APPENDIX

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

BRANCH WILLIAM NIEHOUSE,

Petitioner,

v.

MS. BRIGITTE AMSBERRY,

Respondent.

Case No. 2:17-cv-01049-JE

FINDINGS AND RECOMMENDATION

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JELDERKS, Magistrate Judge.

Petitioner brings this habeas corpus case pursuant to 28 U.S.C. § 2254 challenging the legality of his October 2010 state court convictions in Lane County. For the reasons that follow, the Petition for Writ of Habeas Corpus (#2) should be denied.

BACKGROUND

The Lane County Grand Jury indicted Petitioner in three criminal cases. Case No. 200924905 ("Case #905") involved one count of Robbery I and one count of Unlawful Use of a Weapon. Case No. 200925318 ("Case #318") charged Petitioner with 12 counts of Burglary II, two counts of Burglary I, nine counts of Theft I, three counts of Theft II, 14 counts of Identity Theft, and one count each of Felon in Possession of a Weapon, Possession of a Controlled Substance, and Possession of Burglar's Tools. Case No. 201015983 ("Case 983") involved one count of Criminal Mischief and two counts of Failure to Appear.

The Robbery I charge in Case #905 arose from an incident where Petitioner entered Putters, a pizza parlor and family entertainment center. The owner of Putters, Steven Gilbert, walked to the back room of his business where he discovered Petitioner staring into a large, open safe. The large safe was typically left open, and there were smaller locked compartments within the larger safe where Gilbert kept valuable property. Trial Transcript, p. 231. Workers at Putters placed "lost and found" items on top of the locked compartments where the items could be easily accessed.

Gilbert saw Petitioner holding sunglasses, which he believed Petitioner had taken from the "lost and found" section within the safe. When Gilbert asked Petitioner what he was doing there, Petitioner responded that he was looking for "Scott." There was no person who worked at Putters by that name, and Gilbert told Petitioner to "Get the hell out of here." *Id* at 233. Gilbert called out to the kitchen for help, but no one responded.

Gilbert yelled at Petitioner again to leave, and noticed Petitioner constantly had one hand in his pocket. When Gilbert asked him what was in his pocket, Petitioner pulled out "a chain—a nunchuck kind of thing" that appeared to be fashioned from a motorcycle chain attached to a handle, and told Gilbert to "back the fuck up." *Id* at 234-35. Petitioner raised the weapon in a threatening manner, "like he was going to do some business with it," as if he was "letting [Gilbert] know not to do anything to stop him." *Id* at 234, 236. Petitioner then fled out the rear door of the building.

The Circuit Court consolidated the cases for a bench trial. At the close of the State's case, defense counsel moved for a judgment of acquittal on the basis that the evidence could not support a conviction for Robbery I. Counsel argued that Petitioner had not taken any property, and had only threatened the use of force to allow him to escape the building, hence there was insufficient evidence to show that he had used force to deprive Gilbert of any property as contemplated by Oregon's Burglary I statute. The trial judge denied the Motion, finding

that there was evidence from which the factfinder could find that:

> this use of force or threatened use of force was in an effort to attempt or - the commission of a theft. Certainly lots of evidence - from which one could conclude an attempt. There may even be some evidence, from my recollection of the tape, and - but I'll look at it again, that an actual commission occurred. But that's - a finder of fact kind of decision.

Id at 589.[1] The judge also relied on Gilbert's testimony that "he saw [Petitioner] had sunglasses or something in the [Petitioner's] hand that he thought might have been taken from the safe," and noted that all inferences must be drawn in favor of the State. *Id*.

At the conclusion of the bench trial, the judge found Petitioner not guilty of two counts of Robbery II and two counts of Identity Theft in Case #318, but convicted him as to all remaining charges. The judge imposed consecutive sentences totaling 462 months in prison. *Id* at 810.

Petitioner took a direct appeal wherein he argued that the trial court erred when it denied the Motion for Judgment of Acquittal. The Oregon Court of Appeals affirmed the trial court's decision without issuing a written opinion, and the Oregon Supreme Court denied review. *State v. Niehouse*, 256 Or. App. 761, 302 P.3d 1219, *rev. denied*, 354 Or. 386, 314 P.3d 964 (2013).

Petitioner next filed for post-conviction relief ("PCR") in Umatilla County raising a variety of claims of ineffective

[1] The trial judge's reference to the "tape" was of video footage that showed Petitioner reaching into the open safe at Putters. Trial Transcript, p. 510.

assistance of counsel. The PCR court denied relief on all of Petitioner's claims. The Oregon Court of Appeals affirmed the PCR court's decision without opinion, and the Oregon Supreme Court denied review. *Niehouse v. Myrick*, 282 Or. App. 369, 385 P.3d 101 (2016), *rev. denied*, 361 Or. 240, 392 P.3d 324 (2017).

Petitioner filed this 28 U.S.C. § 2254 habeas corpus case on July 5, 2017, and the Court appointed counsel to represent him on February 26, 2018. In his *pro se* Petition, Petitioner raises seven grounds for relief. With the assistance of appointed counsel, Petitioner argues two claims: (1) the evidence at trial was legally insufficient to convict him of Robbery I (Ground One); and (2) trial counsel was ineffective for failing to seek severance of the discrete criminal episodes in Case #905 from those in Case #318 (Ground Three).[2] Respondent asks the Court to deny relief on these claims because Ground One is procedurally defaulted, and the state court denials of these claims are not unreasonable.

DISCUSSION

I. Exhaustion and Procedural Default

A habeas petitioner must exhaust his claims by fairly presenting them to the state's highest court, either through a direct appeal or collateral proceedings, before a federal court

[2] Petitioner does not argue the merits of his remaining claims, nor does he address any of Respondent's arguments as to why relief on these claims should be denied. As such, Petitioner has not carried his burden of proof with respect to these unargued claims. *See Silva v. Woodford*, 279 F.3d 825, 835 (9th Cir. 2002) (Petitioner bears the burden of proving his claims). Even if Petitioner had briefed the merits of the remaining claims, I have evaluated them in light of the existing record and they do not entitle Petitioner to habeas corpus relief.

will consider the merits of those claims. *Rose v. Lundy*, 455 U.S. 509, 519 (1982). "As a general rule, a petitioner satisfies the exhaustion requirement by fairly presenting the federal claim to the appropriate state courts . . . in the manner required by the state courts, thereby 'affording the state courts a meaningful opportunity to consider allegations of legal error.'" *Casey v. Moore*, 386 F.3d 896, 915-916 (9th Cir. 2004) (quoting *Vasquez v. Hillery*, 474 U.S. 254, 257, (1986)).

If a habeas litigant failed to present his claims to the state courts in a procedural context in which the merits of the claims were actually considered, the claims have not been fairly presented to the state courts and are therefore not eligible for federal habeas corpus review. *Edwards v. Carpenter*, 529 U.S. 446, 453 (2000); *Castille v. Peoples*, 489 U.S. 346, 351 (1989). In this respect, a petitioner is deemed to have "procedurally defaulted" his claim if he failed to comply with a state procedural rule, or failed to raise the claim at the state level at all. *Carpenter*, 529 U.S. 446, 451 (2000); *Coleman v. Thompson*, 501 U.S. 722, 750 (1991). If a petitioner has procedurally defaulted a claim in state court, a federal court will not review the claim unless the petitioner shows "cause and prejudice" for the failure to present the constitutional issue to the state court, or makes a colorable showing of actual innocence. *Gray v. Netherland*, 518 U.S. 152, 162 (1996); *Sawyer v. Whitley*, 505 U.S. 333, 337 (1992); *Murray v. Carrier*, 477 U.S. 478, 485 (1986).

Respondent argues that Petitioner failed to fairly present his Ground One sufficiency of the evidence claim because,

although he cited to the Fourteenth Amendment and a U.S. Supreme Court decision in his Appellant's Brief, his arguments relied almost exclusively on Oregon statutes and cases. She further argues that even if a passing reference to federal law is sufficient to satisfy the exhaustion requirement, the Petition for Review Petitioner filed with the Oregon Supreme Court did not cite to federal law at all.

The only claim Petitioner pursued during his direct appeal challenged the sufficiency of the evidence to sustain his Robbery I conviction. Although he necessarily focused the bulk of his Appellant's Brief argument on what constituted Robbery I under Oregon law, he also directed the Oregon Court of Appeals to the federal standards as well:

> Under federal law, the reviewing court must determine whether, considering the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the defendant guilty of the essential elements of the crime beyond a reasonable doubt. US Const., Amend XIV. *Jackson v. Virginia*, 443 U.S. 307, 99 S Ct 2781, 61 L Ed2d 560 (1979).

Respondent's Exhibit 103, p. 10.

Based upon the foregoing, Petitioner alerted the Oregon Court of Appeals that he sought to raise a federal sufficiency of the evidence claim, thereby giving give that court a reasonable opportunity to resolve the claim. Petitioner then incorporated the same argument by reference in the "Argument" section of his Petition for Review to the Oregon Supreme Court. Respondent's Exhibit 105, p. 7. This method of incorporation by reference in a

petition for review is permissible in Oregon. *See Farmer v. Baldwin*, 346 Or. 67, 80. 205 P.3d 871 (2009). The Court should therefore conclude that Petitioner fairly presented his Ground One claim to Oregon's state courts so as to preserve it for federal habeas corpus review.

II. The Merits

A. Standard of Review

An application for a writ of habeas corpus shall not be granted unless adjudication of the claim in state court resulted in a decision that was: (1) "contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States;" or (2) "based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d). A state court's findings of fact are presumed correct, and Petitioner bears the burden of rebutting the presumption of correctness by clear and convincing evidence. 28 U.S.C. § 2254(e)(1).

A state court decision is "contrary to . . . clearly established precedent if the state court applies a rule that contradicts the governing law set forth in [the Supreme Court's] cases" or "if the state court confronts a set of facts that are materially indistinguishable from a decision of [the Supreme] Court and nevertheless arrives at a result different from [that] precedent." *Williams v. Taylor*, 529 U.S. 362, 405-06 (2000). Under the "unreasonable application" clause, a federal habeas court may grant relief "if the state court identifies the correct

governing legal principle from [the Supreme Court's] decisions but unreasonably applies that principle to the facts of the prisoner's case." *Id* at 413. The "unreasonable application" clause requires the state court decision to be more than incorrect or erroneous. *Id* at 410. Twenty-eight U.S.C. § 2254(d) "preserves authority to issue the writ in cases where there is no possibility fairminded jurists could disagree that the state court's decision conflicts with [the Supreme] Court's precedents. It goes no farther." *Harrington v. Richter*, 562 U.S. 86, 102 (2011).

B. Ground One: Sufficiency of the Evidence

Petitioner contends that the evidence in his case failed to satisfy Oregon law as to Robbery I where it did not establish that he threatened use of force in order to obtain, retain, or to compel another to deliver any property. *See* ORS 164.415. When reviewing a habeas corpus claim based on insufficient evidence, "[t]he relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Jackson v. Virginia*, 443 U.S. 307, 319 (1979) (emphasis in original). When the record supports conflicting inferences, courts must presume that the factfinder resolved the conflicts in favor of the prosecution. *Id* at 326. Because this issue occurs in the habeas corpus context which carries with it a stringent standard of review, this court is required to apply a "double dose of deference" to the state court

decision, a level of deference "that can rarely be surmounted." *Boyer v. Belleque*, 659 F.3d 957, 964 (9th Cir. 2011).

The State presented Gilbert's testimony that: (1) he saw Petitioner reach into the safe at Putters; (2) he witnessed sunglasses in Petitioner's hand; (3) he believed Petitioner had likely taken the sunglasses from the safe; and (4) Petitioner threatened to use a weapon against Gilbert before escaping (with the sunglasses). Trial Transcript, pp. 233-36. When the trial judge denied Petitioner's Motion for Judgment of Acquittal, he specifically noted Gilbert's testimony that Petitioner might have stolen the sunglasses, and that all inferences must be resolved in the State's favor. He also noted that there was video evidence documenting at least some of Petitioner's conduct at Putters.

Viewing this evidence in the light most favorable to the State, Petitioner stole the sunglasses from the Putters "lost and found" area and threatened Gilbert with the use of force so as to retain the stolen property. Because this constituted sufficient evidence to support a Robbery I conviction, the trial court's decision was neither contrary to, nor an unreasonable application of, clearly established federal law.

C. Ground Three: Ineffective Assistance of Counsel

Counsel for Petitioner objected to the consolidation of Case #983, but the trial court overruled that objection and ordered that all three cases be consolidated for trial. Trial Transcript, pp. 15-16. Counsel did not object to the consolidation of, or move to sever, Case #905 (involving 45 counts) from Case #318 that involved only two charges: Robbery I and Unlawful Use of a

Weapon arising from the incident at Putters. Respondent's Exhibit 102. As Ground Three, Petitioner alleges that defense counsel was ineffective when he failed to object to consolidation of Case #905 from Case #318, or move to sever those cases for trial. According to Petitioner, consolidation of these two cases for trial was improper under ORS 132.560 because the offenses in the two Indictments were not: (1) of the same or similar character; (2) connected based on the same act or transaction; or (3) based on two more acts or transactions connected together or constituting a common scheme or plan.

In his briefing, Petitioner argues another claim that counsel should have moved to sever the many separate criminal episodes brought in the Indictment in Case #318.[3] He asserts that the joinder of dozens of counts from 18 discrete criminal episodes resulted in an unfair trial because it showed a perceived propensity to steal, and vitiated the presumption of innocence to which he was entitled. He maintains that where he had no defense to many of the charges, the spillover effect of his guilt from those charges negated his presumption of innocence as to the remaining charges.

The Court uses the general two-part test established by the Supreme Court to determine whether Petitioner received ineffective assistance of counsel. *Knowles v. Mirzayance*, 556 U.S. 111, 122-23 (2009). First, Petitioner must show that his counsel's performance fell below an objective standard of

[3] It is unclear whether this claim is properly pled in the Petition, but this Findings and Recommendations assumes that it is.

reasonableness. *Strickland v. Washington*, 466 U.S. 668, 686-87 (1984). Due to the difficulties in evaluating counsel's performance, courts must indulge a strong presumption that the conduct falls within the "wide range of reasonable professional assistance." *Id* at 689.

Second, Petitioner must show that his counsel's performance prejudiced the defense. The appropriate test for prejudice is whether Petitioner can show "that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id* at 694. A reasonable probability is one which is sufficient to undermine confidence in the outcome of the trial. *Id* at 696. When *Strickland's* general standard is combined with the standard of review governing 28 U.S.C. § 2254 habeas corpus cases, the result is a "doubly deferential judicial review." *Mirzayance*, 556 U.S. at 122.

The PCR court resolved Petitioner's Ground Three claim as follows:

> The failure to file motions to sever. I guess - I don't think there's any question that a motion could have been made. I'm not sure it would have been granted. [I'm] struck with the affidavit that the district attorney made. You had the 45 counts, which was Burglary, Theft, ID Theft, ID Theft, Burglary, ID Theft, ID Theft, Burglary, down the line.
>
> The - the two counts on the other indictment were about two-thirds are there. So they were a couple, three months in.

> And they charged, basically, a robbery and . . . as counsel for the State pointed out, the only difference between that and the other burglaries was someone confronted him. And - and as a practical matter, it's part and parcel of the same thing. He wasn't confronted by anybody, none of the others.
>
> He was confronted in this one, pulled out a weapon, that's what makes it a robbery. It was, basically, the same kind of conduct. That's the argument she says she would have made, and I think that's a pretty good argument.
>
> And I don't think that, especially, if it's a jury - or nonjury trial . . . that the Court would have granted it. But I'm not convinced I would have granted that trial [sic] if I was the trial judge based upon that explanation.
>
> And I understand you have to look at it from the standpoint of what the indictment says, but still, it is -- there's an element of violence in the robbery that's not present in the other burglary charges.
>
> But, again, I think they relate. And even if he had filed a motion with the 45-count indictment which, I think, clearly, was properly joined and triable in one case, I'm not convinced that those other two charges made a bit of difference to a jury or a judge. And so I'm going to deny that claim.
>
> I don't think as a matter - as a matter of an attorney not doing his job, that I'm not convinced that that's true.

Respondent's Exhibit 129, pp. 49-50.

The PCR court determined that the charges within Cases #318 and #905 were sufficiently related to one another that the Lane County Circuit Court properly tried them together. It also expressed its doubt that, given the similarity of the charges, a motion to sever would have been granted. The PCR court's decision

relies upon an interpretation and application of state law that is binding on this Court. *See Estelle v. McGuire*, 502 U.S. 62, 67-68 (1991) ("[W]e reemphasize that it is not the province of a federal habeas court to reexamine state-court determinations on state-law questions."). Where a motion to sever would have been futile, Petitioner has not established that counsel's performance fell below an objective standard of reasonableness.

Even if this Court were not bound by the PCR court's interpretation of state law, the record suggests that the trial court would not have granted a motion to sever. When trial counsel objected to consolidation of Case #983 with the other two cases, the trial judge overruled his objection even though Case #983 bore no relation to the common scheme displayed in the other cases.[4]

In addition, Petitioner suffered no prejudice because he proceeded to a bench trial where the judge, unlike a jury, was well equipped to determine what information was relevant to each charge. Even if a judge were no more immune to issues of bias than members of a jury, had counsel successfully moved for severance, the judge, acting as the factfinder, still would have been privy to the many different charges Petitioner faced and likely presided over many or all of Petitioner's trials such that he would not have benefitted from severance. Because Petitioner

[4] Case #983 involved Petitioner's failure to appear at two hearings and tampering with an electronic surveillance monitoring device the Lane County Sheriff placed upon him, thus it appears to be even more attenuated to Case #318 than the crimes charged in Case #905. Given the trial judge's decision to overrule counsel's objection to the consolidation of Case #983, it is difficult to envision that he would grant a motion to sever Case #318 from Case #905 or sever charges within Case #318.

has not established that he suffered prejudice from error on the part of his attorney, the PCR court's decision is neither contrary to, nor an unreasonable application of, clearly established federal law.

RECOMMENDATION

For the reasons identified above, the Petition for Writ of Habeas Corpus (#2) should be denied and a judgment should be entered dismissing this case with prejudice. The Court should decline to issue a Certificate of Appealability on the basis that Petitioner has not made a substantial showing of the denial of a constitutional right pursuant to 28 U.S.C. § 2253(c)(2).

SCHEDULING ORDER

This Findings and Recommendation will be referred to a district judge. Objections, if any, are due within 17 days. If no objections are filed, then the Findings and Recommendation will go under advisement on that date.

If objections are filed, then a response is due within 14 days after being served with a copy of the objections. When the response is due or filed, whichever date is earlier, the Findings and Recommendation will go under advisement.

DATED this 16 day of August, 2019.

John Jelderks
United States Magistrate Judge

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Case No. 2:17-cv-01049-JE

OBJECTIONS TO FINDINGS AND RECOMMENDATION

The petitioner, Branch William Niehouse, through his attorney, Thomas J. Hester, files the following objections to the Findings and Recommendations (F & R) of the Honorable John Jelderks, United States Magistrate Judge for the District of Oregon. Upon the filing of objections, "[i]t is a statutory and constitutional obligation of the District Court 'to arrive at its own independent conclusion about those portions of the magistrate's report to which objections are made.'" *Simmons v. Revenue Officers*, 865 F.Supp. 678, 679 (D. Idaho 1994), quoting *United States v. Remsing*, 874 F.2d 614, 618 (9th Cir. 1989).

Mr. Niehouse objects to the following findings:

> Viewing the evidence in the light most favorable to the State, Petitioner stole sunglasses from the Putters "lost and found" area and threatened Gilbert with the use of force to retain the stolen property.

F & R at 10.

> [Niehouse's counsel filing] a motion to sever would have been futile . . . [and] Petitioner suffered no prejudice because he proceeded to a bench trial where the judge, unlike a jury, was well equipped to determine what information was relevant to each charge.

F & R at 14.

Mr. Niehouse also objects to the following recommendation:

> [T]he Petition for Writ of Habeas Corpus (#2) should be denied and a judgment should be entered dismissing this case with prejudice. The Court should decline to issue a Certificate of Appealability on the basis that Petitioner has not made a substantial showing of the denial of a constitutional right[.]

F & R at 15.

In support of his objections, Mr. Niehouse relies on the legal arguments presented in his Brief in Support of Petition for Writ of Habeas Corpus filed on April 22, 2019, as supplemented below.

I. Contrary to the Magistrate Judge's Finding, the Evidence of Robbery Was Legally Insufficient.

Oregon robbery law includes an element that the accused "person uses or threatens the immediate use of physical force upon another person with the intent of [p]reventing or overcoming resistance to the taking of the property or to retention thereof immediately after the taking." Or. Rev. Stat. § 164.395; *see also State v. Jackson*, 40 Or. App, 759, 763 (1979). As the Magistrate Judge recognized, in *Jackson v. Virginia*, the Supreme Court prescribed the legal standard for evaluating sufficiency under the Constitution: "[T]he relevant question is whether, after viewing

the evidence light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." F & R at 9 (quoting *Jackson*, 443 U.S. at 319). Because there was only supposition that the sunglasses in Mr. Niehouse's hand that afternoon were taken from the business's lost and found, and there was absolutely no evidence that a pair of sunglasses had been placed in the lost and found, the evidence was insufficient.

A. The Magistrate Judge Deferred to the State Court Determination, Which Misunderstood the Elements of Robbery in Oregon.

Noting that Mr. Niehouse's *Jackson* challenge arises in the habeas, the Magistrate Judge concluded "this court is required to apply a 'double dose of deference' to the state court decision." F & R at 9-10. In this case, the last reasoned decision of the state court was the trial judge's denial of the Motion for Judgment of Acquittal. *See Robinson v. Ignacio*, 360 F.3d 1044, 1055 (9th Cir. 2004). In so ruling, the trial judge explained:

> I'm going to deny the motion. I think there is evidence from which the jury could conclude – or the finder of fact, not the jury, me, could conclude by proof beyond a reasonable doubt that this use of force or threatened use of force was in an effort to attempt or – the commission of a theft. Certainly lots of evidence of – from which one could conclude an attempt. There may even be some evidence . . . that an actual commission occurred.

Tr. 589.[1] The trial judge expressly asked defense counsel if there was any Oregon case law that supported his argument that where there is an attempt to commit a theft, and that attempt is interrupted, and the suspect then uses force to effectuate a departure, it is not considered a robbery.

[1] Given that Mr. Niehouse was found in a private area of the business reserved for employees and the testimony that Niehouse claimed he was looking for someone who did not work there, it was likely a permissible inference that he was seeking valuables to steal. And, in light of the other cases consolidated at trial, in which Niehouse stole computers, purses, checkbooks, a brief case, cameras, lenses, watches, other electronics, cash, jewelry, tools, and a firearm, *see* Ex. 102 (indictment in 200925318, at Counts 2, 4, 13, 14, 23, 27, 29, 32, 33, 35, and 43) from open businesses, there was "lots of evidence" supporting an inference that he entered the private portion of Putters in an attempted theft. *See also* Brief in Support at 1-12.

Tr. 700-01. Defense counsel told the judge there was no appellate case law, rather his argument was "[j]ust . . . statutory." Tr. 701. The judge was not persuaded.

However, as detailed in Mr. Niehouse's opening brief, the Oregon's pattern jury instruction for robbery specifically directs the reader to such a case: *Jackson*, 40 Or. App. 759. Indeed, the pattern instruction's citation to *Jackson* includes the parenthetical explanation that the crime was not robbery because "defendant's use of force against victim did not occur during and attempt to commit theft; rather, defendant used force following an abandoned attempt to commit theft." *See* Or. Unif. Crim. Jury Inst. No. 2101.

Given his dismal record with the State Bar and his subsequent resignation from the practice of law in Oregon, it is not surprising that attorney Jagger was not up to speed on the critical case law and had not reviewed the pattern jury instructions. At least he understood that the use of force had to involve the taking or retention of property. From the state court's "last reasoned decision," it is clear that the trial judge misapprehended the controlling Oregon law. *See* Tr. 589. Accordingly, that decision is not entitled to deference. *See* Brief in Support at 27-29. In light of her ethical obligations, the trial prosecutor was presumably also ignorant as to requirements of Oregon robbery law. *See* Or. Code of Prof'l Responsibility, D.R. 7-106 (B)(1); Tr. 588 (acknowledging there was no inventory of the contents of the lost and found and no one knew if the sunglasses had been taken from there).

In Mr. Niehouse's case, Oregon's courts failed to follow Oregon law in denying the Motion for Judgment of Acquittal. To the extent that the Magistrate Judge deferred to that ruling, he erred.

B. The Evidence of Robbery Was Legally Insufficient Because it Only Involved the Threat of Force to Effect Mr. Niehouse's Escape After an Abandoned Attempt to Commit Theft.

As highlighted in Mr. Niehouse's brief, the Supreme Court has long recognized that the Due Process Clause requires proof of every fact necessary to prove an offense beyond a reasonable doubt. Brief in Support at 23-24; *Jackson*, 443 U.S. at 317-19; *In re Winship*, 397 U.S. 358, 364 (1970).

The Magistrate Judge opined that the evidence adequately established that "Petitioner stole the sunglasses from the Putter's 'lost and found' area." F & R at 10; *but see* Brief in Support at 23-27. As the Sixth Circuit has noted, there is not a bright line separating "where the evidence in the light most favorable to the prosecution creates only a reasonable speculation [such that] . . . there is insufficient evidence to satisfy the *Jackson* standard." *Newman v. Metrish*, 543 F.3d 793, 797 (6th Cir. 2008). However, "guilt beyond a reasonable doubt cannot be premised on pure conjecture." *O'Laughlin v. O'Brien*, 568 F.3d 287, 301 (1st Cir. 2009).

As the second circuit has instructed, under *Jackson*:

> Where a fact to be proved is also an element of the offense[,] it is not enough that the inferences in the government's favor are permissible. The inferences must be sufficiently supported to permit a rational juror to find that the element is established beyond a reasonable doubt.

Langston v. Smith, 630 F.3d 310, 314-15 (2d Cir. 2011). Given the evidence presented at trial, the judge denied the Motion for Judgment of Acquittal because he concluded there was evidence from which the fact-finder could find Mr. Niehouse raised the homemade chain weapon menacingly to escape after an unsuccessful theft attempt. Tr. 589. In his ruling, referring to the sunglasses, the judge continued: "There *may even be some evidence*" of an actual theft. *Id.* (emphasis added). Any inference that the sunglasses Mr. Niehouse carried were stolen from Putters' lost and found that

afternoon was not a permissible inference; it was pure conjecture. The only "possible" evidence was witness Gilbert's testimony: "I think he had sunglasses in his hand[,] which was probably from in the safe lost and found." Tr. 233-34. The trial evidence did establish that Mr. Niehouse produced the homemade weapon in response to Gilbert's question: "What's in your pocket?" and only as he was trying to leave the business. The supposition that Mr. Niehouse did this to retain possession of what Gilbert "thought" were sunglasses, and presumed had been stolen from the lost and found, is not sufficient to rationally support either the conclusion that there were stolen sunglasses, or that the threat was intended to facilitate their retention rather than his exit. When Mr. Niehouse was arrested and interrogated, he repeatedly asked why he was being charged with robbery and, when confronted with a photo of the chain, noted he was "just trying to leave." Tr. 522-24.

In addition to not meaningfully addressing these evidentiary facts, the Magistrate Judge failed to consider the chain of supposition required to conclude, beyond a reasonable doubt, that there was a threat made to retain stolen property. Brief in Support at 26. The Magistrate Judge also failed to address any of the numerous federal appeals court cases granting habeas relief based on insufficient evidence addressed in Mr. Niehouse's brief. *Id.* at 22-26.

As the Seventh Circuit opined in granting habeas relief in insufficiency:

> It's true that we know of no case identical to this one – unsurprisingly, given the combination of weak proof with a verdict based on groundless conjecture. But identity can't be required. The Supreme Court has made clear … that a judge or a jury may not convict someone, on the basis of a belief that has no evidentiary basis whatsoever.

Owens v. Duncan, 781 F.3d 360, 365 (7th Cir. 2015) (Posner, CJ); *accord Langston*, 630 F.3d 310; *O'Laughlin*, 568 F.3d. at 301[2]; *Newman*, 543 F.3d 793.

Beyond quoting the *Jackson v. Virginia* standard for sufficiency, the only case the Magistrate Judge cited was *Boyer v. Belleque*, 659 F.3d 957 (9th Cir. 2011). F & R at 10. Although cited in reference to the Magistrate Judge's mistaken double deference finding, *see* id. 9-10; Brief in Support at 27-29; *supra* at subpoint A, the facts of that case also illustrate the difference between permissible inferences and unconstitutional speculation.

In *Boyer*, the Ninth Circuit found the evidence was legally sufficient to permit a finding of intent to harm the victims where Boyer, who had been HIV-positive for a decade and had full blown AIDS for over two years, subjected boys who were incapable of legal consent to anal sodomy without a condom. The Ninth Circuit quoted the prosecutor's argument on sufficiency:

> [T]he Defendant knowingly and deliberately inserted his penis in the rectum of these two individuals. And inserting bodily fluid from his penis into them, and [sic] thereby caused the AIDS virus to be placed inside each of these two children.
>
> This was a knowing act, a deliberate act. There was absolutely nothing more that he could do to prevent the death of these children if they contracted the AIDS virus.

Boyer, 659 F.3d at 963. The Ninth Circuit emphasized the state court's explanation that proof of intent typically must be inferred from the circumstances and agreed that "given the knowledge that is attributable to Mr. Boyer regarding his infectious disease, the jury could infer . . . intent." *Id.* The Court also rejected that State's argument that sufficiency of the evidence is a state law issue

[2] Quoting *United States v. Flora-Rivera*, 56 F.3d 319, 323 (1st Cir. 1995)("If the evidence viewed in the light most favorable to the verdict gives equal or nearly equal circumstantial support to a theory of guilt and a theory of innocence of the crime charged, this court must reverse the conviction. This is so because where an equal or nearly equal theory of guilt and theory of innocence is supported by the evidence viewed in the light most favorable to the prosecution, a reasonable jury must necessarily entertain a reasonable doubt.")(internal modifications omitted)).

as that "would nullify the federal constitutional prohibition against convicting persons absent proof of guilt beyond a reasonable doubt, a principle firmly established by the United States Supreme Court's precedent. *In re Winship*. . . " *id.* at 965. Instead, the Ninth Circuit concluded that there was "evidence sufficient for a rational jury to [infer intent]," *id.* at 966. In doing so, the Court expressly looked to the last reasoned decision of the state courts, *id.* at 964, and then relied upon prior Oregon appellate case law allowing an inference of specific criminal intent in the precise circumstances presented in *Boyer*. *Id.* at 966-67.

II. Contrary to the Magistrate Judge's Finding, Trial Counsel's Filing a Motion to Sever the Numerous Charges Would Not Have Been Futile and Mr. Niehouse Was Prejudiced.

The Magistrate Judge opined that it would have been futile for trial counsel to seek severance, and therefore concluded that counsel's representation was not deficient. F & R at 14. Yet, as the Magistrate Judge quoted in his findings, the state post-conviction judge did not rule that the motion would have been futile, but rather that "I'm not sure it would have been granted." F & R at 12 (quoting Ex. 129 at 49). Once again, the Magistrate Judge found that "an interpretation and application of state law … is binding on this Court," F & R at 14, where that was not a correct recitation of the record—in this instance, the state court's ruling.

Alternatively, the Magistrate Judge went on to conclude that Mr. Niehouse "suffered no prejudice because he proceeded to a bench trial where the judge, unlike a jury, was well equipped to determine what information was relevant to each charge." F & R at 14. He then opined that if the charges were severed, the judge, as fact-finder, "would have presided over many or all of Petitioner's trials such that he would not have benefitted from severance." *Id.*

The Magistrate's stated reasoning actually suggests the prejudice or how the outcome likely would have been different, if severance were granted. The logical rationale for waiving jury

would be obviated if the charges were severed. *See* Opening Brief at 17-21. Indeed, early in his post-conviction deposition, trial counsel acknowledged as much. Ex. 124 at 11-12; *see also* Ex. 124 at 13-21 (in which counsel vacillates between inconsistent justifications for his actions); Ex. 114 (letter from Mr. Niehouse to counsel eight days before trial commenced advising that he wanted a jury trial). Additionally, the Magistrate Judge's reliance on the trial judge's ability, as fact-finder, to only consider the evidence relevant to the discrete criminal episodes, was suspect in light of that court's inability to comprehend Oregon's law on the most serious charge (i.e., that robbery requires that the threat of force be used to effectuate a theft).

For all of the reasons articulated in Mr. Niehouse's brief, counsel was ineffective in not moving for severance and the state PCR court's rejection of that claim was an unreasonable application of federal law. Brief in Support at 10-22.

III. Conclusion

Mr. Niehouse was convicted of robbery upon legally insufficiency evidence. Additionally, at trial, Niehouse was represented by a retained lawyer whose performance was inadequate. That lawyer failed to seek severance of the eighteen discrete criminal episodes and Niehouse was prejudiced as a result.

The Magistrate Judge's contrary findings and recommendation are erroneous. Accordingly, the Writ should issue, the robbery charge should be dismissed, and Oregon should be given the opportunity to retry Mr. Niehouse on the remaining charges in a severed trial at which he has effective legal representation.

Respectfully submitted on August 29, 2019.

/s/ Thomas J. Hester
Thomas J. Hester
Assistant Federal Public Defender

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

BRANCH WILLIAM NIEHOUSE, Petitioner, v. **MS. BRIGITTE AMSBERRY**, Respondent.	Case No. 2:17-cv-01049-JE **OPINION AND ORDER**

Thomas J. Hester, Assistant Federal Public Defender, 101 SW Main St., Suite 1700, Portland, OR 97204. Attorney for Petitioner.

Ellen F. Rosenblum, Attorney General; Samuel A. Kubernick, Assistant Attorney General, Department of Justice, 1162 Court St. NE, Salem, OR 97301. Attorneys for Respondent.

IMMERGUT, District Judge.

On August 16, 2019, Magistrate Judge John Jelderks issued his Findings and Recommendation (F&R) in this case. ECF 51. Magistate Judge Jelderks recommended Petitioner's Amended Petition for Writ of Habeas Corpus, ECF 2, be denied, that this Court enter a judgment dismissing the case with prejudice, and that no Certificate of Appealability be issued. Petitioner timely filed Objections to the F&R, ECF 53, and Respondent filed a Response to Objections, ECF 54.

DISCUSSION

Under the Federal Magistrates Act ("Act"), as amended, the court may "accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate judge." 28 U.S.C. § 636(b)(1). If a party files objections to a magistrate judge's F&R, "the court shall make a de novo determination of those portions of the report or specified proposed findings or recommendations to which objection is made." *Id.* But the court is not required to review, de novo or under any other standard, the factual or legal conclusions of the F&R to which no objections are addressed. *See Thomas v. Arn*, 474 U.S. 140, 149–50 (1985); *United States v. Reyna-Tapia*, 328 F.3d 1114, 1121 (9th Cir. 2003) (en banc). Nevertheless, the Act "does not preclude further review by the district judge, sua sponte" whether de novo or under another standard. *Thomas*, 474 U.S. at 154.

A petition for writ of habeas corpus shall not be granted unless the adjudication of the claim in the state court proceeding "resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law" or "resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d). Factual determinations made by a state court are presumed to be correct. *Id.* at § 2254(e)(1). The petitioner bears the burden of rebutting that presumption by clear and convincing evidence. *Id.* When reviewing the sufficiency of evidence for a habeas corpus claim, "[t]he relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Jackson v. Virginia*, 443 U.S. 307, 319 (1979).

Petitioner raises objections to the following three determinations made by Magistrate Judge Jelderks's F&R: (1) the evidence at trial was sufficient to establish that Petitioner

committed Robbery in the First Degree, in violation of O.R.S. § 164.415; (2) a motion to sever the charges in the first two indictments would have been futile; and (3) the Court should decline to issue a Certificate of Appealability. As set forth below, this Court agrees with Judge Jelderks's conclusions and ADOPTS the F&R.

Petitioner argues that Magistrate Judge Jelderks erred in finding that the evidence in the record was sufficient to support a rational trier of fact in finding that Petitioner committed the essential elements of Robbery in the First Degree. This Court agrees with Judge Jelderks's conclusion that, when viewed in the light most favorable to the prosecution, a rational trier of fact could find that Petitioner stole sunglasses from the safe at a restaurant, Putters, and used a threat of physical force to leave with the property, thereby satisfying the essential elements of Robbery in the First Degree. The state offered testimony from the business owner, Eric Gilbert, and video surveillance footage to support this finding. Gilbert testified that he discovered Petitioner peering into the open safe where the business stored lost and found items. ECF 20 at 246. Gilbert then stated that he observed Petitioner holding sunglasses that were likely taken from the safe. *Id.* Finally, Gilbert testified that Petitioner threatened to use a weapon against him before leaving with the sunglasses. *Id.* at 246–49. The state also presented surveillance footage that showed Petitioner enter through the back door of the business and walk directly to the safe. *Id.* at 238. The Court agrees with Judge Jelderks's conclusion that the state presented sufficient evidence that Petitioner stole sunglasses from the safe and used a threat of physical force to leave with the property. Accordingly, the state court's decision did not demonstrate an unreasonable determination of the facts presented at trial. *See* 28 U.S.C. § 2254(d). Petitioner failed to provide clear and convincing evidence contrary to this determination. *Id*. at § 2254(e)(1).

Petitioner further argues that the trial judge erred because the facts of his case do not

constitute robbery under Oregon law. *See* ECF 53 at 3–4; O.R.S. § 164.395; O.R.S. § 164.415. Petitioner compares his case to *State v. Jackson*, which held that a defendant has not committed the crime of robbery when he uses force after an abandoned attempt to commit theft. 596 P.2d 600, 602 (Or. Ct. App. 1979). In that case, the Oregon Court of Appeals reversed a robbery conviction after finding that the use of force occurred after the termination of an attempted theft, and "there were no fruits of the theft for defendant to use force to retain." *Id.* Thus, the force was not used "in the course of committing or attempting to commit theft," as required under O.R.S. 164.395. *Id.* Unlike the defendant in *State v. Jackson*, however, the trial court found that Petitioner used force to leave with stolen property, namely the sunglasses from the safe. This Court finds that *State v. Jackson* is distinguishable and agrees with the conclusion in the F&R that the trial judge's findings satisfied due process. *See Johnson v. Montgomery*, 899 F.3d 1052, 1059 n.1 (9th Cir. 2018).

Petitioner's second objection concerns his allegation of ineffective assistance of counsel. Petitioner asserts that trial counsel's representation fell below the standard of objective reasonableness because he failed to file a motion for severance or object to the consolidation of the charges. *See* ECF 53 at 8–9. *Strickland v. Washington*, 466 U.S. 668, 688 (1984) (holding that defendant bears the burden of showing that "counsel's representation fell below an objective standard of reasonableness"). Specifically, Petitioner objects to Judge Jelderks's conclusions that a motion to sever the claims would have been futile and the defense suffered no resulting prejudice. *See* ECF 53 at 8–9. The F&R recommends that the Court deny the Petition for Writ of Habeas Corpus because the post-conviction relief ("PCR") court found that the representation was reasonable and Petitioner failed to establish that he suffered prejudice from the error of his attorney. *See* ECF 51 at 14–15.

When reviewing claims for ineffective assistance of counsel, federal courts are to provide a "doubly deferential" review of state court decisions. *Woods v. Etherton*, 136 S. Ct. 1149, 1151 (2016). Federal courts are not to "reexamine state-court determinations on state-law questions" but limit review to determining "whether a conviction violated the Constitution, laws, or treaties of the United States." *Estelle v. McGuire*, 502 U.S. 62, 67–68 (1991). The PCR court found that the charges were "properly joined and triable in one case." ECF 19 at 50. The PCR court also doubted that a motion for severance would have been granted given the commonality of the charges. *Id.* The F&R properly applied the deferential standards required when a federal court examines a state court's ruling on ineffective assistance of counsel. Petitioner has not shown that his counsel's failure to sever the claims fell below an objective standard of reasonableness. Nor has Petitioner shown that the state court's determination involved an unreasonable application of clearly established Federal law. *See* 28 U.S.C. § 2254(d).

Finally, Petitioner objects to the recommendation that the Court deny a Certificate of Appealability ("COA"). 28 U.S.C. § 2253(c) "permits the issuance of a COA only where a petitioner has made a 'substantial showing of the denial of a constitutional right.'" *Miller-El v. Cockrell*, 537 U.S. 322, 336 (2003). The Court agrees with the F&R that Petitioner has failed to make a substantial showing of the denial of a constitutional right.

CONCLUSION

The Court has reviewed de novo the portions of Judge Jelderks's Findings and Recommendation to which Petitioner objected. Upon review, the Court agrees with Judge Jelderks's recommendation and ADOPTS the Findings & Recommendation, ECF 51. The Petition for Writ of Habeas Corpus, ECF 2, is DENIED. The Court declines to issue a Certificate of Appealability on the basis that Petitioner has not made a substantial showing of the denial of a

constitutional right, as required under 28 U.S.C. § 2253(c)(2).

IT IS SO ORDERED.

DATED this 20th day of September, 2019.

/s/ Karin J. Immergut
Karin J. Immergut
United States District Judge

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

BRANCH WILLIAM NIEHOUSE, Petitioner, v. **MS. BRIGITTE AMSBERRY**, Respondent.	Case No. 2:17-cv-01049-JE **JUDGMENT**

Based on the Court's Opinion and Order, ECF 55, adopting Judge Jelderks's Findings and Recommendation, ECF 51, IT IS ORDERED AND ADJUDGED that Petitioner's Amended Petition for Writ of Habeas Corpus, ECF 2, is DENIED, and this case is DISMISSED with prejudice. The Court DECLINES to issue a Certificate of Appealability because Petitioner has not made a substantial showing of the denial of a constitutional right, as required under 28 U.S.C. § 2253(c)(2).

DATED this 20th day of September, 2019.

/s/ Karin J. Immergut
Karin J. Immergut
United States District Judge

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED

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U.S. COURT OF APPEALS

BRANCH WILLIAM NIEHOUSE, Petitioner-Appellant, v. BRIGITTE AMSBERRY, Respondent-Appellee.	No. 19-35848 D.C. No. 2:17-cv-01049-JE District of Oregon, Pendleton ORDER

Before: LEAVY and MILLER, Circuit Judges.

The request for a certificate of appealability is denied because appellant has not made a "substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2); *see also Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003).

Any pending motions are denied as moot.

DENIED.