

IN THE COURT OF APPEALS OF THE STATE OF OREGON

CONAN WAYNE HALE,  
Petitioner-Appellant,

v.

BRIAN BELLEQUE,  
Superintendent, Oregon State Penitentiary,  
Defendant-Respondent.

Marion County Circuit Court  
04C13562

A143075

Paul J. Lipscomb, Senior Judge.

Argued and submitted on July 09, 2012.

Daniel J. Casey argued the cause and filed the opening and reply briefs for petitioner. Conan Wayne Hale filed the supplemental brief *pro se*.

Timothy A. Sylwester, Assistant Attorney General, argued the cause for respondent. With him on the brief were John R. Kroger, Attorney General, Anna M. Joyce, Solicitor General, Pamela J. Walsh, Assistant Attorney General, and Joanna L. Jenkins, Assistant Attorney General.

Before Wollheim, Presiding Judge, and Haselton, Chief Judge, and Nakamoto, Judge.

WOLLHEIM, P. J.

Convictions of burglary reversed and remanded; otherwise affirmed.

1                   WOLLHEIM, P. J.

2                   In 1998, petitioner was convicted of 13 counts of aggravated murder and  
3 sentenced to death for the murders of three victims committed in 1995. Defendant was  
4 also convicted of a number of other offenses, including burglary, theft, criminal mischief,  
5 kidnapping, rape, sodomy, unlawful sexual penetration, and sexual abuse. On direct  
6 review, the Supreme Court reversed six of the 13 aggravated murder convictions and  
7 affirmed seven of the convictions and the death sentences and remanded for resentencing.  
8 The court remanded the seven affirmed convictions for entry of corrected judgments  
9 reflecting three convictions for aggravated murder and imposing a single sentence of  
10 death for each conviction. *State v. Hale*, 335 Or 612, 75 P3d 612 (2003), *cert den*, 541  
11 US 942 (2004). In this post-conviction proceeding, petitioner sought to have the  
12 remaining seven convictions for aggravated murder and his other convictions set aside  
13 due to constitutionally inadequate and ineffective assistance of counsel during the guilt  
14 and penalty phases of his trial and on appeal, and he also raised independent  
15 constitutional arguments challenging the death sentences. The post-conviction trial court  
16 rejected petitioner's post-conviction claims. For the reasons explained herein, we reverse  
17 and remand two burglary convictions and otherwise affirm.

18   I. THE UNDERLYING CRIMES

19                   We begin with the facts of the underlying crimes, as described by the  
20 Supreme Court on direct review:

21                                    "In late 1995, defendant, then 19, and his friend, Jon Susbauer, then  
22                                   in his early twenties, began committing a series of burglaries and robberies

1 in the Eugene area. As pertinent here, on December 14, 1995, defendant  
2 and Susbauer broke into a woman's home, stole several thousand dollars  
3 worth of her property, and slashed a couch and a stereo speaker with a knife  
4 before leaving.

5 "At around midnight on December 16, 1995, defendant and  
6 Susbauer drove up beside a car parked on an isolated road in a remote  
7 wooded area in Eugene. The men were in a silver Chevrolet Suburban that  
8 Susbauer had stolen a few weeks earlier. Two teenagers, Kara Krause and  
9 Jesse Jarvis, were in the parked car. The person on the passenger side of  
10 the Suburban got out, approached the parked car, and knocked on the  
11 window. He told the couple that they were on his property but that they  
12 could stay. He then returned to the Suburban and Jarvis heard laughter.  
13 The Suburban drove off.

14 "A few minutes later, Jarvis heard a man yelling. Jarvis got out of  
15 the parked car to investigate and, he later testified, a man 'jumped out of  
16 nowhere.' The man was large and stocky. He was dressed in dark clothing  
17 and wore a long coat. His head and face were covered with some kind of  
18 mask or scarf; only his eyes were visible. He carried something that looked  
19 like a machete and was swinging it like a sword. He spoke in a low rough  
20 growl and threatened Jarvis with the machete. He ordered Krause out of  
21 the car and told them both to take off their clothes and shoes. When they  
22 had complied, the man threw the couple's car keys, clothes, and shoes into  
23 the woods. The man forced Jarvis to lie on the ground and Krause to lie  
24 across the hood of the car. He threatened Krause with the blade of the  
25 machete and sexually assaulted her.

26 "Jarvis later told police that he thought that the person who claimed  
27 to be the 'property owner' and the rapist were different people. Weeks later,  
28 at two police lineups, Jarvis identified Susbauer as the 'property owner' and  
29 defendant possibly as the rapist. Krause was not able to identify the rapist  
30 when shown the same lineups.

31 "On December 19, 1995, defendant and Susbauer broke into another  
32 house and again stole thousands of dollars worth of property including,  
33 among other things, a rabbit-fur jacket, a .38 caliber Taurus revolver with  
34 wooden grips, and 25 rounds of ammunition for the revolver. Before they  
35 left, they again slashed the furniture with a knife.

36 "Late in the evening on December 20, defendant and Susbauer were  
37 riding around in the stolen Suburban. Susbauer was driving. They saw  
38 defendant's former girlfriend, Kristal Bendele, 15, her current boyfriend,

1 Brandon Williams, 15, and two other young people, Patrick Finley, 13, and  
2 Michael Black, 15. Defendant and Susbauer drove toward them and parked  
3 the Suburban. Defendant got out of the Suburban. He was wearing a black  
4 trench coat and jeans. Defendant offered the teenagers a ride, which  
5 Bendele, Williams and Finley accepted. Black declined. As Black walked  
6 away, he saw the Suburban slowly drive off in a different direction.

7 "The next afternoon, December 21, 1995, two men found the nude  
8 bodies of Williams and Bendele at a logging landing on McGowan Creek.  
9 Bendele had been shot twice, once in the back and once in the left temple.  
10 Williams had been shot five times; three shots were to the head and face,  
11 one to the chest, and one to the back. Finley, barely alive, also was lying  
12 nearby. He, too, had been shot twice, once in the head and once in the  
13 shoulder. Among other things, he was wearing the rabbit-fur jacket that  
14 defendant and Susbauer had stolen in the earlier burglary. Finley died four  
15 days later without ever regaining consciousness.

16 "Police visited Susbauer at his home on December 24, 1995, and  
17 seized the .38 caliber Taurus revolver stolen during the December 19  
18 burglary. On December 26, police searched defendant's bedroom. There,  
19 they seized a black trench coat and a machete.

20 "The Taurus revolver later was proved to be the murder weapon; all  
21 the bullets recovered at the scene and from the bodies of the victims had  
22 been fired from that gun. Testing of the grip of the revolver revealed a  
23 mixture of DNA patterns, the most predominant of which matched that of  
24 Bendele. Semen obtained from Bendele's mouth, vagina, and anus was  
25 identified as Susbauer's. Semen on Bendele's shirt and on the rabbit-fur  
26 jacket that Finley was wearing was identified as defendant's.

27 "Defendant and Susbauer both were charged with aggravated murder  
28 and various other crimes in the murders of Bendele, Williams, and Finley,  
29 in the assault on Jarvis and Krause, and in the December 14 and December  
30 19 burglaries. Susbauer agreed to cooperate and pleaded guilty to, among  
31 other things, three counts of aggravated murder. Thereafter, the district  
32 attorney decided to seek the death penalty only against defendant.

33 "At the ensuing trial, defendant's theory was that Susbauer was the  
34 rapist and killer and that he, defendant, merely was in the wrong place at  
35 the wrong time. Susbauer's story was the opposite: Defendant was the  
36 director of the abuse and murderer of all the victims; Susbauer was a  
37 secondary--and, in part, unwilling--accomplice. The jury rejected  
38 defendant's theory and convicted him of 13 counts of aggravated murder

1 and multiple noncapital crimes arising out of the burglaries and the attack  
2 on Krause and Jarvis.

3 "Defendant was sentenced on the noncapital crimes at the conclusion  
4 of the guilt-phase trial. The trial court then conducted a penalty-phase trial  
5 on the aggravated murder convictions. In that proceeding, the jury  
6 determined that defendant had acted deliberately in committing the  
7 murders, that he posed a continuing risk to society, and that he should  
8 receive a death sentence. The trial judge then entered a sentence of death."

9 *Hale*, 335 Or at 614-17 (footnote omitted).

## 10 II. THE POST-CONVICTION CASE AND APPLICABLE LAW

11 Petitioner's petition for post-conviction relief alleged 17 claims, and  
12 included claims of inadequacy of trial counsel during both the guilt and penalty phases of  
13 trial<sup>1</sup> and inadequacy of appellate counsel. Petitioner also raised several stand-alone  
14 claims challenging the constitutionality and imposition of the death penalty.

15 A petitioner is entitled to raise on post-conviction relief only those issues  
16 that he could not reasonably have raised on direct appeal. *See* ORS 138.550(2) (post-  
17 conviction relief available only if ground for relief "was not asserted and could not  
18 reasonably have been asserted in the direct appellate review proceeding"); *Palmer v.*  
19 *State of Oregon*, 318 Or 352, 354, 867 P2d 1368 (1994) (holding that a post-conviction  
20 petitioner may not assert, as a ground for relief, any issue "that was not raised at trial in  
21 the underlying criminal proceeding, when the petitioner reasonably could have been  
22 expected to raise that issue in the trial court and when the petitioner does not assert the  
23 failure to raise that issue constituted inadequate assistance of trial counsel."). *Palmer*

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<sup>1</sup> As is typical in capital aggravated murder cases, petitioner was represented at trial by two attorneys. For ease of reading we will refer to both attorneys as counsel.

1 identifies a number of examples: A post-conviction court can consider arguments not  
2 made at trial where counsel was incompetent or guilty of bad faith, where the right  
3 subsequently sought to be asserted was not generally recognized to be in existence at the  
4 time of trial; where counsel was excusably unaware of facts which would have disclosed  
5 a basis for the assertion of the right; and where duress or coercion prevented assertion of  
6 the right. 318 Or at 357-58.

7           To prevail on his claims regarding the effectiveness of counsel under  
8 Article I, section 11, of the Oregon Constitution, petitioner was required to prove, by a  
9 preponderance of the evidence, facts demonstrating that trial or appellate counsel failed  
10 to exercise reasonable professional skill and judgment and that petitioner suffered  
11 prejudice as a result. *Trujillo v. Maass*, 312 Or 431, 435, 822 P2d 703 (1991). To prevail  
12 on his claims under the United States Constitution, petitioner was required to prove that  
13 trial counsel's performance "fell below an objective standard of reasonableness \* \* \*  
14 under prevailing professional norms" and that there is a "reasonable probability that, but  
15 for counsel's unprofessional errors, the result of the proceeding would have been  
16 different." *Strickland v. Washington*, 466 US 668, 694, 104 S Ct 2052, 80 L Ed 2d 674  
17 (1984).<sup>2</sup>

18           The reasonableness of counsel's performance is evaluated from counsel's  
19 perspective at the time of the alleged error and in light of all the circumstances; the post-

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<sup>2</sup> The standards for determining the adequacy of counsel's representation are functionally equivalent under the state and federal constitutions. *State v. Davis*, 345 Or 551, 579, 201 P3d 185 (2008).

1 conviction court's standard of review is a highly deferential one. *Kimmelman v.*  
2 *Morrison*, 477 US 365, 381, 106 S Ct 2574, 91 L Ed 2d 305 (1986). That is, "[a] fair  
3 assessment of attorney performance requires that every effort be made to eliminate the  
4 distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged  
5 conduct, and to evaluate the conduct from counsel's perspective at the time." *Strickland*,  
6 466 US at 689. Whether counsel rendered deficient performance is a question of law.  
7 *Stimpson v. Coursey*, 224 Or App 145, 153-54, 197 P3d 68 (2008), *rev den*, 346 Or 184  
8 (2009). In reviewing a post-conviction claim of ineffective assistance of counsel, the  
9 court "will not second-guess a lawyer's tactical decisions unless those decisions reflect an  
10 absence or suspension of professional skill and judgment[.]" *Cunningham v. Thompson*,  
11 186 Or App 221, 226, 62 P3d 823 (2003), *adh'd to as modified*, 188 Or App 289, 71 P3d  
12 110 (2003), *rev den*, 337 Or 327 (2004) (citing *Krummacher v. Gierloff*, 290 Or 867, 875,  
13 627 P2d 458 (1981)).

14           Even if a petitioner is successful in showing that counsel was ineffective,  
15 the post-conviction court may not grant relief in the absence of a showing of prejudice.  
16 Prejudice of state constitutional magnitude is established by showing that "counsel's  
17 advice, acts, or omissions had 'a tendency to affect the result of the prosecution.'" *Ashley*  
18 *v. Hoyt*, 139 Or App 385, 392, 912 P2d 393 (1996) (quoting *Stevens v. State of Oregon*,  
19 322 Or 101, 110, 902 P2d 1137 (1995)). Under the United States Constitution, prejudice  
20 is established by showing that there is reasonable probability that but for counsel's  
21 deficient performance the result would have been different. *Strickland*, 466 US at 694.

1 The existence of prejudice is a question of law that may be dependent on predicate facts.  
2 *Ashley*, 139 Or App at 395 n 8.

3 The allegations of the petition frame the issues that a post-conviction court  
4 can consider, and a petitioner who fails to raise a claim in a petition for post-conviction  
5 relief has waived it and is foreclosed from making arguments on claims not raised in the  
6 petition, *Bowen v. Johnson*, 166 Or App 89, 92, 999 P2d 1159, *rev den*, 330 Or 553  
7 (2000), or that expand on the claims pleaded. *Leyva-Grave-De-Peralta v. Blackletter*,  
8 232 Or App 441, 448-53, 223 P3d 411 (2009), *rev den*, 348 Or 114 (2010). Preservation  
9 principles apply in the context of post-conviction relief and, as a general rule, arguments  
10 not made to the post-conviction court in support of a claim will not be considered on  
11 appeal. *Haney v. Schiedler*, 202 Or App 51, 55, 120 P3d 1225 (2005); *Taylor v. Hill*, 202  
12 Or App 29, 32-33, 120 P3d 1248 (2005).

13 The appellate court reviews the post-conviction court's legal conclusions  
14 for errors of law, *Monahan v. Belleque*, 234 Or App 93, 95, 227 P3d 777, *rev den*, 348 Or  
15 669 (2010), and is bound by the post-conviction court's findings of fact, if they are  
16 supported by any evidence in the record. *Wyatt v. Czerniak*, 223 Or App 307, 311, 195  
17 P3d 912 (2008). The appellate court does not reweigh the evidence--it simply determines  
18 whether any evidence in the record supports the findings made by the trial court. *Pratt v.*  
19 *Armenakis*, 201 Or App 217, 220, 118 P3d 821 (2005), *rev den*, 340 Or 483 (2006). The  
20 existence of evidence in the record that contradicts the post-conviction court's findings is  
21 not the determinative issue on appeal. The determinative issue on appeal of a judgment



1 dismissing a petition for post-conviction relief is whether there is any evidence in the  
2 record that supports the post-conviction court's findings. *Kinkel v. Lawhead*, 240 Or App  
3 403, 413, 246 P3d 746, *rev den*, 350 Or 408 (2011). If the post-conviction court did not  
4 make findings, and there is evidence from which the facts could be decided more than  
5 one way, the appellate court will presume that the post-conviction court made factual  
6 determinations consistent with the court's ultimate conclusion. *Ball v. Gladden*, 250 Or  
7 485, 487, 443 P2d 621 (1968).

8 In a 35-page opinion, the post-conviction court considered each of  
9 petitioner's claims and denied relief, making extensive findings of fact and conclusions of  
10 law that we discuss in more detail below.

### 11 III. CLAIMS ADDRESSED ON APPEAL

12 In his opening brief, petitioner asserts 16 assignments of error, and, in his  
13 supplemental *pro se* brief, he asserts three additional assignments. We address each  
14 assignment in the context of the post-conviction claims to which it pertains.

#### 15 A. *First assignment of error--mental illness claims*

16 As relevant to the first assignment of error, in the first claim of his post-  
17 conviction petition, petitioner asserted that imposition of the death penalty deprives him  
18 of the protections of Article 1, sections 11, 13, 15, 16, and 20 of the Oregon Constitution  
19 and the protections of the Eighth and Fourteenth Amendments to the United States  
20 Constitution, as well as fundamental fairness, due process, and equal protection.  
21 Specifically, petitioner asserted that he is of low intelligence and may have a mental

1 illness, and that it is cruel and unusual to put to death a person who is so afflicted.

2           Additionally, in his seventh claim for post-conviction relief,<sup>3</sup> petitioner  
3 asserted that trial counsel provided inadequate and ineffective assistance by failing to  
4 provide McDonald, the evaluating psychologist, with a complete psychological history of  
5 petitioner, thereby limiting the reliability of his evaluation, and by failing "to secure a  
6 medical evaluation of the Petitioner by a psychiatrist to determine whether the Petitioner  
7 had an organic brain defect or medical/psychiatric condition, such as Attention Deficit  
8 Disorder, Fetal Alcohol Syndrome or schizophrenia."

9           We summarize the post-conviction court's findings as pertinent to the first  
10 assignment:

11           1. Within a month of petitioner's arrest, petitioner's defense counsel  
12 hired McDonald, a licensed psychologist, who was directed to conduct an  
13 exhaustive psychological examination, and extensive psychological and  
14 cognitive testing of petitioner in an effort to identify any condition that  
15 could assist in defense or mitigation efforts.

16           2. Petitioner's trial counsel made a reasonable tactical and strategic  
17 choice not to give petitioner's juvenile records to McDonald so that those  
18 reports would not be discoverable by the state if McDonald testified. The  
19 records were particularly prejudicial to petitioner because they portrayed  
20 him as an extremely violent and aggressive person who was very  
21 manipulative and who refused to submit to authority or take direction from  
22 anyone. That information directly contradicted the defense theory that  
23 petitioner was merely a follower of his co-defendant, Susbauer. The  
24 records also contained specific information that tended to identify petitioner  
25 as an active participant, if not leader, in the crimes, including comments  
26 about killing people, reference to Satan, his habit of returning ID to his  
27 victims, as occurred in this case, and his sudden, brutal attack on a friend.

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<sup>3</sup> Most of petitioner's claims of inadequacy of counsel were alleged in his seventh claim for post-conviction relief, so there will be many references to that claim throughout this opinion.

1           3. Although defense counsel did not turn over the records  
2 themselves, they did tell McDonald what the records contained, and  
3 McDonald was aware of the substance of mental health evaluations during  
4 which petitioner claimed to be experiencing psychotic symptoms.  
5 Petitioner's trial counsel specifically advised McDonald that he needed to  
6 rule out schizophrenia and told McDonald that petitioner's father might be  
7 mentally ill. Trial counsel also raised with McDonald the issue of whether  
8 petitioner might have multiple personalities.

9           4. McDonald met with petitioner approximately 30 times over the  
10 period of more than a year. McDonald conducted cognitive testing of  
11 petitioner and ruled out the presence of any organic brain defect. During  
12 his meetings with McDonald, petitioner disclaimed any symptoms of  
13 mental illness and denied that mental illness played any role in his crimes.  
14 Petitioner never told trial counsel that mental illness played a role in his  
15 commission of the crimes. Petitioner admitted to McDonald that his  
16 previous reports to counselors and mental health professionals of psychotic  
17 symptoms were false. Based on an exhaustive investigation and evaluation  
18 lasting over one year, McDonald concluded that petitioner did not have a  
19 mental illness. McDonald diagnosed petitioner with antisocial personality  
20 disorder and psychopathy. McDonald's conclusions are reliable.

21           5. Petitioner did not prove that the results of McDonald's evaluation  
22 would have been different if his trial counsel had given McDonald actual  
23 paper copies of the treatment records, instead of telling him what the  
24 records contained.

25           6. Petitioner did not prove that he is mentally retarded or of low  
26 intelligence; his intellectual abilities fall within the average range.

27           7. Petitioner did not prove that he suffers from fetal alcohol  
28 syndrome.

29           8. Petitioner did not prove that he meets the diagnostic criteria for  
30 schizophrenia or that he was suffering from a mental illness at the time he  
31 committed the crimes or during his trial, that he currently suffers from a  
32 mental illness, or that he will suffer from a mental illness in the future. His  
33 primary diagnosis is severe antisocial personality disorder and a very high  
34 degree of psychopathy.

35           9. The report of the state's psychologist, Dr. Colistro, is reliable and  
36 persuasive. The report of petitioner's expert, Dr. Larsen, who diagnosed

1 petitioner with schizophrenia, is not reliable or persuasive, because it is  
2 based on incomplete and unreliable information.

3 10. Petitioner is not credible and his evidence to support his claim  
4 of mental illness is not reliable or credible and conflicts with the vast  
5 weight of the evidence. Petitioner's self-reports of his current mental  
6 condition lack credibility. Petitioner told people that his strategy for post-  
7 conviction relief was to rely on a claim of mental illness built upon the  
8 juvenile reports that he had previously admitted were false.

9 11. Petitioner did not prove that a psychologist is not qualified to  
10 diagnose schizophrenia or that his trial counsel's choice of an expert was  
11 unreasonable or that adequate representation necessitated evaluation by a  
12 psychiatrist rather than a psychologist.

13 12. After a thorough investigation, petitioner's trial counsel made a  
14 tactical choice not to raise an insanity defense or attempt to pursue a mental  
15 illness claim in mitigation. Trial counsel's tactical decision was reasonable,  
16 given the lack of evidence in support of a claim of mental illness and the  
17 risk of opening the door to extremely damaging information about  
18 petitioner and his violent past.

19 Petitioner's first assignment encompasses petitioner's multiple assertions  
20 regarding mental illness. Petitioner asserts that the post-conviction court erred in  
21 rejecting his claims that trial counsel rendered inadequate and ineffective assistance (1)  
22 by failing to have petitioner examined by a psychiatrist (as opposed to a psychologist),  
23 who would have treated petitioner with antipsychotic drugs and diagnosed schizophrenia,  
24 and (2) by withholding from McDonald, the psychologist who examined petitioner,  
25 information in petitioner's juvenile files that might have supported a diagnosis of  
26 schizophrenia. Petitioner asserts further that the record does not support the post-  
27 conviction court's finding that he does not suffer from schizophrenia, because the finding  
28 is based on a flawed analysis by the state's psychologist and the defense psychologist,  
29 who lacked petitioner's juvenile records.

1           Also within his first assignment, petitioner contends that the post-  
2 conviction court erred in rejecting his claim that, because petitioner suffers from  
3 schizophrenia, imposing the death penalty would violate the Eight Amendment's  
4 prohibition against cruel and unusual punishment under the rationale of *Atkins v.*  
5 *Virginia*, 536 US 304, 122 S Ct 2242, 153 L Ed 335 (2002), a case decided after  
6 petitioner's conviction and sentence in this case.

7           Finally, within his first assignment of error, petitioner contends that the  
8 post-conviction court erred in rejecting his claim that trial counsel provided inadequate  
9 and ineffective assistance in failing to further investigate and develop the issue of  
10 whether defendant suffers from fetal alcohol syndrome.

11           The evidence in the post-conviction trial record supports all of the post-  
12 conviction court's findings rejecting petitioner's mental illness claims. The record  
13 supports the post-conviction court's finding that a psychiatrist would not have been more  
14 qualified than McDonald, a psychologist, to diagnose schizophrenia, and it further  
15 supports the post-conviction court's findings that petitioner does not suffer from  
16 schizophrenia or a mental illness. The trial court further found that petitioner does not  
17 suffer from fetal alcohol syndrome, and that finding is also supported by the evidence.

18           The evidence further supports the post-conviction court's findings that  
19 defense counsel made tactical decisions not to raise petitioner's mental health, either as a  
20 defense or in mitigation, and not to provide paper copies of petitioner's juvenile records  
21 to McDonald, so as to prevent them from being discoverable by the prosecution, due to

1 the extremely prejudicial nature of some of the information contained in them. We agree  
2 with the post-conviction court's conclusion that trial counsel's tactical decisions were  
3 objectively reasonable, given the record in support of the finding that petitioner does not  
4 suffer from mental illness, petitioner's admission to falsely reporting psychotic  
5 symptoms, and petitioner's general lack of credibility.

6 We conclude for all of those reasons that trial counsel was not ineffective in  
7 the manner asserted in the first assignment of error.

8 However, even if trial counsel had provided ineffective representation, we  
9 conclude that petitioner did not establish prejudice. Even assuming that trial counsel was  
10 ineffective in not providing McDonald with copies of petitioner's juvenile records, we  
11 conclude that petitioner has failed to establish that the failure to provide those records to  
12 McDonald--as distinct from trial counsel's oral description of their contents--had a  
13 tendency to affect the result of the prosecution and punishment. *Stevens*, 322 Or at 110.  
14 And, even if trial counsel was ineffective in not further investigating the possibility that  
15 petitioner had an organic brain defect or a medical or psychiatric condition by having  
16 petitioner examined by a psychiatrist, in light of the post-conviction court's findings,  
17 which are supported by the evidence in the record, that petitioner does not suffer from  
18 such conditions, petitioner has not shown prejudice.

19 In light of the above conclusions, we reject petitioner's Eighth Amendment  
20 challenge, as framed in this assignment of error, which is premised on petitioner's  
21 assertion that he suffers from mental illness. Additionally, the claim as alleged is not a

1 claim of inadequate assistance of counsel and is barred by *Palmer*.

2 B. *Second assignment of error--use of physical restraints*

3 The arguments in petitioner's second assignment of error address the post-  
4 conviction court's denial of his claims relating to the criminal trial court's orders that  
5 petitioner wear physical restraints--including leg cuffs (shackling), leg braces, and  
6 handcuffs--for transportation to and from the court room and during the guilt and penalty  
7 phases of trial. In his fourth post-conviction claim, petitioner asserted that he is entitled  
8 to relief because, before ordering him to wear restraints, the trial court failed to make the  
9 requisite findings on the record that he was a security or flight risk. That failure,  
10 petitioner contended, deprived him of constitutional rights to a fair trial, to unfettered  
11 consultation with counsel, and to have his guilt or innocence determined solely on the  
12 basis of the evidence.<sup>4</sup> In his seventh claim for relief, petitioner contended that counsel  
13 was inadequate in failing to make a continuing objection to (1) petitioner wearing  
14 shackles as he was led past the jury room and (2) remaining in physical restraints  
15 throughout the guilt and penalty phases of trial, when there was no evidence that  
16 petitioner was a security risk.

17 We summarize the post-conviction court's findings with respect to the

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<sup>4</sup> Petitioner's fourth claim for post-conviction relief alleged that the trial court violated petitioner's constitutional rights when, *without appropriate objection from defense counsel*, the court ordered that petitioner be shackled during the penalty phase of trial. Unlike the state, we do not treat that allegation as one of inadequacy of counsel, as it clearly relates to a ruling of the court. See *Leyva-Grave-De-Peralta*, 232 Or App at 448-53 (declining to expand on the claims pleaded).

1 physical restraint issues raised in the fourth and seventh claims for post-conviction relief:

2 1. The trial court heard testimony at a pretrial hearing about  
3 petitioner's history of violence and his unpredictable conduct. Before the  
4 verdict in the guilt phase of trial, the trial court ordered that petitioner wear  
5 a leg brace and handcuffs during transportation to and from the courtroom.  
6 The handcuffs were removed before the jury entered the court room. The  
7 only restraint that petitioner wore during the guilt phase of trial was a leg  
8 brace that was concealed under his pants and was not visible to the jury.  
9 The trial court also ordered that skirting be affixed to the table at which  
10 petitioner was sitting so that the jury could not see the leg restraints.

11 2. After the verdict in the guilt phase of trial, the trial court ordered  
12 that petitioner also wear shackles during transportation to and from the  
13 courtroom. The shackles were removed before the jury came into the court  
14 room.

15 3. Petitioner did not prove that any juror who participated in the  
16 guilt or penalty phases of trial saw him in leg restraints. Petitioner's  
17 testimony that unnamed jurors saw him in shackles during transport was  
18 not credible. Petitioner's assertion that he told trial counsel that jurors may  
19 have heard his leg restraints during trial also was not credible. Trial  
20 counsel did not hear any noise coming from the leg restraints, and if  
21 counsel had been aware of any noises that might have affected petitioner's  
22 trial, counsel would have raised the issue with the court. Neither the  
23 prosecutor nor the jail deputies who transported petitioner and sat near him  
24 at trial heard noises coming from the restraints he wore at trial. The leg  
25 restraints were not visible to the jury and did not interfere with petitioner's  
26 ability to consult with counsel.

27 4. Petitioner's trial counsel had no reason to object to the restraints  
28 on the basis that they interfered with petitioner's ability to participate and  
29 assist at trial. Petitioner's decision not to testify at trial was a decision made  
30 for a variety of reasons not related to restraints.

31 5. Petitioner's trial counsel reasonably did not object to the trial  
32 court's order that petitioner wear leg restraints and handcuffs during  
33 transport and that he wear leg restraints during the guilt phase of trial.

34 The post-conviction court held that petitioner's stand-alone constitutional  
35 claims relating to physical restraints were based on facts and issues that were known by



1 petitioner or that were reasonably available to him at the time of trial and that they are  
2 therefore barred by ORS 138.550(2) and *Palmer*. We agree. The independent physical  
3 restraint claims are not based on ineffective assistance of counsel but on the assertion that  
4 the criminal trial court erred in ordering the use of physical restraints during trial in the  
5 absence of explicit findings on the record that petitioner was a flight or security risk.<sup>5</sup>  
6 *See State v. Bates*, 203 Or App 245, 249-50, 125 P3d 42 (2005), *rev den*, 340 Or 483  
7 (2006) (although the trial court has discretion to control a dangerous or disruptive  
8 defendant, it abuses that discretion by allowing the accused to be visibly shackled absent  
9 a finding that he poses an immediate or serious risk of dangerous or disruptive  
10 behavior). Petitioner asserts that the claims could not reasonably have been raised on

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<sup>5</sup> The fourth claim for relief alleged in its entirety:

"The Petitioner was deprived of the right to a fair trial, the unfettered right to consult with counsel and the right to decide whether to testify without worrying about the impression shackles would create on the jury as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution, thereby depriving the accused the right to have his guilt or innocence determined solely on the basis of evidence, not on grounds [or] circumstances not adduced as proof at trial. Such shackling also deprives the Petitioner of the right to a fair trial under Article 1, section 10 of the Oregon Constitution. No findings were made that the Petitioner was a security or flight risk and no precautions were taken, aside from a cloth in front of the table, to ensure that the jury did not otherwise see or hear the shackles.

"In addition, the trial court violated the above constitutional rights when it ordered, on its own motion, and without appropriate objection from defense counsel, that the Defendant [*sic*] should be shackled and placed in additional restraint, *i.e.*, leg irons, during the penalty phase in contravention of established law at the time of the penalty phase as expressed by *Duckett v. Godinz/McKay*, 67 F3d 734 (9th Cir 1995)."

1 direct review, because they depend on evidence outside the criminal trial record that did  
2 not come to light until the post-conviction trial, including post-conviction depositions of  
3 petitioner, trial counsel, and the prosecutor, and the affidavits of two law enforcement  
4 officers who transported petitioner. We reject that argument. Although the specific  
5 evidence cited by petitioner could not come into existence until after trial, petitioner  
6 knew he was wearing restraints during transport and at trial and reasonably could have  
7 objected during trial or on appeal if he believed that the restraints had an effect on the  
8 fairness of the trial. The post-conviction court correctly ruled that the stand-alone  
9 constitutional assertions relating to physical restraints are barred by ORS 138.550 and  
10 *Palmer*.

11 As noted, the post-conviction court found that the only restraints worn by  
12 petitioner at trial--leg braces under petitioner's pants--were not visible to or seen or heard  
13 by the jury and did not affect plaintiff's participation in the trial, including plaintiff's  
14 decision not to testify. Those findings are supported by evidence in the record.  
15 Accordingly, even if we were to reach petitioner's stand-alone assertion and conclude that  
16 the trial court erred in not making explicit findings that petitioner was a flight or security  
17 risk, we would conclude that petitioner suffered no prejudice.

18 Petitioner's ineffective assistance of counsel claim related to physical  
19 restraints asserted that counsel was ineffective in allowing, "without continuing  
20 objections, the Petitioner to be walked by the jury room in shackles and to remain in  
21 shackles throughout the guilt and penalty phases when there was no evidence or finding

1 that the Petitioner was a security risk[.]” Petitioner asserts on appeal that neither the  
2 record nor the law supports the post-conviction court's rejection of that claim. In his  
3 view, in the absence of findings by the trial court that petitioner needed to be physically  
4 restrained for security reasons, the failure to object to physical restraints is *prima facie*  
5 case of inadequate assistance of counsel and prejudicial. *See State v. Wall*, 252 Or App  
6 435, 287 P3d 1250 (2012), *rev den*, 353 Or 280 (2013) (a trial judge has discretion to  
7 order shackling of a defendant if there is evidence of an immediate and serious risk of  
8 dangerous or disruptive behavior); *Davis v. Armenakis*, 151 Or App 66, 72, 948 P3d 327  
9 (1997), *rev den*, 327 Or 83 (1998) (petitioner established, *prima facie*, that he had been  
10 denied adequate assistance of counsel by proving that he was shackled in the presence of  
11 the jury without a proper record having been made). The state, for its part, contends that,  
12 to the extent that *Davis* creates a presumption of inadequacy of counsel for failing to  
13 object to physical restraints, that case is inconsistent with controlling precedent, was  
14 wrongly decided and should be overruled. The state contends in any event that the record  
15 supports the criminal trial court's decision to require the physical restraints.

16           Because we agree with the state's second contention, we need not address  
17 whether *Davis* establishes an incorrect standard. Although, as noted, the trial court made  
18 no express findings that petitioner was a flight or security risk, as found by the post-  
19 conviction court, the criminal trial record supported the criminal trial court's decision to  
20 order the restraint of petitioner during transport and at trial. *See Cunningham*, 186 Or  
21 App at 243-44 (although no hearing was held, criminal trial court record supported

1 decision to use restraints). The criminal trial court heard testimony during a pretrial  
2 hearing that petitioner could not control his temper, had engaged in violent attacks, had  
3 threatened to kill several people, and had walked away from a treatment facility while  
4 undergoing treatment. Thus, unlike in *Davis*, 151 Or App at 69-70, the record at  
5 petitioner's criminal trial demonstrated that petitioner needed to be physically restrained  
6 for security and flight reasons. The shackles and wrist restraints that petitioner wore  
7 during transport were removed before the jury was admitted to the court room, and the  
8 post-conviction court found that the leg braces worn at trial were not visible under  
9 petitioner's pants or through the skirting placed around the table. We agree with the post-  
10 conviction court's conclusion that petitioner's trial counsel did not fail to exercise  
11 reasonable skill and judgment by not objecting to the trial court's order that petitioner  
12 wear leg restraints and handcuffs during transport and leg restraints during trial, or if  
13 there was any inadequacy, it was not prejudicial.

14 C. *Third assignment of error--advice not to testify*

15 In his third assignment, petitioner contends that the post-conviction court  
16 erred in denying petitioner's ninth claim for post-conviction relief, in which he asserted  
17 that he was deprived of the right to testify as a result of "defense counsel's reputed advice  
18 that his emotional state made it too risky and by the court's lack of inquiry as to whether  
19 his waiver of this right was knowing, intelligent and voluntary." In rejecting petitioner's  
20 claim, the post-conviction court found that (1) petitioner's trial counsel did not prevent  
21 petitioner from testifying, (2) counsel fully informed petitioner that he had to decide for

1 himself whether to testify, and (3) petitioner made the decision himself not to testify at  
2 trial. The post-conviction court further found that trial counsel reasonably advised  
3 petitioner not to testify, because counsel had observed petitioner's angry, aggressive  
4 behavior, and feared that he would display that behavior to the jury and, further, that  
5 counsel had legitimate concerns that petitioner would request the death penalty.

6           If and to the extent that the ninth post-conviction claim is understood to  
7 allege that trial counsel unreasonably advised petitioner not to testify and thereby  
8 deprived petitioner of his right to testify, that allegation was rejected by the post-  
9 conviction court, and we conclude that the evidence in the record supports the post-  
10 conviction court's findings as well as its conclusion that counsel's advice was not  
11 unreasonable.

12 D.           *Fourth assignment of error--failure to raise due process challenge to*  
13               *indictment*

14  
15           In his fourth assignment of error, petitioner contends that trial counsel was  
16 inadequate and ineffective in failing to challenge the indictment on due process grounds,  
17 as having been obtained through perjured grand-jury testimony. This assertion was  
18 raised, in part, in petitioner's seventh claim for relief, in which he alleged that the state  
19 had admitted that a witness who testified before the grand jury, codefendant Susbauer,  
20 was unreliable and inconsistent. We summarize the post-conviction court's findings in  
21 rejecting that claim:

22           1. Petitioner's counsel did not fail to challenge the indictment on the  
23           ground that it had been obtained through the presentation of false evidence  
24           to the grand jury. Trial counsel raised the issue twice: in a pretrial hearing

1 and during trial. The court rejected defense counsel's assertion, ruling that  
2 the state had not acted improperly in seeking the indictment. Trial counsel  
3 tried to show at trial that Susbauer's testimony to the grand jury was false,  
4 but the evidence did not support that position.

5 2. Petitioner failed to prove that the trial court's rulings rejecting  
6 trial counsels' assertions were attributable to a failure or deficiency on the  
7 part of trial counsel.

8 On appeal, petitioner asserts that, despite the post-conviction court's findings, the record  
9 contains evidence that Susbauer lied to the grand jury and, for that reason, the indictment  
10 was materially defective in violation of due process; accordingly, trial counsel's failure to  
11 make a due process challenge amounted to inadequate assistance. Petitioner further  
12 contends that the record does not support the post-conviction court's findings that trial  
13 counsel raised a due process challenge to the indictment as based on perjured testimony.<sup>6</sup>

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<sup>6</sup> Rather, petitioner contends, trial counsel asserted that the state's disparate treatment of petitioner and Susbauer in plea negotiations had violated the equal privileges and immunities clause in Article I, section 20, of the Oregon Constitution. Petitioner asserts that the only reference that trial counsel made to Susbauer's grand jury testimony was as an example of evidence of the state's improper motive for treating petitioner and Susbauer differently and as a basis for allowing petitioner to conduct further investigation of that issue. When asked by the trial court to explain how that further investigation would further petitioner's disparate treatment claim, trial counsel responded that, "if [the state is] presenting Susbauer's testimony and he's not being truthful, then that would indicate that [the state was] fairly desperate to convict [petitioner] in acting out of some type of improper motive." The trial court allowed trial counsel to examine two prosecutors and codefendant Susbauer's counsel under oath, but then rejected trial counsel's state constitutional claim, ruling that there had been no showing that the state had an improper motive in the way it treated the two defendants or in indicting petitioner:

"I find that the State has acted properly in obtaining this indictment, that there are no improper motives that have been a part of it, and that the fact that an indictment seeks aggravated murder and a death penalty as a consequence upon conviction does not in any way result from a denial of due process or equal protection."

1           The state responds that, on the merits of petitioner's contention, he has not  
2 proven his claim: As the post-conviction court found, there is no evidence that Susbauer,  
3 in fact, lied to the grand jury, and there was no evidence of perjury. In the absence of  
4 perjured testimony, the state asserts, it cannot be inadequate assistance to fail to move  
5 against an indictment based on it having been obtained through perjured testimony. The  
6 state acknowledges that there is evidence in the record that Susbauer lied to police early  
7 in the investigation, attempting to minimize his role. The state points out, however, that  
8 after the evidence came to light, Susbauer admitted greater involvement, to the extent that  
9 the detectives determined that Susbauer was "being truthful in the end." The state asserts  
10 that the record shows that trial counsel inquired into that sequence of events and elicited  
11 testimony from witnesses concerning their belief that, by the time he testified to the grand  
12 jury, Susbauer was being truthful.

13           We agree with the state that the post-conviction court's finding that  
14 petitioner has failed to show that Susbauer lied to the grand jury is supported by evidence  
15 in the record. We therefore affirm the post-conviction court's conclusion that trial  
16 counsel was not inadequate in failing to move against the indictment on that ground.

17 E.           *Fifth assignment of error--various asserted trial errors*

18           In his fifth assignment of error, petitioner asserts that the post-conviction  
19 court erred in denying post-conviction claims asserting various errors in petitioner's  
20 criminal trial. We consider each issue in turn. In his seventh post-conviction claim for

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1 relief, petitioner alleged that trial counsel was inadequate in failing to move to strike the  
2 testimony of two state witnesses who did not have personal knowledge of the events  
3 pertaining to the actual murders but who had knowledge of petitioner having threatened  
4 the victims in the past. Trial counsel did not object and elicited testimony from those  
5 witnesses that they were openly hostile to petitioner, believed he was guilty, and thought  
6 he deserved to die. The post-conviction court rejected the claim of inadequacy, finding  
7 that

8 "[p]etitioner did not prove that his trial counsel provided inadequate  
9 assistance or that they did not make a legitimate tactical choice in  
10 permitting various state witnesses to acknowledge their antipathy towards  
11 petitioner in order to demonstrate their bias, so that they could then be  
12 impeached with that bias. Petitioner did not prove that he suffered  
13 prejudice as a result of his counsel's performance with respect to the  
14 handling of any witness."

15 Petitioner acknowledges that there is evidence that trial counsel tactically relied on the  
16 evidence to show the witnesses' bias, but asserts that that tactical decision was not  
17 objectively reasonable in view of the highly inflammatory nature of the testimony. In  
18 any event, petitioner points out, trial counsel did not argue to the jury that those witnesses  
19 were biased or that they should be disbelieved because of bias. As such, petitioner  
20 contends, the jury was left with the impression that trial counsel agreed with the  
21 witnesses' testimony.

22 The state responds that, although trial counsel made no argument to the jury  
23 regarding the witnesses' bias, on cross-examination trial counsel did, in fact, impeach  
24 both witnesses for bias, based on their strongly negative statements regarding petitioner



1 and the fact that they had formed those opinions, in part, based on inaccurate  
2 information.<sup>7</sup> The post-conviction court's finding that trial counsel made a tactical  
3 decision not to object to the testimony is supported by the evidence. In light of the strong  
4 presumption that counsel's conduct falls within the wide range of reasonable professional  
5 assistance, we decline to hold that counsel's tactical decision was constitutionally  
6 deficient. *Cunningham*, 186 Or App at 226 (reviewing court will not second guess  
7 counsel's tactical decisions unless those decisions "reflect an absence or suspension of  
8 professional skill and judgment"). However, assuming that trial counsel's decision  
9 constituted ineffective assistance, we conclude that the post-conviction court did not err  
10 in concluding that petitioner suffered no prejudice as a result of the testimony.

11 We move on to petitioner's seventh post-conviction claim. Before his trial  
12 for aggravated murder, petitioner had been tried and acquitted of armed robbery in  
13 Marion County, based on events in Salem earlier in the evening on the night of the

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<sup>7</sup> Tracy, petitioner's former girlfriend, testified that there was no doubt in her mind that petitioner was guilty and that he was involved in and participated in the murders. She said that his crime was "sickening" and "wrong" and that she wanted to see him found guilty. Tracy acknowledged that she had formed her opinion based primarily on highly publicized reports that petitioner had confessed to the murders in a recorded conversation with a Catholic priest, and that, having formed that opinion, Tracy was going to stick with it. In fact, petitioner and the state had stipulated that petitioner had not confessed to the crimes in his conversations with the priest. Thus, trial counsel attempted to demonstrate that Tracy had formed her opinion of petitioner's guilt based on inaccurate information.

Freeman testified that both she and Tracy "wish that this stupid butt would be dead" and that "he deserves to die" and that "he had no right to kill" the victim Bendele. Trial counsel established that Freeman's views might have been influenced by Tracy and was thus also based on inaccurate information.

1 murders. Susbauer pleaded guilty to the robbery as an accomplice and testified at  
2 petitioner's armed robbery trial that petitioner had acted as the gunman. The victim also  
3 identified petitioner as the man who had threatened her with a gun and robbed her.  
4 Petitioner testified in his own defense and blamed Susbauer, and the jury acquitted him.

5           During opening statements at the aggravated murder trial, the prosecutor  
6 explained that the jury would hear evidence that Susbauer and petitioner had been on a  
7 crime spree together in the days leading up to the murders and that, although the state and  
8 defense disagreed as to whether petitioner or Susbauer had been the gunman in the armed  
9 robbery, "[i]t really is not that important or central to this case, except that these two guys  
10 are very tight in everything." At trial, the state presented evidence of the earlier robbery,  
11 including evidence that the victim of that offense had identified petitioner as the gunman.  
12 There was also evidence that petitioner had in his possession at the murders the same gun  
13 that had been used in the robbery. The prosecutor argued to the jury in closing that,  
14 notwithstanding his acquittal of armed robbery, petitioner had, in fact, committed that  
15 offense and had been acquitted only because he had "committed outright perjury" in that  
16 case.

17           In his seventh post-conviction claim, petitioner asserted that trial counsel  
18 was inadequate in failing to object to the state's evidence of the Salem robbery, which he  
19 asserted was barred from consideration under principles of issue preclusion.<sup>8</sup> Petitioner's

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<sup>8</sup> Although throughout these proceedings the parties and the post-conviction court referred to the principle as "collateral estoppel," since 1990 the principle is referred to as "issue preclusion," *see Drews v. EBI Companies*, 310 Or 134, 139, 795 P2d 531 (1990),

1 post-conviction trial memorandum on that claim did not include any analysis of issue  
2 preclusion; he argued instead that admission of the evidence violated principles of double  
3 jeopardy under Article I, section 12, of the Oregon Constitution and the Fifth  
4 Amendment to the United States Constitution.<sup>9</sup>

5           The post-conviction court did not address petitioner's double jeopardy  
6 argument, but addressed only the claim in the petition that trial counsel's failure to object  
7 to evidence of the robbery on issue preclusion grounds was inadequate assistance of  
8 counsel. The post-conviction court ruled that evidence of the robbery offense was not  
9 barred by that doctrine and was admissible. Additionally, the court reasoned that, given  
10 that petitioner had been acquitted of the robbery and that Susbauer had admitted his guilt,

11           "reasonable counsel could conclude that evidence of the Salem robbery  
12 would bolster the defense theory that Susbauer was a violent criminal and  
13 instigator, and that petitioner was merely in the wrong place at the wrong  
14 time."

15           On appeal, petitioner asserts that the post-conviction court erred in rejecting  
16 his claim that counsel was inadequate in not objecting to the evidence on the ground of  
17 issue preclusion. Assuming that petitioner preserved that argument--even though he did  
18 not argue it to the post-conviction court--we reject it.

19           Issue preclusion prevents the relitigation of factual issues decided in a prior  
20 proceeding, and can be based on constitutional principles, or statutory or common law

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and that is how we refer to it in this opinion.

<sup>9</sup> The Fifth Amendment provides, in part, that "[n]o person shall \* \* \* be subject for the same offence to be twice put in jeopardy of life or limb."

1 principles. *State v. Rogers*, 313 Or 356, 374, 836 P2d 1308 (1992), *cert den*, 507 US 974  
2 (1993) (applying statutory and constitutional issue preclusion principles and noting that  
3 ORS 43.160, which has its genesis in common law, applies in criminal cases). *See also*  
4 *State v. Mozorosky*, 277 Or 493, 498, 561 P3d 588 (1977); *State v. Dewey*, 206 Or 496,  
5 504, 292 P2d 799 (1956) (the doctrine of *res judicata* or estoppel by judgment is  
6 applicable in criminal cases); *State v. Johnson*, 70 Or App 403, 405-06, 698 P2d 1032  
7 (1984); *State v. Hollandsworth*, 64 Or App 44, 46, 666 P2d 1373 (1983). Petitioner  
8 expressly eschews reliance on a constitutionally-based rationale,<sup>10</sup> and does not make a  
9 statutory argument. *See* ORS 43.160 ("That only is determined by a former judgment,  
10 decree or order which appears upon its face to have been so determined or which was

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<sup>10</sup> In his reply brief, however, petitioner adds the argument made in his trial memorandum that the state's use of the evidence also violated double jeopardy. Under federal law, the doctrine of "collateral estoppel" is viewed as a component of the ban against double jeopardy. *Mozorosky*, 277 Or at 497-98 (federal double jeopardy protection prohibits retrial for the same crime after judgment of acquittal and multiple prosecutions for different crimes based on the same evidence). The United States Supreme Court explained the concept in *Ashe v. Swenson*, 397 US 436, 90 S Ct 1189, 25 L Ed 2d 469 (1970). In *Ashe*, six players of a card game were simultaneously robbed at gunpoint by three or four men. The suspects, including the petitioner, were charged with separate offenses for each of the six victims. The only element of the crime in dispute was identity, *i.e.*, whether the petitioner was one of the robbers. The state tried the petitioner on one of the counts, and he was acquitted. The state then tried the petitioner on another count, which was identical to the first except that it related to a different victim, and the petitioner was convicted. Once again, the only issue had been whether the petitioner was one of the robbers. *Id.* 379 US at 437-40. The Court held that the state was collaterally estopped under principles of double jeopardy from subjecting the petitioner to a second trial on the identical issue. *Id.* at 444-47.

As the state correctly asserts, the double jeopardy aspect of collateral estoppel announced in *Ashe* is not implicated in this case. Petitioner was not being retried for anything arising from the conduct during the Salem robbery.

1 actually and necessarily included therein or necessary thereto.") He instead focuses on  
2 the common-law doctrine, which requires a showing of five elements: (1) the issue in the  
3 two proceedings is identical; (2) the issue has been actually litigated and was essential to  
4 a final decision on the merits in the prior proceeding; (3) the party to be precluded must  
5 have had a full and fair opportunity to be heard on the issue; (4) the party to be precluded  
6 must have been a party or in privity with a party to the prior proceeding; and (5) the prior  
7 proceeding must be the type of proceeding to which courts will give preclusive effect.  
8 *Nelson v. Emerald People's Utility Dist.*, 318 Or 99, 104, 862 P2d 1293 (1993).

9           As the party contending that issue preclusion was applicable, petitioner had  
10 the burden to establish the facts supporting its application. *See State Farm v. Century*  
11 *Home*, 275 Or 97, 104, 550 P2d 1185 (1976). Citing *State v. Garcia*, 74 Or App 649,  
12 655, 704 P2d 544, *rev den*, 300 Or 180 (1985) (in the criminal context, the doctrine of  
13 collateral estoppel bars *proof* of any fact or issue necessarily decided by a previous  
14 verdict), petitioner contends, simply that, because he was acquitted of the robbery, no  
15 evidence relating to that charge could be considered in the aggravated murder trial.

16           The state responds that, to the extent that petitioner preserved his issue  
17 preclusion claim, which was asserted in the post-conviction petition but not specifically  
18 argued to the post-conviction trial court, it is inapposite and the post-conviction court did  
19 not err in rejecting it. We agree with the state that, assuming that petitioner preserved his  
20 claim, petitioner's acquittal of the robbery charge did not preclude the consideration of  
21 evidence of the robbery in the aggravated murder prosecution.

1           First, the state established that evidence of petitioner's involvement in the  
2 robbery was relevant to the aggravated murder prosecution: The evidence was offered to  
3 show petitioner's participation in a crime spree with Susbauer on the night of the murders  
4 and to establish that petitioner had been in possession of the murder weapon, which had  
5 also been used in the robbery.

6           Second, petitioner has not shown that consideration of the robbery evidence  
7 resulted in a relitigation of facts necessarily determined by his acquittal of the robbery.  
8 The ultimate facts to be proven in the aggravated murder trial were different from those  
9 litigated in the robbery prosecution. As the Supreme Court explained in *Dewey*,

10           "[w]here the second prosecution is for another offense, 'the previous  
11 judgment is conclusive only as to those matters which were in fact in issue  
12 and actually or necessarily adjudicated. Thus an acquittal of the charge of  
13 seduction does not adjudicate the question of sexual intercourse although  
14 that was one of the issues in the case, since the acquittal might have been  
15 due to the failure to establish other facts essential to a conviction.'"

16 206 Or at 508 (quoting 2 *Freeman on Judgments* § 648, 1364-65 (5th ed 1925)).

17 Petitioner's acquittal of robbery does not mean that the jury in that case "actually or  
18 necessarily" determined the facts for which the evidence was introduced in the  
19 aggravated murder trial--to show petitioner's involvement in a crime spree on the night of  
20 the murders and his possession of the murder weapon.

21           Finally, even if issue preclusion were applicable, there is evidence in the  
22 record to support the trial court's finding that trial counsel's failure to object to evidence  
23 of the robbery was a tactical decision, and we agree with the post-conviction court's  
24 conclusion that, to the extent that the decision not to object was tactical, it was

1 reasonable.

2           Thus, we conclude that the post-conviction court did not err in rejecting  
3 petitioner's issue preclusion argument and in concluding that trial counsel was not  
4 inadequate in failing to object to evidence of the robbery. We also conclude, however,  
5 that assuming that counsel was inadequate in failing to object, petitioner has not shown  
6 that he was prejudiced by the admission of evidence of the robbery.

7           Petitioner's argument on appeal, that counsel was inadequate in failing to  
8 object to the prosecutor's argument to the jury that petitioner perjured himself during the  
9 robbery trial, was not asserted in the petition and therefore will not be considered here.

10           Also in his seventh claim for relief, petitioner contended that trial counsel  
11 was inadequate in failing to request removal of a juror who had had contact with the  
12 victims' families. The post-conviction court rejected the claim, finding that,

13           "[w]ith respect to each incident involving [the juror], the trial court  
14 and petitioner's trial counsel conducted a thorough inquiry. The record  
15 established that no prejudicial communications involving the juror had  
16 taken place. Petitioner did not prove that the trial court would have granted  
17 a motion to remove the juror. Because the incidents in question were  
18 proven to be innocuous, petitioner's trial counsel would not have been  
19 successful in such a motion. Petitioner did not prove that his trial counsel  
20 provided inadequate assistance or that he suffered prejudice as a result.  
21 Petitioner also did not prove that his trial counsel's decision not to challenge  
22 [the juror] was not a legitimate tactical choice based on a perception that  
23 she would be a favorable juror for the defense."

24 We have considered the evidence in the record and conclude that it supports the post-  
25 conviction court's findings. Accordingly, we reject petitioner's contention that the post-  
26 conviction court erred in denying relief on this claim.

1 F. *Sixth assignment of error--failure to call a potential witness*

2 In his sixth assignment, petitioner contends that the post-conviction court  
3 erred in rejecting petitioner's contention, raised in his seventh claim for relief, that trial  
4 counsel was inadequate and ineffective in failing to present Tracy Reed as a witness or  
5 make an offer of proof of her testimony. Petitioner offered the following evidence: In a  
6 deposition given in the post-conviction proceeding, petitioner's post-conviction counsel  
7 asked co-trial counsel Lance whether the two of them had "talked in the hallway about a  
8 Tracy Reed who came forward and indicated she had been raped by John Susbauer?"  
9 Lance replied "Yes." Based on that response, petitioner asserted at the post-conviction  
10 hearing that trial counsel was constitutionally ineffective in failing to offer proof of, or  
11 otherwise admit evidence of, Susbauer's rape of Reed.

12 The post-conviction court gave several reasons for rejecting that claim:

13 1. Petitioner did not offer an affidavit or testimony of Reed or  
14 otherwise prove what she would have said had she been called as a witness.

15 2. The state's theory was that both petitioner and Susbauer had  
16 raped Bendele. Evidence that Susbauer had raped Reed would not show  
17 that petitioner had not raped Bendele and would not have been exculpatory  
18 of petitioner, but would have opened the door to evidence of petitioner's  
19 prior sexual assaults. Even if Reed might have testified that Susbauer raped  
20 her, trial counsel reasonably did not offer such evidence.

21 3. Evidence of Susbauer's rape of Reed would not have been  
22 admissible.

23 To satisfy a petitioner's burden of proof on a claim that trial counsel was  
24 constitutionally inadequate in failing to call a witness to testify, the petitioner must show  
25 that (1) the witness would have been available to testify, (2) would have appeared at the



1 time of trial, and (3) would have provided testimony likely to have changed the result of  
2 the trial. *See Carias v. State of Oregon*, 148 Or App 540, 546-47, 941 P2d 571 (1997)  
3 (petitioner failed to prove prejudice where he failed to show the availability of the  
4 witness or to show by affidavit, testimony, or otherwise, what the witness's testimony  
5 would have been, to evaluate the likely effect on the trial). *See also New v. Armenakis*,  
6 156 Or App 24, 946 P2d 1101 (1998), *rev den*, 328 Or 594 (1999) (no prejudice shown  
7 where the substance of an omitted witness's testimony was not established in the post-  
8 conviction proceeding through admissible evidence). Petitioner argues on appeal that  
9 Lance's deposition statement satisfied his burden to show that Reed was available, and  
10 that Reed's testimony would have been admissible under OEC 404(3) for a noncharacter  
11 purpose to show that Susbauer lied about having been forced by petitioner to rape  
12 Bendele, from which the jury could have inferred that Susbauer also lied about petitioner  
13 having shot the victims.

14           The state responds that, assuming that trial counsel was ineffective in  
15 failing to seek out Reed as a witness, Lance's testimony does not provide the requisite  
16 proof of the substance of Reed's potential testimony which, in the absence of further  
17 evidence, remains speculative, and deprives the court of the ability to assess how she  
18 would have testified and the impact of that testimony. Further, the state asserts, as the  
19 post-conviction court found, that petitioner never established that Reed would have been  
20 available to testify at the criminal trial.

21           We conclude that, assuming that trial counsel was inadequate in failing to

1 present the testimony of Reed or to make an offer of proof, petitioner's evidence does not  
2 show prejudice. The hearsay evidence, offered through Lance's deposition, of the content  
3 of Reed's potential testimony was insufficient to satisfy petitioner's burden to show how  
4 she would have testified if called as a witness. *New*, 156 Or App at 29. Further, the  
5 inferences that necessarily must be drawn from Lance's affirmative response to the  
6 deposition question are that (1) that Reed would have been available to testify at  
7 petitioner's trial and (2) she would have testified in a way that had a tendency or a  
8 reasonable probability of affecting the outcome of the case. In the absence of an affidavit  
9 by Reed describing her testimony, those inferences are speculative at best, and the post-  
10 conviction court was not obligated to make them. We conclude for that reason that the  
11 post-conviction court did not err in concluding that petitioner had not established  
12 prejudice and in rejecting the claim, and we therefore do not address petitioner's  
13 contention that the post-conviction court erred in determining that Reed's testimony, if  
14 offered, would not have been admitted.

15 G. *Seventh assignment of error--claims relating to jury instructions*

16 In his seventh assignment of error, petitioner asserts that the post-  
17 conviction court erred in rejecting two claims relating to jury instructions: (1) that  
18 counsel was inadequate in failing to object at trial to the uniform jury instruction on  
19 reasonable doubt, Uniform Criminal Jury Instruction 1009, which used the phrase "moral  
20 certainty" and which, petitioner contends, misled the jury to believe that it could convict  
21 on less than reasonable doubt; and (2) that counsel was inadequate in failing to object to

1 burglary charge instructions that included dual or contradictory specific intent  
2 requirements.

3           We reject petitioner's contention regarding the "moral certainty" uniform  
4 jury instruction without discussion. *State v. Williams*, 313 Or 19, 36-38, 828 P2d 1006  
5 (1992) (including the term "moral certainty" in an instruction defining reasonable doubt  
6 is not error when the jury could not reasonably have construed the instruction either to  
7 decrease the state's burden of proof or allow the jury to base its decision on anything  
8 other than the evidence). We move on to consideration of the burglary instruction.

9           As noted, in addition to aggravated murder, petitioner was charged with  
10 multiple other offenses, including two counts of burglary, Count 1 and Count 4, with  
11 respect to two different burglaries involving different victims, Johnson and Noble. Those  
12 counts alleged that petitioner entered dwellings and remained unlawfully "with intent to  
13 commit the crime of theft or criminal mischief." Petitioner alleged in his seventh claim  
14 for relief that "counsel was inadequate for "failing to object at trial to jury instructions \* \*  
15 \* [w]hich included [d]ual or contradictory specific intent requirements for the burglary  
16 counts." Generously interpreted, that claim would appear to be that counsel was  
17 inadequate in failing to request instructions that the same ten jurors must agree regarding  
18 which of two underlying crimes--criminal mischief or theft--petitioner intended to  
19 commit while in the dwellings. *State v. Boots*, 308 Or 371, 780 P2d 725 (1989).

20           Petitioner is correct that a concurrence instruction was required, *see State v.*  
21 *Frey*, 248 Or App 1, 273 P3d 143 (2012) (specific crime that defendant intended to

1 commit is a material fact upon which the jury must concur in order to convict defendant  
2 of attempted burglary), and we agree that, in light of the state of the law at that time,  
3 *State v. Sanders*, 280 Or 685, 572 P2d 1307 (1977), reasonable counsel would have  
4 requested the instruction. As we explained in *Frey*, it has long been the law in Oregon  
5 that the specific crime that the defendant intended to commit upon entry is a material  
6 element of burglary. 248 Or App at 9 (citing *Sanders*, 280 Or at 689.). Thus, the failure  
7 to request the instruction was inadequate and ineffective assistance of counsel.<sup>11</sup>

8           The remaining question is whether petitioner has shown prejudice. We  
9 reject the post-conviction court's reasoning and the state's contention that there was no  
10 prejudice because petitioner's counsel conceded in closing argument at the murder trial  
11 that petitioner is "a thief. He's a burglar. He's a liar." Those statements were consistent  
12 with the defense strategy that, although petitioner had participated with Susbauer in the  
13 crime spree, he did not murder the victims. But those statements did not amount to an  
14 admission that petitioner had in fact carried out the particular burglaries alleged in the  
15 indictment. Additionally, petitioner's subsequent admission at sentencing of his  
16 involvement in the burglaries does not bear on the prejudicial effect of not giving a  
17 concurrence instruction at trial. *See Bogle v. Armenakis*, 172 Or App 55, 64, 18 P3d 390  
18 (2001) (failure to give *Boots* instruction had tendency to affect result of prosecution).

19           As petitioner points out, in addition to the burglary convictions, the jury

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<sup>11</sup> Although the record shows that at least ten jurors voted for each guilty verdict on the burglary counts, it is not known whether the same ten jurors agreed on the underlying crimes.

1 also found petitioner guilty of two counts of theft relating to the Johnson burglary (Count  
2 1), and three counts of theft and one count of criminal mischief related to the Noble  
3 burglary (Count 4). In petitioner's view, those guilty verdicts do not cure the failure to  
4 give the concurrence instruction. It is possible, petitioner contends, that with respect to  
5 the Johnson burglary (Count 1) there were two jurors who found petitioner not guilty of  
6 theft but guilty of burglary based on an intent to commit criminal mischief, while other  
7 jurors voted guilty based on an intent to commit theft. And it is possible, petitioner  
8 contends, that with respect to the Noble burglary (Count 4), the 10 jurors who found  
9 petitioner guilty of burglary were not the same 10 who found him guilty of theft and  
10 criminal mischief. We agree with petitioner that those scenarios are *possible*; in the  
11 absence of a poll of the jurors, it is impossible to know with certainty on this record  
12 whether the same 10 jurors agreed on the underlying offense petitioner intended to  
13 commit in each of the two burglaries.

14           Nonetheless, the state asserts that the *uncontested* evidence of petitioner's  
15 participation in the burglaries is so overwhelming that no reasonable jury could have  
16 found petitioner not guilty. If there is "overwhelming evidence of \* \* \* guilt," even  
17 serious errors could not reasonably change the result. *Davis*, 151 Or App at 72 (trial  
18 counsel's failure to object to the petitioner being held in shackles in presence of the jury  
19 did not require post-conviction relief). Petitioner does not dispute the uncontested nature  
20 of the evidence, but replies that "the state does not cite *which* evidence proved *which*  
21 underlying crime petitioner intended to commit upon entering the dwellings at issue in

1 this case[.]"<sup>12</sup> (Emphasis in original.) We agree with petitioner. In the absence of a  
2 concurrence instruction, it is not possible on this record to determine which underlying  
3 offense formed the basis for each of the burglary convictions. Although our conclusion  
4 with respect to this claim does not affect petitioner's aggravated murder convictions and  
5 resulting death sentences, we agree with petitioner that he has an interest in having the  
6 record reflect a correct resolution of the burglary charges. *See State v. Link*, 346 Or 187,  
7 199-200, 208 P3d 936 (2009). Accordingly, we conclude that petitioner has established  
8 prejudice and is entitled to post-conviction relief on the burglary convictions.

9 H. *Petitioner's supplemental brief-- "natural and probable consequences"*  
10 *instruction*

11  
12 During the guilt phase of petitioner's trial, the jury was instructed that a  
13 person who aids and abets another in committing a crime is also criminally responsible  
14 for any act or other crime committed "as a natural and probable consequence" of the

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<sup>12</sup> As earlier quoted, \_\_\_ Or App at \_\_\_ (slip op at \_\_\_), the Supreme Court's opinion summarized the facts underlying the two burglary counts, in the light most favorable to the state:

"As pertinent here, on December 14, 1995, defendant and Susbauer broke into a woman's home, stole several thousand dollars worth of her property, and slashed a couch and a stereo speaker with a knife before leaving.

"\* \* \* \* \*

"On December 19, 1995, defendant and Susbauer broke into another house and again stole thousands of dollars worth of property including, among other things, a rabbit-fur jacket, a .38 caliber Taurus revolver with wooden grips, and 25 rounds of ammunition for the revolver. Before they left, they again slashed the furniture with a knife."

(Quoting *Hale*, 335 Or at 614.)

1 planning, preparation, or commission of the intended crime. In the seventh claim of his  
2 post-conviction petition, petitioner asserted that trial counsel was inadequate in failing to  
3 object to jury instructions "[w]hich did not specify that the Petitioner was being tried as  
4 an accomplice, a status which involves a different or additional requirement of proof,  
5 such as specific intent to facilitate the commission of the crime by another." In rejecting  
6 that claim, the post-conviction court found, among other facts,<sup>13</sup> that "[t]he trial court  
7 instructed the jury on criminal liability for the conduct of another person pursuant to ORS  
8 161.150 and ORS 161.155." The post-conviction court found that trial counsel  
9 reasonably did not object to that instruction, because it was legally correct and that, for  
10 the same reason, petitioner did not suffer any prejudice.

11 In a supplemental *pro se* brief, among a long list of assertions in his second  
12 supplemental *pro se* assignment of error,<sup>14</sup> petitioner argued that trial counsel was  
13 inadequate in failing to object to "the accomplice instructions [that] allowed a confusion  
14 of theories and intents." After the post-conviction court entered its judgment in 2009, the  
15 Supreme Court decided *State v. Lopez-Minjarez*, 350 Or 576, 260 P3d 439 (2011).  
16 Petitioner has filed a memorandum of additional authorities, arguing that *Lopez-*

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<sup>13</sup> The post-conviction court also found that the jury heard evidence sufficient to allow it to find that petitioner personally committed all of the crimes for which he was convicted and that he aided and abetted Susbauer in the commission of some of the crimes.

<sup>14</sup> In his first supplemental *pro se* assignment of error, petitioner asserts error with respect to the exclusion of testimony of a defense expert. Petitioner's second supplemental *pro se* assignment of error lists numerous unrelated investigative and trial errors and prosecutorial misconduct with some argument in a footnote.

1 *Minijarez* requires reversal of petitioner's convictions. In *Lopez-Minijarez*, the Supreme  
2 Court reversed the defendant's convictions because the "natural and probable  
3 consequences" portion of the uniform jury instruction on aiding and abetting incorrectly  
4 stated the principles of accomplice liability under Oregon law, as it instructed the jury  
5 that it could find the defendant guilty on a theory of accomplice liability, whether or not  
6 he intended to commit or aid in the commission of the underlying offense. *Id.* at 583.  
7 Petitioner contends that, likewise, his convictions here must be overturned, because a  
8 similar instruction was given, and counsel was ineffective in failing to object.

9           Assuming that the post-conviction petition raised the inadequacy of counsel  
10 claim now asserted and that petitioner's supplemental *pro se* brief adequately assigned  
11 error to the post-conviction court's rejection of the claim, the post-conviction court did  
12 not err in rejecting it. As the post-conviction court found, the "natural and probable  
13 consequences" instruction was correct when given in 1998. Until this court's 2010  
14 opinion and the Supreme Court's 2011 opinion in *Lopez-Minijarez*, the "natural and  
15 probable consequences" instruction was a standard instruction included in the uniform  
16 criminal jury instructions and had been described in *State v. Gibson*, 252 Or 241, 246,  
17 448 P2d 534 (1968), as "a correct statement of the law." The failure of trial counsel to  
18 object to it was a reasonable exercise of professional skill and judgment. *See Wells v.*  
19 *Peterson*, 315 Or 233, 236, 844 P2d 192 (1992) (failure of criminal trial counsel to  
20 contend that statute prohibited the sentence was not inadequate assistance of counsel,  
21 because at the time of trial the meaning of the statute was not clearly settled and



1 reasonable counsel could have disagreed about whether to make the argument at the time  
2 that the original case was tried). Accordingly, we conclude that trial counsel was not  
3 inadequate in failing to object to the "natural and probable consequences" instruction.  
4 We further conclude that, assuming that trial counsel was inadequate in failing to object,  
5 in view of the evidence that petitioner was the primary actor, as described in the Supreme  
6 Court's opinion affirming the death sentence, the uniform criminal jury instruction on  
7 aiding and abetting did not have a tendency to affect the result of the prosecution or cause  
8 actual prejudice to the defense.

9           We have considered the remaining assignments of error both in petitioner's  
10 brief filed by counsel<sup>15</sup> and in his supplemental *pro se* brief, and we reject them without  
11 further discussion.

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<sup>15</sup> Petitioner's eighth assignment asserts inadequacy of counsel based on failure to demur to Oregon's death penalty statute on grounds that have been previously rejected. The ninth assignment asserts that petitioner was inadequate in failing to investigate potential mitigation witnesses. Petitioner's tenth assignment, which was not preserved, asserts inadequacy of counsel during the penalty phase of trial based on counsel's failure to assert in closing arguments that codefendant Susbauer likely would not receive the death penalty. In his eleventh assignment, petitioner asserts that appellate counsel was inadequate in failing to assign error on direct appeal to the trial court's preclusion of argument about codefendant Susbauer having a collection of women's underwear. Petitioner's twelfth assignment of error asserts three stand-alone challenges to the imposition of the death penalty in the face of codefendant Susbauer's life sentence. In his thirteenth assignment of error, petitioner raises an Eighth Amendment challenges to the manner of conducting Oregon's death penalty by lethal injection. Petitioner's fourteenth assignment asserts the appearance bias of the trial court. In his fifteenth assignment, petitioner asserts prosecutorial misconduct and trial court error relating to conduct and rulings with respect to evidence concerning codefendant Susbauer. In his sixteenth assignment of error, petitioner challenges the Supreme Court's opinion in *Palmer*. We have considered each assignment and reject them as not preserved, as barred under ORS 138.550(2) and *Palmer*, or on their merits.

1

Convictions of burglary reversed and remanded; otherwise affirmed.