No. _____

IN THE SUPREME COURT
OF THE UNITED STATES

PAUL FREDERICK STOVER,

Petitioner,

v.

OREGON BOARD OF PAROLE AND POST PRISON SUPERVISION,

Respondent.

On Petition For Writ Of Certiorari To
The United States Court Of Appeals
For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

In a single trial, the prosecution alleged three separate incidents involving a single victim, two as assault in the fourth degree and one as assault in the second degree. At trial, the defense centered around the claim that the use of fireplace tongs as a weapon, enhancing the incident to second degree assault, could not be established beyond a reasonable doubt, while not disputing that other aggressive contacts occurred during all three incidents. Nevertheless, trial counsel failed to request a lesser-included offense instruction on the second degree assault charge. The district court found that the trial attorney's failure to request a lesser-included instruction was competent, despite counsel's failure to recall why he did not make such a request, and not prejudicial, despite the sole contest at trial being use of a weapon. This petition seeks an order vacating the denial of a certificate of appealability under 28 U.S.C. § 2253(c) and remanding to the Ninth Circuit for review of the merits of the claim that, under *Strickland v. Washington*, 466 U.S. 668 (1984), the conviction for second-degree assault should be vacated for violation of the Sixth Amendment right to effective assistance of counsel. The question presented is:

> Could reasonable jurists debate whether trial counsel's failure to request a lesser-included offense instruction as an alternative to second degree assault constituted ineffective assistance of counsel under this Court's well-established Sixth Amendment standards, where evidence of the lesser-included offense was not seriously disputed?

PARTIES TO THE PROCEEDINGS

The petitioner, Paul Frederick Stover, has served his 71-month prison sentence imposed in the underlying case and is currently on post-prison supervision under the jurisdiction of the respondent.

RELATED PROCEEDINGS

There are no related proceedings.

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For The Ninth Circuit

The petitioner, Paul Frederick Stover, respectfully requests that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit entered on May 24, 2022, denying the certificate of appealability necessary to challenge the decision of the district court denying federal habeas corpus relief under 28 U.S.C. § 2254.

Opinions Below

The United States District Court for the District of Oregon denied the petitioner's habeas corpus petition and declined to issue a certificate of appealability on October 25,

2021. Appendix 2. Based on the filing of a notice of appeal, the Ninth Circuit denied a certificate of appealability on May 24, 2022. Appendix 1.

Jurisdictional Statement

This Court's jurisdiction is invoked under 28 U.S.C. §§ 1254(1) and 2253(a).

Relevant Statutory And Constitutional Provisions

The full text of 28 U.S.C. §§ 2253 and 2254 are set out in the appendix. The relevant parts of the statute on the certificate of appealability state:

> (1) 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; or
>
> (B) the final order in a proceeding under section 2255.
>
> (2) A certificate of appealability may issue under paragraph (1) only if the applicant has made a substantial showing of the denial of a constitutional right.
>
> (3) The certificate of appealability under paragraph (1) shall indicate which specific issue or issues satisfy the showing required by paragraph (2).

28 U.S.C. § 2253(c). The Sixth Amendment guarantee of effective assistance of counsel states:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

The Oregon statute on assault in the fourth degree states:

(1) A person commits the crime of assault in the fourth degree if the person:

(a) Intentionally, knowingly or recklessly causes physical injury to another;

(b) With criminal negligence causes physical injury to another by means of a deadly weapon; or

(c) With criminal negligence causes serious physical injury to another who is a vulnerable user of a public way, as defined in ORS 801.608 ("Vulnerable user of a public way"), by means of a motor vehicle.

(2) Assault in the fourth degree is a Class A misdemeanor.

Or. Rev. Stat. 163.160. The statute on the greater Oregon offense of assault in the second degree states:

(1) A person commits the crime of assault in the second degree if the person:

(a) Intentionally or knowingly causes serious physical injury to another;

(b) Intentionally or knowingly causes physical injury to another by means of a deadly or dangerous weapon; or

(c) Recklessly causes serious physical injury to another by means of a deadly or dangerous weapon under circumstances manifesting extreme indifference to the value of human life.

(2) Assault in the second degree is a Class B felony.

Or. Rev. Stat.163.175.

Statement Of The Case

The state court trial involved three separate incidents of domestic abuse against the same individual over a period of four days before the police became involved. The trial and the post-conviction proceedings focused on the incident during which the state claimed a weapon was used. Mr. Stover preserved the federal constitutional claim that, by failing

to request a lesser-included offense instruction, his defense lawyer provided ineffective assistance of counsel.

A. The Trial Focus On The Controverted Use Of A Weapon

In August 2013, the state indicted Mr. Stover for one count of assault in the second degree, one count of criminal mischief in the second degree, and two counts of assault in the fourth degree. Ex. 102 at 1-2.[1] The state accused Mr. Stover of causing physical injury to Earlene Kay Brown on three separate dates in 2013: August 23rd, August 25th, and August 27th. *Id.* The state further alleged that Mr. Stover caused physical injury by means of a weapon—a fire poker or tongs—on August 25th, and that all three assaults involved domestic violence. *Id.* Defense attorney Herman Bylenga represented Mr. Stover at trial.

The state's evidence rested primarily on the testimony of the complainant. At the time of the incidents, Ms. Brown and Mr. Stover had been involved in a relationship for several years and lived together in a motor home. Ex. 103 at 146-47. Ms. Brown testified that, on the night of August 23rd, she and Mr. Stover engaged in a dispute during which Mr. Stover got angry and tried to push her out of the motor home while she was naked. *Id.* at 148. Ms. Brown "flopped" herself to the ground in an effort to stay in the motor home, and Mr. Stover hit her on the back of her head and knocked her out. *Id.*. Ms. Brown left the motor home for a little while and then came back "and everything was okay," although the pain lasted "for days and days." *Id.* at 149-50.

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[1] Citations in the fact section refer to exhibits filed in the district court in *Stover v. State of Oregon*, 2:18-cv-00043-HZ, Exhibits to Answer, ECF 33 (D. Or. May 1, 2020).

The next incident happened on August 25th. Ex. 103 at 150-51. Ms. Brown was working at a second-hand store called Lucky Dog Second Chance. *Id.* at 151. Ms. Brown and Mr. Stover had been arguing and drinking that day. *Id.* at 152, 172. When Mr. Stover showed up at the store, Ms. Brown "got a little upset" when she saw him talking to another woman and threw her phone toward Mr. Stover. *Id.* at 152-5. Mr. Stover stomped on the phone. *Id.* Ms. Brown stated that she bent down to pick the phone up, and Mr. Stover "whacked" her on the right wrist with tongs from a fireplace set. *Id.* at 154-55, 167. The tongs left a mark and some swelling on her arm. *Id.* at 155. Mr. Stover started to walk out of the store. *Id.* at 157. Ms. Brown followed him and called him a slur, and Mr. Stover punched Ms. Brown in the mouth, splitting her lip. *Id.* at 157-58. Ms. Brown and Mr. Stover were the only ones in the store during the incidents. *Id.* at 157.

The last incident took place in the early morning the following day. Ex. 103 at 158. Ms. Brown testified that Mr. Stover was again trying to push Ms. Brown out of the motor home while she was naked, and Mr. Stover hit her on the cheek with a closed fist. *Id.* at 159-60. Ms. Brown called 911. *Id.* at 160. Police officers responded to the call and observed injuries including to her left eye, left ear, and upper lip. *Id.* at 126-29.

Ms. Brown subsequently obtained a restraining order against Mr. Stover. Ex. 103 at 161. The restraining order alleged additional incidents, but, on cross-examination, defense counsel elicited testimony regarding inconsistencies regarding the charged incidents. *Id.* at 175-79. Ms. Brown also testified on cross-examination that she did not ever mention being hit with the fire poker in the restraining order, although she did mention getting into the

argument with Mr. Stover during which she threw her cell phone at him. *Id.* at 179-80. In the restraining order, Ms. Brown stated that Mr. Stover hit her on the right wrist and arm, but never mentioned the tongs. *Id.* at 179-80. Ms. Brown additionally testified that she was in a bike accident on August 22nd. *Id.* at 169. She had a scratch on her upper left arm from the wreck, and cuts and breaks on her skin from putting the gears and brakes back on her bike. *Id.* at 167, 170.

The state called Gregory Dixson, a relative of Mr. Stover's who helped to open the Lucky Dog Second Chance store. Ex. 103 at 215. Mr. Dixson testified that he received a phone call from Mr. Stover while Mr. Stover was in custody. *Id.* During the phone call, Mr. Stover admitted that his fingerprints would be on the fire poker. *Id.* at 118, 242, 259. Defense counsel asked Mr. Dixson one question on cross-examination. *Id.* at 217-18 ("Mr. Dixson, when you said he hit her with the fire poker, you were simply assuming, because you never saw it, right?").

At the close of the state's case, defense counsel made a motion for judgment of acquittal on the assault in the second degree charge. Ex. 103 at 219. Defense counsel argued that no reasonable jury could find that Mr. Stover caused Ms. Brown's injury with a fire poker because the photographs of Ms. Brown did not show injuries consistent with a fire poker. *Id.* at 219-20. Rather, counsel argued that the mark on Ms. Brown's wrist "looks like a slap or a grab of some sort." *Id.* at 220. The trial court denied the motion. *Id.* at 221. The defense case rested based on testimony impeaching Ms. Brown's credibility, without testimony from Mr. Stover. *Id.* at 221-22.

Defense counsel began closing argument by telling the jury: "I hope at least there was enough interest in the case that it did give you some entertainment value." Ex. 103 at 245.[2] Defense counsel repeatedly stated that "this is a really sad case." *Id.* at 245-46 ("But we just saw a bunch of pictures where this woman is all bruised up. It's a sad thing."). Counsel stated, "Well, he's not totally innocent." *Id.* at 248. Counsel's argument focused on the charge of assault in the second degree. *Id.* at 252-61. Counsel admitted that the wrist injuries could have been caused by "grabbing" or "slapping":

> Now, the injury, you know, there's an instruction about it where it talks about physical injury is something where you have impairment of a bodily condition or substantial pain, all right. Well, perhaps—again, the injury or the pain was not a result of the fire poker, if there was any at all, but perhaps it was from something else.
>
> *There's so many injuries. Maybe it was from a grab by Mr. Stover. Perhaps it was Mr. Stover that was grabbing. Maybe he slapped her. Maybe. And maybe that's what caused an injury that hurt a little bit for a couple hours, is what she said. A little bit for a couple hours, as far as when she was hit by the poker, or the grab.*
>
> There's confusion. Lots of confusion. Lots of ambiguity.

Id. at 261 (emphasis added). Defense counsel also repeatedly pointed out to the jury that Ms. Brown did not mention the fire poker in the restraining order affidavit. *Id.* at 258, 260-61.

The jury found Mr. Stover guilty of assault in the second degree as well as both counts of assault in the fourth degree, while acquitting on criminal mischief. Ex. 103 at

[2] The entire defense closing argument is set out at Appendix 21.

280-81. The court sentenced Mr. Stover to a total of 71 months in the custody of the Oregon Department of Corrections. *Id.* at 307, 316. Mr. Stover's direct appeal raised claims not at issue in this federal habeas corpus case.

B. State Post-Conviction Proceedings For Ineffective Assistance Of Counsel

As relevant to this case, Mr. Stover claimed in his state post-conviction proceedings that counsel was ineffective for failing to request that the jury be instructed on the lesser-included offense of assault in the fourth degree on the count that resulted in the conviction for assault in the second degree. Ex. 110 at 6-9. In response to the allegations of ineffective counsel, the state submitted a declaration from the defense attorney, Mr. Bylenga. Ex. 120. Mr. Bylenga stated that he did "not recall specifically why I did not request a lesser-included-offense instruction for fourth-degree assault":

> I recall that my overall trial strategy was to focus on the second-degree assault charge and to argue that the state had not met its burden of establishing that any of her injuries were caused by petitioner using the fire poker or tongs. Instead, the injuries were the product of the victim accidentally injuring herself while repairing a bike or one of the other altercations with petitioner, in which no weapon was involved. . . .
>
> *I do not recall specifically why I did not request a lesser-included-offense instruction for fourth-degree assault.* However, based on my recollection of overall trial strategy, I likely concluded that an "all or nothing" approach would be best. As explained above, the main focus of the defense was that the state had not proven that petitioner had caused any injury with the weapon alleged in the indictment. Instead, to the extent petitioner caused any of the injuries, they occurred during the other altercations in which no weapon was used. Because petitioner was also charged with various crimes relating to those altercations, I did not believe there was any risk that the jury would find him guilty of second-degree assault simply to prevent him from avoiding responsibility when he had clearly committed a crime.

Ex. 120 (paragraphs 2 and 5) (emphasis added). Neither party presented live testimony at the post-conviction hearing. Ex. 121 at 12-13.

The post-conviction court issued a judgment denying relief, finding the defense lawyer credible and that his strategy was to "suggest that the victim was injured during one of the other altercations and that Petitioner did not attack her with the fireplace tongs, therefore, no dangerous weapon was involved." Ex. 122 at 2. The court found that, despite defense counsel's lack of memory, he "made a conscious strategic decision to not request a lesser-included instruction." *Id.* at 4. The post-conviction court additionally found that "the use of the fire tongs by the Petitioner to assault the victim on one occasion, thus elevating one of the assaults to Assault in the Second Degree, was not doubtful," and that counsel's decision not to request a lesser-included instruction was reasonable. *Id.*

Mr. Stover appealed the post-conviction court's decision regarding trial counsel's failure to request a lesser-included offense instruction, but the Oregon courts affirmed without opinion and denied his petition for review. Ex. 123 at 7; Ex. 126; Ex. 127.

C. Federal Habeas Corpus Proceedings

Mr. Stover filed a timely pro se federal petition for habeas corpus relief identifying the violation of his Sixth Amendment rights when appointed counsel failed to seek a lesser-included offense instruction while virtually admitting guilt for assault in the fourth degree.

ECF 2.[3] With the assistance of counsel, Mr. Stover filed a brief in support citing to the circuit court cases in which, in reliance on Supreme Court authority on lesser-included offense instructions, courts granted habeas corpus relief. ECF 43. Mr. Stover asserted that the state court unreasonably determined the facts by finding a strategic decision not claimed by defense counsel and unreasonably applied the law in finding a reason for an all-or-nothing strategy unsupported by the record. ECF 43.

On October 25, 2021, the district court denied habeas corpus relief. Appendix 2. First, the court found no unreasonable determination of the facts because counsel, who did not remember why he did not ask for a lesser-included offense instruction, did not outright concede the assault in the fourth degree, even though he suggested the injury could have resulted from Mr. Stover "grabbing" or "slapped" the victim. *Id.* at 14-15; 37. Second, the court found no prejudice because, despite the evidence and argument against use of a weapon, "the jury was not likely to acquit Petitioner of Assault II and convict him of the lesser offense." *Id.* at 15. The district court also denied a certificate of appealability. *Id.* at 16. After a timely notice of appeal, the Ninth Circuit also denied a certificate of appealability. Appendix 1.

[3] The citations to the Oregon district court record reference the docket report numbers of *Stover v. Oregon Board of Parole & Post-Prison Supervision*, No. 2:18-cv-00043-HZ.

Reasons For Granting The Petition

I. The Court Should Grant Certiorari To Address The Ninth Circuit's Failure To Implement This Court's Standards For Issuance Of A Certificate Of Appealability In The Context Of The Courts Of Appeals' Failure To Review Ineffective Counsel Where, With No Memory Of Why, Trial Counsel Failed To Request A Necessary Lesser-Included Offense Instruction.

This Court has set a standard for issuance of certificates of appealability that balances the need for finality against the appropriateness of review where reasonable jurists could differ over non-frivolous constitutional claims. In the present case, the courts below declined to issue a certificate of appealability despite the uncontroverted testimony that trial counsel could not remember why he did not ask for a lesser-included offense instruction. This occurred in the context of a case that, upon objective review, discloses no reason for not giving the jury a way of acquitting the defendant of the most serious offense. This Court has repeatedly noted the due process interest in a lesser-included offense instruction where the lesser charge is not in dispute. *Beck v. Alabama*, 447 U.S. 625, 634 (1980); *Keeble v. United States*, 412 U.S. 205, 208 (1973). To vindicate this Court's standards for issuance of a certificate of appealability, and to assure state court compliance with *Strickland v. Washington*, 466 U.S. 668 (1984), the Court should grant certiorari, vacate the decision below denying issuance of the certificate of appealability, and remand for the Ninth Circuit to address the merits of the appeal in the first instance.

A. This Court Requires Issuance Of A Certificate Of Appealability When Jurists Of Reason Would Find The Issues Debatable.

"At the COA stage, the only question is whether the applicant has shown that 'jurists of reason could disagree with the district court's resolution of his constitutional claims or that jurists could conclude the issues presented are adequate to deserve encouragement to proceed further.'" *Buck v. Davis*, 137 S. Ct. 759, 773 (2017) (quoting *Miller-El v. Cockrell*, 537 U.S. 322, 336 (2003)). "[A] COA should issue when the prisoner shows, at least, that jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right[.]" *Slack v. McDaniel*, 529 U.S. 473, 484 (2000).

"This threshold question should be decided without 'full consideration of the factual or legal bases adduced in support of the claims.'" *Buck*, 137 S. Ct. at 773 (quoting *Miller-El*, 537 U.S. at 336). Indeed, a prisoner need not "show[] that the appeal will succeed[,]" only "something more than the absence of frivolity or the existence of mere good faith on his or her part." *Miller-El*, 537 U.S. at 337-38 (citation and internal quotation marks omitted). "[A] claim can be debatable even though every jurist of reason might agree, after the COA has been granted and the case has received full consideration, that petitioner will not prevail." *Miller-El*, 537 U.S. at 338.

In the present case, the Ninth Circuit, citing to *Slack*, denied issuance of a certificate of appealability based on its ruling that no jurist of reason would find debatable either the substantive claim of a constitutional violation or "whether the district court was correct in its procedural ruling." Appendix 1. This case involves a substantial claim of ineffective

assistance of counsel given the lack of any tactical reason not to take the logical step of offering the jury a lesser included offense that was virtually conceded in all three incidents. "Obtaining a certificate of appealability 'does not require a showing that the appeal will succeed,' and 'a court of appeals should not decline the application . . . merely because it believes the applicant will not demonstrate an entitlement to relief.'" *Welch v. United States*, 578 U.S. 120, 127 (2016) (quoting *Miller-El*, 537 U.S. at 337). Under this Court's controlling precedent, the Ninth Circuit should have issued a certificate of appealability.

B. This Court Should Grant This Petition, Vacate The Ninth Circuit's Denial Of A Certificate Of Appealability, And Remand For Determination Of The Merits Of The Appeal.

This Court has authority to "reverse any judgment" brought before it and "remand the cause and direct entry of such appropriate judgment . . . or require such further proceedings to be had as may be just under the circumstances." 28 U.S.C. § 2106. The Ninth Circuit's order denying Mr. Stover's request for a certificate of appealability failed to apply the substance of this Court's precedent in *Welch*, *Miller-El*, and *Slack*. Mr. Stover satisfied the standard for a certificate of appealability, which warrants grant of the petition and remand to the appellate court for a ruling on the merits.

This case involves two unique facts: 1) trial counsel admitted he did not know why he did not ask for the lesser-included offense, and 2) objective review of the record demonstrates that there was no reason not to ask for a lesser-included offense because the lesser offense was largely undisputed. Although trial counsel speculated that he might have had an "all-or-nothing" strategy, he did not actually remember making such a strategic

choice, and such a choice made no sense when there was no "nothing" possible: the convictions for fourth degree assault in all three incidents were foregone conclusions.

The trial counsel failed to assert the due process right to a lesser-included offense instruction that was clearly warranted by both the facts and trial counsel's argument acknowledging assaultive conduct. "[I]t is now beyond dispute that the defendant is entitled to an instruction on a lesser included offense if the evidence would permit a jury rationally to find him guilty of the lesser offense and acquit him of the greater." *Keeble*, 412 U.S. at 208. The option benefits the defendant because "it affords the jury a less drastic alternative than the choice between conviction of the offense charged and acquittal." *Beck*, 447 U.S. at 633; *see Hopper v. Evans*, 456 U.S. 605, 611 (1982) ("But due process requires that a lesser included offense instruction be given *only* when the evidence warrants such an instruction.") (emphasis in original). Under *Strickland*, failure to request a lesser-included offense can constitute deficient performance. *See, e.g., Crace v. Herzog*, 798 F.3d 840 (9th Cir. 2015); *Breakiron v. Horn*, 642 F.3d 126, 137-38 (3d Cir. 2011); *Richards v. Quartermain*, 566 F.3d 553, 569 (5th Cir. 2009).

For example, even in a case where, unlike the present case, there were no other counts of the same minor offense, the court granted the writ of habeas corpus. In *Breakiron*, on the charge of robbery, trial counsel adduced testimony that the defendant had taken money and, in argument, admitted that the taking constituted theft. 642 F.3d at 136. The Third Circuit held that it was "apparent from the record that counsel did not have a strategic reason for not requesting a theft instruction." *Id.* at 138. Addressing the all-or-nothing

rationale, the court stated: "Without a theft instruction, the jury was left with only two choices—conviction of robbery or outright acquittal." *Id.*

In such all-or-nothing situations, "'[w]here one of the elements of the offense charged remains in doubt, but the defendant is plainly guilty of some offense, the jury is likely to resolve its doubts in favor of conviction.'" *Id.* (citing *Beck*, 447 U.S. at 634, and quoting *Keeble*, 412 U.S.at 212-13).

> Thus, even though juries are obligated "'as a theoretical matter'" to acquit if they do not find every element of a crime, there is a "'substantial risk that the jury's practice will diverge from theory'" when it is not presented with the option of convicting of a lesser offense instead of acquitting outright. By conceding theft but not requesting a theft instruction, Breakiron's counsel exposed him to that "substantial risk," and the record reveals that he had no strategic reason for doing so.

Id. (quoting *Keeble*, 412 U.S. at 212). Mr. Stover's counsel exposed him to just such a "substantial risk" with no reasonable strategic reason for doing so.

The *Breakiron* court also recognized the obvious prejudice from failure to request a jury instruction that also applies to the present case: "Counsel did not pursue an all-or-nothing strategy at trial by arguing that Breakiron had not committed any crime." *Id.* Although the admissions in argument were slightly more tenuous, the defense closing argument recognized that Mr. Stover had put hands on Ms. Brown repeatedly in ways that the jury would inevitably find at least amounted to fourth degree assault:

> There's so many injuries. Maybe it was from a grab by Mr. Stover. Perhaps it was Mr. Stover grabbing. Maybe he slapped her. Maybe. An maybe that's what caused an injury that hurt a little bit for a couple of hours[.]

Like defense counsel in *Breakiron*, Mr. Stover's attorney "neglected to request the [lesser-included] instruction that not only would have been consistent with that theory of defense but would have given the jury an opportunity to effectuate it." 642 F.3d at 138; *see also Crace*, 798 F.3d at 848 ("It is therefore perfectly plausible that a jury that convicted on a particular offense at trial did so despite doubts about the proof of that offense—doubts that, with 'the availability of a third option,' could have led it to convict on a lesser included offense.") (citing *Keeble*, 412 U.S. at 213). The post hoc rationalization in the present case, from an attorney who admitted having no memory of why he did not ask for the lesser-included offense instruction, does not overcome the objective facts that provide no reason not to request the lesser-included offense instruction. *See Richards*, 566 F.3d at 569-70 (rejecting counsel's post hoc rationalization and finding that "failing to request a lesser-included offense instruction fell below an objective standard of reasonableness[.]"). As in the present case, counsel's deficient performance resulted in *Strickland* prejudice.

And in the present case, the district court did not correctly apply *Strickland*, instead asserting that the jury "was not likely to acquit" the defendant of the more serious offense. Appendix at 15. The *Strickland* standard does not require proof by a preponderance of the evidence: "[W]e believe that a defendant need not show that counsel's deficient conduct more likely than not altered the outcome in the case." 466 U.S. at 693. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* at 699. The *Strickland* standard for prejudice "does not require a showing that counsel's actions

'more likely than not altered the outcome[.]'" *Harrington v. Richter*, 562 U.S. 86, 111-12 (2011).

Although the difference may be slight, and only applies in rare cases, the district court here required a higher level of prejudice than this Court requires and failed to even address this Court's express rulings on the prejudice from "all-or-nothing" approaches when the lesser offense has been effectively conceded.

Conclusion

For the foregoing reasons, the Court should grant a writ of certiorari, and, at a minimum, the case should be remanded to the Ninth Circuit with instructions to vacate the denial and issue a certificate of appealability and provide full review of the merits of the appeal.

Dated this 16th day of August, 2022.

Stephen R. Sady
Attorney for Petitioner

FILED

MAY 24 2022

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

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

PAUL FREDERICK STOVER, Petitioner-Appellant, v. OREGON BOARD OF PAROLE AND POST PRISON SUPERVISION, Respondent-Appellee.	No. 21-35900 D.C. No. 2:18-cv-00043-HZ District of Oregon, Pendleton ORDER

Before: RAWLINSON and NGUYEN, 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

PAUL FREDERICK STOVER,

Petitioner,

v.

OREGON BOARD OF PAROLE & POST-PRISON SUPERVISION,

Respondent.

Case No. 2:18-cv-00043-HZ

OPINION AND ORDER

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Attorneys for Respondent

HERNANDEZ, District Judge.

Petitioner brings this habeas corpus case pursuant to 28 U.S.C. § 2254 challenging the legality of his Umatilla County convictions dated December 17, 2013 and January 14, 2014. For the reasons that follow, the Petition for Writ of Habeas Corpus (#2) is denied.

BACKGROUND

The Umatilla County Circuit Court provided a comprehensive factual background for this case:

> At trial, the state presented the following evidence. Over the course of four days Petitioner assaulted his girlfriend, Earlene Brown, three times. On one occasion, between the late hours of Friday, August 24, and early hours of Saturday, August 25, Brown refused Petitioner's sexual advances. As a result, Petitioner started pushing a naked Brown outside. In an attempt to stay inside the house, Brown dropped to the floor. With Brown lying on the floor, Petitioner falsely accused Brown of kicking him in the testicles. Then, Petitioner punched Brown in the head, knocking her out. Petitioner punched Brown so hard that she was in pain and bruised for several days. In love and hoping Petitioner would change, Brown decided not to call the police.
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> About two days later, however, Petitioner again struck Brown. On that day, Petitioner visited Brown at the store where she worked. There, Petitioner began to talk to a woman that was in the store. Petitioner asked the woman to meet up with him later. Hearing what Petitioner said, Brown became jealous and tossed her phone towards Petitioner but did not strike him. Although the phone landed some distance away from his feet, Petitioner stomped on Brown's phone,

> cracking the screen. When Brown bent down to pick up her broken phone, Petitioner grabbed tongs from a fireplace set and, using the tongs, smacked Brown on her right wrist. As a result, she was in pain for several hours. In fact, Petitioner hit Brown so hard that Brown bore a tong-shaped bruise and a swollen wrist. Then, Petitioner turned around and began to walk out of the store. As Brown followed Petitioner outside, Petitioner turned around and punched Brown in the mouth. Later that day the couple talked and Petitioner, in tears, told Brown he would never hit her again. Brown again decided not to call the police.
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> On August 27, Brown refused Petitioner's sexual advances. Demanding that Brown leave, Petitioner again started to shove Brown outside while she was naked. Brown began to struggle to prevent Petitioner from throwing her outside without pants. Then, Petitioner punched Brown in the cheek. Subsequently, Brown's cheek and mouth became bruised and swollen and she was in immense pain. That day, Brown realized Petitioner was never going to stop abusing her so she decided to call the police. The police arrived at the scene and subsequently arrested Petitioner.
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> Based on the first and last assault, a grand jury indicted Petitioner on two counts of fourth-degree assault. Based on the second assault, the grand jury indicted Petitioner on one count of second-degree assault with "a fire poker or tongs" and second-degree criminal mischief for damaging Brown's cell phone. Petitioner did not testify at his trial. After deliberation, the jury unanimously found Petitioner guilty of each count of assault, but found him not guilty on the count of criminal mischief.

Respondent's Exhibit 122, pp. 1-2.

Based upon these incidents, the trial court sentenced Petitioner to 47 months in prison. Petitioner also entered a no-

contest plea to Tampering with a Witness, leading to the imposition of a consecutive 24-month prison term. As a result, Petitioner's prison sentence totaled 71 months. Trial Transcript, pp. 317-20.

Petitioner took a direct appeal wherein he raised claims pertaining to the trial court's jury instructions and its assessment of a court-appointed attorney fee. Respondent's Exhibit 104. The Oregon Court of Appeals affirmed the trial court's decision without issuing a written decision, and the Oregon Supreme Court denied review. *State v. Stover,* 276 Or. App. 919, 370 P.3d 565, *rev. denied,* 360 Or. 236, 381 P.3d 830 (2016).

Petitioner next filed for post-conviction relief ("PCR") in Umatilla County where the PCR court denied relief on his claims. Respondent's Exhibit 122. On appeal, and relevant to this habeas corpus proceeding, he pursued a claim that his trial attorney was ineffective when he failed to request a lesser-included jury instruction of Assault in the Fourth Degree ("Assault IV") as to the incident at Brown's workplace involving the fireplace tongs which resulted in his Assault in the Second Degree ("Assault II") conviction. Respondent's Exhibit 123. The Oregon Court of Appeals affirmed the PCR court's decision without opinion, and the Oregon Supreme Court denied review. *Stover v. Bowser,* 299 Or. App. 123, 449 P.3d 581, *rev. denied,* 366 Or. 64, 455 P.3d 39 (2019).

Petitioner now brings this 28 U.S.C. § 2254 habeas corpus case raising nine grounds for relief. Respondent asks the Court

to deny relief on the Petition because: (1) with the exception of Petitioner's Ground Eight claim of ineffective assistance of counsel, he failed to fairly present any of his claims to Oregon's state courts thereby leaving them procedurally defaulted; (2) the PCR court's decision denying relief on Ground Eight is neither contrary to, nor an unreasonable application of, clearly established federal law; and (3) all of Petitioner's claims lack merit.

DISCUSSION

I. 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 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 of § 2254(d)(1), 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).

Twenty-eight U.S.C. § 2254(d)(2) allows a petitioner to "challenge the substance of the state court's findings and attempt to show that those findings were not supported by substantial evidence in the state court record." *Hibbler v. Benedetti*, 693 F.3d 1140, 1146 (9th Cir. 2012). A federal habeas court cannot overturn a state court decision on factual grounds "unless objectively unreasonable in light of the evidence presented in the state-court proceeding." *Miller-El v. Cockrell*, 537 U.S. 322, 340 (2003). This is a "'daunting standard—one that will be satisfied in relatively few cases,' especially because we must be 'particularly deferential to our state-court colleagues.'" *Hernandez v. Holland*, 750 F.3d 843, 857 (9th Cir. 2014) (quoting *Taylor v. Maddox*, 366 F.3d 992, 1000 (9th Cir. 2004)).

II. Unargued Claims

Petitioner raises nine grounds for relief in his Petition. In his supporting memorandum, however, he chooses to brief only

his Ground Eight claim that his trial attorney was ineffective for failing to request a jury instruction on the lesser-included offense of Assault IV. 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 these claims, the Court has examined them based upon the existing record and determined that they do not entitle him to relief.

III. Ground Eight: Ineffective Assistance of Counsel

In Oregon, the fundamental difference between Assault II and Assault IV is that the former requires the State to prove that a criminal defendant utilized a dangerous weapon whereas the latter does not. *Compare* ORS 163.175(1)(b) (Assault II), *with* ORS 163.160(1)(a) (Assault IV). At trial, Petitioner's attorney sought to secure a full acquittal as to the Assault II charge by convincing the jury that Petitioner never attacked Brown with a weapon. He did not, however, ask the trial judge to give the jury a lesser-included instruction that would permit it to convict Petitioner of Assault IV. Petitioner claims that where counsel essentially conceded that an assault occurred at Brown's workplace while also arguing that the assault did not involve a dangerous weapon, it was incumbent upon him to give the jury the option to reach a guilty verdict as to Assault IV.

Where he did not, and where the jury could have found that the State had not proven the dangerous weapon element of Assault II, Petitioner maintains that counsel's omission left the jury in the uncompromising position of either convicting him of Assault II or acquitting him even though criminal conduct had obviously occurred at Brown's workplace.

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 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. In this particular instance, Petitioner can demonstrate prejudice if he can establish a reasonable probability that the jury would have convicted him of Assault IV had counsel requested the lesser-included instruction. 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.

During Petitioner's PCR proceedings, counsel submitted a Declaration wherein he explained his trial strategy:

> 2. I recall that my overall trial strategy was to focus on the second-degree assault charge and to argue that the state had not met its burden of establishing that any of her injuries were caused by petitioner using the fire poker or tongs. Instead, the injuries were the product of the victim accidentally injuring herself while repairing a bike or of one of the other altercations with petitioner, in which no weapon was involved.
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> 5. I do not recall specifically why I did not request a lesser-included-offense instruction for fourth-degree assault. However, based on my recollection of overall trial strategy, I likely concluded that an "all or nothing" approach would be best. As explained above, the main focus of the defense was that the state had not proven that petitioner had caused any injury with the weapon alleged in the indictment. Instead, to the extent petitioner caused any of the injuries, they occurred during the other altercations in which no weapon was used. Because petitioner was also charged with various crimes relating to those altercations, I did not believe there was any risk that the jury would find him guilty of second-degree assault simply to prevent him from avoiding responsibility when he had clearly committed a crime.

Respondent's Exhibit 120, pp. 1-2.

After holding a hearing, the PCR judge denied relief on this claim as follows:

> I find [t]he testimony of [trial counsel] to be credible. The trial attorney's strategy was to attack the credibility of the complaining witness and to challenge the charge of Assault in the Second Degree and suggest that the victim was injured during one of the other altercations and that Petitioner did not attack her with the fireplace tongs, therefore, no dangerous weapon was involved. This strategy was supported by evidence that the victim did not mention being hit with fire tongs when she obtained a restraining order the day after she spoke to the police and Petitioner was arrested. The victim did, however, tell the investigating police officer who responded to the 911 call that Petitioner had struck her on the wrist with the fire tongs.
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> Petitioner has not proven that his trial attorney failed to exercise reasonable professional skill and judgment by not requesting a lesser included instruction of Assault in the Fourth Degree to the Assault in the Second-Degree charge. While trial counsel does not at this point remember specifically why he did not request the lesser-included instruction, he believes he likely concluded that an all or nothing approach was best. The main focus of the defense was that the state had not proven that the Petitioner caused any injury with a dangerous weapon. Because Petitioner was also charged with other crimes, including two counts of Assault in the Fourth Degree, he did not believe the jury would find him guilty of Assault in the Second Degree simply to prevent him from avoiding responsibility. Based on this testimony, I find that trial counsel, more likely than

> not, made a conscious strategic decision to not request a lesser-included instruction.
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> The question then is whether that strategic decision was reasonable. A decision to not request a lesser-included instruction can enhance the chance of an unwarranted conviction and thus be unreasonable when the element that elevates the lesser-included offense to the greater one (in this case the use of a dangerous weapon) is doubtful and there is substantial evidence of a serious lesser-included offense. In this case, there was substantial evidence that Petitioner repeatedly assaulted the victim and caused injury even if he did not use the fire tongs. However, the use of the fire tongs by the Petitioner to assault the victim on one occasion, thus elevating one of the assaults to Assault in the Second Degree, was not doubtful. The victim testified that Petitioner hit her on the wrist with the tongs and reported the same to the responding officers. There were marks on the victim's wrist and the tongs were located. Petitioner admitted his fingerprints would be on the tongs. Petitioner did not testify to dispute the victim's account. The only question raised about the victim's version came from her restraining order affidavit in which she describes being struck on the arms but does not mention that fire tongs were used. Because of these factors and the fact that there were other assault charges on which the jury could convict the Petitioner if they acquitted him on the Assault in the Second-Degree charge, I find that the trial attorney's decision to not request a lesser-included instruction was reasonable.

Respondent's Exhibit 122, pp. 2-4.

Petitioner contends that the PCR court's decision is flawed because it failed to address a serious inconsistency in counsel's PCR Declaration. Specifically, he argues that pursuing

an "all or nothing" approach is inconsistent with counsel's concession that Petitioner assaulted Brown at her workplace. He therefore concludes that the PCR court's decision, which depended on its finding that trial counsel was credible, was based upon an unreasonable determination of the facts in light of the evidence presented.[1]

This Court finds no inconsistency in trial counsel's Declaration or his approach to Petitioner's defense. He concentrated Petitioner's defense on overcoming the Assault II charge and, contrary to Petitioner's representation, did not concede that Petitioner caused the injury to Brown's wrist during the incident at her place of employment. Instead, he stated that it was difficult to ascertain the origins of that particular injury given the confusion and ambiguity in the case stemming from the different altercations at issue as well as Brown's "clouded judgment," poor recall, and "fuzzy" perception as a result of her alcohol use. *Id* at 257, 261. As he stated in his PCR Declaration, to the extent Petitioner caused the injury to Brown's wrist, it "occurred during the other altercations in which no weapon was used." Respondent's Exhibit 120, p. 2.

[1] Petitioner also asserts that the PCR court made an unreasonable factual determination when it concluded that counsel's strategy was supported by Brown's failure to mention the fire tongs in her restraining order affidavit, all the while failing to recognize Brown's statements that Petitioner hit her on the wrist. To the contrary, the PCR court did recognize various ways in which Brown stated that Petitioner hit her on the wrist including her trial testimony, her application for a restraining order, and her statements to authorities. Respondent's Exhibit 122, p. 4. Consequently, even though the PCR court found that counsel's strategy had at least some evidentiary support, it also recognized that contradictory evidence existed.

Consistent with that Declaration, counsel argued to the jury that Brown suffered "so many injuries" that the "injury or the pain [in the wrist] was not a result of the fire poker, if there was any at all, but perhaps it was from something else." Trial Transcript, p. 261. He claimed that Brown's injuries could have occurred from any of the altercations she had with Petitioner, and also directed the jury's attention to Brown's testimony about injuries she sustained from a bicycle accident. *Id* at 246, 252-254. He next pointed to the fact that Brown had suffered an injury to her arm while attempting to repair her bicycle. *Id*. Finally, he referenced law enforcement testimony that Brown had suffered an injury to her arm while working on a light fixture. *Id*. In this regard, counsel did not simply concede that Petitioner assaulted Brown at her workplace causing the injury to her wrist.

Although the jury could still find from the evidence that Petitioner assaulted Brown at her workplace, this fact does not lead inexorably to the conclusion that counsel was obligated to request a lesser-included instruction. When counsel elected not to request such an instruction, he sought to secure a full acquittal as to the most serious charge his client faced. Without a lesser-included instruction, if the jury had concluded that Petitioner assaulted Brown but did not use a dangerous weapon, the result would have presumably been a full acquittal on the Assault II charge.[2] Had he requested a lesser-included

[2] Even with a lesser-included instruction, the jury would have been obligated to render a decision based solely on the Assault II charge before considering the lesser-included offense; it could not have simply weighed both options

instruction in this context, he would have exposed Petitioner to the very real possibility of an additional Assault IV conviction. Because counsel's strategic decision not to do so was a reasonable one, his performance did not fall below an objective standard of reasonableness.

Even assuming counsel was constitutionally obligated to request a lesser-included jury instruction under these circumstances, Petitioner is unable to demonstrate prejudice. As the PCR court found, aside from Brown's omission in her application for the restraining order, all of the evidence adduced at trial showed that petitioner had, in fact, assaulted her with fire tongs. This included Brown's testimony, her statement to law enforcement officers, Petitioner's own admission that his fingerprints would be found on the tongs, and the fact that Brown displayed "a tong-shaped bruise." Respondent's Exhibit 122, p. 1; *see also* 28 U.S.C. § 2254(e)(1) (state-court factual findings are presumed correct absent clear and convincing evidence to the contrary). Thus, even had counsel successfully sought a lesser-included instruction on Assault IV, the jury was not likely to acquit Petitioner of Assault II and convict him of the lesser offense. For all of these reasons, the PCR court's decision was not objectively unreasonable and habeas corpus relief is not warranted.

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simultaneously before deciding which it preferred. *See* ORS 136.460(2) (requiring juries to first make a finding as to the charged offense before considering the lesser included offense).

CONCLUSION

For the reasons identified above, the Petition for Writ of Habeas Corpus (#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 pursuant to 28 U.S.C. § 2253(c)(2).

IT IS SO ORDERED.

October 25, 2021
DATE

Marco Hernandez
Marco A. Hernandez
United States District Judge

28 U.S.C. § 2253

§ 2253. Appeal

(a) In a habeas corpus proceeding or a proceeding under section 2255 before a district judge, the final order shall be subject to review, on appeal, by the court of appeals for the circuit in which the proceeding is held.

(b) There shall be no right of appeal from a final order in a proceeding to test the validity of a warrant to remove to another district or place for commitment or trial a person charged with a criminal offense against the United States, or to test the validity of such person's detention pending removal proceedings.

(c)(1) 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; or

(B) the final order in a proceeding under section 2255.

(2) A certificate of appealability may issue under paragraph (1) only if the applicant has made a substantial showing of the denial of a constitutional right.

(3) The certificate of appealability under paragraph (1) shall indicate which specific issue or issues satisfy the showing required by paragraph (2).

28 U.S.C. § 2254

§ 2254. State custody; remedies in Federal courts

a) The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.

(b)(1) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that-

(A) the applicant has exhausted the remedies available in the courts of the State; or

(B)(i) there is an absence of available State corrective process; or

(ii) circumstances exist that render such process ineffective to protect the rights of the applicant.

(2) An application for a writ of habeas corpus may be denied on the merits, notwithstanding the failure of the applicant to exhaust the remedies available in the courts of the State.

(3) A State shall not be deemed to have waived the exhaustion requirement or be estopped from reliance upon the requirement unless the State, through counsel, expressly waives the requirement.

(c) An applicant shall not be deemed to have exhausted the remedies available in the courts of the State, within the meaning of this section, if he has the right under the law of the State to raise, by any available procedure, the question presented.

(d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim-

(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or

(2) 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.

(e)(1) In a proceeding instituted by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination of a factual issue made by a State court shall be presumed to be correct. The applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence.

(2) If the applicant has failed to develop the factual basis of a claim in State court proceedings, the court shall not hold an evidentiary hearing on the claim unless the applicant shows that-

(A) the claim relies on-

(i) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or

(ii) a factual predicate that could not have been previously discovered through the exercise of due diligence; and

(B) the facts underlying the claim would be sufficient to establish by clear and convincing evidence that but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.

(f) If the applicant challenges the sufficiency of the evidence adduced in such State court proceeding to support the State court's determination of a factual issue made therein, the applicant, if able, shall produce that part of the record pertinent to a determination of the sufficiency of the evidence to support such determination. If the applicant, because of indigency or other reason is unable to produce such part of the record, then the State shall produce such part of the record and the Federal court shall direct the State to do so by order directed to an appropriate State official. If the State cannot provide such pertinent part of the record, then the court shall determine under the existing facts and circumstances what weight shall be given to the State court's factual determination.

(g) A copy of the official records of the State court, duly certified by the clerk of such court to be a true and correct copy of a finding, judicial opinion, or other reliable written indicia showing such a factual determination by the State court shall be admissible in the Federal court proceeding.

(h) Except as provided in section 408 of the Controlled Substances Act, in all proceedings brought under this section, and any subsequent proceedings on review, the court may appoint counsel for an applicant who is or becomes financially unable to afford counsel, except as provided by a rule promulgated by the Supreme Court pursuant to statutory authority. Appointment of counsel under this section shall be governed by section 3006A of title 18.

(i) The ineffectiveness or incompetence of counsel during Federal or State collateral post-conviction proceedings shall not be a ground for relief in a proceeding arising under section 2254.

damaging her cell phone or recklessly causing her physical injury behind the head and to the eye?

This is why we're here and this is why the state asks you to find to an honest moral certainty that Mr. Stover assaulted in the second degree Ms. Brown, assaulted in the fourth degree, on or about August 23rd, that Friday, Ms. Brown, assaulted in the fourth degree, on or about August 27th, when the police were finally called, and that he had also intentionally damaged her cell phone.

This is why we're here and this is why the state asks you, after deliberations, to convict him on all charges. Thank you.

THE COURT: Mr. Ludington, if you please?

MR. BYLENGA: Mr. Bylenga.

THE COURT: Mr. Bylenga, if you please. Do you have your lapel mic on?

MR. BYLENGA: No.

THE COURT: Please fix that.

MR. BYLENGA: I know we look similar, but...

THE COURT: Slip of the tongue.

MR. BYLENGA: I know, Your Honor. That's okay. He's a handsome gentleman.

MR. LUDINGTON: You have better hair.

MR. BYLENGA: That's true.

Okay. It's on.

Thank you, Your Honor. Thank you, ladies and gentlemen.

I know we're here a second day. Probably didn't want to have to come back, and I hope it wasn't -- I hope at least there was enough interest in the case that it did give you some entertainment value. I know that's not what we're here for. What we're here for is to uphold the constitution of the United States and to do your duty under that constitution, which has some very strict guidelines that were designed for criminal defendants, and the distrust the founders had of the state.

You know, this is a really sad case. I know we've talked about some things in the beginning, about whether people were inherently evil or good or basically good. I'm going to tell you, I -- when I was hearing this, you know, I wanted to ask you questions earlier, you know, to get a feel for who you were, and that's how we decide whether we feel that you're one of these outliers that are extreme or something that we don't want on our jury, so I asked maybe some difficult questions.

Ultimately what I'm looking for is people that will honestly evaluate whether the state has proven the case beyond a reasonable doubt, each and every element of that.

This is sad. This is a really sad case. I

think everybody agrees. It's sad for Ms. Brown, it's sad for Mr. Stover. People's lives are shattered and destroyed. Our emotion, you know, it goes out and feels for them, whatever happened.

What we know is we did see pictures that Mr. -- that you were just shown. I won't go over those again. But we just saw a bunch of pictures where this woman is all bruised up. It's a sad thing.

We know that there was at least three possible sources of these injuries from the evidence. One of those being -- or these are potential sources -- Mr. Stover. One of the other potential sources was the bike accident that we heard nothing about until I asked her about it. Another source -- Actually, there's four, I believe.

There's another source which was the bike repair, with all the blood that ended up on the arm. But then Zaugg, Officer Zaugg brings up even another source, when I asked him yesterday. The last thing I asked him. And he says, No, it wasn't because of the, you know, the fixing the bike. She said that it was because she was taking a light fixture out, you know, or she was working on some light fixture that caused that blood to come back.

She's had a lot of pain in the course of a week. It's sad, wherever it came from.

You know, one of the instructions that we read -- or that the judge read to you yesterday included about following the law whether you agree with it or not. You know, emotion gets into this and it affects our judgment. But the law is the law, and there are elements that must be proven beyond a reasonable doubt as to each and every charge and each and every element.

The instruction talks about not being influenced by any degree of personal feelings, sympathy for or prejudice against any party, witness, or lawyer, or any participants in this case.

So when I questioned Ms. Brown and seemed a little harsh on her, you know, it's not nice asking somebody, but we're here to get the truth, and there's some really inconsistent things that are being said in this case.

And the proof, you want that moral certainty. There's three levels that we talked about. We'll get a little more into that. But the founding fathers, I want to go back to that, in their great wisdom, which I think most people, we can agree, the one thing I think at least we agree still on, I think most Americans do, is in this process of proof beyond a reasonable doubt, this idea that the jury makes the decision about this, not the king or the government, who may order us to do certain things that

we don't like to do, whether it be if you're in favor of health care or not, I'm going to order you to -- or order you to go get health care.

It can make -- the government can make us do a lot of things, but the founders said the one thing they can't do, the people are the only ones that can take away your liberty. The people. The founders had the belief that they would rather set ten guilty men free than wrongfully convict one innocent man.

Now, the question is, well, what does that mean? Innocence. Do we know if Mr. Stover is innocent? Well, he's not totally innocent. He's using the jail call, he's doing wrong things because he doesn't have contact with the outside world, and he's in a really bad situation, thinking, wow, I want my story told, and he did some wrong things.

And you know what, we're not here to decide those things today, so when we're being asked about whether he did wrong stuff or whether Ms. Brown did wrong things, we're not here to decide that, we're here to decide the specific elements that the state has charged.

Mr. Stover is -- you know, he can deal with the other matters later, but today we're here for specific crimes, and that's what your job is today, to answer those questions that relate to these particular crimes or

charges.

This idea of proof beyond a reasonable doubt, I want to just get on that -- just talk about it a little bit. We talked about what preponderance of the evidence was. You know, you see Lady Justice, the scales of justice where they're leaning a little more one way or the other. That's preponderance of the evidence or weight. It's just a little over, okay.

Clear and convincing evidence, okay. And that's -- again, that's the preponderance of the evidence. That's a probably. Fifty-one percent. The weight is in favor of one side. And then you have clear and convincing evidence, which is higher. It's still lower than the proof beyond a reasonable doubt.

The proof beyond a reasonable doubt, moral certainty, you can be completely convinced, completely convinced. That's a lower standard than the proof beyond a reasonable doubt, moral certainty.

There's a lot of facts here that don't add up. Let's see why we should doubt. Why doubt? And I have really poor handwriting. I've been told it since I was a child, and then tried, but I just don't get better. And my hand is a little shaky. Let's see. Why doubt?

Well, the first thing to doubt over. One of the -- I'm going to get to the instruction as far as,

we're going to start with the first charge, which is Assault 2. Assault 2, which Mr. Ludington has referred to, where, the crime of Assault in the Second Degree: If a person knowingly causes physical injury to another by use of a dangerous weapon, okay.

I want you to focus on use, injury by use of a dangerous weapon. Actually, if we use this theory called the pronouncement method, and sometimes in some studies I've heard it used, I want you to focus on the words injury and use.

We've seen evidence -- or we've heard some statements about, yes, I was hit with the fire poker, or sometimes referred to as the tongs. Yes, I was. Okay. Ms. Brown says that's what happened. Well, there was no physical -- no physical evidence from the state that proves it, and I'm going to explain.

Injury and use. And I would say that their evidence contradicts that. I'd like to go back to the state's exhibit. And you're going to get all these pictures, so look through them. They're talking about there was -- their claim is that she was struck on the right arm, okay.

I'm sorry I have so many papers. I don't have a great memory. But I liked the one picture. And you can look at any other picture, too. Just look at the

right arm. A couple of them have some blood on it, and we've already been explained what that blood is. That blood came from, out of Ms. Brown's own mouth, came from an old injury. She said during the scuffle that injury was opened up. That's what she said in her testimony. And that's why, because in the scuffle with Mr. -- I don't know if she used the word scuffle, so I don't want to put words in her mouth, but you get the idea. And then they saw the blood.

What we know -- so we know that the blood wasn't the cause. It wasn't from any fire poker or anything else. What we see here is a pretty wide slap. Grab maybe. I don't know. I'm not an expert on wounds. The police officer isn't an expert either. But my common sense tells me -- take a look at the -- I'm going to show one of these and then the other one.

This is a very narrow object. At any point -- Think about that injury that you see, that red mark. At any point where this object hits that arm, whether it be here, here, would you conclude that you have this wide mark?

Injury by use. Now, I would say if this part, the top end, and it was closed, you would have some kind of mark like this, where you see the marks of it, a narrow object hitting. The top over here, one here and

one here, if it was swung from this side.

We feel bad because, guess what, how did she get all this stuff? We just need to be sympathetic. The constitution, again, the laws, the protections of a right to trial by jury, the right to remain silent, all the rights afforded there is not about helping the victim. People want to say over here -- and I do sympathize with this. This was designed for defendants who are accused, so they're not wrongfully taken their liberty from, or their liberty is not taken away. The state has to prove by a moral certainty. Moral certainty. Morally certain with this kind of mark.

You might find some of the other things, perhaps, that, yeah, I figure he did this, but certainly not the Assault 2. It does not make sense. It doesn't add up. The state presented no evidence by any expert that shows that this object caused this injury.

No, we want to leave that alone, because that's really not a good fact. Look at all the pictures. So we have -- this is a problem on the Assault 2. We also have -- I'll just put, one, no physical evidence; two, within a week, four sources of injuries. I'm just adding this. I've already discussed it.

Now, maybe it's real bad luck. And it is sad. I don't know. Maybe it's from drinking. I don't

know. What is it from? Who knows? But does the proof match -- or does the evidence match your decision?

The next section here: Ms. Brown's account of incident is unreliable.

Has anybody ever -- Well, I don't want to ask. I'll just state it. And it's often misquoted. If you've ever heard of a play called *The Morning Bride*, there was a guy named William Congreve, and he said, Heaven hath no rage like a woman -- or heaven hath no rage like love turned hatred, or hell hath no fury like a woman scorned. He is misquoted to say, Hell hath no fury like a woman scorned. And it's often attributed with William Shakespeare. That's wrong.

But there's jealousy involved in this incident, too. Now, whether or not that makes a difference, I don't know.

But when we add all these things up, the certainty starts weakening, the doubt starts increasing. You know what, maybe you could say, well, he probably did it. "Probably" is not enough under the law. Even if you're clearly convinced, it's not enough. Moral certainty.

So jealousy, anger. Inconsistencies about where the blood came from. Now, the blood in the one case. Inconsistencies. We have, the blood was caused by

bike repair, out of her mouth. I'm going to just put, Ms. Brown says, in court, bike repair. Testimony in court. That's where the blood came from. You can -- maybe you have a better recall of that. But Officer Zaugg says she told him it came from a light fixture.

Well, there's just confusion. Who knows? Maybe they got it wrong. Maybe we're trying to match up something. In fact, you might recall, and I'd ask you to look at the defense exhibit again, with the probable cause affidavit that Officer Reddington filled out, and then we talked about these inconsistencies and trying to patch those things up, but Officer Reddington said something that's important.

He indicated that when he filled in the probable cause affidavit, he believed that she was hit twice, in the wrist and the upper arm. He's confused because later on we get maybe another story that maybe says, okay, now is consistent.

Well, listen to all the tapes and hopefully we can figure it all out. But are we sure? And this is just one minor little point. There's just way too much other stuff to be worrying about. So whether or not -- you know, but her, came from light fixture, bike repair, okay.

Then we have -- I'd like to play it. There

was -- and I'm going to -- you know, you can play this over so you can listen to it, because I don't know if you recall how muddled all the sound was.

Obviously, you know, this is not a professional editing crew of any sort, you know, putting this together, and we don't expect the police to do that. They're doing the best with what they have. But the whole sound system sounded fairly muddled. But I'm going to just play a brief point of this and then stop. But I'll give you a description because maybe you can't hear it right away.

There was something about money. What was this fight over? Okay. And I -- what I think is important is even if it's very subtle, it's a tone change within just a matter of seconds. Okay. Because we have to trust the evidence. People are good liars. They lie all the time. I never know if my clients are telling me the truth or not. People lie. People tell the truth, too, but -- or even exaggeration. Might not be a lie. It's just a way to be a little more victim-like. Just the subtlety.

(Audio recording played for jury.)

MR. BYLENGA: Okay. And you go ahead and go back to that if you like. Where is it? It's about the 12:53 mark in the tape, if you want to refer to it.

But it starts out: I told him, let me have some money. I told him. I told him, let me have some money. Then later I asked him, or let me have some money, please.

It's subtle. I just want to make sure the officer knows that I'm not -- diminish my -- or maybe I want to sound a little more, you know, not as culpable or part of the problem or whatever. You know, changing tone when convenient. I'll just write "changing tone."

But it's not only that. The fact is, again, that's not what really happened here, about throwing objects. In fact, there was a section in there where Mr. Ludington, he asked for you to speculate as to the jail call, which you're not allowed to do. It was told in the jury instructions that you're not allowed to do that. You can't speculate about anything.

But he says, What was the reason how he answered? Maybe this, maybe that. I can't remember exactly the other words he used. But you're not allowed to do that. You can't guess what the reason was. You're not to guess. The state has to prove.

So these things about changes in tone, you know, especially in light of that this is about the defendant's liberty, this case, when we're doing that, when she -- when we ask about, did you do anything, it's

pretty much never anything.

She did admit that she drinks every single day. We know from Officer Reddington's testimony that people that drink have attention problems, and they have these attention -- divided attention tests for DUII stops. Well, they do that because they have attention problems.

When you're drinking, how do you know exactly what's going on with you? You know, a lot of it, there's memory problems. You guys, you know, may know more about that than I do. But alcohol affects our brains. We know that. That's why we have attention, you know, tests.

So we also have perception issues, okay. Now, those perception issues come from, you know, perhaps from alcohol, you know, clouded judgment. Maybe from jealousy. You know, you can convince yourself of a lot of stuff if you repeat it long enough to believe it.

But what we have, and I think it's important to look at that, because the longer this case gets away, and I've repeated something to myself, or maybe Ms. Brown has, maybe that perception of what actually happened is a little bit fuzzy.

But let's go back to the beginning. Defense exhibit -- If I may, do we have the restraining order here?

And I would like you to pay attention to this

restraining order. Now, some people say, oh, it's just a little minor difference, a date or something. That's what we're going to hear, you know. And, again, this is not about whether I feel bad for Ms. Brown or Mr. Stover. This is about, did the state prove their case?

Restraining order. There's not just one reason to doubt, there's quite a few, to be not morally certain. I think the most revealing thing is, this restraining order -- and you'll get a chance to look at it -- asks you, Describe the incidents of abuse that happened in the last 180 days. Describe how respondent hurt or threatened to hurt you, starting with the most recent incident.

Well, we can understand, you might have written the date wrong and such. And we can even understand that your education, you know, if you're not that educated, you might not know how to spell or how to elaborate. But you can elaborate in quite a few things. But you never mention a fire poker in a sworn statement here. You never mention it. That's a problem. No mention -- no mention of weapons used.

This was written soon, like a day after, I believe, from her testimony. You can double-check the documents, when they're signed. I don't actually know. I just know it was really soon after. And it was -- it's

not mentioned, anything about the fire poker.

Now, later on, there's a statement on August 27th, and I know everybody thought, oh, Herman, stop, or don't beat up on this poor lady, because it is sad. I'm sad, you know. But I want the truth, because my client demands the truth, or at least the state does its job to that moral certainty.

August 27th she writes, this is the day that the patrol vehicles come up. And this is the day that it's alleged that he punched her in the face and, you know, I think that's where she says in the 911 tape, and you can also listen back to that, that when they asked about whether any weapon was used, she says, no, there was no weapon used at this time.

So this is a date after the fire poker incident. So you got to get this straight. Fire poker comes after -- or before the two days when the police show up. There's a period of time where there's a fire poker incident. We know there's some fire poker incident. And Mr. Stover in his, you know, in the jail call, we hear he says there's a fire poker with her prints on it, because she came after him with the fire poker.

And, in fact, in the tape, listen to it again: "She came after me with the fire poker." Well, we don't know exactly what happened. But did it cause the

injury? Did it brush up against her perhaps, you know? Who knows? Did it cause an injury that had this pain? You know, so there's just confusion.

But August 27th, two days after the fire poker incident, "Fight broke out. I threw my phone at him. I picked up my phone and he hit me in the right wrist, arm, and words were said and he hit me in the mouth."

Well, we're confused, because the mouth incident, now, you know, supposedly was on the 27th, the day that the police showed up. You know, "threw my phone at him, and I picked up my phone and he hit me in the right wrist, arm." Well, that's written the day that the police show up.

One other thing that's really important in this thing here is something else totally left out. Nothing is mentioned about him breaking the phone on that date, that "he stepped on my phone."

"I picked my phone up." Never did she say, "He stepped on my phone." Again, this is the restraining order. I'd just ask you guys to review it and look at it.

I'm going to just put it this way. It's sad. Something happened. The state certainly has not proven that a fire poker was used that caused use, or injury by the use of the weapon.

Now, the injury, you know, there's an instruction about it where it talks about physical injury is something where you have impairment of a bodily condition or substantial pain, all right. Well, perhaps -- again, the injury or the pain was not a result of the fire poker, if there was any at all, but perhaps it was from something else.

There's so many injuries. Maybe it was from a grab by Mr. Stover. Perhaps it was Mr. Stover that was grabbing. Maybe he slapped her. Maybe. And maybe that's what caused an injury that hurt a little bit for a couple hours, is what she said. A little bit for a couple hours, as far as when she was hit by the poker, or the grab.

There's confusion. Lots of confusion. Lots of ambiguity. There is lots of bad -- or there's bad recall here. You know, with the restraining order -- And I don't want to forget this point. Thoughts sometimes come into my head late. But the fact is, you say, well, she has a third-grade education or she can't write. My third graders could write "poker," "fire poker."

Use your common sense. That's what the jury instruction tells you to do. But if you are not convinced to a moral certainty that the state has proven these things, everything, and I'm not just talking about the other stuff. All of it. I don't even know what happened.

As a lawyer here, I'm not sure. Okay. But I certainly could -- Well, regardless of that, I think you have the decision to make. It's not my call. You guys make the decision. That's why we have you. It's not for me or the state or anyone else to decide. It's how you decide. That's your job.

And we thank -- are very thankful that you're here so you can make that call and do justice and do what our founding principles are based on, that you would rather send a guilty man free than wrongfully convict him, or ten guilty men free than wrongfully convict one. Thank you.

THE COURT: Mr. Ludington, you're entitled to summation.

MR. LUDINGTON: Thank you, Your Honor.

Does this look like a bike accident, a fuzzy recollection of an alcoholic, or a jealous woman trying to make up something to get somebody in trouble?

State's Exhibit 3, page 2. This is of Earlene Brown's face. State's Exhibit page 3. This is the back of Ms. Brown's head. According to State's Exhibit page 4, that bruise was at least an inch and a half in size behind the left ear.

Now, there's other bruises and marks that are marked here, but here's what I would ask. As Mr. Bylenga