

1 state court proceedings violated Petitioner Said Farzad’s Double Jeopardy rights, and object to
2 the recommendation that Petitioner’s habeas corpus petition be granted; (2) Respondents object
3 to the inclusion of Respondents Mark Roe and Robert Ferguson in the caption of the Proposed
4 Order and Proposed Judgment; and (3) Respondents contend that Petitioner is required to
5 exhaust state remedies. (Dkt. No. 28 at 1-2.)

6 **Discussion**

7 **I. Legal Standard**

8 Under Federal Rule of Civil Procedure 72, the Court must resolve de novo any part of the
9 Magistrate Judge’s Report and Recommendation that has been properly objected to and may
10 accept, reject, or modify the recommended disposition. Fed. R. Civ. P. 72(b)(3); see also 28
11 U.S.C. § 636(b)(1).

12 **II. Respondents’ Objections**

13 **A. Double Jeopardy**

14 Respondents object to the Report and Recommendation’s finding that Petitioner’s retrial,
15 after the jury was unable to reach a verdict on Count I, violated Double Jeopardy. (Dkt. No. 28
16 at 2-5.)

17 The Report and Recommendation indicate that, while the jury expressly declared that
18 they were deadlocked as to Count II, they did not do so as to Count I. (Dkt. No. 27 at 7-8.) The
19 trial court did not make further inquiry or finding as to whether the jury was deadlocked on
20 Count I. (Id. at 8.) Respondents contend that when Petitioner rejected the trial court’s offer to
21 do so, he “acquiesced” in the jury’s discharge and provided “implied consent” such that retrial
22 was permitted. (Id. at 3.)

1 After review of the Report and Recommendation and all related papers, the Court
2 concludes that Petitioner's retrial violated Double Jeopardy. In Brazzel v. Washington, the Ninth
3 Circuit held that "[a]n implied acquittal occurs when a jury returns a guilty verdict as to a lesser
4 included or lesser alternate charge, but remains silent as to other charges, without announcing
5 any signs of hopeless deadlock." 491 F.3d 976, 981 (9th Cir. 2007). That is precisely what
6 occurred here. Petitioner's failure to affirmatively request that the trial court question the jurors
7 as to whether they were genuinely deadlocked on Count I does not constitute "acquiescence" or
8 "implied consent" allowing for retrial. Further, contrary to Respondents' suggestion, Petitioner's
9 agreement to the use of the "failure to agree" instruction does not constitute "waiver" of the
10 implied acquittal as this is the proper instruction in Washington. Daniels v. Pastor, No. C09-
11 5711BHS, 2010 WL 56041, at *4 (W.D. Wash. Jan. 6, 2010) (citation omitted).

12 The Court concludes that Petitioner's retrial on Count I violated Double Jeopardy.

13 **B. Dismissal of Mark Roe and Robert Ferguson**

14 Respondents object to the Report and Recommendation's inclusion of Respondent Mark
15 Roe and Robert Ferguson on the Proposed Order and Judgment. (Dkt. No. 28 at 5.) Magistrate
16 Judge Tsuchida recommended that these Respondents be dismissed from the action, as neither
17 has custody over or supervises Petitioner. (Dkt. No. 27 at 5-6); see also Rumsfeld v. Padilla, 542
18 U.S. 426, 434 (2004) (quoting 28 U.S.C. § 2242).

19 The Court concludes that Respondents Roe and Ferguson should be dismissed from this
20 action, and modifies the caption on the Proposed Order and Proposed Judgment, entered
21 herewith, accordingly.

1 Dated May 3, 2018.

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4 Marsha J. Pechman
5 United States District Judge
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