No._____

IN THE SUPREME COURT OF THE UNITED STATES

TIMOTHY JAMES THOMPSON,

Petitioner,

v.

JEFF PREMO, Superintendent,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether when assessing prejudice to determine if the default of an ineffective assistance of trial counsel claim should be excused under *Martinez v. Ryan*, 566 U.S. 1 (2012), the idiosyncrasies of the trial judge may be considered?

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OPINIONS BELOW

The United States District Court for the District of Oregon denied Mr. Thompson's petition for writ of habeas corpus in an unpublished opinion and order. Appendix at 2 ("Opinion and Order"). That Court also denied a Certificate of Appealability. *Id.* at 3. Mr. Thompson filed with the United States Court of Appeals for the Ninth Circuit a Notice of Appeal, which was considered a motion for a certificate of appealability pursuant to its local Rule 22-1(d), but the Court denied it. Appendix at 1 (order).

JURISDICTIONAL STATEMENT

This Court has jurisdiction to review this petition for writ of certiorari under 28 U.S.C. § 1254(1) (2012). The Ninth Circuit filed the order sought to be reviewed on March 5, 2021. Appendix at 1.

STATUTORY PROVISIONS

28 U.S.C. § 2253(c)(1) (2012) provides:

> Unless a circuit justice or judge issues a certificate of appealability, an appeal may not be taken to the court of appeals from—
>
> (A) the final order in a habeas corpus proceeding in which the detention complained of arises out of process issued by a State court . . .

28 U.S.C. § 2253(c)(2) (2012) provides:

> A certificate of appealability may issue . . . only if the applicant has made a substantial showing of the denial of a constitutional right.

STATEMENT OF THE CASE

A. State Court Proceedings

Mr. Thompson went to jury trial on a multiple-count indictment. At the close of the state's evidence, defense counsel moved to acquit Mr. Thompson on exclusively state-law grounds. Ultimately, Mr. Thompson was convicted of multiple offenses. Postconviction counsel did not claim that trial counsel was ineffective in failing to move for judgment of acquittal on federal double jeopardy or federal due process grounds.

On direct appeal, the Oregon Court of Appeals affirmed without opinion, and the Oregon Supreme Court denied review. *State v. Thompson*, 278 P.3d 141 (Or. Ct. App. 2012) (table), *review denied*, 293 P.3d 1045 (Or. 2012) (table).

Mr. Thompson petitioned for post-conviction relief, but the Oregon trial-level court denied it. The Oregon Court of Appeals affirmed without opinion, and the Oregon Supreme Court denied review. *Thompson v. Premo*, 356 P.3d 682 (Or. Ct. App. 2015) (table), *review denied,* 364 P.3d 1002 (Or. 2015) (table).

B. Federal Habeas Proceedings

Mr. Thompson timely filed a petition for habeas corpus relief, a Magistrate Judge was assigned, and counsel was appointed. D. Ct. Dkts. 1 (petition), 3 (assignment notice), & 4 (counsel appointment order). In an amended habeas petition, Mr. Thompson asserted, among other claims, that trial counsel was ineffective in failing to seek a judgment of acquittal on double jeopardy and due process grounds. D. Ct. Dkt. 77 at 8-9 (second amended petition). Respondent contended that the claim was procedurally defaulted because it was not raised in state postconviction proceedings and that, therefore, the District Court should not reach its merits. D. Ct. Dkt. 54 at 2. Mr. Thompson countered that because postconviction counsel was ineffective in failing to raise the trial counsel ineffectiveness claim, the District Court should excuse and reach the merits of the claim. D. Ct. Dkt. 74 at 10-11 (citing to *Clabourne v. Ryan*, 745 F.3d 362, 377 (9th Cir. 2014) (setting out the test for demonstrating cause and prejudice for excusing a procedural default due to post-conviction ineffective assistance of counsel pursuant to *Martinez v. Ryan*, 566 U.S. 1 (2012)), *overruled on other grounds*, *McKinney v. Ryan*, 813 F.3d 798(2015)).

The Magistrate Judge's Findings and Recommendation advised against excusing the default, reasoning that because the trial judge had rejected the arguments trial counsel did make, the trial judge would also have denied a motion

for acquittal based on due process and double jeopardy guarantee violations. D. Ct. Dkt. 84 at 9-10 ("it is evident that any failure on counsel's part to base his motions for judgment of acquittal specifically on due process and double jeopardy did not prejudice Thompson").

Mr. Thompson objected that the Magistrate Judge's reasoning contradicted this Court's holding that when analyzing ineffective assistance of counsel claims, "[t]he assessment of prejudice . . . should not depend on the idiosyncrasies of the particular decisionmaker." *Strickland v. Washington*, 466 U.S. 668, 695 (1984). D. Ct. Dkt. 92 at 5-6. The Article III judge adopted the Magistrate Judge's Findings & Recommendation, denied relief, and denied a Certificate of Appealability ("COA"). Exhibit at 2 (*Thompson v. Premo*, 2020 WL 4572329 (D. Or. Aug. 7, 2020) (Opinion and Order)).

Mr. Thompson filed a Notice of Appeal. D. Ct. Dkt. 96. On March 5, 2021, the Ninth Circuit Court of Appeals denied a COA. Exhibit at 1 (*Thompson v. Premo*, No. 20-35777 (9th Cir. March 5, 2021)). Under Ninth Circuit Local Rule 22-1(d), Petitioner's Notice of Appeal constituted a request for a COA. *Id.* ("If appellant does not file a COA request with the court of appeals after the district court denies a COA in full, the court of appeals will deem the notice of appeal to constitute a request for a COA.").

REASONS FOR GRANTING THE WRIT

This Court has long held that assessing whether trial counsel's deficient performance prejudiced a defendant "should . . . not depend on the idiosyncrasies of the particular decisionmaker [, but] should proceed on the assumption that the decisionmaker is reasonably, conscientiously, and impartially applying the standards that govern the decision." *Strickland v. Washington*, 466 U.S. 668, 695 (1984). Whether *Strickland*'s prohibition against considering the idiosyncrasies of the particular decisionmaker applies in determining, under *Martinez v. Ryan*, whether postconviction counsel's ineffectiveness should excuse the default of an ineffective assistance of trial counsel claim is an important federal question because the answer dictates how *Martinez v. Ryan* is applied to determine whether federal courts may reach the merits of procedurally defaulted ineffective assistance of trial counsel claims. As this case illustrates, the court below has eroded this Court's requirement that the idiosyncrasies of the decisionmaker should play no role in assessing prejudice.

The Ninth Circuit denied a COA on whether, in declining to excuse under *Martinez v. Ryan* the default of a claim that trial counsel was ineffective in failing to seek a judgment of acquittal on federal due process and double jeopardy grounds, the District Court erred by relying on the trial judge's rulings to find that he would have rejected the omitted arguments had they been made.

There can be no question that, if *Strickland*'s prohibition against considering the idiosyncrasies of the trial judge when assessing prejudice applies when determining whether to excuse a procedural default under *Martinez v. Ryan*, a COA was warranted because "[1] jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right and [2] that jurists of reason would find it debatable whether the district court was correct in its procedural ruling." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000). Given the District Court's adopting the Magistrate Judge's Findings and Recommendation, and Petitioner's objection to the Magistrate Judge's reliance on the trial judge's idiosyncrasies, the Ninth Circuit's refusal to grant a COA reflects a determination that the pertinent *Strickland* prohibition does not apply when determining whether to excuse a default under *Martinez v. Ryan*.

CONCLUSION

For these reasons, this Court should grant certiorari and either entertain briefing on the question presented or, alternatively, remand to the Ninth Circuit with instructions to issue a Certificate of Appealability on whether the District Court erred by considering the idiosyncrasies of the trial judge when assessing

prejudice to determine if the default of the ineffective assistance of trial counsel claim should be excused under *Martinez v. Ryan*, 566 U.S. 1 (2012).

Respectfully submitted on June 4, 2021.

/s/ Oliver W. Loewy
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APPENDICES

FILED

MAR 5 2021

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

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

TIMOTHY JAMES THOMPSON, Petitioner-Appellant, v. JEFF PREMO, Superintendent, Respondent-Appellee.	No. 20-35777 D.C. No. 6:16-cv-00413-AC District of Oregon, Eugene ORDER

Before: CANBY and VANDYKE, Circuit Judges.

The request for a certificate of appealability is denied because appellant has not shown that "jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000); *see also* 28 U.S.C. § 2253(c)(2); *Gonzalez v. Thaler*, 565 U.S. 134, 140-41 (2012); *Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003).

Any pending motions are denied as moot.

DENIED.

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

TIMOTHY THOMPSON,

Petitioner,

v.

JEFF PREMO, State of Oregon,

Respondent.

Case No. 6:16-cv-00413-AC

OPINION AND ORDER

MOSMAN, J.,

On April 27, 2020, Magistrate Judge John V. Acosta issued his Findings and Recommendation ("F&R") [ECF 84], recommending that this court deny Petitioner's Second Amendment Petition for Writ of Habeas Corpus [ECF 77] and dismiss this case with prejudice. Petitioner objected. [ECF 92]. Respondent filed a response. [ECF 93]. Upon review, I agree with Judge Acosta, and I DENY the petition.

DISCUSSION

The magistrate judge makes only recommendations to the court, to which any party may file written objections. The court is not bound by the recommendations of the magistrate judge but retains responsibility for making the final determination. The court is generally required to make a de novo determination regarding those portions of the report or specified findings or recommendation as to which an objection is made. 28 U.S.C. § 636(b)(1)(C). However, the court is not required to review, de novo or under any other standard, the factual or legal conclusions of

the magistrate judge as to those portions of the F&R to which no objections are addressed. *See Thomas v. Arn*, 474 U.S. 140, 149 (1985); *United States v. Reyna-Tapia*, 328 F.3d 1114, 1121 (9th Cir. 2003). While the level of scrutiny under which I am required to review the F&R depends on whether or not objections have been filed, in either case, I am free to accept, reject, or modify any part of the F&R. 28 U.S.C. § 636(b)(1)(C).

CONCLUSION

Upon review, I agree with Judge Acosta's recommendation and I ADOPT the F&R [84]. I DENY Petitioner's Second Petition for Writ of Habeas Corpus [77] and DISMISS this case with prejudice. Because Petitioner has not made a substantial showing of the denial of a constitutional right, I DECLINE to issue a certificate of appealability. 28 U.S.C. § 2253(c)(2).

IT IS SO ORDERED.

DATED this 7 day of August, 2020.

Michael W. Mosman
MICHAEL W. MOSMAN
United States District Judge

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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

TIMOTHY JAMES THOMPSON,	**Case No. 6:16-cv-00413-AC**
Petitioner,	**OBJECTIONS TO MAGISTRATE JUDGE'S FINDINGS AND RECOMMENDATION**
v.	
JERI TAYLOR, Superintendent, Eastern Oregon Correctional Institution,	
Respondent.	

Mr. Timothy Thompson, through counsel and pursuant to 28 United States Code Section 636 (b)(1) hereby makes the following objections to the Findings and Recommendation ("F&R") of the Honorable John V. Acosta, United States Magistrate Judge for the District of Oregon. In support of these objections, Mr. Thompson fully incorporates by reference his Brief in Support of First Amended Petition for Writ of Habeas Corpus (Dkt. 41), Petitioner's Reply to Respondent's Response (Dkt. 74), and his Reply to Response to Second Amended Petition for Wirt of Habeas Corpus (Dkt. 83).

BACKGROUND

In July 2009, a Washington County, Oregon, grand jury returned a twenty-nine count indictment against Mr. Thompson, charging him with ten counts of Fourth Degree Assault (ORS 163.160(3)), fifteen counts of Second Degree Assault (ORS 163.175 (1)(b)), three counts of First Degree Mistreatment (ORS 163.205), and one count of Felony Unlawful Possession of Marijuana (ORS 475.864). After a bench trial, Mr. Thompson was convicted of eight counts of Second Degree Assault (Counts 18-25), one count of First Degree Criminal Mistreatment (Count 28), and one count of Non-Felony Unlawful Possession of Marijuana, a violation and not a crime (Count 29).

All of the assault counts charged that Mr. Thompson had assaulted his wife, Ms. Thompson. At issue are Mr. Thompson's first and third claims in his habeas petition challenging Counts 18-22 and 24, each of which charged Second Degree Assault by means of a piece of wood. The sole difference between the counts is the charged date during which the assault allegedly occurred. Each of Counts 18-22 and 23 charged a one-week date range, and Count 24 charged a particular date.[1] While there was substantial trial record evidence of Ms. Thompson's physical injury, there was a total lack of evidence supporting a finding that Mr. Thompson physically injured her on any of the charged dates or that he used a piece of wood to physically injure her as charged in Counts 18-22 and 24. This is because there was no evidence beyond a reasonable doubt that he caused her substantial pain or impaired her physical condition on any of those dates, an element of Second Degree Assault, or that he did so using a

[1] The date range for Count 18 was between May 18, 2009, and May 24, 2009; for Count 19, between June 15, 2009, and June 21, 2009; for Count 20, between June 22, 2009, and June 28, 2009; for 21, between June 29, 2009, and July 5, 2009; for Count 22, between July 6, 2009, and July 12, 2009; and, for Count 24, on or about July 20, 2009. Dkt. 20-1 at 12-13 (Indictment).

piece of wood as charged in the Indictment. Accordingly, the convictions on those counts violate due process, and the state court's finding to the contrary unreasonably applied both *In Re Winship*, 397 U.S. 358 (1970), and *Jackson v. Virginia*, 443 U.S. 307 (1979). Additionally, because it was not possible to identify the particular acts for which Mr. Thompson was convicted, his convictions violate his Fifth Amendment right against Double Jeopardy. *Russell v. United States*, 369 U.S. 749 (1962); *Valentine v. Konteh*, 395 F.3d 626, 634-35 (6th Cir. 2005).

Magistrate Judge Acosta erred in several respects in finding that Mr. Thompson should be denied relief on his habeas petition Claim One and Claim Three, each of which concerns Counts 18-22 and 24. Claim One asserts that the trial evidence was insufficient to prove guilt beyond a reasonable doubt and to identify the criminal acts for which he was convicted, in violation of Mr. Thompson's Fourteenth Amendment right to due process and Fifth Amendment right against double jeopardy. Second Amended Petition at 4. Claim Three includes the corresponding ineffective assistance of trial counsel ("IATC") claims, viz., that trial counsel was ineffective in failing to seek relief on federal constitutional due process and double jeopardy grounds. *Id.* at 7.

I. FIRST OBJECTION

Mr. Thompson objects to the finding "that any claim of ineffective assistance of counsel for failing to base a motion for judgment of acquittal on double jeopardy and due process grounds, is not substantial under *Martinez*."[2] F&R at 9. Based on this finding, Magistrate Judge Acosta declined to excuse the procedural default of Claim Three—that trial counsel was

[2] *Martinez v. Ryan*, 566 U.S. 1 (2012).

ineffective in failing, among other things, to move to acquit Mr. Thompson on due process and double jeopardy grounds—and found that it should be denied as procedurally defaulted. *Id.* at 10. Magistrate Judge Acosta based his conclusion that the claim is not substantial on two grounds. First, he based it on his analysis of the double jeopardy and due process stand-alone claim, i.e., Claim One, and his conclusion that it fails. Second, he based it on his belief that the trial court would have denied the motion to acquit on double jeopardy and due process grounds because that specific judge rejected the arguments that trial counsel did make. Neither basis is a valid ground for finding that the IATC claim is not substantial under *Martinez*.

A. In Finding That Claim Three Is Not A "Substantial" IATC Claim Because Its Corresponding Stand-Alone Double Jeopardy And Due Process Claim (Claim One) Is Without Merit, The Magistrate Judge Imposed Too High Of A Burden On Mr. Thompson To Establish That His Procedural Default Should Be Excused.

In *Ramirez v. Ryan*, 937 F.3d 1230 (9th Cir. 2019), the Ninth Circuit held that it is error for a district court to find that an IATC claim is not substantial for *Martinez* purposes based on its assessment that the claim fails on the merits. *Id.* at 1242. It is error, the Court reasoned, because it "hold[s] [the petitioner] to a higher burden than required in the *Martinez* procedural default context." *Id.* This is precisely what the Magistrate Judge did when he determined that Mr. Thompson's IATC claim (Claim Three) is not substantial based on "a review of the record and the analysis of Claim One (*see* below)," i.e., the corresponding stand-alone double jeopardy and due process claims. F&R at 9. Because the referenced analysis was of the merits of Claim One, concluding that the claim did not warrant relief, the Magistrate Judge's finding that the IATC claim is not substantial placed too high a burden on Mr. Thompson to demonstrate that IATC claim's procedural default should be excused. This would be true even if the Magistrate Judge had reviewed de novo Claim One. However, in analyzing the merits of Claim One, he

doubly deferred to the trial court's findings. First, he "presume[d]. . . that the trier of fact resolved any [conflicting inference which the evidence may have supported] in favor of the prosecution, and . . . defer[red] to that resolution." F&R at 12 (quoting *Jackson v.* Virginia, 443 U.S. 307, 326 (1979). Second, the Magistrate Judge applied 28 U.S.C. § 2254 (d) to require that "the state court unreasonably applied the principles underlying the *Jackson* standard" before granting habeas relief. F&R at 12. *See also* F&R at 18 ("conclud[ing] that Thompson cannot demonstrate [as § 2254 (d) requires for claims adjudicated in state court] that the Oregon court's denial of this due process claim was contrary to or involved an unreasonable application of *Jackson*, or that it was based on an unreasonable determination of the facts in light of the evidence presented in State court").

B. In Determining That Mr. Thompson's IATC Claim Was Not Substantial, The Magistrate Judge Violated The Supreme Court's Holding That The Assessment Of Prejudice Must Be Objective Rather Than An Assessment Of How This Particular Trial Judge Would Have Ruled.

The Supreme Court has long held that, in considering IATC claims, "[t]he assessment of prejudice . . . should not depend on the idiosyncrasies of the particular decisionmaker." *Strickland v. Washington*, 466 U.S. 668, 695 (1984). *See*, *also*, *White v. Ryan*, 895 F.3d 641, 670-71 (9th Cir. 2018) ("test for prejudice is an objective one" and "PCR court erred by applying a subjective test"). In the instant case, the Magistrate Judge determined that Claim Three was not a substantial IATC claim, reasoning: "At a minimum, given the arguments counsel presented to the trial court, it is evident that any failure on counsel's part to base his motions for judgment of acquittal specifically on due process and double jeopardy did not prejudice Thompson." F&R at 9-10 (footnote omitted). By determining that Mr. Thompson could not prove prejudice because the trial court would not have granted the motions for judgment of acquittal, Magistrate

Judge Acosta did not heed the *Strickland* requirement that courts assess objectively whether prejudice establishing IATC exists.

II. SECOND OBJECTION

Mr. Thompson objects to the Magistrate Judge's finding "even on de novo review the IATC claim set forth in Claim Three should be denied on its merits." F&R at 10. The F&R provides no reasoning supporting this conclusion.

Counts 18-22 and 24 each charged that Mr. Thompson "did unlawfully and intentionally cause physical injury to Susan Thompson by means of a dangerous weapon, to wit: a piece of wood." Dkt. 20-1 at 3-4 (Indictment). The sole difference between the counts was the date range during which (or, respecting Count 24, the particular date on which) the charged assault occurred. Oregon law defines the "physical injury" element as "impairment of physical condition or substantial pain." ORS § 161.015 (7). The prosecution failed to present evidence that Mr. Thompson caused physical injury to Ms. Thompson on six particular occasions. True, Ms. Thompson testified at trial that Mr. Thompson struck her "a couple of times a week between April and when the defendant was arrested, except for a two-to-three-week period at the end of May into June[,]" Dkt. 21-1 ("Transcript") at 161, and that some of those incidents caused her substantial pain. However, she did not testify how many of the incidents caused substantial pain, nor did she specify any particular incident that did. Thus, in answering the prosecutor's questions about "beatings," a term that the prosecutor introduced (*see* Transcript at 151-55), Ms. Thompson testified that there were at least three degrees of "beatings." Her descriptions of the different kinds of "beating" leaves no doubt that some of the "beatings" would not cause physical injury. Specifically, Ms. Thompson testified that sometimes she "only got a few swats"; other times it was "a pretty good whipping, but nothing that was over the top"; still other

times she suffered the "ultimate beating as far as number of lashes." *Id.* at 154-55. Ms. Thompson did not testify regarding the degree or duration of any pain suffered consequent to any of these, nor did she testify that she suffered any more than "only . . . a few swats" on any of the dates charged in Counts 18-22 and 24.

As a matter of Oregon law, substantial pain can no more be inferred from "a few swats" than it can be inferred from clumps of hair being pulled out of a victim's head, *State v. Lewis*, 337 P.3d 199, 203 (Or. Ct. App. 2014); or from bruising absent testimony of associated pain, *State v. Rennells*, 291 P.3d 777, 781 (Or. Ct. App. 2012); or from a blow using a gas can absent any evidence indicating the "degree of the pain" or that the pain was "anything more than a fleeting sensation," *State v. Capwell*, 627 P.2d 905, 907 (Or. Ct. App. 1981). There is no question that the record lacks sufficient evidence to support a finding beyond a reasonable doubt that Mr. Thompson caused that degree and duration of pain constituting substantial pain to Ms. Thompson during any of the particular charged date ranges. Thus, no rational trier of fact could find beyond a reasonable doubt from Ms. Thompson's testimony that she suffered substantial pain on any of those dates.

While Magistrate Judge Acosta provides no reason why he concluded that, on de novo review, Claim Three should be denied on its merits, he does quote the trial judge's reasons for denying what trial counsel denominated as a motion for acquittal. Magistrate Judge Acosta concludes that "Thompson cannot demonstrate that trial court unreasonably applied *Jackson* when it concluded on the evidence summarized above that there was sufficient evidence to prove each of these counts beyond a reasonable doubt." F&R at 17. The trial court summary as presented by the F&R addressed whether the prosecution had met its burden respecting Counts 18-22 and 24 as follows:

[Referencing testimony from Kouzes regarding Susan's statements to the grand jury, the court stated:] [Susan] says that it happened every day - it happened every day one week without - and there was a week or so without a beating, and that - the only time we hear about this absence of beating is when she's - when we're talking about the Assault II charges, not the Assault IV charges. So that happening every -once a week, and that's how the Assault II charges are drafted, makes me think that she was talking about the Assault II, the stick incidents, because it doesn't connect up otherwise.

* * *

[From the medical records, court noted:] DHS and police talking with patient. Severe bruising, hematomas present on bilateral legs, wrists, hands and buttocks. Patient states there has been ongoing abuse for five years. Current injuries ongoing for last two months. Children were present in the house during assault. Patient states husband was striking her with branches from an apple tree. * * * So I know from the medical records that it's been going on for five years and that the bruising and injuries that she has were from the last two months, and that has to do with the Assault II, not the Assault IV' s.

* * *

[W]hen I turn to the restraining order, I have an incident that talks about July 21st, I have an incident that talks about July 16th, and then I have this statement: "The physical abuse was daily, weekly, continuously. He made sure that bruises were only on my legs, hips, and where my clothing would cover it."

* * *

It was clear that she -from all of this that I've been talking about that the defendant caused all of her injuries while she was at the hospital, that beginning April of '09 she was beat at least once, maybe a couple times a week, she said yes to that, and she said except for that two- or three-week period of time at the end of May.

Now, the next question is that again we have no evidence concerning the actual incidences that caused the physical injury, like for instance we don't know what injury was caused between April 1st, 2009 to April 5th, 2009, we have no idea. We have no idea what injury was caused between April 6, 2009 and April 11, 2009, and so forth and so on.

However, we do have photographs that were taken from the hospital, and we do know from the medical records that those injuries were the injuries that

> were caused over the last two months, and it can be inferred clearly that those injuries that were reflected in the medical records and the photographs caused her physical injury.
>
> So it seems to me that the State has met its burden with regard to the Assault in the Second Degree starting with Count 18, May 18th through May 24th, would be the two months prior to the time she goes to the hospital where there are facts that are articulated that support each and every charge once a week.

F&R at 13-14 (quoting Dkt. 21 at 58-67). Magistrate Judge Acosta also relied on the trial court's explanation for its finding Mr. Thompson guilty of the relevant counts. In particular, quotes that explanation:

> [T]here was testimony from the grand jury and testimony from Ms. Thompson that this abuse occurred weekly, so I find that there was sufficient evidence to prove beyond a reasonable doubt that this occurred weekly from May 18th, 2009, except for the break in time between Count 18 and Count 19, and therefor through Count 25.
>
> The next issue that is - we have to show is whether or not defendant intentionally caused physical injury to Susan Thompson. There's no question in my mind that this was intentional behavior. * * * This is strictly just sadistic behavior, and the defendant did cause physical injury to Ms. Thompson, and the reason why I say that is because the medical records are quite clear that - and Dr. Alexander's testimony is quite clear that the injuries were blunt trauma, and that the injuries were ongoing for the last two months per Ms. Thompson, and that this was consistent with the injuries. * * * Physical injury means substantial pain or impairment of physical condition. Defendant testified that he hit her hard. There's no question that being hit hard with those types of sticks that were in evidence, or similar sticks, or switches, certainly would cause physical injury.* * * There's a dispute whether or not these were the same sticks that were used for all of the Counts 18 through 25 and whether those sticks were considered dangerous weapons, but if you look at the injuries that are reflected over the last couple of months, anything that would cause those types of injuries would be I believe dangerous weapons, and I'm making that inference.
>
> So I am finding the defendant guilty of Assault in the Second Degree on Counts 18 through 25.

F&R at 14-15 (quoting Dkt. 21 at 124-27).

While this evidence is unquestionably sufficient to find that Ms. Thompson suffered physical injury sometime between the earliest and latest dates charged in the relevant counts (i.e., between May 18, 2009, and July 20, 2009), it contains—as the trial court acknowledged—"no evidence concerning the actual incidences that caused the physical injury[.]" Dkt. 21-2 at 66. Based on the medical records and hospital photographs depicting injuries to Ms. Thompson, the trial court found that "it can be inferred clearly that those injuries were the injuries that were caused over the last two months[.]" F&R at 14. The evidence, however, does not allow a reasonable inference that the physical injury was caused during some particular date ranges, or on any specific date, as charged in the Indictment. Nor does it allow a reasonable inference that, regardless of when they occurred, there were six particular instances of assault causing physical injury. There is an obvious and important difference between proving that someone has been assaulted and suffered physical injury during a two month period and proving that there was an assault with physical injury at least once each week over that two month period. While the evidence allows an inference that Mr. Thompson assaulted and caused physical injury to Ms. Thompson over the range of time charged in the multiple counts, it contains nothing allowing an inference as to when the physical injury occurred during that two-month period.

The Ninth Circuit has repeatedly held that while reasonable inferences are permitted, not all inferences are reasonable. "Speculation and conjecture cannot take the place of reasonable inferences and evidence[.]" *Juan H. v. Allen*, 408 F.3d 1262, 1279 (9th Cir. 2005). In *Juan H.*, the Ninth Circuit reversed the petitioner's first degree murder and attempted first degree murder juvenile adjudications under an aiding and abetting theory because, viewed in the light most favorable to the prosecution, the evidence did not permit a reasonable inference that the petitioner knew that the triggerman planned to commit the first degree murders. *Id.* at 1277-

1278. *See also Maquiz v. Hedgpeth*, 907 F.3d 1212, 1220-1222 (9th Cir. 2018) (insufficient evidence supporting gang sentence enhancement, as state court unreasonably inferred the findings necessary for the enhancement); *Goldyn v. Hayes*, 444 F.3d 1062, 1070 (9th Cir. 2006) (reversing felony and misdemeanor bad check convictions and consequent five habitual offender life sentences because state court unreasonably concluded that the evidence was sufficient to prove that petitioner wrote bad checks); *Garcia v. Carey*, 395 F.3d 1099, 1103 (9th Cir. 2005) (reversing sentence enhancement because insufficient evidence: "we agree with the federal magistrate that there is absolutely nothing in this record which would support an inference that [petitioner] robbed [the victim] in order to facilitate other gang related criminal operations"); *O'Laughlin v. O'Brien*, 568 F.3d 287, 305 (1st Cir. 2009) ("piling inference upon inference does not amount to proof beyond a reasonable doubt"; reversing four felony convictions, including armed assault with intent to murder based on insufficiency of the evidence).

Mr. Thompson's convictions on those counts, therefore, violated his due process right to conviction upon sufficient evidence. *Jackson v. Virginia*, 443 U.S. 307 (1979) ("essential [to] due process guaranteed by the Fourteenth Amendment [is] that no person shall be made to suffer the onus of a criminal conviction except upon sufficient proof"). For this same reason, the convictions also violated Mr. Thompson's Fifth Amendment right against double jeopardy because there was a "very real possibility that [Mr. Thompson] would be subject to double jeopardy in his initial trial by being punished multiple times for what may have been the same offense." *Valentine v. Konteh*, 395 F.3d 626, 634-35 (6th Cir. 2005).

Furthermore, the trial court unreasonably inferred that the each of the charged offenses in Counts 18-22 and 24 was committed "by means of a dangerous weapon, to-wit: a piece of wood." Dkt. 20-1 at 3-4 (Indictment). Magistrate Judge Acosta found that the trial court

reasonably inferred that element from the injuries. However, even assuming that Mr. Thompson did assault Ms. Thompson on six different occasions, there was insufficient evidence to prove beyond a reasonable doubt that Mr. Thompson assaulted her on each of those dates "by means of a dangerous weapon, to-wit: a piece of wood." Further—still *assuming* that six different assaults occurred—while sticks were seized from the home and Ms. Thompson testified that Mr. Thompson had sometimes spanked her with them, there was no evidence presented that Mr. Thompson used "a piece of wood" on each specified date. Just as the "inference" of physical evidence was actually speculation, it was speculation rather than an "inference" that a piece of wood was used for each charged assault.

III. THIRD OBJECTION

Mr. Thompson objects to the Magistrate Judge's disposing of procedurally defaulted Claim One by engaging in analysis reserved for claims adjudicated in state court. Specifically, the F&R applies Section 2254 (d) deference to find that habeas relief is unavailable on the grounds that trial counsel relied on in moving for a judgment of acquittal. However, as the Magistrate Judge acknowledges, trial counsel did not move for a judgment of acquittal on double jeopardy and due process grounds. F&R at 9 (given that trial court denied motion to acquit on grounds trial counsel did assert, it would not have granted the motion had trial counsel asserted double jeopardy and due process grounds). Because the state courts did not adjudicate Claim One on its merits, Section 2254 (d) is inapplicable.

To the extent that Magistrate Judge Acosta determined that Claim One was adjudicated in the Oregon state courts, Mr. Thompson objects to that determination. Trial counsel did move to acquit Mr. Thompson but not on the federal constitutional double jeopardy and due process grounds which form the basis of Claim One. Instead, the closest trial counsel came to moving to

acquit on those federal grounds was his assertion not that the Court should acquit but that it should order the prosecution to elect which conduct proves each count, and, further, did not mention or even allude to any due process or double jeopardy basis for that assertion:

> And so I guess, Your Honor, there's been a lot of testimony, and I've had a hard time putting together which facts the State is relying on to support which count, which specific instance, and I think that's the burden on the State. It's not enough to say, "Oh, this happened a lot," or you know, "This happened many times."
>
> The State has to prove beyond a reasonable doubt – well, even at this point has to prove, give some evidence of each specific instance so that Your Honor can differentiate between those and judge them accordingly.
>
> And so at this point I would be asking the State to elect which conduct it's alleging proves which count because there's some confusion as far as the defense to, you know, which conduct that's been testified goes to which count.

Tr. at 45-46. This cannot fairly be construed as a motion to acquit, let alone a motion to acquit on federal due process grounds and double jeopardy grounds. Thus, the F&R's conclusion that habeas relief should be denied because "Thompson cannot demonstrate that the Oregon court's denial of this due process claim was contrary to or involved an unreasonable application of *Jackson*, or that it was based on an unreasonable determination of the facts in light of the evidence presented in State Court" is wrong because the Oregon courts did not adjudicate Claim One. Even were the request that the Court order the prosecution to elect construed as a motion to acquit, at no time did trial counsel reference any federal constitutional ground. For this reason, too, the claim the trial court adjudicated is not the habeas petition's Claim One. Claim One, never presented to the state courts, is procedurally defaulted.

Mr. Thompson argued before Magistrate Judge Acosta that Claim One is procedurally defaulted, but that the default should be excused under *Martinez v. Ryan*. If the default is excused, of course, the Court must review it de novo as there is no state court decision to which

the Court could defer. *Murphy v. Royal*, 875 F.3d 896, 925 (10th Cir. 2017) ("If the state court did not adjudicate the claim 'on the merits,' there is no decision to which the federal court can defer."); *Shotts v. Wetzel*, 724 F.3d 364, 375 (3rd Cir. 2013) ("Deference is not owed in this case, however, because there was no decision on the merits."); *Reaves v. Secretary, Fla. Dept. of Corrections*, 717 F.3d 886, 900 (11th Cir. 2013) ("because the Florida Supreme court did not each the issue of prejudice there is no decision on that issue to which we could defer"); *Cristini v. McKee*, 526 F.3d 888, 899 (6th Cir. 2008) ("Since there is no decision on the merits . . ., this Court reviews that issue *de novo*"); *Turner v. Hall*, 2007 WL 1575240 at *10 (D. Or. 2007) (Aiken, J.) ("Because there is no decision to which I can defer, the court conducts an independent review of the record with respect to this claim."); *Stevenson v. Hill*, 2007 WL 987453 at *5 (D. Or. 2007) (same) (Mosman, J.); *See also*, *Dawson v. Marshall*, 561 F.3d 930, 933 (9th Cir. 2009) (*"De novo* review means that the reviewing court 'do[es] not defer to the lower court's ruling but freely consider[s] the matter anew, as if no decision had been rendered below'") (quoting *United States v. Silverman*, 861 F.2d 571, 576 (9th Cir. 1988)). As explained above, Magistrate Judge Acosta's determination that *Martinez* is of no help to Mr. Thompson is fatally flawed. First, it assigned too high a burden to Mr. Thompson. Second, he determined that there was no prejudice based on an assessment of how Mr. Thompson's trial judge, rather than an objective decisionmaker, would have ruled on a motion to acquit grounded in the due process and double jeopardy federal constitutional guarantees. Thus, the determination that the procedural default of Claim One should not be excused is erroneous.

IV. FOURTH OBJECTION

Mr. Thompson objects to the Magistrate Judge's conclusion that *Valentine v. Konteh*, 395 F.3d 626 (6th Cir. 2005), should not be relied on because it is a Sixth Circuit rather than a Ninth

Circuit Court of Appeal case and because it is "factually distinguishable." F&R at 16. While *Valentine* does not control the outcome in this case, the Court should consider its guidance. This is particularly so because though, as Magistrate Judge Acosta notes, "the trial judge, sitting as fact finder, articulated which counts the state was able to prove beyond a reasonable doubt and why," the trial judge did not in any way address Mr. Thompson's contention that the record does not contain any direct or circumstantial evidence that he caused Ms. Thompson to suffer physical injury—defined as "impairment of physical condition or substantial pain," ORS § 161.015(7)—each time he assaulted her. *See* supra at 6-11. Without knowing on which occasions Mr. Thompson caused physical injury, the trial court could not have "discerned the evidence that supports each individual conviction." *Valentine*, 395 F.3d at 637. For this reason, there is no way to know "what double jeopardy would prohibit because we cannot be sure what factual incidents were presented and decided by the [factfinder]." *Id.* at 635.

CONCLUSION

For all these reasons and those in earlier briefing, the Court should reject the Findings and Recommendation and grant habeas relief on Claims One and Three.

Respectfully submitted on July 10, 2020.

/s/ Oliver W. Loewy
Oliver W. Loewy
Attorney for Petitioner Thompson

UNITED STATES DISTRICT COURT

DISTRICT OF OREGON

TIMOTHY JAMES THOMPSON, Petitioner, v. DON MILLS, Respondent.	Case No. 6: 16-cv-00413-AC FINDINGS AND RECOMMENDATION

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ACOSTA, Magistrate Judge.

Petitioner Timothy Thompson, an inmate at the Oregon State Penitentiary, brings this habeas corpus action pursuant to 28 U.S.C. § 2254 and challenges his convictions and sentence for Assault. For the reasons set forth below, the Second Amended Petition for Writ of Habeas Corpus (#77) should be denied, and Judgment should be entered dismissing this action with prejudice.

Factual Background

On July 21, 2009, Hillsboro Police responded to an anonymous caller's report of a woman screaming at Thompson's residence where he lived with his wife Susan and their three small children. Hearing yelling and screaming, the officers knocked on the door. Thompson answered the door and invited them in. The house was dark with the windows covered, there was little basic furniture, and it was messy, dirty, and foul smelling. Officer Irvine took Thompson outside so that Officer Slade could talk to Susan alone. Thompson admitted that he and Susan had had an argument but denied hitting or touching her. Meanwhile, Officer Slade sensed something was not right with Susan and saw evidence of a hand injury. Insisting that it was their way of communicating, Susan disclosed that Thompson had thrown her against the wall. Paramedics and additional law enforcement came to the scene. Susan was too weak at this point to get up and put her baby in his crib so that paramedics could examine her. They discovered that she had two broken fingers.

Susan eventually described a spanking incident with a wooden stick that left her bruised to the point she could not sit down right. Officers took photographs of the home and seized wooden sticks. Paramedics took Susan to the emergency room ("ER"). Sergeant Case accompanied Susan to the ER. She was in so much pain that she needed assistance to remove her clothing.

Case testified that she observed "layers and layers" of bruising over the majority of Susan's legs, thighs, and buttocks, and saw splits to the skin that Case compared to overripe fruit being struck. Case testified that in all her years in law enforcement she had never seen bruising like that on somebody who was still alive.

Dr. Alexander examined Susan in the ER. He testified that she had significant body-wide injuries with bruises of various ages as shown by their different coloration. He attributed the bruises to her being struck with an instrument that generated a lot of force. He also noticed scabbing of various ages, which denoted multiple injuries over a longer period of time. He opined that given the proximity of the injuries to Susan's bladder, spleen and kidneys, the blows could have been lethal; he equated the injuries with those one might see in a vehicular or homicidal trauma patient. He also noted fractures of various ages to Susan's left hand. Susan told Dr. Alexander that she had experienced ongoing abuse for five years and that her current injuries were ongoing from the last two months. He testified that it was the most significant case of abuse he had seen in twelve years of ER practice.

Officers arrested Thompson. In the patrol car after his arrest, he admitted to spanking Susan with sticks. He stated it was the way they communicated and worked out their problems. Officer Hahn, along with Detective Banks, later interviewed Thompson in the Washington County Jail. He explained that the "games" he and Susan played were between two consenting adults and that things had gone too far in the recent incident that led to his arrest. He described using a "love paddle" and a switch from a tree to spank Susan. He denied preventing her from seeing her family and insisted that her body had been bruise-free a few days prior to the interview.

At trial, prosecutors called the grand jury foreperson, Lisa Kouzes. She testified that Susan had been sincere in her testimony before the grand jury. Kouzes stated that the evidence of abuse they heard was overwhelming both in the amount and severity of the beatings and that they had been conservative in charging Thompson.

Despite Susan's earlier disclosures to law enforcement, medical professionals, and the grand jury, she was a reluctant witness at trial. She admitted that she had been leaving messages for prosecutors telling them that she loves Thompson and wants him back. She also met with Thompson's defense attorney before trial. Nevertheless, she testified that the abuse started a couple of months ago (presumably a couple of months prior to Thompson's July 2009 arrest), and she admitted that in April 2009 Thompson switched to hitting her with sticks because his shoulder hurt from hitting her with a belt. She testified that after he started using sticks in April the beatings occurred sometimes more than one time a week. She also confirmed that she had testified under oath before the grand jury that when the beatings with the pieces of wood started in April they occurred one-to-two times a week – if not daily – between April 2009 and Thompson's arrest. Only for a two-to-three week period between the end of May into early June did the beatings stop, only to then resume because Thompson "missed" it. She further testified that Thompson caused all of the injuries shown in the photographs taken in the ER.

Laurie Wuthrich from child protective services testified that in her interview with Susan on July 24, 2009, Susan told her that the abuse had been ongoing for the five years since she and Thompson were married. Wuthrich also testified that Susan also revealed that Thompson hit her with objects, including sticks, and made threats to kill her and her children.

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Procedural Background

On July 27, 2009, the Washington County Grand Jury returned a secret indictment charging Thompson with ten counts of Felony Assault in the Fourth Degree, fifteen counts of Assault in the Second Degree, three counts of Criminal Mistreatment in the First Degree, and one count of Unlawful Possession of Marijuana. Respondent's Exhibit 102. Following a bench trial, the court convicted Thompson on eight counts of Assault in the Second Degree, one count of Criminal Mistreatment in the First Degree, and on a violation for marijuana possession. The court imposed a sentence totaling 140 months. Respondent's Exhibit 101.

Thompson directly appealed his convictions and sentence. The Oregon Court of Appeals affirmed without opinion and the Oregon Supreme Court denied review. *State v. Thompson*, 249 Or. App. 334 (2012), *rev. denied* 352 Or. 666, (2012). Respondent's Exhibits 103-107.

Thompson then filed a petition for post-conviction relief ("PCR") in state court. The PCR court denied relief. *Thompson v. Premo*, Marion County Circuit Court Case No. 13C10603. Respondent's Exhibit 116. On appeal, the Oregon Court of Appeals affirmed without opinion and the Oregon Supreme Court denied review. *Thompson v. Premo*, 271 Or. App. 863 (2015), *rev. denied* 358 Or. 249 (2015). Respondent's Exhibits 117-121.

On March 7, 2016, Thompson filed this action. His grounds for relief as set forth in his Second Amended Petition are as follows:

1. Ground One: Respecting Counts 18-22 and Count 24, the indictment was insufficiently specific and the trial evidence was insufficient to prove guilt beyond a reasonable doubt, in violation of Thompson's Fourteenth Amendment right to due process and his Fifth Amendment right against double jeopardy;[1]

[1] Thompson does not challenge his Assault in the Second Degree convictions on Counts 23 and 25, which encompass the date of his arrest and another report by Susan that she sustained injuries to her hip and hand five days earlier on July 16, 2009. Moreover, in his supporting briefs,

2. Ground Two: The State intimidated its key witness to testify falsely and the prosecution failed to disclose the intimidation to the defense, all in violation of Thompsons right to due process as guaranteed by the Fourteenth Amendment;

3. Ground Three: Thompson's trial and direct appeal counsel rendered ineffective assistance in failing respectively to move to acquit Thompson on double jeopardy and due process grounds and in failing to seek relief on appeal on double jeopardy and due process grounds; and

4. Ground Four: The cumulative effect of the prejudicial errors made in Thompson's case mandate that his convictions and sentence be vacated.

Respondent asks the Court to deny relief on the Petition because Claim One was correctly denied on the merits in a state court decision that is entitled to deference, and because the remaining claims are procedurally defaulted and lack merit.

Discussion

I. Exhaustion and Procedural Default

A. Standards

Under the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), a writ of habeas corpus cannot be granted unless it appears that the petitioner has exhausted all available state court remedies. 28 U.S.C. §2254(b)(1); *see also Coleman v. Thompson*, 501 U.S. 722, 111 (1991). To exhaust state remedies, the petitioner must fairly present his claims to the state's highest court in a procedurally appropriate manner. A claim is fairly presented if the petitioner has described the operative facts and the federal legal theory on which his claim is based.

Thompson does not argue the merits of his deficient indictment claim. As such, he has not met his burden of proof with respect to that claim, and the court finds it is waived. *See Renderos v. Ryan*, 469 F.3d 788, 800 (9th Cir. 2006)(holding that petitioner waived claims in petition for writ of federal habeas corpus where counsel did not attempt to set forth the legal standards for such claims or attempt to meet them).

Anderson v. Harless, 459 U.S. 4, 6, (1982). He must clearly alert the state court that he is alleging a specific federal constitutional violation. *See Casey v. Moore*, 386 F.3d 896, 913 (9th Cir. 2004). He must make the federal basis of the claim explicit either by citing specific provisions of federal law or federal cases, even if the federal basis of a claim is 'self-evident, *Gatlin v. Madding*, 189 F.3d 882, 888 (9th Cir. 1999), or by citing state cases that explicitly analyze the same federal constitutional claim, *Peterson v. Lampert*, 319 F.3d 1153, 1158 (9th Cir. 2003)(en banc).

If the petitioner presents claims in state court but that court finds them defaulted on state procedural grounds, a federal habeas court will find them procedurally defaulted so long as the state procedural bar was independent of federal law and adequate to warrant preclusion of federal review. *See Harris v. Reed*, 489 U.S. 255, 262 (1989). Although federal courts retain the power to consider the merits of procedurally defaulted claims, they will not review the merits of a procedurally defaulted claim unless the petitioner demonstrates cause for his failure to exhaust the claim in state court and prejudice from the alleged constitutional violation, or shows that a fundamental miscarriage of justice would result if the federal court did not reach the merits of the claim. *Coleman*, 501 U.S. at 750.

While *Coleman* held that ineffective assistance of counsel in post-conviction proceedings does not establish cause for the procedural default of a claim, the Court announced a new, narrow exception to that rule in *Martinez v. Ryan*, 566 U.S. 1, 17 (2012):

> Where, under state law, claims of ineffective assistance of trial counsel must be raised in an initial-review collateral proceeding, a procedural default will not bar a federal court from hearing a substantial claim of ineffective assistance at trial if, in the initial-review collateral proceeding, there was no counsel or counsel in that proceeding was ineffective.

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Accordingly, to demonstrate cause and prejudice under *Martinez* sufficient to excuse the procedural default of an ineffective assistance of trial counsel claim, a petitioner must make two showings:

> First, to establish "cause," he must establish that his counsel in the state post-conviction proceeding was ineffective under the standards of *Strickland*.[2] *Strickland* in turn, requires him to establish that both (a) post-conviction counsel's performance was deficient, and (b) there was a reasonable probability that, absent deficient performance, the result of the post-conviction proceedings would have been different.

Clabourne v. Ryan, 745 F.3d 362, 377 (9th Cir. 2014), overruled on other grounds. Determining whether there was a reasonable probability of a different outcome "is necessarily connected to the strength of the argument that trial counsel's assistance was ineffective." *Id.* at 377-78.

And second, to establish prejudice under *Martinez*, a petitioner must show that the ineffective assistance of trial counsel claim was "substantial" or had "some merit." A claim is substantial if it meets the standard for the issuance of a certificate of appealability, *Martinez*, 566 U.S. at 14, that is, "reasonable jurists could debate whether (or, for that matter agree that) the petition should have been resolved in a different manner or that the issues presented were adequate to deserve encouragement to proceed further." *Miller-El v. Cockrell*, 537 U.S. 322, 336 (2003)(citations and internal quotations omitted). A court should conduct a "general assessment of the merits" of the underlying ineffective assistance claim to determine whether counsel's performance fell below an objective standard of reasonableness and that the deficiency prejudiced the petitioner. Notably, the court should measure this by the prevailing professional norms at the time of representation. Moreover, "the inquiry of counsel's performance under *Strickland* is 'highly deferential,' the court 'must indulge a strong presumption that counsel's conduct falls

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[2] *Strickland v. Washington*, 466 U.S. 668 (1984).

within the wide range of reasonable professional assistance,' and 'the defendant must overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy.'" *Ramirez v. Ryan*, 937 F.3d 1230, 1243 (9th Cir. 2019)(quoting *Strickland*, 466 U.S. at 688-89). In *Ramirez*, the court first examined the question of whether the underlying ineffective assistance claim was substantial and then evaluated PCR counsel's performance under *Strickland*.

B. Analysis

Petitioner failed to fairly present Claims Two through Four to the Oregon courts. He concedes that these claims are procedurally defaulted, but indicates that *Martinez* should excuse their default, including the default of his ineffective assistance of trial and appellate counsel claims (Claim Three). Critically, however, *Martinez* cannot excuse the default of either trial court error, prosecutorial misconduct, or ineffective assistance of appellate counsel claims. *See Davila v. Davis*, 137 S. Ct. 2058, 2063 (2017)(observing that *Martinez* does not apply to underlying claims of ineffective assistance of direct appellate counsel, but only to procedurally defaulted claims of ineffective assistance of trial counsel). Accordingly, *Martinez* cannot excuse the default of Claims Two, Four, and that portion of Claim Three pertaining to Thompson's direct appellate counsel.

Moreover, a review of the record and the analysis of Claim One (*see* below) reveals that any claim of ineffective assistance of counsel for failing to base a motion for judgment of acquittal on double jeopardy and due process grounds, is not substantial under *Martinez*. At a minimum, given the arguments counsel presented to the trial court, it is evident that any failure on counsel's part to base his motions for judgment of acquittal specifically on due process and double jeopardy

did not prejudice Thompson.[3] Accordingly, Claims Two through Four should be denied as procedurally defaulted.

Alternatively, even on de novo review, the ineffective assistance of trial counsel claim set forth in Claim Three should be denied on its merits.

II. 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's 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 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

[3] For example, counsel argued: "You can't just assume, well, it happened this one day, and so there is repeated conduct of this nature and physical injury occurred this other day. And so the State has not carried their burden [i]n that respect." Transcript of State Court Proceedings [21] at 253.

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. 28 U.S.C. § 2254(d) "preserves authority to issue the writ in cases where there is no possibility fair minded jurists could disagree that the state court's decision conflicts with the Courts precedents. It goes no farther." *Harrington v. Richter*, 562 U.S. 86, 102 (2011).

When a state court reaches a decision on the merits but provides no reasoning to support its conclusion, the federal habeas court must conduct an independent review of the record to determine whether the state court clearly erred in its application of Supreme Court law. *Delgado v. Lewis*, 223 F.3d 976, 982 (9th Cir. 2000). In such an instance, although the court independently reviews the record, it still lends deference to the state court's ultimate decision and can grant habeas relief only if the state court's decision was objectively unreasonable. *Richter*, 562 U.S. at 98; *Pirtle v. Morgan*, 313 F.3d 1160, 1167 (9th Cir. 2002).

B. Analysis

Citing *Jackson v. Virginia*, 443 U.S. 307 (1979), and *Valentine v. Konteh*, 395 F.3d 626, 634-35 (6th Cir. 2005), Thompson alleges in Claim One that the trial evidence was insufficient to prove guilt beyond a reasonable doubt, in violation of his due process rights and his right against double jeopardy. Specifically, he contends that the state failed to introduce evidence tying any particular injury Susan sustained to any particular incident, such that the subject six incidents of Assault in the Second Degree could be proven beyond a reasonable doubt. He contends that the state introduced only general statements of abuse and medical records describing the injuries and depicting them in photographs. Moreover, even assuming six assaults occurred, Thompson

maintains that the state presented no evidence that he used a piece of wood on each specified date. And finally, he argues that the state failed to present evidence that Thompson caused "physical injury" on any of the particularly charged date ranges.

Importantly, there is a "heavy burden" on a petitioner challenging a conviction for sufficiency of evidence on federal due process grounds. *Juan H. v. Allen*, 408 F.3d 1262, 1274 (9th Cir. 2005). A federal habeas court reviews challenges to the sufficiency of the evidence by determining whether in "viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of he crime beyond a reasonable doubt." *Lewis v. Jeffers*, 497 U.S. 764, 781 (1990)(citations omitted). "A reviewing court must consider all of the evidence admitted by the trial court, regardless of whether that evidence was admitted erroneously." *McDaniel v. Brown*, 558 U.S. 120, 131 (2010). Sufficiency of the evidence claims raised in § 2254 proceedings must be measured with reference to substantive requirements as defined by state law. *Jackson*, 443 U.S. at 324 n.16. In cases where the evidence is unclear or would support conflicting inferences, the federal court "must presume-even if it does not affirmatively appear in the record-that the trier of fact resolved any such conflict in favor of the prosecution, and must defer to that resolution." *Id.* at 326. To prevail here, petitioner must show that the prosecution's case against him was so lacking that the trial court should have entered a judgment of acquittal. *McDaniel*, 558 U.S. at 131.

In addition, AEDPA adds another layer of deference over the already deferential *Jackson* standard. Under AEDPA, the federal court may not grant a habeas petition unless it finds that the state court unreasonably applied the principles underlying the *Jackson* standard when reviewing the petitioner's claim. *See e.g., Jaun H*, 408 F.3d at 1275 n. 12; *Jones v. Wood*, 114 F.3d 1002,

1013 (9th Cir. 1997)(recognizing that the "unreasonable application" standard applies to insufficient evidence claim).

In denying Thompson's motion for judgment of acquittal on Counts 18-25, the trial court made the following factual findings and legal conclusions:

> THE COURT: Okay. Well, last night after you all left I stayed here until about seven o'clock. I relistened to the – Ms. Thompson's testimony. I also relistened to the grand jury foreman, Ms. Kouzes' testimony. * * * I reviewed the medical records, and I also reviewed the doctor's testimony because I knew this was coming.
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> * * *
>
> [Referencing testimony from Kouzes regarding Susan's statements to the grand jury, the court stated:] [Susan] says that it happened every day – it happened every day one week without – and there was a week or so without a beating, and that – the only time we hear about this absence of beating is when she's – when we're talking about the Assault II charges, not the Assault IV charges. So that happening every –once a week, and that's how the Assault II charges are drafted, makes me think that she was talking about the Assault II, the stick incidents, because it doesn't connect up otherwise.
>
> * * *
>
> [From the medical records, court noted:] DHS and police talking with patient. Severe bruising, hematomas present on bilateral legs, wrists, hands and buttocks. Patient states there has been ongoing abuse for five years. Current injuries ongoing for last two months. Children were present in the house during assault. Patient states husband was striking her with branches from an apple tree. * * * So I know from the medical records that it's been going on for five years and that the bruising and injuries that she has were from the last two months, and that has to do with the Assault II, not the Assault IV's.
>
> * * *
>
> [W]hen I turn to the restraining order, I have an incident that talks about July 21st, I have an incident that talks about July 16th, and then I have this statement: "The physical abuse was daily, weekly, continuously. He made sure that bruises were only on my legs, hips, and where my clothing would cover it."
>
> * * *
>
> It was clear that she – from all of this that I've been talking about that the defendant caused all of her injuries while she was at the hospital, that beginning April of '09 she was beat at

> least once, maybe a couple times a week, she said yes to that, and she said except for that two- or three-week period of time at the end of May.
>
> Now, the next question is that again we have no evidence concerning the actual incidences that caused the physical injury, like for instance we don't know what injury was caused between April 1st, 2009 to April 5th, 2009, we have no idea. We have no idea what injury was caused between April 6th, 2009 and April 11th, 2009, and so forth and so on.
>
> However, we do have photographs that were taken from the hospital, and we do know from the medical records that those injuries were the injuries that were caused over the last two months, and it can be inferred clearly that those injuries that were reflected in the medical records and the photographs caused her physical injury.
>
> So it seems the State has met its burden with regard to the Assault in the Second Degrees starting with Count 18, May 18th through May 24th, would be the two months prior to the time she goes to the hospital where there are facts that are articulated that support each and every charge once a week. [4]

Transcript of State Court Proceedings [21], pp. 261-71.

> In addition, in finding Thompson guilty on the subject assault counts, the court found:
>
> [T]here was testimony from the grand jury and testimony from Ms. Thompson that this abuse occurred weekly, so I find that there was sufficient evidence to prove beyond a reasonable doubt that this occurred weekly from May 18th, 2009, except for the break in time between Count 18 and Count 19, and therefor through Count 25.
>
> The next issue that is – we have to show is whether or not defendant intentionally caused physical injury to Susan Thompson. There's no question in my mind that this was

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[4] The trial court granted Thompson's Motions for Judgment of Acquittal on 17 Assault Counts pertaining to allegations of Thompson beating Susan with a belt (Counts 1-10 Assault in the Fourth Degree) and of him beating her with a wooden stick from April 1, 2009 through May 17, 2009 (Counts 11-17). Regarding to the beatings with the belt, the trial court stated that while there was clearly abuse going on, he did not have the facts he needed to say beyond a reasonable doubt that these incidents occurred as charged. He found there was no evidence of how frequently the beatings with the belt occurred or evidence supporting allegations that the beatings took place two times a month. Similarly, while the judge found evidence that beginning in April 2009 Thompson beat Susan with sticks at least one time a week until his arrest (save a brief period starting at the end of May into early June) regarding the early April to mid-May beatings with sticks (Counts 11-17), the judge found that there was no evidence concerning the actual incidences that caused the physical injury. He contrasted those charges with the later ones linked to injuries reported by Susan and described in medical records and the photographs of Susan's injuries taken at the hospital. Transcript of State Court Proceedings [21], pp. 261-71.

> intentional behavior. * * * This is strictly just sadistic behavior, and the defendant did cause physical injury to Ms. Thompson, and the reason why I say that is because the medical records are quite clear that – and Dr. Alexander's testimony is quite clear that the injuries were blunt trauma, and that the injuries were ongoing for the last two months per Ms. Thompson, and that this was consistent with the injuries. * * * Physical injury means substantial pain or impairment of physical condition. Defendant testified that he hit her hard. There's no question that being hit hard with those types of sticks that were in evidence, or similar sticks, or switches, certainly would cause physical injury. * * * There's a dispute whether or not these were the same sticks that were used for all of the Counts 18 through 25 and whether those sticks were considered dangerous weapons, but if you look at the injuries that are reflected over the last couple of months, anything that would cause those types of injuries would be I believe dangerous weapons, and I'm making that inference.
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> So I'm finding the defendant guilty of Assault in the Second Degree on Counts 18 through 25.

Id. at 328-31.

Thompson's reliance on *Valentine v. Konteh*, 395 F.3d 626 (6th Cir. 2005), to support his arguments that lack of sufficient trial proof violated his right to due process and to be free from double jeopardy, are unavailing. In *Valentine*, the defendant was indicted on 20 counts of rape of a minor and 20 counts of felonious sexual penetration of a minor. All 20 rape counts were worded identically with one another; likewise, all 20 penetration counts were worded identically with one another. Each count alleged that the offense had occurred "between March 1, 1995 and January 16, 1996." At trial, the young victim testified that the defendant had raped her about 20 times and digitally penetrated her about 15 times. No dates were given for any of these incidents, nor were any other specific facts given whereby the trier of fact might have identified specific incidents. The defendant was convicted of 20 counts of rape and sexual penetration, although a court of appeals reversed five convictions for penetration. *Valentine* at 628-29.

The Sixth Circuit determined that the accused in *Valentine* had been denied due process and was entitled to habeas relief. It explained that an indictment satisfies due process only "if it

(1) contains the elements of the charged offense, (2) gives the defendant adequate notice of the charges, and (3) protects the defendant against double jeopardy." *Id.* at 631.

Valentine held that the indictment in that case failed to give constitutionally adequate notice of the charges:

> [T]he constitutional error in this case is traceable * * * to the fact that there is no differentiation among the counts. * * * [I]f prosecutors seek multiple charges against a defendant, they must link those multiple charges to multiple identifiable offenses. * * * Courts cannot uphold multiple convictions when they are unable to discern the evidence that supports each individual conviction.

395 F.3d at 636-37.

For similar reasons, the state's failure in *Valentine* to differentiate the charges, either in the indictment or at trial, also failed to protect the defendant against the possibility of double jeopardy. "We cannot be sure what double jeopardy would prohibit because we cannot be sure what factual incidents were presented and decided by the jury." *Id.* at 635.

As an initial matter, even if the facts here were analogous to those presented in *Valentine*, the Ninth Circuit has not adopted that court's reasoning, nor does that reasoning control the resolution of this case. Regardless, this case is factually distinguishable from *Valentine* largely because the trial judge, sitting as fact finder, articulated which counts the state was able to prove beyond a reasonable doubt and why. And as is supported by the record, the judge carefully outlined what the state's evidence at trial showed: (1) the beatings with wood sticks occurred at least one time a week as charged in the indictment; (2) Thompson caused all of Susans injuries seen at the hospital and those injuries were ongoing for the last two months prior to his arrest in July 2009; (3) Thompson intentionally caused Susan physical injury – he testified that he hit her hard and as the court found, "[t]here is no question that being hit hard with those types of sticks

that were in evidence, or similar sticks, or switches, certainly would cause physical injury"; and (4) the sticks were "dangerous weapons" in that they were capable of and came close to actually causing Susan serious physical injury. Finally, as noted above, the trial court granted Thompson's motions for judgment of acquittal on 17 Counts of Second and Fourth Degree Assault due to insufficient evidence. In carefully examining these counts and granting Thompson's motions on all pre-May 18, 2009 assault counts, despite the court having "no doubt that there [was] abuse going on," it demonstrated its understanding of and commitment to holding the state to its burden to prove beyond a reasonable each element of the remaining charges.

Accordingly, on these facts, it cannot be said that "there was no differentiation among the counts," or that the record does leaves the court "unable to discern the evidence that supports each individual conviction." *Id.* at 636-37.

Despite his argument "that because no evidence tied any particular physical injury to any particular incident, there was insufficient evidence that there were six incidents of second degree assault as charged in Counts 18-22 and 24," Thompson cannot demonstrate that the trial court unreasonably applied *Jackson* when it concluded on the evidence summarized above that there was sufficient evidence to prove the elements of each of these counts beyond a reasonable doubt. Due process does not require, and prohibitions against double jeopardy do not mandate, that to support these convictions a victim of severe and unrelenting abuse such as Susan, for whom a couple of weeks *without* a severe beating stood out as the anomalous, memorable event, had to catalogue the exact implement used in each beating, quantify how much pain she experienced during each beating, and identify which bruise, split or scab of the "layers" of injuries on her body the beating caused. Susan was clear that Thompson beat her with a wood stick or implement at

least once a week during the relevant time period, and that the visible injuries on her body were ongoing for the two months prior to Thompson's arrest. In addition, the record supports the trial court's finding that Susan's reporting was consistent with and corroborated by her disclosures to law enforcement and medical professionals, her medical records, and the photographs of her injuries taken at the hospital.

Based on the foregoing, and having conducted an independent review of the record, the court concludes that Thompson cannot demonstrate that the Oregon court's denial of this due process claim was contrary to or involved an unreasonable application of *Jackson*, or that it was based on an unreasonable determination of the facts in light of the evidence presented in State court.

Recommendation

For the foregoing reasons, the Second Amended Petition for Writ of Habeas Corpus (#77) should be DENIED, and judgment should enter DISMISSING this case with prejudice. A certificate of appealability should be DENIED.

Scheduling Order

The Findings and Recommendation will be referred to a district judge. Objections, if any are due in 14 days. If no objections are filed, then the Findings and Recommendation will go under advisement on that date.

A party my respond to another party's objections within 14 days after the objections are filed. If objections are filed, review of the Findings and Recommendation will go under

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advisement upon receipt of the response, or the latest date for filing a response.

IT IS SO ORDERED.

DATED this 27th day of April, 2020.

John V. Acosta
United States Magistrate Judge