No. 14-407

IN THE SUPREME COURT

OF THE UNITED STATES

JEFF PREMO, Superintendent,
Oregon State Penitentiary,

Petitioner,

v.

TYREE DUANE HARRIS,

Respondent.

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

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Robert A. Weppner
Counsel of Record
4110 S.E. Hawthorne Boulevard, No. 127
Portland, Oregon 97214
raw-law@comcast.net
(503) 901-5239

Attorney for Respondent

QUESTION PRESENTED

Where a state court has shown that it can summarily and efficiently reject the direct appeal of a criminal conviction on identified procedural grounds, should this Court speculate that an opinion not articulating any basis likewise relied upon those same grounds?

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Cases Cited

Constitutional and Statutory Provisions

Court Rules

Other Authority

OPINIONS BELOW

The memorandum Opinion of the United States Court of Appeals for the Ninth Circuit is unpublished, but appears at page 1 of the Appendix to the Petition ("Pet. App."). The Findings and Recommendation and Order in the district court are likewise unreported and commence at page 25 of the Appendix to the Petition.

JURISDICTION

This Court has jurisdiction to review the judgment of the court below by writ of certiorari pursuant to 28 U.S.C. §1254(1) and 28 U.S.C. § 2101(c). The petition for writ of certiorari was filed and docketed on October 7, 2014, less than ninety days after judgment was filed in the Ninth Circuit on July 10, 2014.

STATEMENT

Petitioner State of Oregon[1] has conceded below that imposition of a "dangerous offender" designation and enhanced additional thirty-year sentence on respondent Tyree Duane Harris based on facts found by a judge, not a jury, violated the Sixth Amendment under principles first announced in *Apprendi v. New Jersey*, 530 U.S. 466 (2001). Petitioner has also conceded that respondent first raised that issue on his direct appeal in state court, an appeal that was pending

---

[1] Respondent adopts petitioner's shorthand for referring to respondent Jeff Premo, Superintendent, Oregon State Penitentiary, as the "state." *See* Petition, p. 7, n.1.

at the time the *Apprendi* decision was announced.[2] Petitioner has abandoned any argument that the *Apprendi* error should or could have been considered harmless. Petitioner's sole substantive argument in support of review is that the Ninth Circuit erred when it rejected petitioner's affirmative defense of procedural default to respondent's action under 28 U.S.C. § 2254.[3]

In doing so, the district and circuit courts necessarily found that the state had failed to prove it more likely than not that the Oregon Court of Appeals had denied petitioner's direct appeal on an independent and adequate state procedural law ground. The state court's decision took the form of an affirmance without written opinion (in Oregon parlance, an "AWOP") which gave no indication whatsoever of the Court's thought processes or analysis on any of the four distinct state and federal legal issues urged on appeal.[4] What the petition does not reveal

---

[2] *See, e.g.,* Petition, p.5. Mr. Harris also raised the issue in his state petition for post-conviction relief, which was incorrectly decided against him on different procedural grounds.

[3] Petitioner's assertion that the Ninth Circuit "held that the Oregon Court of Appeals addressed the merits of petitioner's federal constitutional argument" is demonstrably incorrect. *Cf.* Petition, p. 4, *with* App. 1-2 to Petition. A more likely interpretation of the Ninth Circuit's decision is that petitioner failed to meet its burden of proving the affirmative defense of procedural default. *See, e.g., Gray v. Netherland*, 518 U.S. 152, 166 (1996)("[S]tate court procedural default. . .is an affirmative defense.")

[4] *See* Pet. App., p. 71; *cf.* Appendix to Brief of Respondent in Opposition to Petition for Writ of Certiorari ("BIO App."), pp. 2-11.

is that the Oregon Court of Appeals has shown -- in at least one direct appeal featuring the same procedural posture -- that it knows how to indicate its reliance on state procedural default in a summary affirmance when it wants to, by the addition of a brief caselaw citation. This distinction is why the Ninth Circuit granted respondent *habeas* relief while denying it to another, similarly situated, *habeas* petitioner.[5]

To avoid having to explain or defend its failure to prove its affirmative defense, the state invites this Court to proclaim what would essentially be a new, pro-prosecution, conclusive presumption: that a state court affirmance that does not identify its basis as grounded in state or federal law does not address the merits of a federal claim. This would take the place of the *habeas* rule first announced some twenty-five years ago in *Harris v. Reed, infra,*[6] that state-law procedural default reliance should not be presumed from an ambiguous denial of a federal claim absent clear and express indication that the state court did in fact so rely. In the course of this argument, the state repeatedly insists that this Court likewise assume that the Oregon Court of Appeals *must* have rejected

---

[5] *See Harris v. Premo,* Pet. App., pp 1-2; *cf. Nitschke v. Belleque*, 680 F.3d 1105, 1110-12 (9th Cir.), *cert. denied sub nom Nitschke v. Premo,* ___ U.S. ___, 133 S. Ct. 450, 184 L. Ed. 2d 276 (2012).

[6] 489 U.S. 255 (1989).

respondent's direct appeal on state procedural default grounds, even though there are three separate indications that the state court considered and rejected the merits of his federal constitutional claim.

Besides there being no error to correct in this case, perhaps more germane is that petitioner has failed to make a case for why this Court should exercise its discretion to consider it at all. Petitioner has not shown an important conflict among the circuit courts on the very narrow issue presented here. While petitioner conclusorily asserts that the issue here "affects a large number of cases nationwide," it falls far short of showing this to be true. Finally – at least in Oregon – any impact on federalism concerns will be *de minimis*, as the only effort necessary to effectively satisfy the dictates of the *Harris* line of cases will be no more than a dozen or two keystrokes added to any summary affirmance – as the Oregon Court of Appeals has already demonstrated it knows how to do.

REASONS FOR DENYING THE PETITION

1. The *Harris-Coleman-Johnson* line of cases controls here.

To help understand why the Ninth Circuit's decision in this case was correct, it is useful to first briefly revisit the development of this Court's doctrine in the area.

The seminal case addressing how a federal *habeas* court should deal with a

state court opinion not clearly identifying whether it had rejected a federal constitutional claim on state- or federal-law grounds is *Harris v. Reed, supra.* Harris was convicted of murder in Illinois state court, and his direct appeal on the sole ground of insufficiency of the evidence was rejected. He then brought an action for state post-conviction relief, alleging ineffective assistance of counsel. He lost in the trial court and the Appellate Court of Illinois affirmed. In its order, the latter court cited to the "well-settled" principle of Illinois law that Harris had waived the issues he tried to raise post-conviction, which he could have raised on direct appeal but did not. Nonetheless, the court went on to consider Harris's ineffective-assistance claim on its merits and reject it. *Harris, supra,* 489 U.S. at 257-58. Harris then sought federal *habeas* relief, but the district court held that the state court had determined Harris's federal claim on its merits. It proceeded to consider it, and granted the writ. The Seventh Circuit disagreed and reversed, calling the state court's merits determination merely "an alternate holding." *Id.*, at 259.

This Court reversed the circuit's decision. It held that unless a state court opinion clearly and expressly stated on its face that it was, in fact, relying on an independent state-law procedural default ground to reject a federal constitutional claim, a federal *habeas* court must presume that the state court had resolved the

claim on its substantive federal merits. This apparently conclusive presumption would allow the federal court to revisit the earlier merits resolution. (Had an independent and adequate state procedural bar applied, the federal court could not second-guess the state court's decision absent a showing of cause for, and prejudice from, that default.[7])

Although *Harris* has never been overruled, it was in some ways clarified two years later in *Coleman v. Thompson*, 501 U.S. 722 (1991). Coleman was convicted in Virginia state court of rape and capital murder. His conviction and death sentence were affirmed on direct appeal. He then filed a state post-conviction relief petition, raising numerous federal claims that he had not raised on direct appeal. The state court denied his petition. He filed an appeal, but three days late under the applicable state court rule. The Commonwealth filed a motion to dismiss the appeal, on the sole and factually incontrovertible ground of the untimely filing of Coleman's appeal. *Id.*, 501 U.S. at 726-27.

The state court did not act immediately on the motion, and over the ensuing months the parties filed several briefs, variously addressing both the motion to dismiss and the appeal's substantive merits. The Supreme Court of Virginia eventually filed an order which, on its face, mentioned only the motion to dismiss,

---

[7] *See Wainwright v. Sykes*, 433 U.S. 72, 84-85 (1977).

and expressly granted the motion. The court's order was silent as to any of the federal grounds for relief asserted in Coleman's petition; however, it did not expressly state that it was relying on the state-law grounds urged in the motion. *Id.*, 501 U.S. 727-28.

Coleman then filed a federal *habeas* petition, raising eleven federal constitutional claims, seven of which he had raised in the dismissed state *habeas* petition. The district court denied relief, and the Fourth Circuit affirmed, ruling that state-law procedural default barred consideration of those seven claims. It concluded that the Virginia court had met the *Harris v. Reed* "plain statement" requirement by granting a motion to dismiss that was based solely on state procedural grounds. *Id.*, 501 U.S. at 728-29.

This Court affirmed. It stated that part of the holding in *Harris* was that its presumption only applied in cases where the state court's decision "must fairly appear to rest primarily on federal law or to be interwoven with federal law," harking back to *Harris*'s predecessor case dealing with direct appeals. *See Coleman, supra,* 501 U.S. at 736, *quoting Harris, supra,* at 261, *quoting Michigan v. Long,* 463 U.S. 1032, 1042 (1983). Because the Virginia court's order dismissing the appeal plainly articulated its reliance on state law, its decision did not "rest primarily on federal law" nor was it "interwoven with federal law"

Harris required a threshold showing that the state court's decision could fairly be said to incorporate federal law. Thus, that predicate for *Harris*'s presumption went unmet, so there was no need to either ask or answer the question whether the state decision "clearly and expressly" invoked state procedural law.

Coleman's result is certainly correct and dictated by the doctrine announced in *Harris*. But there seems to be a certain circularity in the Court's reasoning – at least, if one tries to apply *Coleman* to the facts in respondent's case – which undermines *Harris*'s architecture in ways this court may not now wish to embrace. It might have been more consonant with *Harris* to have adopted the circuit court's reasoning and simply characterized as a distinction without a difference any disparity between the facts in *Harris* and those in the case before it. The Virginia court's order surely provides the "plain statement" *Harris* requires.

After all, the requirements that a case either "fairly appear to rest primarily on federal law" or that it include a "clear and express statement" that it relies on state law are but two sides of the same coin. The problem with applying the *Coleman* formulation directly to respondent's case is that it converts what had been a workable rebuttable presumption (à la *Harris*) into a conclusive presumption against respondent. After all, where there is no indication on its face whatsoever of the basis for a state court's ruling, it can pose a well-nigh

insurmountable barrier to require respondent to prove what the state court was thinking. More importantly, perhaps, is that the Court's apparent ruling can be said to shift to respondent the burden of disproving the state's affirmative defense – an inversion of how pleading and proof are supposed to work.

This Court returned to this area last year, in *Johnson v. Williams*, ___ U.S. ___, 133 S. Ct. 1088 (2013). Although *Johnson* involved the related but distinct question of when to treat an ambiguous state court decision as having been on the federal claim's merits for purposes of Antiterrorism and Effective Death Penalty Act ("AEDPA") deference, its comments on *Harris* and *Coleman* are enlightening. Williams was involved in a robbery that led to the store-owner's death and was charged with first-degree murder. At her trial, notes from the jury led the trial judge to inquire into the attitudes of one juror, whom he then dismissed for bias. *Id.*, 133 S. Ct. at 1092. Williams was convicted, and argued on appeal that dismissal of the juror violated both the Sixth Amendment and California statutory law, somewhat conflating her arguments. The California Court of Appeal affirmed, holding that the juror had been properly dismissed. Though invoking a Supreme Court case's discussion of bias under the Sixth Amendment, the state court did not expressly say that it was deciding the Sixth Amendment issue, either in its initial or second opinion (the latter after state

supreme court remand for reconsideration in light of new state-law precedent). *Id.*, 133 S. Ct. at 1093.

After state *habeas* proceedings proved unavailing, Williams sought federal post-conviction relief. The district court denied the writ because in its view the state court had adjudicated Williams's Sixth Amendment claim on its merits, and application of AEDPA's deference to the state court's decision led it to deny her relief. standard she was not entitled to relief. The Ninth Circuit reversed, finding that the state court had "overlooked or disregarded", rather than adjudicated, the federal claim, which it ruled to be meritorious. *Id.*, 133 S. Ct. at 1093-94.

This Court reversed the Ninth Circuit, finding that AEDPA deference was indeed called for because "[w]hen 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." *Id.*, *quoting Harrington v. Richter,* ___ U.S. ___, 131 S. Ct. 770, 784-85, 178 L. Ed.2d 624 (2011). It also stated that "[w]hen a state court rejects a federal claim without expressly addressing that claim, a federal habeas court must presume that the federal claim was adjudicated on the merits -- but that presumption can in some limited circumstances be rebutted." *Johnson, supra,* 133 S. Ct. at 1096.

This formulation differently states the *Harris* presumption by focusing on the other side of the state/federal "coin." It restores the correct balance which might otherwise be questioned by *Coleman,* at least, on facts like those at bar. When a state court opinion is completely silent as to its disposition of the federal and state claims before it – as in the AWOP here – *Johnson* restores the petitioner-favoring presumption of *Harris* (that the federal claims were disposed of on the merits), but allows the prosecution to attempt to rebut that presumption. Restoration of the *Harris* status quo is both important and appropriate in that it once again allows the proper allocation of the burden of proof of a *habeas* affirmative defense. Under *Johnson*, it is the state that must bear the burden of rebutting the presumption if it wishes to make out its affirmative defense of state-law procedural default.

2. There is good reason to believe that the Oregon Court of Appeals addressed the merits of respondent's *Apprendi* claim rather than invoking state-law procedural default against him.

From the outset, and throughout its petition, the state repeatedly asserts that the Oregon Court of Appeals's affirmance of respondent's conviction on direct appeal "should not be viewed as an adjudication of the federal claim's merits, but as a decision based on independent state-law grounds." *See* Petition, p. 1 and *passim*.

In the first place, to try to coax such a meaning – or any meaning – from the three words "Affirmed Without Opinion" stands Oregon's rules of *stare decisis* on their head. Oregon law is clear and consistent as to one feature of affirmances without opinion, or AWOPs: they do not represent any ascertainable reasoning upon which courts can later rely. "Cases affirmed without opinion by the Court of Appeals should not be cited as authority." Or. R. App. P. 5.20(5), *cited in Long v. Argonaut Insurance Co.,* 169 Or. App. 625, 627-28, 10 P.3d 958 (2000); *see also Devin Oil Co. v. Morrow Cty.,* 236 Or. App. 164, 168 n.1, 235 P.3d 705 (2010)(same); *Nero v. City of Tualatin*, 142 Or. App. 383, 389, 920 P.2d 570 (1996)(same).[8] Independent state law grounds dictate that this Court not import any meaning into the AWOP below.

Even if such divination were possible and not foreclosed by Oregon law, there are three distinct reasons to support the belief that the Oregon court addressed the merits of respondent's *Apprendi* claim.

a. The affirmance "without written opinion," but with reasons.

---

[8] Because of the dearth of Oregon substantive decisional law regarding to AWOPs, respondent submitted to the Ninth Circuit a CLE article written earlier this year by a sitting judge of the Oregon Court of Appeals, with the advice of the chief judge. The article lists ten separate reasons why the court might choose to issue an AWOP. *See* BIO App., pp. 13-14.

The Ninth Circuit recently decided a case very similar to this one except in its result. *See Nitschke v. Belleque*, *supra,* n.5. It likewise addressed the question "whether Petitioner['s] *Apprendi* claim is procedurally defaulted under Oregon's preservation rule." *Nitschke,* 680 F.3d at 1106.

Nitschke had also been found to be a dangerous offender by judge rather than jury, and was given a similarly enhanced sentence. As with respondent, *Apprendi* was decided after Nitschke's trial, but raised for the first time while his case was still on direct appeal. On that appeal, a panel of the Oregon Court of Appeals affirmed his conviction in a ruling without a written opinion, which ruling read in its entirety as follows:

> Affirmed. *State ex rel Huddleston v. Sawyer*, 324 Or. 597, 932 P.2d 1145, *cert. den.* 522 U.S. 994, 118 S. Ct. 557, 139 L. Ed. 2d 399 (1997); ***State v. Crain*, 177 Or.App. 627, 33 P.3d 1050 (2001).**

State v. Nitschke, 177 Or.App. 727, 33 P.3d 1027 (2001) (per curiam)(emphasis added).

In the *Crain* case, an appellant had sought to raise unpreserved *Apprendi* error for the first time on appeal. That panel was having none of it, and specifically held in a written opinion that the objection was foreclosed for non-preservation. Moreover, it was not "plain error" that the appellate court would address under Or. R. App. P. 5.45.

In rejecting the state's invitation in the case at bar to speculate as to the Oregon appellate court's unstated *ratio decidendi,* the Ninth Circuit crucially distinguished between the Delphic AWOP in respondent's case and the *Nitschke* state court ruling with its specific reliance on *Crain*: "Even if the state court could have relied on *State v. Crain*. . .to reject the claim, the court did not 'clearly and expressly' base[] its decision on state-law grounds." *See Harris v. Premo*, Pet. App., p.2, *quoting Nitschke*, 680 F.3d at 1112. In Nitschke's case, therefore, the Oregon court left no question that it had based its decision on state-law procedural grounds. In respondent's case, there is no way to tell what the basis of the Court's decision was, and it transgresses Oregon law to try.[9]

It is worth noting that Judge (and later Chief Judge) David V. Brewer sat on both the panels that decided Nitschke's and respondent's direct appeals. *See* Pet. App., p. 71; *see also State v. Nitschke, supra.* Since Judge Brewer thus demonstrably knew how to issue summary affirmances both with, and without, an

---

[9] Put another way, an Oregon AWOP denotes only that the judges on the panel saw no reason to disturb the lower court's decision below. Although the standards vary, trying to guess why is much like trying to glean meaning or reasoning from this Court's denials of *certiorari.* "[A]ll that it means, is that there were not four members of the Court to whom the grounds on which the decision of the Court of Appeals was challenged seemed sufficiently important when judged by the standards governing the issue of the discretionary writ of certiorari." *Rosenberg v. United States*, 344 U.S. 889, 889-90 (1952); *see also Maryland v. Baltimore Radio Show*, 338 U.S. 912, 919 (1950).

express statement of state-law basis, the omission of that statement in respondent's case strongly points to the case's *not* having been decided on a state-law procedural basis.

Because of the distinction between the *Nitschke* case and this one, *Coleman, supra*, does not call for a different outcome despite petitioner's contentions to the contrary. In *Coleman*, the state court's opinion also could be read as "ambiguous" under *Harris* on its face, but the Court effectively found the *Harris* presumption rebutted under all the circumstances. The Virginia Supreme Court had granted the relief sought (dismissal) in a motion brought on one, and only one, irrefutable state-law ground (Coleman had missed the deadline for appeal). But motion practice is unlike substantive appellate practice. When respondent raised the *Apprendi* issue on direct appeal, petitioner chose to limit its opposition to invocation of state-law procedural default. Where petitioner gets it wrong is by leaping to the conclusion that when it opted to argue no other ground, it somehow rendered the appellate court powerless to consider the issue respondent raised. A moment's reflection shows that a ruling *against* an appellant on an issue he raises is not, necessarily, analytically the same thing as a ruling in *favor* of his opponent's argument against it, even if they lead to the same end result. The salient fact is that, from the three-word ruling in this case, one cannot tell which

was done, if either. It is submitted that petitioner's unsupported view of what the Oregon court had the power to do is unusually crabbed.

Petitioner also seizes on the comment in *Coleman* disavowing this Court's "power to tell state courts how they must write their opinions." (*See* Petition, p. 19, *quoting Coleman, supra,* 501 U.S. at 739.) Petitioner's reading of this remark is overbroad. In the first place, the very soul of the common law contemplates that lower courts will, indeed must, look to higher courts for guidance how to write their opinions and what to say in them. More critically, it is not as though the Oregon Court of Appeals does not know how to affirm a trial court's determination summarily and, at the same time, satisfy the dictates of *Harris* and *Coleman* by noting briefly but plainly that it has done so in reliance on state law. That it chose not to do so here is not only significant in itself, but it also tends to demonstrate the this Court has no need to tell it "how to write [its] opinions"; it already knows. That the state panel in respondent's appeal did not issue a *Nitschke*-like opinion strongly suggests that his case was decided on a different basis.

b. Oregon jurisprudence at the time of respondent's state law case was such as to suggest that the state court would have rejected his *Apprendi* claim on its merits.

The decision rejecting respondent's direct appeal was filed on February 27,

2002. Pet. App., p. 71. Less than thirty days earlier, a panel of the Oregon Court of Appeals expressed jurisprudential hostility to the then newly-announced Sixth Amendment principle that juries must find the facts to support an increase in a defendant's punishment. In its initial decision in *State v. Dilts*, 179 Or.App. 238, 39 P.2d 276 (2002),[10] the Court of Appeals rejected the argument that *Apprendi* required a jury, not a judge, to find the facts that had increased a defendant's punishment some twenty months beyond the amount statutorily justified by his plea of guilty. *See id.,* 179 Or. App. at 240.

Petitioner presents this Court with an incomplete description of the possible interpretations of the Oregon court's AWOP decision, and argues that it could have been made only for one of two reasons, both of which it characterizes as being state-law decisions: either that respondent's *Apprendi* claim was defaulted for lack of a contemporaneous objection; or, that the Court conducted a plain error

---

[10] This first opinion in *Dilts* was handed down on January 30, 2002. Moreover, Judge Brewer – who authored *Dilts* – was also on the panel that ruled on respondent's appeal. *See* Pet. App., p. 71. It was only after the Supreme Court's *Blakely* opinion that Oregon higher courts eventually accepted for the first time that dangerous offender findings had to be made by juries. *See State v. Warren,* 195 Or.App. 656, 98 P.3d 1129 (2004); *see also State v. Dilts*, 336 Or. 158, 161, 82 P.3d 593 (2003)(*Dilts I*), *vacated Dilts v. Oregon,* 542 U.S. 934 (2004), *reversed Dilts v. Oregon,* 337 Or. 645, 103 P.3d 95 (2004)(*Dilts II*). (The U.S. Supreme Court had remanded the case for reconsideration in light of *Blakely*.)

review and found that the claim did not qualify for waiver of the contemporaneous objection rule. It purports to find this duality in the Ninth Circuit's language itself. *See, e.g.,* Petition, pp. 9-10. But this narrow reading completely ignores the wholly plausible third construction necessarily contained within the second: that the Oregon court considered that respondent's *Apprendi* claim was meritless, that is, not "error" at all, plain or otherwise. This would describe a decision on the federal constitutional merits, neither found barred by state procedural default nor following full plain error consideration.

c. That the Oregon Court addressed all of respondent's non-*Apprendi* claims on direct appeal and resolved them against him by its AWOP decision gives rise to a presumption that it addressed the merits of his *Apprendi* claim as well.

Respondent did not restrict his attack on his conviction on direct appeal to the *Apprendi* issue regarding his sentence. He raised three other issues on appeal, all of them on exclusively state-law grounds, two of them seeking resentencing. His last claim sought resentencing on the basis of *Apprendi*. *See* BIO App., pp. 2-11. The Oregon Court of Appeals's dismissive response was to affirm without comment as to all four issues.

In *Harrington v. Richter*, *supra*, this Court considered whether the AEDPA's deferential approach to claims previously "adjudicated on the merits" applies when state-court relief is summarily denied without an accompanying

statement of reasons. *See* 28 U.S.C. § 2254(d). Richter was convicted of murder and other crimes and, after direct appeals proved fruitless, petitioned the California Supreme Court for *habeas corpus* relief, asserting a number of grounds including ineffective assistance of counsel and, specifically, that defense counsel was deficient for failing to present expert evidence on serology, pathology, and blood spatter patterns. The California Supreme Court denied his petition in a one-sentence summary order. Richter then filed for federal *habeas* relief. The district court and a three-judge panel of the Ninth Circuit Court of Appeals rejected his petition, but the latter Court reconsidered *en banc* and reversed the district court. The Supreme Court accepted review and reversed the circuit court, holding that

> [w]hen 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. *Cf. Harris v. Reed*, 489 U.S. 255, 265...(1989)(presumption of a merits determination when it is unclear whether a decision appearing to rest on federal grounds was decided on another basis).
>
> The presumption may be overcome when there is reason to think some other explanation for the state court's decision is more likely.

Harrington, 131 S. Ct. at 784-85.[11]

---

[11] The latter paragraph is likely *dicta*, since the Court immediately goes on to observe that

> Richter, however, does not make that showing [beyond]

In *Johnson v. Williams*, *supra*, the Court revisited this area to address the slightly different issue whether, when a state court in a written opinion addresses some of the claims raised by a defendant but not a federal claim that is later raised in a federal *habeas* proceeding, the federal court must presume, subject to rebuttal, that the federal claim was "adjudicated on its merits," or whether the federal court should assume the state court ignored or overlooked the federal issue. Relying expressly on *Harrington v. Richter*, this Court stated that "[a]lthough *Richter* itself concerned a state-court order that did not address any of the defendant's claims, we see no reason why the *Richter* presumption should not also apply when a state-court opinion addresses some but not all of a defendant's claims." *Johnson*, 133 S. Ct. at 1094.

As noted above, *Apprendi* was not the only grounds urged in support of reversal and remanding for resentencing in respondent's direct appeal. Petitioner

---

> mention[ing] the theoretical possibility that the members of the California Supreme Court may not have agreed on the reasons for denying his petition. It is pure speculation, however, to suppose that happened in this case.

Id., 131 S. Ct. at 785. Elsewhere in the *Harrington* opinion, for example, the Court states a very different burden for the *habeas* petitioner to overcome the presumption, by "showing that there was **no** [other] **reasonable basis** for the state court to deny relief." *Id.*, 131 S. Ct. at 784 (emphasis added).

has never argued that the Oregon Court's summary rejection of respondent's three state-law claims was based on failure to make a contemporaneous objection, or any other state-law grounds. It may be assumed, then, that the Oregon Court addressed, and rejected, those state-law bases for resentencing on their merits. *See also Smith v. Oregon Board of Parole and Post-Prison Supervision*, Pet. App. 9; 736 F.3d 857, 860-61 (9th Cir. 2013). Under *Harrington* and *Johnson*, then, it may be inferred as a matter of law that the Oregon Court addressed the merits of respondent's *Apprendi* claim on its merits, at least for purposes of applying AEDPA deference. Petitioner's contrary factual speculation in that regard is qualitatively akin to petitioner Richter's speculation that there might have been disagreements among the California justices as to the basis for their decision. *See Harrington, supra,* 131 S. Ct. at 785.

3. This case is not an appropriate vehicle for this Court as its central issue involves resolution of a question of purely state law.

The underlying question in this case is what if any meaning can be ascribed to the Oregon Court of Appeals's affirmance without opinion in respondent's direct appeal. This is at bottom a state-law question. (And as argued above, the actual reasons for the Oregon court's disposition of respondent's appeal are unknown and unknowable.)

Until the filing of its instant petition, the state itself pushed the centrality of

Oregon law to disposition of respondent's case. Before the magistrate judge, the district court, and the circuit court, the state repeatedly and consistently made the same argument: that the Oregon Court of Appeals *must* have rejected respondent's *Apprendi* claim on procedural grounds without even conducting plain error review or considering the constitutional error at all, because otherwise Oregon caselaw would have required it to justify in a written opinion even *considering* whether there was plain error. Since the court did not issue a written opinion – the argument concluded – it followed *ipso facto* that they must not have considered whether there was plain error.

The state's argument claimed to extrapolate from the Oregon case of *Ailes v. Portland Meadows, Inc.*, 312 Or. 376, 823 P.2d 956 (1991). *Ailes* dealt with a case in which the Court of Appeals in a written opinion declared with little or no analysis that there had been "plain error," and proceeded to reverse the trial court on an issue not preserved below. The Oregon Supreme Court said that the lower court should have first specifically set forth a detailed explanation of its decision to conduct plain error review and its method of doing so. The state strenuously and repeatedly argued below that *Ailes* should be extended to cover an AWOP decision. In other words, if the Court of Appeals wished to even consider plain error review in a case it was otherwise inclined to affirm without written opinion,

it would have to write an opinion (where it otherwise would not have) just so that it could address its decision to consider plain error -- even if it did not find any and did not reverse the trial court.[12]

Here the state has abruptly discarded this argument, now stating that "a state appellate court. . .necessarily assess[es] whether the plain error exception to state preservation requirements permit[s] review" before it rejects a claim without discussion. *See* Petition, p. 1. In lieu of its abandoned argument it makes the sweeping claim that *all* state courts that consider whether there is "plain error" (or whatever may be the individual state's formulation, if any, of an excuse to overlook the contemporaneous objection rule), by doing so perform an exclusively state-law function. Because of this – the argument goes – if they rule against a prisoner, they *necessarily* have done so on "state-law grounds," meaning that the prisoner's claim is automatically procedurally defaulted in all cases. *See* Petition, pp. 1-2.

This argument proves too much, because it reduces the universe of unexplained appellate affirmance over a claim of unpreserved error to only two situations, while any of three might apply. *See* Argument 2(a), *supra*. It also –

---

[12] This was, to say the least, an unusual position for a party now purporting to espouse the virtue of conserving judicial resources. *Cf.* Petition, p. 20.

again -- imparts precedential meaning to a type of affirmance that is, under Oregon law, devoid of precedential content. *See* Argument 2, *supra*.

Finally, it would serve to erect an irrebuttable presumption affecting the burden of proof: that when a state court affirms completely articulation of its reasoning despite an unpreserved claim of federal constitutional error, it must have done so on independent and adequate state grounds. This is just the sort of conclusive presumption which *Coleman*'s result suggests that *Harris*'s was not, and is also not unlike the one this Court rejected in *Johnson v. Williams, supra,* 131 S. Ct. at 1096. *See also* Argument 1, *supra*.

4. There is no split of authority in the circuits that requires this Court's resolution.

Petitioner also maintains that this Court ought to step in to resolve what it characterizes as a split of authority among nine circuits on the issue of law presented here, with five circuits on its side and four circuits on respondent's side. *See* Petition, pp. 13-18. It begins by once again mis-stating the facts as necessarily being that when a "state appellate court employs a plain error methodology...analogous to Oregon's...[to] reject[] an unpreserved federal claim, its decision is [therefore] based on state law procedural grounds." *Id.*, at 13-14. (As repeatedly stated above, it is but sheer guesswork whether the Court of Appeals engaged in plain error analysis before AWOP-ping in respondent's case.)

Even if one accepts petitioner's premise, however, a close reading of the cases it claims to support its proffered rule of law shows that only in Second Circuit jurisprudence might one have ever found pronounced dissonance with the Ninth Circuit's ruling here, and that only in a 1993 decision that has been, if not overruled outright, at least seriously circumscribed by subsequent case law.

This centerpiece of petitioner's claim of disagreement among the circuits is *Quirama v. Michele*, 983 F.2d 12 (2d Cir. 1993). Quirama made no trial court objection to the constitutionality of an accomplice liability instruction given at his trial on charges of drug possession and sale. On direct appeal, the state argued both that the claim was meritless and that Quirama was barred from raising the instruction's constitutionality by failure to make contemporaneous objection. *Id.*, 983 F.2d at 13. On the first tier of appellate review, the Appellate Division – which could have, "within [its] sole discretion," addressed unpreserved error -- affirmed without issuing an opinion, and the Court of Appeals likewise affirmed without a written opinion (although under New York law the latter court could not have addressed unpreserved error even if it had been inclined to do so.)[13]

The Second Circuit – citing *Coleman* for the proposition that *Harris v. Reed*

---

[13] Regarding the scope of appellate review in New York at the time *see, e.g., People v. Robinson*, 36 N.Y.2d 224, 367 N.Y.S.2d 208, 211 (1975).

did not apply to affirmances without opinion when there was "good reason to question whether there is an independent and adequate state ground for the decision" (*Quirama, supra,* 983 F.2d at 14) – found that there was no such "good reason" and dismissed the petition.

Quirama does not present a conflict with the Ninth Circuit's decision here because there is ample reason to believe respondent's case was not disposed of on state-law grounds. *See* Arguments 2(a), (b) and (c), *supra*. Moreover, it is not at all clear that *Quirama* would be decided the same way 21 years later. To be sure, *Quirama* has never been cited outside the Second Circuit by a single court for the proposition urged. And as petitioner concedes in a footnote, the Second Circuit later declined to extend *Quirama* to a case essentially indistinguishable from the case here.

In *Fama v. Commissioner of Correctional Services,* 235 F.3d 804 (2d Cir. 2000), the state court had held expressly that it was rejecting an unpreserved claim because it was "either unpreserved for appellate review or without merit." *Id.*, 235 F.3d at 810. It almost goes without saying that this formulation encompasses the entire universe of silent appellate affirmances. To paraphrase, the court is saying only that it is affirming "on one or more of the bases on which we may affirm." Such a ruling reveals no informational content whatsoever as to a court's

basis for decision; just as, in respondent's case, the Oregon Court of Appeals's AWOP revealed no clue as to the court's reasoning. *See also Jimenez v. Walker*, 458 F.3d 130 (2d Cir. 2006)(again applying *Fama* to the same "either/or" appellate court language, and noting that the history of "confusion in our opinions" in the area represented a "mare's nest", 458 F.3d at 136). Citing *Harris v. Reed*, the *Jimenez* Court held that "such an either/or decision is deemed to rest on the merits of the federal claim under the *Harris* presumption because there is no plain statement to the contrary." *Id.*, 458 F.3d at 146.

And *Quirama* is the *most* persuasive example of those respondent has cited in an attempt to show conflict among the circuit courts.

It is unclear how respondent finds conflict with the Third Circuit's reasoning in *Campbell v. Burris*, 515 F.3d 172 (3d Cir.), *cert. denied* 555 U.S. 817 (2008) -- or, indeed, why it cites the case at all. In *Campbell*, the Delaware Supreme Court, on direct appeal, expressly cited Delaware's state-law contemporaneous objection rule as the basis for the rejection of the bulk of Campbell's claims. *Id.*, 515 F.3d at 175. There was no need for guesswork or application of the *Harris* or *Coleman* presumptions, as there was no ambiguity as to the Delaware court's reasoning or any claim that it had resolved the issues on the merits. Rather, the issue presented and resolved in *Campbell* was whether the

Delaware contemporaneous objection rule was "an independent and adequate state ground that precludes federal habeas review," and the Third Circuit held that it was. *Id.*, 515 F.3d at 175, 182.

Similarly, neither can support for the alleged circuit split be found in the Fifth Circuit's case of *Rocha v. Thaler*, 626 F.3d 815 (5th Cir. 2010), *cert. denied* 132 S. Ct. 397 (2011) (where, in any case, respondent represents that there is only a split of authority by "analog[y]", *see* Petition, p.15). In *Rocha*, the Texas Court of Criminal Appeals dismissed the last of a succession of state *habeas* petitions as "an abuse of the writ" under state law because it sought to raise the ineffectiveness of his sentencing counsel for the first time when he could have raised it in an earlier petition. *Id.*, 626 F.3d at 820. The Texas court expressly relied upon state law in its written opinion of dismissal. Rocha then brought a Rule 60(b) motion in federal court, claiming that the Texas court's rejection of his federal constitutional claim had, in reality, been "on the merits," thereby opening up the issue for plenary federal court review. *Id.* Since the Texas court had expressly relied on state law grounds to reject Rocha's petition, the only issue presented – as, above, in *Campbell* – was whether the expressly stated state-law grounds for dismissal was both "independent" of federal law and "adequate" in the consistency of its application. *See Rocha, supra,* 626 F.3d at 821 *et seq.* The Fifth Circuit held that

it was. As was the case in *Campbell*, *dicta* floating around in the *Rocha* opinion – as distinguished from its actual holding – do not present a decisional split crying out for this Court's resolution.

Also inapposite is *Daniels v. Lee*, 316 F.3d 477 (4th Cir.), *cert. denied* 540 U.S. 851 (2003). In *Daniels*, the North Carolina Supreme Court *expressly* held that Daniels had failed to preserve certain of his federal constitutional objections under state-law contemporaneous objection requirements. There was thus no ambiguity as to whether state procedural or federal merits law disposed of his claims, and no conflict with the case at bar. The state court did go on to consider whether it should nonetheless reach the federal claim on the ground that the failure of the trial court to recognize an error and step in *sua sponte* to correct it so infected the trial with unfairness that the resulting conviction constituted a denial of due process. *Id.*, 316 F.3d at 487. (While this is, to be sure, a state court mechanism designed to provide relief from procedural default in an appropriate case, it is a standard otherwise in no way "analogous" to the Oregon procedure for assessing plain error under Or. R. App. P. 5.45. *Cf.* Petition, pp. 13-14. The *Daniels* case has little to do with respondent's case.

Lastly, petitioner claims that the Ninth Circuit's opinion is in conflict with the decision of the Seventh Circuit in *Willis v. Aiken*, 8 F.3d 556 (7th Cir. 1993),

cert. denied 511 U.S. 1005 (1994). Willis brought a federal *habeas* challenge to his state court conviction for theft, claiming that a jury instruction arguably allowed the jury to ignore or alter the law prescribing the offense, violating his federal due process rights. He had not objected to this or any instruction at trial, nor during the state court appeal which had led to affirmance of his conviction, but had raised the error for the first time in his state *habeas* petition. *Id.*, 8 F.3d at 559. Under Indiana law, however, his failure to earlier object could have been excused if the habeas court found the trial court committed a "fundamental error."[14] The postconviction trial court granted relief and both parties appealed. The appellate court reversed in a three-page written opinion that relied exclusively on state law alone, and which did not explicitly refer to either the state or federal due process guarantees. *Id.*, 8 F.3d at 560. The Supreme Court of Indiana denied review. Willis then sought federal *habeas* relief, but the district court denied his petition as to the instructional error, noting that the state appeals court had ruled against Willis "by way of an analysis of the Indiana Constitution and Indiana case

---

[14] Errors "fundamental" under Indiana law included ones that led to a "failure to meet the requirements of due process of law, gross error which offends our concept of criminal justice, and the denial of fundamental due process." *See Reynolds v. State*, 460 N.E.2d 506, 508 (Ind. 1984), *quoting Nelson v. State*, 274 Ind. 218, 219, 409 N.E.2d 637, 638 (1980). This standard is also not a good analog for Oregon's.

law. . .[and] cannot fairly be read to invoke or be intertwined with federal law." *Id.* The Seventh Circuit affirmed. Again, this is a straightforward application of the *Harris* presumption to a reasoned decision, and presents no conflict. *See id.*, 8 F.3d at 561-62.

5. Even were there a split of authority among the circuits, petitioner has not shown that it involves an "important matter."

Supreme Court Rule 10(a) indicates that *certiorari* may be appropriate to resolve a claimed disagreement among the circuit courts on an "important matter." Petitioner argues that this requirement is met because this case "implicates significant federalism principles," affects a "large number of cases" nationwide, and impacts state and federal court efficiency. *See* Petition, pp. 18-20. However, consideration of none of these concerns in this case warrants this Court's exercise of jurisdiction.

First, petitioner again states that "as a factual matter — the state court did no[t]" address the *Apprendi* claim on the merits in this case. *Id.*, at p. 18. Once again, this so overstates the case as to mis-state it. Moreover, petitioner's approach in this regard essentially asks this Court to find that when the Oregon court expressly cites state law in one ruling, but is silent in another, it is just being sloppy and inconsistent because it does not know any better. This is the same sort of paternalistic federal condescension that this Court disdained to countenance

when invited to assume a state court "overlooked or disregarded" a federal claim just because it did not expressly mention it in its decision. *See Johnson, supra,* 133 S. Ct. at 1097-99. Far from "undermin[ing] state court sovereignty," the Ninth Circuit's decision respects the Oregon courts' ability to understand the law, and to say what it is doing, when it is doing it. Petitioner's warning of danger to federalism principles is not well-taken.

As argued above, to require the sort of additional identification of authority demonstrated by the Oregon court in its *Nitschke* decision is so trivial a burden as to represent a minimal intrusion on state court practice. Even were it not, the related claim that such oversight "will require state. . .courts to expend more resources than they otherwise would" implies a potential problem which petitioner overstates. If the Oregon Court of Appeals had intended to indicate in respondent's case that it had relied on state-law default principles, all it would have had to do would have been to add a reference to "*State v. Crain*" to its terse "affirmed without opinion" language. It did not. To require that of the Court, so as to satisfy *Harris* and *Coleman*, would scarcely cause such an "expend[iture]" of more state court resources that this Court should exercise its jurisdiction to step in.

Finally, the state claims that resolution of the central issue in this case is important because it will "affect[] a large number of cases nationwide." Petitioner

has not shown this, and it seems unlikely. Even were all the circuit cases it cites actually in conflict with the Ninth Circuit's opinion here – and only one of them, probably no longer good law, seems to ever have been – it would only have shown applicability to five contrary cases nationwide (ten cases altogether, if one includes this case, the *Smith* case, and the other circuit cases identified as agreeing with them). There may well be more, but petitioner has not identified them. Besides making general statements about AWOPs in Oregon, petitioner has not even tried to substantiate that the Ninth Circuit's very narrow ruling in this case will have any significant effect, even in the state from which it arose.

CONCLUSION

The United States Court of Appeals for the Ninth Circuit committed no error for this Court to address. Even if there were error, petitioner has not shown this case to be an appropriate one for exercise of this Court's jurisdiction. The petition for the write of certiorari should be denied.

/ / /

/ / /

/ / /

Respectfully submitted,

/s/ Robert A. Weppner

ROBERT A. WEPPNER
Law Office of Robert A. Weppner
4110 S.E. Hawthorne Blvd., #127
Portland, OR 97214-5246
Phone: (503)901-5239
raw-law@comcast.net
Counsel of Record for Respondent
Tyree Duane Harris

November 6, 2014

APPENDIX

IN THE COURT OF APPEALS OF THE STATE OF OREGON

STATE OF OREGON Plaintiff-Respondent, vs. TYREE DUANE HARRIS, Defendant-Appellant.	No. A106757 Multnomah Co. No. 94-11-37777

APPELLANT'S BRIEF

Appeal from the Judgment of the Circuit Court
for the Multnomah
Honorable Robert W. Redding
May 25, 1999

HARDY MEYERS
Attorney General, (64-077)
MICHAEL D. REYNOLDS
Solicitor General, (74-269)
100 Justice Building
Salem, Oregon 97310
Phone: 378-4402
Attorneys for Respondent

STEVEN H. GORHAM
Attorney at Law (75-136)
341 State Street
Salem, Oregon 97301
Phone: 364-6494
Attorney for Appellant

12/2000

APPELLANT'S BRIEF

PAGE

with Count 1 and therefore that all the sentences -- As I understand your sentencing order, you made all the sentences consecutive, I believe, to Count 2. Let me make sure on that.

THE COURT: They were all consecutive to one another, but concurrent with the racketeering.

MR. MANNING: Right, right.

THE COURT: And you're now contesting the consecutive nature?

MR. MANNING: That's right, of Count 2, because it should have gone into Count 1.

Yes, Your Honor. That's right. You made Count 2 concurrent with Count 1. And then the remainder of the counts consecutive to Count 2 and to each other. And we're saying -- at least raising the issue that Count 2 should have merged into Count 1 because of the finding of the predicate act. And, therefore, the sentences should have been concurrent since Count 2 would basically be gone into Count 1. That's basically what we are raising, Your Honor.

THE COURT: That motion is denied.

MR. MANNING: Thank you, Your Honor. (End of Proceedings.) (RTr. 39-43)

Mr. Harris again appeals his convictions and sentences.

ASSIGNMENT OF ERROR NO. 1

The trial court erred in not resentencing the Defendant. The pertinent parts of the transcript are set forth in the above Statement of Facts.

ARGUMENT

Defendant. was originally convicted on all counts in the indictment and was originally sentenced to 396 months on Count 1, ORICO, 48 months as a

durational departure on Count 2, Felon in Possession of a Firearm, concurrent with count 1. The remainder of the sentences on the remaining counts were made consecutive to count 2 but concurrent to count 1. See Original Judgment of Conviction and Sentence, Appendix B, App-6. This Court ordered, "ORICO conviction reversed; otherwise affirmed, remanded for resentencing." (Court of Appeals Decision, Appendix C, App-16)

In this Assignment of error, the Defendant argues that what appeared to be a resentencing was in fact not accomplished and thus this Court's decision has been violated and the Defendant has in fact not yet been resentenced as ordered by this Court. Upon remand, the trial court appeared to resentence the Defendant to the exact same sentence it had originally imposed but for deleting the sentence on the ORICO count. This is what the trial Court said it did, over the objection of the Defendant. However, the Court never issued a new Judgment of Conviction and Sentence spelling out the sentences that it alleged to reissue. What it did was produce an "Order" describing what it wanted to do which was dismiss the ORICO charge which had already been done by this Court and then stated in its writing, "Other sentences in original judgment of conviction in full force and effect." **(Appendix E, App-21)** The original judgment, however, as stated above contains a conviction and sentence that this Court nullified without setting down a new Judgment and Sentence. Thus the trial Court did not comply with this Court's mandate.

What the trial in fact did was thumb its nose at this Court's ruling and abused the Defendant's rights by merely crossing out the ORICO charge and giving the Defendant the same sentence as if the ORICO charge was still present.

One need only look at the original sentencing to see how true this fact is. The original sentencing is set forth in **Appendix F, App-23.** The trial Court originally made the ORICO sentence the primary sentence as it is mandated to do under the guidelines.

> Mr. French (The Prosecutor): "***
>
> The first thing I think the Court has to do is assign a primary offense here, and I believe the primary offense should be the Racketeering charge because it reflects conduct that began earliest of all these matters....(Tr 1382)"

There is probably not a page of the sentencing transcript where the Racketeering charge is not mentioned and/or not used to give Mr. Harris the lengthy sentence that he appears to have received on remand. Now on the resentencing the trial Court either forgot or because this Court removed the Racketeering charge, it officially was like it didn't exist, but the Court gave exactly the same sentence as before. The trial Court and the State cannot have it both ways. Either the Racketeering charge meant a lot in the sentencing or it did not and it is obvious that in the original and in the remanded "sentence" that it did even though it no longer existed.

This is reversible error.

ASSIGNMENT OF ERROR NO. 2

The trial court erred in denying Defendant's Motion for a new Sentence. The pertinent part of the transcript is set forth above in the Statement of Facts.

ARGUMENT

Defendant moved the trial Court for an order amending the sentence imposed upon the Defendant so that the sentence on all counts should run concurrent with count 2 of the indictment, Felon in Possession of a Firearm, rather than consecutive.

As has been stated, the Defendant was originally sentenced to 396 months on Count 1, ORICO, 48 months as a durational departure on Count 2, Felon in Possession of a Firearm, concurrent with count 1. The remainder of the sentences on the remaining counts were made consecutive to count 2 but concurrent to count 1. Upon remand, the trial court appeared to resentence the Defendant to the exact same sentence it had originally imposed but for deleting the sentence on the ORICO count. (See Assignment of Error No. 1)

Count 2, Felon in Possession of a Firearm, was committed on December 21, 1993. This charge is also a part of count 1, the ORICO count as it is pled as predicate act number 4 (there is a typographical error in the indictment alleging it occurred on December 21, 1994) The proof at trial was that this count was the same criminal episode.

Since Count 2 was a proven predicate act of count 1, count 2 should have been merged with count 1 at the time of the original sentencing. Since

this merger should have occurred all of the sentences should have been concurrent with count 2 due to the concurrent sentence with count 1.

The error in this matter goes beyond the Court's refusal to sentence the Defendant correctly. Defendant in this assignment argues that the Court violated ORS 138.222 (5) which states,

> ***If the appellate court determines that the sentencing court , in imposing a sentence in the case, committed an error that requires resentencing, the appellate court shall remand the entire case for resentencing. The sentencing court may impose a new sentence for any conviction in the remanded case."

In this case the trial Court refused to look at the whole sentencing picture and did not in effect resentence the Defendant on all of the convictions in the remanded case. This is error that this Court must reverse and again remand for a real resentencing.

What the Court did do was allow the prosecutor to speculate as to what evidence could be admitted in a new trial or new sentencing proceeding. It in fact joined with the prosecutor in this speculation then stated that it would not do a complete resentencing. This was error.

ASSIGNMENT OF ERROR NO. 3

The trial court erred in not granting the Defendant's Motion for a New Trial. The pertinent portions of the record are set forth in the Statement of Facts above. The standard for review is abuse of discretion.

ARGUMENT

Defendant in a timely manner after he was allegedly resentenced in this case moved for a new trial under ORS 136.534. This statute refers to ORCP 64. Defendant moved under ORCP 64 (1) and (6). Both of the new trial grounds are based upon the same error by the trial court in failing to sustain defendant's demurrer to the ORICO count and, further, by allowing into evidence facts which supported the ORICO count.-,

Mr. Harris was prevented from receiving a fair trial by this error of the trial court. The ORICO count and the evidence introduced pertaining to it affected the whole trial to the Defendant's prejudice. The ORICO count involved several other individuals and their separate activities; these activities were irrelevant to the case against Mr. Harris but for the ORICO count. The evidence on the ORICO count portrayed Mr. Harris generally as a bad man. It clearly affected the jury in its consideration of the other counts against the defendant.

It certainly can be seen that there would have been a far different trial if the ORICO count was not before the jury. The jury would have heard evidence only relevant to the remaining counts of the indictment. It would not have heard of the numerous activities of other individuals which, by the indictment, necessarily tied the Defendant to these activities and other individuals since they were pled and evidence adduced to show that these were part of a "pattern of racketeering activity."

If the trial Court had properly granted the demurrer to the ORICO count, then the jury would have heard only admissible evidence as to the remaining counts of the indictment against the Defendant.. The Defendant would have had a fair trial since the evidence would have been limited to the other counts and against him alone, not the activities of others. Who can say now that in hearing all of the evidence on the ORICO count, the jury did not use this information to convict the Defendant because of his alleged prior bad acts or the bad acts of others. All of this without giving the Defendant the opportunity to contest the relevancy of his or the others alleged bad acts.

ORCP 64 B provides as follows:

> **B Jury trial: grounds for new trial.** A former judgment may be set aside and a new trial granted in an action where there has been a trial by jury on the motion of the party aggrieved for any of the following causes materially affecting the substantial rights of such party:
>
> B (1) Irregularity in the proceedings of the court, ,,.,,° jury or adverse party, or any order of the court, or abuse of discretion, by which such party was prevented from having a fair trial.;
>
> B (6) Error in law occurring at the trial and objected to b the party making the application.

The order of the court which denied Defendant a fair trial was its order which denied defendant's demurrer to the ORICO count of the indictment. Given the Court of Appeals reversal of the trial Court's ruling on the demurrer this part of the rule is a given.

Motions for a new trial are directed to the discretion of the court and will only be reversed for an abuse of discretion. *State v. Middleton*, 294 Or 427 (1982). Under the law of this case, there is no question that the court committed error in failing to sustain the demurrer to the ORICO indictment. The issue then is whether this error "materially affected the substantial rights" of Mr. Harris. It clearly did.

There was substantial prejudice due to the trial Court's order denying the demurrer since substantial evidence concerning other wrongs by the Defendant and other persons was heard by the jury which would have not been heard if the court had sustained the demurrer. In effect, the evidence in the case was top heavy with the evidence of the ORICO compared to the remainder of the evidence relevant to the other charges.

A reading of the indictment discloses, among other crimes, allegations of Tampering with a Witness, Possession of a Controlled Substance, Robbery in the Third Degree, several counts alleging various degrees of Assaults, Recklessly Endangering and at least a dozen counts dealing with weapons offenses. These alleged predicate offenses including other crime evidence and other bad acts evidence alleged personally against Mr. Harris and other individuals.

The hearing of this evidence certainly affected any reasonable juror in his or her consideration of the case against Mr. Harris. There was a substantial likelihood that jurors were prejudiced against Mr. Harris in their consideration of the remaining counts against him. Who could not be? All of the ORICO offenses tended to paint Mr. Harris as a bad man who hung and committed wrongs with other bad men.

There is just too strong a likelihood that the verdicts against Mr. Harris on the remaining counts were influenced and affected by the evidence on the ORICO counts. For this reason, Mr. Harris was denied a fair trial and, accordingly, he should be granted a new trial.

The State and the trial Court speculated that this evidence would have come in anyway against the Defendant in a new trial. They did so without allowing any litigation on this issue. This must not be allowed. The trial Court abused its discretion in allowing this speculation without due process litigation to affect its decision in not granting a new trial. This Court must reverse this decision and grant Defendant a new trial.

ASSIGNMENT OF ERROR NO. 4

The trial court erred in not resentencing the Defendant. The pertinent parts of the transcript are set forth in the above Statement of Facts.

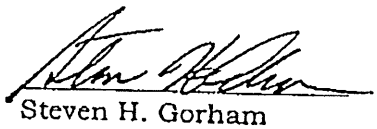
ARGUMENT

The Defendant was sentenced as a Dangerous Offender. It does not appear that anyone considered the line of cases or logic that resulted in the United States Supreme Court case of Apprendi v New Jersey, supra. In light of *State v LaLonde*, ___ Or ___ (2000), Oregon Supreme Court, slip opinion, November 9, 2000. This Court must examine the sentencing, resentencing and the arguments put forth above and find that the trial Court erred in not granting the Motion for New Trial and Motion for New Sentence in this case.

CONCLUSION

For the aforementioned reasons, Petitioner respectfully requests that the convictions on the indictment and the sentences be vacated, and the case be remanded to the trial court.

Respectfully submitted



Steven H. Gorham
Attorney for Defendant
Tyree Harris

Chapter 1

WHY DOES THE COURT OF APPEALS AWOP CASES?

Hon. Lynn R. Nakamoto[1]

The Court of Appeals has historically affirmed a significant percentage of cases on appeal or judicial review without issuing a published opinion that explains the basis for the affirmance. The court currently affirms without opinion (AWOP) in approximately two-thirds of its cases. The percentage rate of AWOPs can vary by the type of case. The case type with the lowest rate of AWOPs has been in administrative agency and adjudicatory board (*e.g.*, land use and workers' compensation) review. A case type with a high rate of AWOPs by percentage are post-conviction relief cases, which have a rigorous evidentiary standard and demanding standard of review and which sometimes involve *pro se* litigants.

The judges on the court realize that, most of the time, the parties would prefer to receive an opinion that explains the basis for a decision. That is particularly true of the parties who have not prevailed on appeal. At the same time, there is the reality of limited judicial resources to consider. The most basic reason for the volume of AWOPs is the ratio between the judges and staff and the numbers of cases decided. We could not possibly write on every case that comes before the court at this time given that ratio.

The AWOP process is largely "behind the curtain" because we currently do not offer the parties any explanation for why we have AWOP'd a particular case. In addition, there are no appellate rules governing the bases for AWOP decisions. So, we hope that this summary provides basic information in response to questions the bar may have regarding AWOPs.

1. Who decides which cases will be AWOP'd? A case will be AWOP'd only if the judges on the panel agree *unanimously* that an AWOP—as opposed to an affirmance—is appropriate. If one of the judges is uncertain about the disposition of a case or wants to write an opinion, regardless of the disposition of the case, the case will be taken under advisement.

2. When are AWOP decisions issued? Usually, the AWOPs are issued on a Wednesday roughly three weeks after the case is submitted. However, sometimes, a panel member will want more time to review portions of the record or to conduct legal research to determine whether to write or to vote to AWOP a case that has been submitted. If that review is completed later than within a few days of the submission of the case, the judge will prepare an AWOP memorandum and circulate it for consideration by the other judges on the panel at department conference. If the panel agrees that the case should be AWOP'd at a later conference based on an AWOP memo, then the AWOP decision may issue a month or longer after the case has been submitted.

3. How does a panel of judges on the court triage the cases submitted and decide which ones to AWOP and which ones to take under advisement? The judges meet in conference to discuss submitted cases. The judges first discuss their tentative votes on the case. To the extent that everyone is in agreement that the case should be affirmed, the judges decide whether the case is an AWOP or is one to write on. There are a variety of reasons that judges may wish to AWOP. Generally, they revolve around a balance between the resources required to write the opinion and the helpfulness of

---

[1] Credit is due to the Hon. Rick T. Haselton for much of the content in this paper, particularly the list of reasons that judges may have when deciding to AWOP cases.

an opinion to the parties or to other litigants, the bench, and the bar. Here is a list of some of the reasons we may AWOP:

(a) Nonpreservation. If a party has failed to preserve assignments of error for appeal, and there is no plain error, we will readily AWOP.

(b) No new law. AWOPs when the law is settled and the circumstances are unexceptional.

(c) "Unique circumstances." Sometimes, when the law is clear but the circumstances are unusual, we may AWOP anyway because the circumstances seem idiosyncratic and unlikely to appear again. Thus, at bottom, we think that writing an opinion in the case will not be helpful to the bench and bar.

(d) The appellant's or petitioner's position is unclear. The operative principle is that it is the appellant's and petitioner's obligation to identify the purported error(s) and to coherently explain why they should win and what they want us to do. The task of writing is difficult if we are in part guessing about the position or positions taken on appeal.

(e) "Juice isn't worth the squeeze." Sometimes, the procedural entanglements and complications on a garden-variety case, along with the parties' unhelpful briefing, make it evident that, to explain all of it and the reasoning and results will take more staff and judicial time than it is worth given the limited value of the case to the bench and bar.

(f) "Three-way split." If everyone agrees that the case is an affirm, albeit for different reasons, and publication won't give any meaningful guidance to the bar or the parties, we will not write. That might happen, for example, if the judges conclude that an error was harmless, but for different fact-based reasons that would not assist the bar in an analysis of harmless error. If, on the other hand, there were significant disagreement about the law, and if published majority and concurring opinions would be of benefit to the bench and bar, then we may well write.

(g) "Move on with their lives" AWOPs. It is evident that the parties need closure sooner rather than later, writing will only delay the inevitable disposition, and the benefit of an opinion to others is low.

(h) "No added value." Sometimes, we choose not to write because an administrative law judge or board, especially one that publishes its own opinions, such as the Land Use Board of Appeals or the Workers' Compensation Board, has done a thorough job; there is no sense replicating much of that effort for the parties; and the court's opinion would provide no added value to other litigants.

(i) "Can't get there from here" AWOPs. The issue is provocative, but it is controlled by Supreme Court precedent, which the appellant hopes to get the Supreme Court to revisit, or by our precedent, which is not challenged as "clearly wrong," or, if it is, we have decided such a challenge before. Typically, we would not add anything helpful by writing. On occasion, in such cases, we may issue a short per curiam opinion citing the controlling case(s), rather than AWOPing, just to make our basis of decision explicit.

(j) "Misleading law" AWOPS. Sometimes, we may wish to avoid publishing misleading law when, because of the ways in which the issues have been briefed (or not briefed), we are compelled to affirm—but, if the issues had been presented correctly (that is, if the adversarial system had worked correctly), the result (or, at least, the analysis) might well have been different. On the other hand, we sometimes write published opinions in those circumstances, to clarify proper application of the law.

No. 14-407

IN THE

SUPREME COURT OF THE UNITED STATES

JEFF PREMO, Superintendent,
Oregon State Penitentiary,

Petitioner,

v.

TYREE DUANE HARRIS,

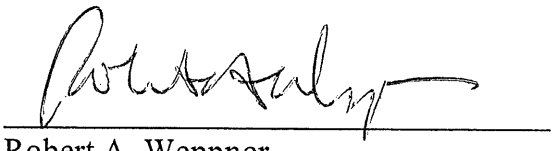
Respondent.

MOTION FOR LEAVE
TO PROCEED *IN FORMA PAUPERIS*

The respondent, Tyree Duane Harris, requests leave to file the attached brief in opposition to petition for writ of certiorari to the United States Court of Appeals for the Ninth Circuit without prepayment of costs, and to proceed in forma pauperis pursuant to Rule 39.1 of this Court and 18 U.S.C. §3006A(d)(7). The Respondent was represented by counsel appointed under the Criminal Justice Act in the District of Oregon and on appeal in the Ninth Circuit Court of Appeals,

and, therefore, no affidavit is required.

RESPECTFULLY SUBMITTED this 6th day of November, 2014.



Robert A. Weppner
Counsel of Record
Attorney for Respondent

No. 14-407

IN THE

SUPREME COURT OF THE UNITED STATES

JEFF PREMO, Superintendent,
Oregon State Penitentiary,

Petitioner,

v.

TYREE DUANE HARRIS,

Respondent.

CERTIFICATE OF SERVICE

I, Robert A. Weppner, certify that:

1. I am a member of the bar of the above-captioned Court.

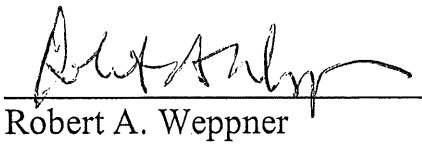
2. On November 6, 2014, I caused to be deposited in the United States Mail, first-class postage prepaid, a true and correct copy of the BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI (*In Forma Pauperis* Motion attached) filed with the above court by first-class mail this date, addressed

to: Anna M. Joyce, Solicitor General, 1162 Court Street, Salem, OR 97301-4096.

I also this date served a true copy of the same BRIEF electronically by email to anna.joyce@doj.state.or.us.

All the above was done in compliance with U.S. Supreme Court Rule 29.5(c).

RESPECTFULLY SUBMITTED this 6th day of November, 2014.



Robert A. Weppner
Counsel of Record
Attorney for Respondent