for 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).

III. Discussion

A. Ground One – Ineffective Assistance for Failure to Move to Dismiss the Charges of Aggravated Murder and Arson as Prohibited Under Double Jeopardy

Petitioner contends that trial counsel was ineffective in failing to move to dismiss the charges of aggravated murder and arson on double jeopardy grounds after the hung jury in the first trial. Petitioner concedes he procedurally defaulted this claim in the state PCR proceeding, but argues his procedural default is excused under *Martinez v Ryan*, 566 U.S. 1 (2012).

In *Coleman*, the Supreme Court held that ineffective assistance of counsel in post-conviction proceedings does not establish cause for the procedural default of a claim. *Coleman*, 501 U.S. at 753. In *Martinez v. Ryan*, however, the Supreme Court established a "narrow exception" to the rule announced in *Coleman*: "Where, under state law, claims of ineffective assistance of trial counsel must be raised in initial-review collateral proceeding, a procedural default will not bar a federal habeas court from hearing a substantial claim of ineffective assistance at trial if, in the initial-review collateral proceeding, there was no counsel or counsel in that proceeding was ineffective." 566 U.S. at 17.

In the Ninth Circuit, in order to demonstrate cause and prejudice under *Martinez* sufficient to excuse a procedural default, a petitioner must make two showings. First, to establish cause, the petitioner must show that PCR counsel was ineffective under *Strickland v. Washington*, 466 U.S. 688 (1984), which requires a showing that PCR counsel's performance was deficient and that there was a reasonable probability that, absent the deficient performance, the result of the PCR proceeding would have been different. *Clabourne v. Ryan*, 745 F.3d 362, 376-77 (9th Cir. 2014), *overruled on other grounds by McKinney v. Ryan*, 813 F.3d 789, 819 (9th Cir. 2015). Second, to establish prejudice, the petitioner must show that the "underlying ineffective-assistance-of-trial-counsel claim is a substantial one, which is to say that the prisoner must demonstrate that the claim has some merit." *Id*.

Here, Petitioner's PCR petition, in which he was represented by counsel, alleged a claim that trial counsel was ineffective in failing to argue that the double jeopardy clause prohibited the state from retrying Petitioner on the aggravated murder and arson charges following the partial mistrial. The PCR trial judge denied the claim on the merits and, on appeal, the Oregon Court of Appeals affirmed that decision without discussion. Resp. Exh. 125; *Tolle*, 261 Or. App. at 640). Petitioner did not seek review of the Oregon Court of Appeals' decision in the Oregon Supreme Court. Respondent contends that the failure to seek review of the claim by the Oregon Supreme is the juncture at which Petitioner procedurally defaulted his claim and, that because *Martinez* only excuses default at the PCR trial stage, the procedural default cannot be excused.[1]

Petitioner counters that PCR trial counsel "abandoned" the claim, arguing that PCR trial counsel's arguments were so deficient that there was no meaningful adjudication of the claim and, therefore, the procedural default occurred at the state PCR trial level. Contrary to Petitioner's position, however, PCR trial counsel did not "abandon" the claim; while it was not addressed in his trial memorandum, PCR trial counsel did argue the claim at the PCR hearing on the state's motion for judgment on the pleadings. Resp. Exh. 124, pp. 16-17. Moreover, the PCR trial court was apprised of the legal question and reached a decision on the merits, finding that Petitioner did not allege any ultimate facts demonstrating what reasonable argument trial counsel could have made in support of moving to dismiss the aggravated murder and arson in the first degree charges after the jury was unable to reach a verdict on those counts at petitioner's

[1] When the default is caused on appeal from the initial-review collateral proceeding, "the rule of *Coleman* governs," "even though that initial-review collateral proceeding may be deficient for other reasons." *Martinez*, 566 U.S. at 16.

first trial. Resp. Exh. 125, p. 2. On appeal, Petitioner argued that the allegations contained in the petition sufficiently stated a claim that trial counsel should have raised a double-jeopardy objection based on the first jury's finding that Petitioner did not cause physical injury to the victim during the burglary. Resp. Exh. 126, pp. 18-20. In response, the state did not argue that Petitioner failed to preserve his argument, but instead responded on the merits. Resp. Exh. 127, pp. 6-9. As noted above, the Oregon Court of Appeals issued a written opinion granting relief on another claim, but affirming the dismissal of the double jeopardy claim without discussion. *Tolle v. Franke*, 261 Or. App. 639, 640 (2014). Petitioner did not seek further review of that claim in the Oregon Supreme Court and, because he can no longer do so, that is the point in the PCR proceeding where the procedural default occurred.

Where, as here, a claim was "raised in the initial postconviction proceeding, and [was] rejected by the state post-conviction court on the merits, *Martinez* has no bearing on the resolution of [the claim]." *Jones v. Franke*, Case No. 2:11-cv-01527-KI, 2013 WL 4026368, at *2 (D. Or. Aug. 5, 2013); *see also Whiley v. Mills*, Case No. 3:10-v-00365-JO, 2013 WL 840084, at *8 (D. Or. Mar. 4, 2013) (holding that "any alleged failure on [post-conviction] counsel's part to thoroughly develop and support the subject ineffective assistance of trial counsel claim raised during petitioner's . . . post-conviction proceeding, does not bring it under *Martinez's* purview"). Because Petitioner fairly presented to the post-conviction trial court his claim concerning trial counsel's failure to raise double jeopardy, which the PCR trial court and Oregon Court of Appeals denied on the merits, but did not seek review by the Oregon Supreme Court, *Martinez* does not apply. Accordingly, Petitioner has not established cause and prejudice to excuse his procedural default of this claim.

B. Ground Two – Ineffective Assistance for Failure to Adequately Present the Motion to Question Jurors and Motion for New Trial

In Ground Two, Petitioner argues trial counsel was ineffective in failing to argue in the motions to question jurors regarding misconduct and for new trial that some jurors intimidated and threw things at other jurors who were holding out for an acquittal. In his amended PCR petition filed after the Oregon Court of Appeals reversed and remanded the PCR trial court's initial entry of judgment on the pleadings, Petitioner alleged that trial counsel was ineffective in failing to timely move for a new trial. Resp Exh. 130, p. 6. In his trial memorandum, however, Petitioner argued more broadly that counsel was ineffective in failing to adequately raise the issue of juror intimidation in his motions to question jurors and for new trial. Resp. Exh. 131, pp. 37-39.

In response to this argument, the state's trial memorandum noted that the claim as pleaded in the petition was limited to the timeliness issue, and that the expanded argument regarding juror intimidation was not properly before the PCR trial court. Resp. Exh. 139, pp. 8-10. At the evidentiary hearing on the amended petition, counsel for the state again pointed out that the claim in the amended petition alleged only that counsel was ineffective in failing to timely move for a new trial. Resp. Exh. 153, pp. 35-36. The PCR trial court agreed with the state in its written judgment:

> Petitioner has failed to prove his claim that his attorneys were ineffective for failing to timely move for a new trial. *Petitioner attempts to argue other matters in his trial memo but Petitioner's claims are limited to those plead in his Petition.* Petitioner's trial attorney filed for a new trial as soon as he learned of the phone call from a juror to Detective Selig and later amended it when he learned additional facts. The court denied the motion for a new trial. Petitioner failed to prove that a motion for new trial should have reasonably been filed sooner or that an earlier filing of a motion for a new trial would have had any impact on the results of the proceeding. The trial judge considered the evidence of juror intimation and found it was insufficient to grant a new trial.

Resp. Exh. 154, p. 3 (emphasis added).

Petitioner argues that his claim that trial counsel was ineffective in failing to adequately address the juror intimidation issue is not procedurally defaulted because, even though the PCR court determined that he did not allege the claim in his petition and it was not properly before the court, it also resolved the claim on the merits. However, "a state court need not fear reaching the merits of a federal claim in an *alternative* holding. By its very definition, the adequate and independent state ground doctrine requires the federal court to honor a state holding that is a sufficient basis for the state court's judgment, even when the state court also relies on federal law." *Harris v. Reed*, 489 U.S. 255, 264 n.10 (1980) (emphasis in original). This rule has been repeatedly and consistently applied in the Ninth Circuit. *See Ayala v. Chappell*, 829 F.3d 1081, 1095-96 (9th Cir. 2016) (holding that claims were procedurally defaulted where California Supreme Court ruled that they were untimely in addition to denying them on the merits); *Renteria v. Subia*, 449 F. App'x 615, 616 (9th Cir. 2011) ("[t]he state ruling did not lose its independence merely because the state court ruled in the alternative on the merits"); *Harper-Leonard v. Washburn*, Case No. 2:21-cv-00539-JE, 2022 WL 18282960, at *3 (D. Or. Nov. 14, 2022) (where state PCR court concluded action was untimely, but also resolved claim on its merits, claim was nonetheless procedurally defaulted).

Petitioner makes no argument that the procedural rule relied upon by the PCR court in its alternative holding that the claim was not properly before the court was not an independent and adequate state procedural rule.[2] Because the PCR court concluded that the claim was not

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[2] Once the state has adequately pleaded the existence of an independent and adequate state procedural ground as an affirmative defense, the burden to place that defense in issue shifts to the petitioner. *Bennett v. Mueller*, 322 F.3d 573, 586 (9th Cir. 2003).

properly before it, it applied a procedural bar that was independent of the federal question and adequate to support its judgment. Accordingly, the claim alleged in Ground Two is procedurally defaulted, and because Petitioner has not established cause and prejudice or a fundamental miscarriage of justice to excuse the procedural default, he cannot obtain habeas corpus relief under § 2254.[3]

C. Remaining Claims Not Addressed by Petitioner

Petitioner does not address the remaining claims for relief alleged in his Petition for Writ of Habeas Corpus. As such, Petitioner has not sustained his burden to demonstrate why he is entitled to relief on these claims. *See Lambert v. Blodgett*, 393 F.3d 942, 970 n. 16 (9th Cir. 2004). Nevertheless, the Court has reviewed Petitioner's remaining claims and is satisfied that Petitioner is not entitled to habeas corpus relief. The claims alleged in Grounds Three, Four, Five, and Six are all procedurally defaulted, and the claim alleged in Ground Seven does not state a cognizable claim for habeas relief.

RECOMMENDATION

For these reasons, the Petition for Writ of Habeas Corpus (ECF No. 1) should be DENIED, and a judgment of dismissal should be entered. Because Petitioner has not made a substantial showing of the denial of a constitutional right, a certificate of appealability should be DENIED. *See* 28 U.S.C. § 2253(c)(2).

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[3] Petitioner alternatively seeks an evidentiary hearing on the merits of the claim alleged in Ground Two. However, because the claim is procedurally defaulted, no evidentiary hearing is necessary or warranted. *See Totten v. Markle*, 137 F.3d 1172, 1176 (9th Cir. 1998) ("[i]t is axiomatic that when issues can be resolved with reference to the state court record, an evidentiary hearing becomes nothing more than a futile exercise").

SCHEDULING ORDER

These Findings and Recommendations will be referred to a district judge. Objections, if any, are due by October 5, 2023. If no objections are filed, then the Findings and Recommendations 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 Recommendations will go under advisement.

NOTICE

These Findings and Recommendations are not an order that is immediately appealable to the Ninth Circuit Court of Appeals. Any Notice of Appeal pursuant to Rule 4(a)(1), Federal Rules of Appellate Procedure, should not be filed until entry of a judgment.

DATED September 21, 2023.

/s/ Youlee Yim You
Youlee Yim You
United States Magistrate Judge

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED

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

BENJAMIN ALLEN TOLLE, Petitioner - Appellant, v. TROY BOWSER, Respondent - Appellee.	No. 24-5862 D.C. No. 2:18-cv-01996-YY District of Oregon, Pendleton ORDER

Before: BEA, CHRISTEN, and DESAI, Circuit Judges.

The panel has unanimously voted to deny appellant's petition for rehearing. Judge Christen and Judge Desai have voted to deny the petition for rehearing en banc, and Judge Bea so recommends. The full court has been advised of the petition for rehearing en banc, and no judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 40.

The petitions for rehearing and rehearing en banc are DENIED.

FILED: March 19, 2014

IN THE COURT OF APPEALS OF THE STATE OF OREGON

BENJAMIN ALLEN TOLLE,
Petitioner-Appellant,

v.

STEVE FRANKE, Superintendent, Two Rivers Correctional Institution,
Defendant-Respondent.

Umatilla County Circuit Court
CV110522

A151417

Christopher R. Brauer, Judge.

Submitted on February 05, 2014.

James N. Varner filed the brief for appellant.

Mary H. Williams, Deputy Attorney General, Anna M. Joyce, Solicitor General, and Carson L. Whitehead, Assistant Attorney General, filed the brief for respondent.

Before Ortega, Presiding Judge, and DeVore, Judge, and Schuman, Senior Judge.

PER CURIAM

Reversed and remanded for further proceedings on petitioner's claim that he was denied adequate assistance of trial counsel because of the failure to call certain witnesses; otherwise affirmed.

PER CURIAM

Petitioner appeals a judgment dismissing his amended petition for post-conviction relief. We write only to address petitioner's contention that the court erred in dismissing his claim that trial counsel was inadequate for failing to call certain witnesses and reject his remaining contentions without discussion. Petitioner assigns error to the post-conviction court's dismissal of that claim because petitioner failed to attach "[a]ffidavits, records or other documentary evidence supporting the allegations of the petition[,]" as required by ORS 138.580. The state concedes that the attached documentation satisfied the requirements of ORS 138.580, as explained in *Ogle v. Nooth*, 254 Or App 665, 298 P3d 32, *rev allowed*, 353 Or 747 (2013). Having reviewed the petition, we agree with the state and accept its concession that the claim should not have been dismissed on grounds that petitioner failed to attach sufficient documentation to the petition.

Reversed and remanded for further proceedings on petitioner's claim that he was denied adequate assistance of trial counsel because of the failure to call certain witnesses; otherwise affirmed.

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IN THE CIRCUIT COURT OF THE STATE OF OREGON

FOR THE COUNTY OF UMATILLA

BENJAMIN ALLEN TOLLE, Petitioner, v. STEVE FRANKE, Superintendent Two Rivers Correctional Institution, Defendant.	Case No. CV11-0522 ORDER AND GENERAL JUDGMENT **ORS 20.140 - State fees deferred at filing**

This matter came before the Honorable Christopher Brauer on defendant's Motion for Judgment on the Pleadings. Petitioner appeared via video link and by and through his attorney, Manuel Perez, and defendant appeared by and through W. Douglas Marshall, Senior Assistant Attorney General. Both counsel appeared telephonically.

At the outset of the hearing, defendant indicated that he had received petitioner's proposed Exhibits 13 and 14, did not object to those exhibits, and further did not object to petitioner's motion to amend ¶ 15b of the Formal Petition for Post-Conviction Relief by deleting the name "Katie Chandler" and substituting the names "Richard Dice" and "Linda Fisher." Based on defendant's non-opposition, the Court allows the amendment to ¶ 15b of the formal petition. In addition, the Court accepts defendant's answer, already on file, as also answering the Amended Formal Petition.

Thereafter, the Court heard oral argument from defendant as to why defendant's motion was well taken, as drafted, under ORCP 21B, and in addition, as also presented in oral argument under ORCP 47. The Court also heard oral argument from petitioner as to why the affidavits of

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Richard Dice and Linda Fisher, respectively Exhibits 13 and 14, created a genuine issue of material fact and satisfied the requirements of ORS 138.580 as to ¶ 15b.

The Court having read the documents submitted by the parties, heard oral argument, and being fully advised, finds as follows:

1. Under ORS 138.620, petitioner has the burden of proving his claims in ¶¶ 15a and 15b by a preponderance of the 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 petitioner, no objectively reasonable factfinder could find in petitioner's favor on the claim in ¶ 15a;
7. Exhibits 13 and 14 contain hearsay from the affiants and speculation by these witnesses;

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8. Petitioner failed to demonstrate that the testimony in Exhibits 13 and 14 would have been admissible at petitioner's second criminal trial and material to the outcome;

9. 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 ¶ 15b;

10. Because petitioner has failed to support his claim in ¶ 15b with admissible and material evidence, even viewing the record before the Court in the manner most favorable to petitioner, no objectively reasonable factfinder could find in petitioner's favor on the claim in ¶ 15b; and

11. The Court adopts the reasoning of defendant as put forth in defendant's memorandum of points and authorities and as presented orally at the hearing on defendant's motion.

NOW, THEREFORE, IT IS ORDERED that defendant's Motion for Judgment on the Pleadings as to ¶¶ 15a and 15b is granted. IT IS FURTHER ORDERED AND ADJUDGED that the claims in ¶¶ 15a and 15b of the Amended Formal Petition for Post-Conviction Relief are dismissed with prejudice and that the petition is dismissed with prejudice in its entirety.

DATED this 4 day of May, 2012.

HONORABLE CHRISTOPHER BRAUER
Circuit Court Judge

Submitted by W. Douglas Marshall
Senior Assistant Attorney General
Of Attorneys for Defendant

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