FILED
United States Court of Appeals
Tenth Circuit

January 9, 2019

Elisabeth A. Shumaker
Clerk of Court

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

CECIL BOYETT,

Petitioner - Appellant,

v.

R.C. SMITH, Warden, Lea County Correctional Facility; ATTORNEY GENERAL FOR THE STATE OF NEW MEXICO,

Respondents - Appellees.

No. 18-2107
(D.C. No. 2:17-CV-00374-KG-CG)
(D. N.M.)

ORDER AND JUDGMENT*

Before **BACHARACH**, **PHILLIPS**, and **EID**, Circuit Judges.

Cecil Boyett, a New Mexico prisoner proceeding pro se, appeals from the district court's denial of his 28 U.S.C. § 2254 habeas application challenging his conviction for first degree murder, which carried a mandatory sentence of life in prison with eligibility for parole after thirty years. This court granted a certificate of appealability (COA) on

* After examining the briefs and appellate record, this panel has determined unanimously that oral argument would not materially assist in the determination of this appeal. *See* Fed. R. App. P. 34(a)(2); 10th Cir. R. 34.1(G). The case is therefore ordered submitted without oral argument. This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. It may be cited, however, for its persuasive value consistent with Fed. R. App. P. 32.1 and 10th Cir. R. 32.1.

APPENDIX A

Mr. Boyett's claim that his trial counsel was ineffective and denied a COA on all other claims. Exercising jurisdiction under 28 U.S.C. §§ 1291 and 2253, we affirm.

I. BACKGROUND

Mr. Boyett and Renate Wilder were to be married on February 6, 2004. A few days before the wedding, Ms. Wilder left the home she shared with Mr. Boyett without telling him where she was going. As it turned out, she was with her friend and former lover, Deborah Roach. Mr. Boyett suspected Ms. Wilder was with Ms. Roach and tried to locate them but was unsuccessful.

Ms. Wilder came home during the afternoon of February 5. Shortly after her return, Ms. Roach approached the house. When Ms. Roach arrived, Mr. Boyett grabbed a handgun, opened the front door, and shouted at her to leave the property. He then shot her in the head. She was taken to the hospital, where she died.

At his trial, "[t]he State successfully argued to the jury that [Mr. Boyett] hated [Ms. Roach], was furious with her for having kept Wilder away without telling him about it, and shot her that afternoon to put an end to her meddling in the couple's affairs." *State v. Boyett*, 185 P.3d 355, 357 (N.M. 2008). Mr. Boyett, however, "claimed that [Ms. Roach] came to the house that day intent on killing him to prevent his impending marriage to Wilder." *Id.* "[I]n the process of trying to run her off, he observed her draw the gun that he knew she routinely carried. In fear for his life, [Mr. Boyett] raised his revolver and shot [Ms. Roach]. [Mr. Boyett] asserted that if he had not shot her, she would have fired her gun and fatally wounded him." *Id.* Testimony from third parties established that a handgun was found under Ms. Roach's arm after she was shot.

In addition to arguing self-defense, Mr. Boyett claimed that he was unable to form the specific intent necessary to commit first-degree murder because of a traumatic brain injury (TBI) he had suffered in 1998, the result of a violent attack by a patient while he was working as a nurse. His ineffective-assistance claim, which is the only claim relevant to this appeal, arises from that specific-intent theory of defense.

Part of Mr. Boyett's own testimony addressed the TBI and its effects on his cognitive abilities. Counsel also had planned to support the specific-intent defense by calling Dr. Lori Martinez, a clinical psychologist who had examined Mr. Boyett for competency and who had further opined that he was incapable of forming specific intent. But the day before she was scheduled to take the stand, Dr. Martinez notified counsel that in light of additional records she had received from the prosecution, she would not testify. Counsel did not call Dr. Martinez, did not present testimony from any other expert, and did not request either a continuance to obtain expert testimony or a mistrial. As a result of the failure to provide expert testimony, the trial court refused to instruct the jury on the specific-intent defense.

The jury found Mr. Boyett guilty of first degree murder. The trial court subsequently denied Mr. Boyett's motion for a new trial, which alleged that the defense had been taken by surprise by Dr. Martinez's withdrawal and denied the opportunity to present expert testimony regarding specific intent. That motion, however, did not attach any evidence from an expert supporting a lack of capacity to form specific intent. On

direct appeal, the New Mexico Supreme Court affirmed both the denial of the specific-intent instruction and the denial of a new trial. *Id.* at 362, 363.

Mr. Boyett then pursued state post-conviction relief, arguing, among other issues, that his counsel was ineffective in failing to call an expert witness to support his specific-intent defense. The state district court held an evidentiary hearing, at which an expert in forensic psychology, Dr. Susan Cave, testified that, if called, she would have opined that Mr. Boyett lacked the capacity to form the specific intent to commit murder. An experienced criminal attorney opined that Mr. Boyett's trial counsel performed deficiently with regard to the specific-intent defense. But another experienced criminal attorney opined that the self-defense and specific-intent arguments were somewhat contradictory, that defense counsel had a strong case for self-defense, and that in New Mexico arguing self-defense was much more likely to succeed than arguing a lack of capability to form specific intent.

The state district court denied post-conviction relief. It held that Dr. Cave's "testimony would have been insufficient to permit the requisite instruction of lack of or inability to form specific intent, because the evidence proved that [Mr. Boyett] engaged in other activities that required an ability to form specific intent at the time of the shooting." R. at 471. Because of potential conflicts between self-defense and the specific-intent defense and advantages to self-defense (such as the possibility of a complete acquittal), "[r]easonably competent trial counsel could reasonably have decided to abandon the diminished capacity claim when his expert changed her opinion and refused to testify." *Id.* at 472. "Defense counsel's actions were therefore, consistent with

a legitimate trial tactic" and did "not fall below an objective standard of reasonableness." *Id.* The state district court further held that Mr. Boyett "did not show a reasonable probability that but for claimed errors of counsel, the result of the proceedings would have been different." *Id.* at 473. "The defense in this case provided a plausible self-defense case, and such defense was a stronger argument than a claim of diminished capacity to form specific intent." *Id.* The New Mexico Supreme Court denied a writ of certiorari, making the state district court's decision the last reasoned decision of the state courts.

Mr. Boyett then raised his ineffective-assistance claim, along with other claims, in his § 2254 application to the federal district court. The magistrate judge recommended that the district court deny habeas relief, and Mr. Boyett timely objected. The district court adopted the recommendation, denied the § 2254 application, and denied a COA. As stated, this court subsequently granted a COA on the ineffective-assistance claim.

II. ANALYSIS

"In appeals from orders denying a writ of habeas corpus, we review the district court's legal analysis de novo and its factual findings for clear error." *Postelle v. Carpenter*, 901 F.3d 1202, 1208 (10th Cir. 2018). Because Mr. Boyett proceeds pro se, we construe his filings liberally and hold them to a less stringent standard than filings drafted by lawyers. *Garrett v. Selby Connor Maddux & Janer*, 425 F.3d 836, 840 (10th Cir. 2005).

I. Legal Standards

A. Habeas Standards

Because the state courts addressed the merits of the ineffective-assistance claim, the federal courts review the claim under 28 U.S.C. § 2254(d). *Cullen v. Pinholster*, 563 U.S. 170, 187 (2011). Section 2254(d) allows habeas relief only when the state court's decision "was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States" or "was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d)(1), (2). It establishes a "highly deferential standard for evaluating state-court rulings, which demands that state-court decisions be given the benefit of the doubt." *Woodford v. Visciotti*, 537 U.S. 19, 24 (2002) (per curiam) (citation and internal quotation marks omitted).

1. Section 2254(d)(1) Standards

A state-court decision is contrary to Supreme Court precedent "if the state court arrives at a conclusion opposite to that reached by [the Supreme] Court on a question of law or if the state court decides a case differently than [the Supreme] Court has on a set of materially indistinguishable facts." *Williams v. Taylor*, 529 U.S. 362, 413 (2000). "But a state court need not cite the Court's cases or, for that matter, even be aware of them. So long as the state-court's reasoning and result are not contrary to the Court's specific holdings, § 2254(d)(1) prohibits us from granting relief." *Wood v. Carpenter*, 907 F.3d 1279, 1289 (10th Cir. 2018) (*Tremane Wood*).

A state court unreasonably applies Supreme Court precedent if it "identifies the correct governing legal principle from [the] Court's decisions but unreasonably applies that principle to the facts of the prisoner's case." *Williams*, 529 U.S. at 413. "[A]n *unreasonable* application of federal law is different from an *incorrect* application of federal law." *Id.* at 410. "[A] federal habeas court may not issue the writ simply because that court concludes in its independent judgment that the relevant state-court decision applied clearly established federal law erroneously or incorrectly. Rather that application must also be unreasonable." *Id.* at 411. "[A] state court's application of federal law is only unreasonable if all fairminded jurists would agree the state court decision was incorrect." *Tremane Wood*, 907 F.3d at 1289 (internal quotation marks omitted).

2. Section 2254(d)(2) Standards

"[A] state court-decision unreasonably determines the facts if the state court plainly misapprehended or misstated the record in making its findings, and the misapprehension goes to a material factual issue that is central to petitioner's claim." *Id.* (brackets and internal quotation marks omitted). "[A] state-court factual determination is not unreasonable merely because the federal habeas court would have reached a different conclusion in the first instance." *Wood v. Allen*, 558 U.S. 290, 301 (2010) (*Holly Wood*). "[E]ven if reasonable minds reviewing the record might disagree about the finding in question, on habeas review that does not suffice to supersede the trial court's determination." *Id.* (brackets, ellipsis, and internal quotation marks omitted).

B. Ineffective-Assistance Standards

For this ineffective-assistance claim, the clearly established federal law is *Strickland v. Washington*, 466 U.S. 668 (1984).[1] Under *Strickland*, a defendant must demonstrate both that counsel's performance was deficient and that counsel's deficient performance prejudiced his defense. *Id.* at 687.

"[T]he defendant must show that counsel's representation fell below an objective standard of reasonableness." *Id.* at 688. "[T]he performance inquiry must be whether counsel's assistance was reasonable considering all the circumstances." *Id.* To satisfy the performance prong, "the defendant must overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy." *Id.* at 689 (internal quotation marks omitted). "Judicial scrutiny of counsel's performance must be highly deferential," and "a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." *Id.* A court must make every effort to "reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." *Id.*

Under the prejudice prong, the defendant must show "that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." *Id.* at

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[1] Mr. Boyett suggests that this case should be measured under the standards set forth in *United States v. Cronic*, 466 U.S. 648, 659 (1984). This assertion contradicts his counsel's concession at the state-court evidentiary hearing that *Strickland* controls. And his counsel was correct. Because the "argument is not that his counsel failed to oppose the prosecution throughout the . . . proceeding as a whole, but that his counsel failed to do so at specific points," the proper precedent is *Strickland* rather than *Cronic*. *Bell v. Cone*, 535 U.S. 685, 697-98 (2002).

687. The defendant satisfies the prejudice prong by establishing "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* at 694. "The likelihood of a different result must be substantial, not just conceivable." *Harrington v. Richter*, 562 U.S. 86, 112 (2011).

II. Discussion

In light of the deferential standards applicable under both § 2254(d) and *Strickland*, our review of the state court's denial of an ineffective-assistance claim is "doubly deferential"; "[w]e take a highly deferential look at counsel's performance through the deferential lens of § 2254(d)." *Cullen*, 563 U.S. at 190 (citation and internal quotation marks omitted). "When § 2254(d) applies, the question is not whether counsel's actions were reasonable," but instead, it is "whether there is any reasonable argument that counsel satisfied *Strickland*'s deferential standard." *Harrington*, 562 U.S. at 105. "Under § 2254(d), a habeas court must determine what arguments or theories supported . . . the state court's decision; and then it must ask whether it is possible fairminded jurists could disagree that those arguments or theories are inconsistent with the holding in a prior decision of [the Supreme] Court." *Id.* at 102. "[A] state prisoner must show that the state court's ruling on the claim being presented in federal court was so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement." *Id.* at 103. "[B]ecause the *Strickland* standard is a general standard, a state court has even more latitude to

reasonably determine that a defendant has not satisfied that standard." *Knowles v. Mirzayance*, 556 U.S. 111, 123 (2009).

Although the state court did not cite *Strickland*, it identified and analyzed the applicable factors (performance and prejudice). Neither its reasoning nor its result was contrary to or an unreasonable application of *Strickland*. As required by *Strickland*, the state court made an effort to reconstruct the circumstances, affording deference to counsel. It concluded that in light of Mr. Boyett's strong case for self-defense, it was not deficient performance for trial counsel effectively to abandon the specific-intent defense when Dr. Martinez abruptly declined to testify. It further concluded that Mr. Boyett had not suffered prejudice. At a minimum, these are reasonable arguments that counsel satisfied *Strickland*'s deferential standards. *See Harrington*, 562 U.S. at 105. In *Knowles v. Mirzayance*, for example, the Supreme Court refused to disturb a state court's rejection of an ineffective-assistance claim arising out of a recommendation that a client abandon a weak position after witnesses refused to testify:

> It was not unreasonable for the state court to conclude that his defense counsel's performance was not deficient when he counseled Mirzayance to abandon a claim that stood almost no chance of success. . . . [T]his court has never required defense counsel to pursue every claim or defense, regardless of its merit, viability, or realistic chance of success.

556 U.S. at 123.[2] And even if the state court erred in its conclusions, that does not make its decision unreasonable. *See Williams*, 529 U.S. at 411. In sum, the state court's ruling

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[2] Mr. Boyett suggests that counsel was ineffective and violated his right to compulsive process in failing to subpoena Dr. Martinez to testify. It is not clear whether Mr. Boyett raised this aspect of his ineffective-assistance argument before the state

(continued)

is not "so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement." *Harrington*, 562 U.S. at 103.

Finally, there is no indication that the state court's decision "was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding," so as to satisfy § 2254(d)(2). Even if we were to disagree with a state-court finding, "a state-court factual determination is not unreasonable merely because the federal habeas court would have reached a different conclusion in the first instance." *Holly Wood*, 558 U.S. at 301. Again, at a minimum, reasonable minds might disagree about the state court's findings, meaning that Mr. Boyett is not entitled to relief under § 2254(d)(2). *See id.*

III. CONCLUSION

Mr. Boyett's motion to proceed without prepayment of costs and fees is granted. The district court's judgment is affirmed.

Entered for the Court

Allison H. Eid
Circuit Judge

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courts. But in any event, the Supreme Court has stated, "[c]ompetence does not require an attorney to browbeat a reluctant witness into testifying." *Knowles*, 556 U.S. at 125. Moreover, Dr. Martinez's withdrawal suggests that her testimony might have damaged rather than aided Mr. Boyett's case.

FILED
United States Court of Appeals
Tenth Circuit

September 20, 2018

Elisabeth A. Shumaker
Clerk of Court

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

CECIL BOYETT,

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v.

R.C. SMITH, Warden, Lea County Correctional Facility, and ATTORNEY GENERAL FOR THE STATE OF NEW MEXICO,

Respondents - Appellees.

No. 18-2107
(D.C. No. 2:17-CV-00374-KG-CG)
(D. N.M.)

ORDER GRANTING IN PART AND DENYING IN PART A CERTIFICATE OF APPEALABILITY*

Before **BRISCOE**, **HOLMES**, and **MATHESON**, Circuit Judges.

Petitioner Cecil Boyett, a New Mexico state prisoner appearing *pro se*, seeks a certificate of appealability (COA) in order to appeal from the district court's denial of his 28 U.S.C. § 2254 petition for federal habeas relief. For the reasons outlined below, we grant Boyett a COA as to a claim of ineffective assistance of trial counsel, but deny him a COA on his remaining claims. As to the ineffective assistance of counsel claim on which we grant Boyett a COA, we

* This order is not binding precedent except under the doctrines of law of the case, res judicata, and collateral estoppel. It may be cited, however, for its persuasive value consistent with Fed. R. App. P. 32.1 and 10th Cir. R. 32.1.

APPENDIX A - PART 2

direct respondents to file a response and to supplement the record with the materials necessary for us to resolve that claim.

I

The underlying crime

On February 5, 2004, a woman named Deborah Roach approached Boyett's house and knocked on the front door. Boyett and Roach were familiar with and antagonistic towards each other due to the fact that they shared a romantic interest in the same woman, Renate Wilder. Although Roach and Wilder "were childhood friends who eventually moved in together and started an intimate relationship," "Wilder later met" and "became romantically involved" with Boyett. State v. Boyett, 185 P.3d 355, 357 (N.M. 2008). In fact, Boyett and Wilder were scheduled to be married on February 6, 2004. When Roach approached Boyett's house on February 5, 2004, and knocked on the front door, Boyett, who was inside at the time, grabbed a .357 revolver, opened the front door, and shouted at Roach to leave his property. Boyett then shot Roach in the head and killed her.

The state trial proceedings

Boyett was charged in New Mexico state court with first degree murder, in violation of N.M. Stat. Ann. § 30-2-1(A). The case proceeded to trial, where the State "argued to the jury that [Boyett] hated [Roach] . . . and shot her that afternoon to put an end to her meddling" in his relationship with Wilder. 185 P.3d at 357. Boyett, in contrast, "claimed that [Roach] came to the house that day intent on killing him to prevent his impending marriage to Wilder." Id. Boyett

testified that Roach was "furious" that day when he encountered her, and that "in the process of trying to run her off, he observed her draw the gun that he knew she routinely carried." Id. "In fear for his life," Boyett testified, he "raised his revolver and shot [her]." Id. Boyett testified "that if he had not shot her, she would have fired her gun and fatally wounded him." Id. Boyett also testified at trial regarding a serious brain injury that he suffered in 1998 and the effects that brain injury had on his cognitive abilities.

Boyett's two theories of defense were (1) "that he was not guilty because he acted lawfully in shooting [Roach], either in self[-]defense, defense of another, or defense of habitation," and (2) "that he was not guilty because he was unable," due to the 1998 brain injury, "to form the specific intent necessary to commit first degree murder." Id. Although Boyett's retained trial counsel filed with the trial court a list of three expert witnesses who could have purportedly testified in support of this latter defense, trial counsel "did not produce an expert witness at trial." Id. "The expert that [trial counsel] expected to testify regarding [Boyett's] specific intent, Dr. Lori Martinez, withdrew on the eve of her scheduled testimony after receiving police reports and other records from the State." Id. Boyett's trial counsel "did not offer testimony from the other experts" he had listed, "nor did he seek a continuance to procure such testimony." Id. at 357–58.

Boyett's trial counsel requested jury instructions on both of these theories of defense. The state trial court instructed the jury on self-defense and defense of another, but "concluded that the jury instruction related to defense of habitation

did not apply . . . because [Boyett] did not shoot [Roach] inside his home" Id. at 358 (citation omitted). The state trial court also "denied [Boyett's] instruction on inability to form specific intent because it required expert testimony and none had been provided." Id. (citation omitted).

"[T]he jury convicted [Boyett] of first degree murder." Id. The state trial court "sentenced [Boyett] to life in prison." Id.

The direct appeal

Boyett filed a direct appeal "challeng[ing] the [state] trial court's refusal to instruct the jury on defense of habitation and inability to form specific intent, as well as its denial of his motion for a new trial" regarding Dr. Martinez's withdrawal and his inability to obtain another expert to testify to the specific intent issue. Id. The Supreme Court of New Mexico rejected each of Boyett's arguments and affirmed his conviction. Id.

Although the Supreme Court of New Mexico rejected as erroneous the trial court's and State's position that the defense of habitation "requires an intruder to cross the threshold of the defendant's home," id. at 360, it nevertheless concluded that an instruction was not warranted because "there [wa]s no evidence to support the theory that [Boyett] killed [Roach] in defense of his habitation." Id. at 361.

As for the state trial court's refusal to instruct the jury on Boyett's inability to form specific intent, the Supreme Court of New Mexico noted that "[t]he only evidence that [Boyett] presented linking his organic brain damage to his inability to form specific intent was his own testimony regarding his [brain] injury." Id. at

362. And that testimony, the court noted, "did not reasonably tend to show that [he] was unable to form specific intent at the time of the murder." Id. Consequently, it held "that the [state] trial court properly refused to instruct the jury on inability to form specific intent." Id.

Lastly, the Supreme Court of New Mexico rejected Boyett's argument that the state "trial court erred in refusing to grant him a new trial so that he could present expert witness testimony regarding his inability to form a specific intent defense." Id. In doing so, the court noted that "[a]fter Dr. Martinez refused to testify, [Boyett] never subpoenaed her or any other expert to testify about his inability to form specific intent, nor did he move for a continuance to secure such testimony." Id. at 363.

State habeas proceedings

Boyett then filed a petition for state habeas relief asserting two distinct claims. First, he argued that his trial counsel was ineffective for failing to seek a continuance or secure a different expert witness after Dr. Martinez refused to testify. Second, he argued that he was denied the right to be present at all critical stages of the trial because, he alleged, at some point outside of his presence a juror was replaced with an alternate.

In mid-April of 2016, the state district court held an evidentiary hearing on Boyett's claims and heard testimony from several witnesses, including Boyett, the lead prosecutor in his trial, his appellate counsel, and two expert witnesses: Dr. Susan Cave, a psychologist who testified about the impact of Boyett's brain injury

on his ability to form specific intent, and Larry Renner, an expert in blood spatter and crime scene reconstruction.

Following the hearing, the state district court rejected Boyett's petition in its entirety. In doing so, the state district court found, in light of the evidence presented at trial and the evidence presented at the evidentiary hearing, that Boyett's trial counsel pursued a plausible, rational trial strategy by foregoing the lack-of-specific-intent defense in favor of the self-defense and defense of others theories. In reaching this conclusion, the state district court concluded that a reasonably competent trial attorney could have chosen to abandon the lack-of-specific-intent defense in favor of a theory of self-defense. The state district court concluded that the available evidence better supported self-defense, and it also concluded that presenting both defenses could have confused the jury and undermined defense counsel's credibility. Also, the state district court concluded it was reasonable for counsel to focus on self-defense because that theory, if successful, would have resulted in acquittal, whereas the incapacity defense would simply have resulted in conviction of a lesser offense. Lastly, the state district court concluded that Boyett was not prejudiced by trial counsel's performance because the evidence presented at trial established that he took actions that required specific intent, and also because the expert testimony presented by Boyett at the evidentiary hearing established, at best, that he was only "likely impaired" at the time of the offense. As for Boyett's claim that he was denied the right to be present at all critical stages of trial, the state district court found, as a matter of

historical fact, that no juror was replaced and that Boyett was present at all stages of the trial.

Boyett filed a petition for writ of certiorari with the Supreme Court of New Mexico. That was denied.

The federal habeas petition

On March 27, 2017, Boyett initiated these federal proceedings by filing a *pro se* petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254. The petition asserted four broad grounds for relief: (1) ineffective assistance of trial counsel; (2) denial of the right to be present at all critical stages of the trial; (3) denial of the right to due process (as a result, in part, of the state trial court's denial of requested jury instructions); and (4) prosecutorial misconduct due to withholding of exculpatory evidence.

The magistrate judge assigned to the case reviewed Boyett's petition and determined that it contained four claims that had been exhausted in the New Mexico state courts: (1) ineffective assistance of trial counsel for failure to present expert testimony regarding Boyett's brain injuries in support of his lack-of-specific-intent defense (or to seek a continuance of trial to obtain and present such testimony); (2) denial of the right to be present at all stages of trial; (3) denial of due process resulting from the trial court's refusal to instruct the jury on the defense of habitation; and (4) denial of due process resulting from the trial court's refusal to instruct the jury on Boyett's purported inability to form specific intent. The magistrate judge concluded, however, that all other claims contained in the

petition were unexhausted and recommended that Boyett be given an opportunity to file an amended petition or voluntarily dismiss the unexhausted claims. Boyett responded by voluntarily dismissing the unexhausted claims in his petition.

The magistrate judge then reviewed the four exhausted claims on the merits and concluded that the New Mexico state courts' resolution of those claims was neither contrary to nor an unreasonable application of clearly established federal law. The magistrate judge also concluded that the New Mexico state courts did not make any unreasonable determinations of fact in denying the claims. Consequently, the magistrate judge recommended that Boyett's petition be denied in its entirety.

Boyett timely objected to the magistrate judge's report and recommendation.

On July 13, 2018, the district court issued an order overruling Boyett's objections, adopting the magistrate judge's report and recommendation in its entirety, denying Boyett's petition, and dismissing the case with prejudice. The district court also denied Boyett a COA.

Final judgment was entered in the case on July 13, 2018. Boyett filed his notice of appeal on July 23, 2018. Boyett has since filed an application for COA with this court.

II

To obtain a COA from this court, Boyett must make "a substantial showing of the denial of a constitutional right," 28 U.S.C. § 2253(c)(2), by demonstrating

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) (quotation marks omitted). In other words, he must show that the district court's resolution was either "debatable or wrong." Slack v. McDaniel, 529 U.S. 473, 484 (2000). We decide whether Boyett has made this showing by "a preliminary, though not definitive, consideration" of the merits of the issues on which he seeks a COA. Miller-El v. Cockrell, 537 U.S. 322, 338 (2003).

Turning first to Boyett's claim that his trial counsel was ineffective for failing to present expert testimony at trial regarding Boyett's brain injury and its effect on his ability to form specific intent to murder Roach (and trial counsel's related failure to request a continuance to obtain and present such expert testimony), we are persuaded after reviewing the limited record that reasonable jurists could disagree with the district court's conclusion that the state district court's dismissal of this claim was consistent with the standards of review outlined in 28 U.S.C. § 2254(d). More specifically, we conclude that reasonable jurists could disagree as to whether the state district court made two errors in rejecting the claim. First, the state district court concluded that the testimony provided by Dr. Cave at the evidentiary hearing "would have been insufficient to permit the requisite instruction of lack of or inability to form specific intent." Dist. Ct. Docket No. 11, Exh. 5 at 22. But that conclusion was arguably inconsistent with the testimony of Dr. Cave, who testified that, had she been called as a witness at

Boyett's trial, she would have testified that he lacked the capacity, due to his brain injury, to form the specific intent to kill Roach (as opposed to the intent to shoot her). See Mathews v. United States, 485 U.S. 58, 63 (1988) ("As a general proposition a defendant is entitled to an instruction as to any recognized defense for which there exists evidence sufficient for a reasonable jury to find in his favor."). Second, the state district court concluded that "[r]easonably competent trial counsel could have reasonably chosen not to pursue a mental condition theory in order to avoid a conflict with the self-defense theory," and that "[r]easonably competent trial counsel could [also] reasonably have decided to abandon the diminished capacity claim when his expert [Dr. Martinez] changed her opinion and refused to testify." Dist. Ct. Docket No. 11, Exh. 5 at 23. The problem, however, is that the record appears to indicate that Boyett's trial counsel did not knowingly and intentionally adopt either of these strategies, and instead continued to pursue the lack-of-specific-intent defense through the conclusion of the trial proceedings and in filing a motion for new trial. Further, it appears from the chronology of events preceding trial that no expert was called in support of the diminished capacity defense because Dr. Martinez withdrew, and not because of any trial strategy decision of trial counsel. For these reasons, we conclude that a COA is warranted as to this claim of ineffective assistance of trial counsel.

As for Boyett's remaining claims, we conclude that no COA is warranted. With respect to Boyett's claim that he was denied the right to be present at all stages of trial, there is simply no indication that the state district court, in rejecting

Boyett's state habeas petition, made "an unreasonable determination of the facts" in finding that no juror was replaced and that Boyett was present at all stages of trial. 28 U.S.C. § 2254(d)(2). And, with respect to Boyett's claims that he was denied due process due to the state trial court's refusal to instruct the jury on certain defenses, we are not persuaded that the Supreme Court of New Mexico's rejection of those claims "was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States." Id. § 2254(d)(1).

Boyett's application for COA is GRANTED IN PART and DENIED IN PART. Respondents are ORDERED to file a response, within thirty days of this order, addressing Boyett's claim that his trial counsel was ineffective for failing to present at trial, and in his motion for new trial, expert testimony regarding Boyett's brain injury. Respondents are further ORDERED to supplement the record on appeal with all materials necessary for this court's review of that ineffective assistance of counsel issue.

Entered for the Court

Mary Beck Briscoe
Circuit Judge

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF NEW MEXICO

CECIL BOYETT,

Petitioner,

No. CV 17-374 KG/CG

v.

R.C. SMITH, et al.,

Respondents.

ORDER ADOPTING CHIEF MAGISTRATE JUDGE'S PROPOSED FINDINGS AND RECOMMENDED DISPOSITION

THIS MATTER is before the Court on Chief Magistrate Judge Carmen E. Garza's *Proposed Findings and Recommended Disposition* (the "PFRD"), (Doc. 24), filed March 20, 2018; and Petitioner Cecil Boyett's *Objections to the U.S. Magistrate's Recommendations/Findings on Petitioner's 28 U.S.C. Section 2254 Petition for Writ of Habeas Corpus filed March 27, 2018* (the "Objections"), (Doc. 25), filed March 29, 2018. In the PFRD, the Chief Magistrate Judge found that Petitioner is not entitled to relief under 28 U.S.C. § 2254, and therefore recommended denying Petitioner's *Petition Under 28 U.S.C. § 2254 for Writ of Habeas Corpus* (the "Petition"), (Doc. 1) and his *Motion for Order of Release from Custody; Second Request for Appointment of Counsel* (the "Motion for Release"), (Doc. 19). (Doc. 24 at 19). Also before the Court is Petitioner's *Motion to Produce; or in the Alternative-Issuance of Subpoena to April Perea, State Trial Jury Member–Pursuant to Rule 45(3)(c)(i), Fed. Rules of Civil Procedure* (the "Motion to Produce"), (Doc. 26), filed June 18, 2018; Respondents' *Response in Opposition to Plaintiff's Motion to Produce; or in the Alternative Issuance of Subpoena to April Perea, State Trial Jury Member–Pursuant to Rule 45(3)(c)(i), Fed. Rules of Civil Procedure [Doc. 26]*, (Doc. 27), filed June 25, 2018; and Petitioner's *Reply in Opposition*

APPENDIX B

to Respondent's Response in Opposition to Plaintiff's Motion to Produce; or in the Alternative . . . , (Doc. 28), filed July 2, 2018.

The parties were informed that objections to the PFRD were due within fourteen days. *Id.* Petitioner timely objected to the PFRD. (Doc. 25). Respondents did not object to the PFRD or respond to the Objections, and the time for doing so has passed. *See* Rule 12 of the Rules Governing Section 2254 Proceedings in the United States District Courts (the "Rules Governing § 2254 Proceedings"); Fed. R. Civ. P. 72(B)(2). Following a *de novo* review of the Petition, Motion for Release, PFRD, Objections, and Motion to Produce, the Court will overrule the Objections, adopt the PFRD, deny the Petition, Motion for Release, and Motion to Produce, and dismiss this case with prejudice.

I. Background

This case arises from Petitioner's trial and conviction related to the shooting death of Deborah Roach. On February 5, 2004, Petitioner shot Ms. Roach, killing her, in front of his house. Petitioner pursued two defenses at trial: first, that he was innocent because he shot Ms. Roach in self-defense, defense of another, and defense of his home, or "habitation;" and second, that he was innocent of first-degree murder because he was incapable of forming specific intent to murder at the time of the incident. (Doc. 11-2 at 4-5). In support of these theories, Petitioner testified that he knew Ms. Roach regularly carried a gun, that she drew her gun first, and that he shot her before she could shoot him. *Id.* Petitioner also testified that he suffered serious brain injuries years earlier, and he theorized those injuries made him incapable of forming the intent to murder. *Id.* at 13-14. Petitioner also planned to call an expert witness in support of his incapacity theory. *Id.* at 4-5; *see* (Doc. 22-1 at 2). However, before her scheduled testimony, the expert

witness informed Petitioner's counsel she would not testify on his behalf. (Doc. 22-1 at 2). Petitioner did not call any other experts or request a continuance to do so.

At the conclusion of trial, Petitioner requested jury instructions on both of his theories. The trial court granted instructions on self-defense and defense of another, but denied instructions on defense of habitation or inability to form specific intent. (Doc. 12-2 at 33-34). The trial court first declined to instruct on defense of habitation because there was no evidence Petitioner shot Ms. Roach inside his home, which the trial judge thought was necessary under New Mexico law. (Doc. 11-2 at 5). The trial court next denied an instruction on inability to form specific intent because it required expert testimony and none had been provided. *Id.*

The jury found Petitioner guilty of first-degree, willful and deliberate murder in violation of NMSA 1978, Section 30-2-1(A)(1) (1994). (Doc. 11-1 at 1-2). Petitioner filed a motion for a new trial, arguing in part that he was prejudiced by the lack of expert testimony on his ability to form specific intent. (Doc. 22-1 at 2, 11-13). The trial court denied the motion and imposed the mandatory life-sentence. *Id.* at 25-26.

Petitioner then appealed his conviction, arguing the trial court erred by denying his requested jury instructions and his motion for a new trial. (Doc. 11-1 at 22-23). The New Mexico Supreme Court affirmed on all grounds. (Doc. 11-2 at 1-21); *State v. Boyett*, 2008-NMSC-030, 144 N.M. 184, 185 P.3d 555. First, the court affirmed the denial of an instruction on defense of habitation. The court reasoned that, in New Mexico, defense of habitation requires evidence that the commission of a felony inside the home was imminent and that deadly force was necessary to prevent the commission of the felony. *Boyett*, 2008-NMSC-030, ¶ 15. The court found that such evidence was absent in Petitioner's case. *Id.*, ¶ 25. Second, the court agreed that expert testimony was necessary to link Petitioner's brain injury with his alleged

inability to form specific intent; therefore the court found that the trial court properly denied the instruction. *Id.*, ¶ 29. Finally, the court held that the trial court did not err in denying the motion for a new trial because Petitioner failed to show how he was prejudiced by the lack of expert testimony. *Id.*, ¶¶ 34-35.

Next, Petitioner filed a petition for writ of habeas corpus in state court, claiming he was denied his rights to effective assistance of counsel and to be present at every stage of the trial. (Doc. 11-2 at 23-39). Petitioner argued his trial counsel was ineffective in part by failing to ask for a continuance or secure a different expert witness. (Doc. 1 at 5). Petitioner also claimed that he was denied his right to be present at all critical stages of trial because a juror was replaced with an alternate outside his presence. *Id.* at 7.

On April 13, 15, and 18, 2016, the Thirteenth Judicial District Court of New Mexico held an evidentiary hearing and heard testimony from several witnesses. First, Petitioner testified that at the end of trial the jury was sworn in and dismissed for lunch, and when they returned, an alternate juror was in the jury box while an original juror, April Perea, was seated in the gallery. (Doc. 11-3 at 14-17). Susan McLean, the trial prosecutor, testified that Petitioner's recollection was mistaken. (Doc. 11-4 at 42-47). Ms. McLean testified instead that the jurors were sworn in and sequestered, not dismissed, and returned to court to render their verdict, and that no juror was replaced. *Id.* Further, Ms. McLean testified the trial judge always polled jurors by name, and that the trial record shows Ms. Perea was polled by name. *Id.* The trial transcript, which was before the state habeas court, reflects that Ms. Perea was polled by name. (Doc. 22-1 at 31); (Doc. 11-4 at 45); *see* (Doc. 11-5 at 19).

Regarding Petitioner's inability to form specific intent, Dr. Susan Cave testified on Petitioner's behalf. (Doc. 11-3 at 17). Dr. Cave stated that if she had been called as an expert

witness at trial, she would have testified that Petitioner could not form specific intent at the time of incident due to a combination of factors, including his brain injuries. *Id.* at 31-32. On cross examination, Dr. Cave opined that it was "highly likely" that Petitioner's "ability to form specific intent was likely impaired." *Id.* at 37. Dr. Cave's opinion, "to a reasonable degree of certainty," was that Petitioner was not capable of forming specific intent to kill at the time of the incident. *Id.* at 52.

Next, Sheila Lewis, Petitioner's appellate counsel, testified that Petitioner's trial counsel was ineffective due to his failure to secure an expert like Dr. Cave. (Doc. 11-4 at 7). Ms. Lewis believed it was ineffective assistance, rather than a tactical decision, given trial counsel's proposed jury instructions and the motion for a new trial. *Id.* at 12-13, 17-23. On questioning by the state court, Ms. Lewis agreed that a reasonable trial attorney could have chosen to abandon the incapacity theory, but she maintained that Petitioner's trial counsel did not consciously choose to abandon the theory. *Id.* at 15, 21-22. Instead, Ms. Lewis felt that Petitioner's trial counsel negligently failed to pursue the incapacity theory. *Id.* at 22-36.

Finally, attorney Paul Kennedy testified as an expert witness in criminal defense litigation. (Doc. 22-1 at 31-71). In response to Ms. Lewis' testimony, Mr. Kennedy stated there is inherent tension between defenses based on self-defense and an inability to form specific intent. *Id.* at 43-46. Mr. Kennedy testified it can be difficult to explain to jurors how a defendant is unable to form specific intent to kill but still able to intentionally defend himself. *Id.*; *see id.* at 65. Further, Mr. Kennedy believed the self-defense theory was stronger than the incapacity theory. *Id.* at 41-47. In Mr. Kennedy's opinion, emphasizing self-defense over incapacity was a reasonable trial tactic. *Id.* at 46-48.

Following the evidentiary hearings, the state court found Petitioner was not entitled to relief under either of his claims. (Doc. 11-5 at 17-25). First, the state court found Petitioner's trial counsel pursued a plausible, rational trial strategy; therefore Petitioner received effective assistance of counsel. *Id.* at 24-25. Second, the court found that no juror was replaced outside Petitioner's presence; therefore he was present at all stages of trial. *Id.* at 24-25. Petitioner filed a petition for writ of certiorari with the New Mexico Supreme Court, (Doc. 11-5 at 27-37). That petition was denied, (Doc. 11-5 at 48).

Petitioner subsequently filed the instant Petition. As originally filed, the Petition contains four broad claims: (1) ineffective assistance of counsel; (2) denial of the right to be present at all critical stages of trial; (3) denial of the right to due process; and (4) prosecutorial misconduct. (Doc. 1 at 5-10). The Petition and supporting documents included several other claims, for instance that the trial judge should have recused himself because of his personal and business relationship with Petitioner's trial counsel, (Doc. 1 at 25); that New Mexico Supreme Court Justice Petra Jimenez Maes improperly participated in Petitioner's case after recusing herself, (Doc. 1 at 16); and that Petitioner was denied his right to compulsory process, (Doc. 16 at 4).

The Chief Magistrate Judge reviewed the Petition and found that it contains four exhausted claims under § 2254(b)(1)(A): (1) ineffective assistance of counsel due to trial counsel's failure to present expert testimony about Petitioner's brain injuries; (2) denial of Petitioner's right to be present at all stages of trial; (3) denial of due process arising from the denial of the defense of habitation jury instruction; and (4) denial of due process arising from the denial of the inability to form specific intent jury instruction. (Doc. 17 at 14-15). The Chief Magistrate Judge found that all other claims in the Petition were not properly before this Court because Petitioner had not presented them in state court. *Id.*

Because the Petition contained both exhausted and unexhausted claims, the Chief Magistrate Judge recommended allowing Petitioner to choose between amending his Petition to contain only exhausted claims, or dismissing the Petition without prejudice so he could exhaust all of his claims. *Id.* at 16-17. The Chief Magistrate Judge explained that if Petitioner chose to amend the Petition to delete his unexhausted claims, those claims would be deemed abandoned. *Id.* Petitioner chose to voluntarily dismiss all claims except for the four identified as exhausted. (Doc. 18 at 2-3). Petitioner also filed his Motion for Release, asking to be released from state custody pending a ruling on the Petition. (Doc. 19).

The Chief Magistrate Judge proceeded to analyze Petitioner's four exhausted claims. (Doc. 24). The Chief Magistrate Judge explained that, under § 2254, Petitioner must show that the state courts' decisions were contrary to or an unreasonable application of clearly established federal law, or that they were unreasonable determinations of fact. § 2254(d). The Chief Magistrate Judge found that the state habeas court's decision that Petitioner's trial counsel was not ineffective was not contrary to federal law. (Doc. 24 at 11-12). In addition, the Chief Magistrate Judge found that the state habeas court's conclusion that Ms. Perea was not replaced outside Petitioner's presence was not unreasonable given the evidence and testimony presented. *Id.* at 13-15. Finally, the Chief Magistrate Judge found that the denial of Petitioner's requested jury instructions was not contrary to or an unreasonable application of federal law. *Id.* at 15-18. The Chief Magistrate Judge therefore recommended that Petitioner's Petition and Motion for Release be denied. *Id.* at 19.

Petitioner has timely objected to the PFRD. Petitioner states generally that the state proceedings were fundamentally unfair to him, referring to Justice Maes' participation in his case. (Doc. 25 at 2). Petitioner poses a number of questions for the Court to consider, including:

"Did the state habeas court err by disregarding expert witness testimony in favor of defendant?"; "Did the court err by failing to produce April Perea for required testimony?"; and "Did the court err by failing to grant Defendant a new trial based on multiple constitutional violation claims?" *Id.* at 4. Petitioner argues that § 2254's standard of review does not apply in his case because he claims he is actually innocent of first degree murder, and also argues that he is entitled to an evidentiary hearing because he diligently developed his claims in state court. *Id.* at 5, 10.

Petitioner reiterates that his trial counsel was ineffective for failing to secure expert witness testimony and cites several cases in support of this argument. *Id.* at 6-7, 9-11. In addition, Petitioner raises his prior arguments that the trial court judge should have recused himself and that his right to compulsory process was violated. *Id.* at 7-8. Petitioner also raises two new arguments in his Objections: first, that the trial court erred by denying a motion for a directed verdict, *id.*, and second that the "equity of the statute" rule was not applied in his case, *id.* at 11-12. Petitioner did not object to the Chief Magistrate Judge's analysis of any claim other than ineffective assistance of counsel or to the recommendation regarding his Motion for Release. Respondents did not respond to the Objections, and the time for doing so has passed.

Finally, Petitioner has filed a Motion to Produce a statement from Ms. Perea. (Doc. 26). Petitioner asks that the Court order a government attorney to find Ms. Perea and take a statement from her. *Id.* at 1-2. Alternatively, Petitioner asks for permission to subpoena Ms. Perea. *Id.* at 3. Liberally construed,[1] Petitioner is requesting leave to conduct discovery or expand the record under Rules 6 and 7 of the Rules Governing § 2254 Proceedings. Respondents contend that because Petitioner received an evidentiary hearing in state court, the Court may not consider new evidence on this claim. (Doc. 27 at 1-2).

[1] Because Plaintiff appears *pro se*, the Court must liberally construe his pleadings, though the Court may not act as his advocate. *Hall v. Bellmon*, 935 F.2d 1106, 1110 (10th Cir. 1991).

II. Analysis

A. *Standards of Review under § 2254*

Under 28 U.S.C. § 2254, a person in state custody may petition a federal court for relief on the ground that he is in custody in violation of the United States Constitution or laws. § 2254(a). A petition under § 2254 may not be granted unless the state court judgment: (1) resulted in a decision contrary to or involved an unreasonable application of clearly established federal law, as determined by the Supreme Court; or (2) resulted in a decision based on an unreasonable determination of the facts in light of the evidence presented. §§ 2254(d)(1)-2). Factual findings are presumed correct, and the petitioner must rebut that presumption by clear and convincing evidence. § 2254(e)(1).

A state court decision is "contrary to" clearly established law if it "applies a rule that contradicts the governing law set forth" in Supreme Court cases, or if it "confronts a set of facts that are materially indistinguishable" from a Supreme Court decision and "nevertheless arrives at a result different from" the Supreme Court decision. *Williams v. Taylor*, 529 U.S. 362, 405-06 (2000). Similarly, a state court decision constitutes an "unreasonable application" of federal law when a state "unreasonably applies" Supreme Court precedent "to the facts of a prisoner's case." *Id.* at 409. The state court decision must be more than incorrect or erroneous. *Renico v. Lett*, 559 U.S. 766, 773 (2010) (citation and quotation omitted). "Rather, the application must be 'objectively unreasonable.'" *Id.* (quoting *Williams*, 529 U.S. at 409). This imposes a "highly deferential standard of review," and state court decisions must be given the benefit of the doubt. *Id.* (citation and quotation omitted).

B. *Law Regarding Objections*

Pursuant to Rule 8 of the Rules Governing § 2254 Proceedings, a district judge may, under 28 U.S.C. § 636(b), refer a pretrial dispositive motion to a magistrate judge for proposed findings of fact and recommendations for disposition. Within fourteen days of being served, a party may file objections to this recommendation. Rule 8(b) of the Rules Governing § 2254 Proceedings. A party may respond to another party's objections within fourteen days of being served with a copy; the rule does not provide for a reply. FED. R. CIV. P. 72(b).[2]

When resolving objections to a magistrate judge's recommendation, the district judge must make a *de novo* determination regarding any part of the recommendation to which a party has properly objected. 28 U.S.C. § 636(b)(1)(C). Filing objections that address the primary issues in the case "advances the interests that underlie the Magistrate's Act, including judicial efficiency." *United States v. One Parcel of Real Prop., With Bldgs., Appurtenances, Improvements, & Contents*, 73 F.3d 1057, 1059 (10th Cir. 1996). Objections must be timely and specific to preserve an issue for *de novo* review by the district court or for appellate review. *Id.* at 1060. Additionally, issues "raised for the first time in objections to the magistrate judge's recommendation are deemed waived." *Marshall v. Chater*, 75 F.3d 1421, 1426 (10th Cir. 1996); *see also United States v. Garfinkle*, 261 F.3d 1030, 1031 (10th Cir. 2001) ("In this circuit, theories raised for the first time in objections to the magistrate judge's report are deemed waived.").

C. *Petitioner's Objections*

1. *Objection Regarding the Standard of Review*

First, Petitioner objects to the standard of review the Chief Magistrate Judge applied to his Petition. In the PFRD, the Chief Magistrate Judge applied the standard of review in §

[2] The Federal Rules of Civil Procedure may be applied to the extent that they are not inconsistent with any statutory provisions or the Rules Governing Section 2255 Proceedings. Rule 12 of the Rules Governing Section 2255 Proceedings for the United States District Courts.

2254(d). (Doc. 24 at 7-8). Petitioner claims § 2254(d)'s standard of review does not apply in this case because he is innocent. (Doc. 25 at 10). Petitioner cites *House v. Bell*, 547 U.S. 518 (2006), and *Schlup v. Delo*, 513 U.S. 298 (1995), in support of this argument. *Id.*

Both *Schlup* and *House* concern claims raised in habeas corpus petitions that were not raised in earlier petitions. Normally, if a petitioner raises a claim in a second habeas petition that was not raised in the first petition, courts cannot consider the new claim. *See House*, 547 U.S. at 533-66. *Schlup* and *House* discuss the "miscarriage of justice" exception to this rule. *See Schlup*, 513 U.S. at 317-23; *House*, 547 U.S. at 537-38. In *Schlup*, the Supreme Court held that courts may consider new claims if the petitioner shows that in light of new evidence "'a constitutional violation has probably resulted in the conviction of one who is actually innocent.'" *Schlup*, 513 U.S. at 320-27 (quoting *Murray v. Carrier*, 477 U.S. 478, 496 (1986)). In order to qualify for the exception, a petitioner must present new, reliable evidence that was not presented at trial. *Id.* at 324. In *House*, the Supreme Court held the *Schlup* standard applies to new claims in later petitions under § 2254. *House*, 547 at 539. If a petitioner meets the exception, the claims are reviewed under the standards in § 2254(d). *See Floyd v. Vannoy*, 887 F.3d 214, 227-33, 240-41 (5th Cir. 2018); *Jones v. Colloway*, 842 F.3d 454, 463-64 (7th Cir. 2016).

While *Schlup* and *House* discuss the standard for whether a court may hear claims in successive habeas petitions, the § 2254(d) standard still applies to the merits of those claims. The Court notes that Petitioner has raised two new arguments in his Objections. To the extent Petitioner contends the miscarriage of justice exception applies to those arguments, Petitioner must present new, reliable evidence that was not presented at trial. *Schlup*, 513 U.S. at 324. Petitioner has not done so here, so the Court finds that the miscarriage of justice exception does

not apply. The Court further finds that § 2254(d) provides the correct standard of review for Petitioner's claims. Therefore, the Court will overrule this objection.

2. Whether Petitioner is Entitled to an Evidentiary Hearing

Second, Petitioner argues he is entitled to an evidentiary hearing because he diligently developed the factual basis of his claims in state court. (Doc. 25 at 5). As support, Petitioner cites *Williams v. Taylor*, 529 U.S. 420 (2000), and *Littlejohn v. Trammell*, 704 F.3d 817 (10th Cir. 2013). (Doc. 25 at 5, 11). Petitioner cites a third case, *Lancaster v. Metrish*, 683 F.3d 740 (6th Cir. 2012), but that case was overruled by the Supreme Court in *Metrish v. Lancaster*, 569 U.S. 351 (2013), so the Court cannot rely on it.

The Supreme Court has held that in order to receive an evidentiary hearing on a § 2254 petition, petitioners must diligently pursue their claims in state court. *Williams*, 529 U.S. at 432-38. Diligence typically requires that a petitioner, "at a minimum, seek an evidentiary hearing in state court." *Id.* at 437. If a petitioner was not diligent, he is not entitled to a hearing unless he can show one of two exceptions. *Id.*; § 2254(e)(2). The exceptions are if a claim relies on "a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court," or if a claim relies on "a factual predicate that could not have been previously discovered through the exercise of due diligence." § 2254(e)(2)(A)(i)-(ii). Petitioner's claims do not rest on a new rule of constitutional law or on a new factual basis. Rather, Petitioner's claims rest on settled law and the facts presented to the state court. Accordingly, neither exception applies here.

Being diligent, however, does not necessarily entitle a petitioner to an evidentiary hearing. In *Cullen v. Pinholster*, 563 U.S. 170, 181-82 (2011), the Supreme Court held that if a petitioner receives an evidentiary hearing in his state habeas corpus proceedings, the petitioner is not entitled to an evidentiary hearing in federal court. Rather, the federal court must review the

petitioner's claims based on the record before the state court. *Id.* In other words, if the petitioner was diligent and received an evidentiary hearing in state court, the federal court cannot hold another evidentiary hearing to supplement the first one. *See Davis v. Workman*, 695 F.3d 1060, 1072-73 (10th Cir. 2012) (stating review under § 2254 "must be confined to the state-court record").

In contrast, if a petitioner diligently pursues claims and is denied an evidentiary hearing in state court, then the federal court may conduct its own evidentiary hearing. *See Littlejohn*, 704 F.3d at 867-68. In *Littlejohn*, the petitioner asked for a hearing in state court but was denied one for procedural reasons, so the Tenth Circuit found he was diligent and entitled to an evidentiary hearing in federal court. *Id.* Nevertheless, the Tenth Circuit recognized that if the state courts had granted an evidentiary hearing, federal courts could not conduct a second one under *Cullen*. *Id.* at 868, n. 26.

Petitioner is therefore correct that in order to obtain an evidentiary hearing, he must have diligently pursued and developed the factual basis of his claims in state court. *See Williams*, 529 U.S. at 437; § 2254(e)(2). However, because Petitioner received an evidentiary hearing on all claims properly before the Court, the Court may not hold another evidentiary hearing and must instead decide the Petition on the record before the state courts. *Cullen*, 563 U.S. at 181-82. The Court therefore finds that Petitioner is not entitled to an evidentiary hearing.

3. Objections Related to Waived Arguments

Third, Petitioner raises several claims previously raised in his Petition and supporting documents. For instance, Petitioner complains that New Mexico Supreme Court Justice Petra Jimenez Maes participated in denying Petitioner a writ of certiorari to review his state writ of habeas corpus. (Doc. 15 at 2); *see* (Doc. 11-5 at 48). Petitioner states this was improper because

Justice Maes recused herself when Petitioner appealed his conviction. *Id.*; *see* (Doc. 11-1 at 93); (Doc. 11-5 at 48). Petitioner also states that the trial court violated his right to compulsory process by not compelling the expert witness to testify on its own accord. *Id.* at 7-8; (Doc. 16 at 4). Finally, Petitioner claims the trial judge should have recused himself because of his alleged personal and business relationship with Petitioner's trial counsel. *Id.* at 8; (Doc. 1 at 23-25).

These claims were previously identified as unexhausted. (Doc. 17 at 7, 15). As discussed, Petitioner was given the choice to give up these claims and proceed with his four exhausted claims or return to state court to pursue his unexhausted claims. *Id.* at 16-17. Petitioner voluntarily dismissed his unexhausted claims, including those described above, and proceeded with the four claims identified as exhausted. (Doc. 18 at 2-3). The Court therefore finds that Petitioner dismissed his claims, and Petitioner's objections related to them are overruled.

Petitioner also claims the trial court erred by denying a motion for a directed verdict and that the equity of the statute rule was not applied in his trial. (Doc. 25 at 8, 12). Petitioner has raised these arguments for the first time in his Objections, therefore they are waived. *See Marshall*, 75 F.3d at 1426; *Garfinkle*, 261 F.3d at 1031. Liberally construed, Petitioner may have meant that the trial court erred by denying his motion for a new trial, which he argued on appeal. *See Boyett*, 2008-NMSC-030, ¶ 31-35. Nevertheless, the Court must find that Petitioner waived this argument because he did not raise it in his Petition.

4. Objections Regarding Ineffective Assistance of Counsel

Petitioner objects to the Chief Magistrate Judge's finding that the state court's decision that Petitioner received effective assistance of counsel was reasonable under § 2254. In order to show ineffective assistance of counsel, Petitioner must show that his trial counsel's performance was objectively unreasonable and that he was prejudiced by his counsel's errors. *Strickland v.*

Washington, 466 U.S. 668, 687-94 (1984). In order to obtain relief here, Petitioner must show that the state court's decision that his trial counsel was not ineffective was "contrary to or involved an unreasonable application" of *Strickland.* § 2254(d)(1).

Petitioner first compares his case to *Ouber v. Guarino*, 293 F.3d 19 (1st Cir. 2002). Like Petitioner's case, *Ouber* involved ineffective assistance of counsel relating to testimony the jury did not hear. At the beginning of the *Ouber* petitioner's trial, trial counsel promised four times that the petitioner would testify, emphasized that the case came down to the petitioner's testimony and credibility, and encouraged the jury to base its decision on the petitioner's version of events versus another witness's version. 293 F.3d at 22. Despite counsel's statements, the petitioner did not testify. *Id.* at 23. Petitioner's trial counsel advised the petitioner to remain silent, though they did not discuss counsel's earlier promises. *Id.* at 24. Following deliberations, the jury convicted the petitioner. *Id.*

The *Ouber* petitioner moved for a new trial, arguing ineffective assistance of counsel. The state courts denied relief, and the petitioner filed a petition under § 2254. *Id.* at 24-25. On review, the First Circuit Court of Appeals held that the petitioner received ineffective assistance of counsel and that the state courts' decisions were unreasonable applications of *Strickland. Id.* at 27-36. The First Circuit found it was objectively unreasonable for counsel to "structure[] the entire defense around the prospect of petitioner's testimony" and then advise petitioner not to testify. *Id.* at 27-30. Further, the First Circuit found that the state courts' contrary decisions were unreasonable under § 2254 because they relied on mischaracterizations of the record. *Id.* at 30-32.

Regarding prejudice, the First Circuit found counsel's error "monumental" and prejudicial because the jury never heard petitioner's version of events. *Id.* at 33-34. Here again,

the First Circuit found that the state court's decision otherwise was unreasonable because it rested on an unsupported mischaracterization of the record. *Id.* at 34-35. The court therefore found that the petitioner was entitled to relief under § 2254. *Id.* at 35-36.

Petitioner's case is similar to *Ouber*, in that both claims are based on testimony the jury did not hear: the petitioner's in *Ouber* and expert witness testimony in Petitioner's case. Further, the lack of testimony was at least in part trial counsel's fault. In this case, Petitioner's trial counsel failed to secure a backup witness or ask for a continuance to do so. Petitioner alleges this error was objectively unreasonable and changed the outcome of his trial. (Doc. 25 at 11-12).

However, there are many differences between *Ouber* and Petitioner's case. First, Petitioner's trial counsel pursued two different defenses, self-defense and inability to form specific intent, and did not rest Petitioner's defense on testimony from an expert witness. Further, two attorneys testified that it was not objectively unreasonable for Petitioner's trial counsel to focus on self-defense after the expert witness dropped out. Ms. Lewis agreed that a reasonable trial attorney could choose to do so, even though she did not think Petitioner's trial counsel did so, and Mr. Kennedy thought it was reasonable for Petitioner's trial counsel to forgo the incapacity theory. *See* (Doc. 22-1 at 60). This contrasts with *Ouber*, where there was no legitimate reason for trial counsel to advise the petitioner against testifying. *Ouber*, 293 F.3d at 27.

Additionally, to the extent Petitioner's trial counsel erred, it was not as damaging as in *Ouber*. In his opening statement, Petitioner's trial counsel emphasized self-defense. (Doc. 22-1 at 46-47, 60, 70). Trial counsel did not mention the issue of inability to form specific intent at all according to Petitioner. (Doc. 25 at 9-10). Again, this contrasts with *Ouber*, where trial counsel repeatedly promised the petitioner would testify. *Ouber*, 293 F.3d at 22. Additionally, in *Ouber*,

the petitioner's lack of testimony essentially meant the petitioner did not present a defense. *Id.* at 33-34. In this case, Petitioner testified and presented his version of events, which was that he shot Ms. Roach in self-defense, therefore Petitioner was not left without a defense due to counsel's errors. Finally, the First Circuit found the state court decisions unreasonable because they relied on assertions that the record did not support. *See Ouber*, 293 F.3d at 30-32, 34-35. Here, by contrast, the state habeas court conducted an evidentiary hearing and relied on testimony from several witnesses. (Doc. 11-5 at 17-25). Because *Ouber* is distinguishable from Petitioner's case, the Court finds that *Ouber* does not show that the state court's decision was contrary to or an unreasonable application of the *Strickland* standard.

Petitioner also cites *Moore v. Texas*, 137 S. Ct. 1039 (2017), to further his argument that the state court's ineffective assistance analysis was unreasonable. In *Moore*, a state court used old, superseded medical standards and other non-medical "evidentiary standards" to find that a death row inmate was not intellectually disabled and thus could be executed. *Moore*, 137 S. Ct. at 1046. The Supreme Court reversed, holding that the state court's standards violated the Eighth Amendment. *Id.* at 1048-53. The Court acknowledged that states have discretion in determining whether a defendant may be executed, however its precedent does not "license disregard of current medical standards." *Id.* at 1049.

Petitioner argues the state habeas court erred by disregarding current medical standards. In particular, Petitioner alleges the state habeas court erred by ignoring Dr. Cave's testimony. (Doc. 25 at 6-7). Petitioner contends the state court would have been forced to conclude that he received ineffective assistance if the court had not disregarded Dr. Cave's testimony.

First, the Court disagrees that the state court ignored or disregarded Dr. Cave's testimony. Rather, the court considered Dr. Cave's testimony and incorporated it into the court's findings.

(Doc. 11-5 at 22-24). The court ultimately found that the testimony was not sufficient to establish that Petitioner was prejudiced by the lack of expert witness testimony. *Id.* This differs from *Moore*, where the court disregarded current medical standards entirely in favor of older standards. *Moore*, 137 S. Ct. at 1046.

Second, *Moore* does not apply to this case. *Moore* involves Eighth Amendment claims concerning what evidence courts may consider when sentencing defendants to death. However, *Moore* does not dictate how state courts may, or must, evaluate expert witness testimony in habeas corpus proceedings on ineffective assistance of counsel claims. The Court therefore finds that *Moore* does not show that the state court's decisions regarding Dr. Cave's testimony or petitioner's ineffective assistance of counsel were unreasonable under § 2254(d).

D. The Motion to Produce

Finally, Petitioner has filed a Motion to Produce requesting that the Court secure a statement from April Perea, the juror that Petitioner claims was replaced outside his presence. Petitioner asks the Court to compel a statement from Ms. Perea under Federal Rule of Criminal Procedure 26.2(a). (Doc. 26 at 1). This Rule provides,

> [a]fter a witness other than the defendant has testified on direct examination, the court, on motion of a party who did not call the witness, must order an attorney from the government or the defendant's attorney to produce, for the examination and use of the moving party, any statement of the witness that is in their possession and that relates to the subject matter of the witness's testimony.

Petitioner argues that because he is *pro se* and has been denied counsel, it is appropriate for the government to find Ms. Perea and take her statement. (Doc. 26 at 2). Petitioner provides contact information for multiple people with this name, April Perea, residing in New Mexico, but he does not know if one was the juror at his trial. *Id.* at 2, 4. In the alternative, Petitioner asks the

Court for permission to subpoena Ms. Perea. *Id.* at 3. Respondent argues that under *Cullen*, Petitioner may not present any new evidence to support this claim. (Doc. 27 at 2).

Liberally construed, Petitioner requests permission to conduct discovery or expand the record. *See* Rules 6, 7 of the Rules Governing § 2254 Proceedings. The Court may, "for good cause," allow a party to conduct discovery under the Federal Rules of Civil Procedure or may order that the parties expand the record. *Id.* Affidavits may be submitted, and the Court may even propound its own interrogatories. Rule 7 of the Rules Governing § 2254 Proceedings.

Petitioner received an evidentiary hearing in state court, including on his claim that Ms. Perea was replaced outside his presence. As a result, this Court decides the Petition on the record before the state court. *Cullen*, 563 U.S. at 181-82. Even if the Court gave Petitioner permission to subpoena Ms. Perea or conduct other discovery, the Court agrees with Respondent that it may not consider any new evidence produced pertaining to this claim. *See Black v. Workman*, 682 F.3d 880, 895 (10th Cir. 2012) (stating review under § 2254(d) is limited to evidence before state court). The Court must therefore deny Petitioner's Motion to Produce.

III. Conclusion

For the foregoing reasons, the Court finds that the Chief Magistrate Judge conducted the proper analysis and correctly concluded that the state courts' decisions were not contrary to or unreasonable applications of clearly-established federal law, or that they resulted in an unreasonable determination of facts in light of the evidence presented. Therefore, Petitioner's objections are overruled. Petitioner did not object to the Chief Magistrate Judge's recommendation that the Motion for Release be denied, so the Court will deny that Motion as well. Finally, the Court will deny Petitioner's Motion to Produce for the reasons stated above.

IT IS THEREFORE ORDERED that Petitioner's *Petition Under 28 U.S.C. § 2254 for Writ of Habeas Corpus by a Person in State Custody*, (Doc. 1); *Motion for Order of Release From Custody; Second Request for Appointment of Counsel*, (Doc. 19); and *Motion to Produce; or in the Alternative–Issuance of Subpoena to April Perea, State Trial Jury Member–Pursuant to Rule 45(3)(c)(i), Fed. Rules of Civil Procedure*, (Doc. 26), are **DENIED** and this case shall be **DISMISSED WITH PREJUDICE**.

IT IS FURTHER ORDERED that a Certificate of Appealability is **DENIED**.

UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF NEW MEXICO

CECIL BOYETT,

Petitioner,

No. CV 17-374 KG/CG

v.

R.C. SMITH, et al.,

Respondents.

FINAL JUDGMENT

THE COURT, having issued an Order adopting the *Proposed Findings and Recommended Disposition* of Chief United States Magistrate Judge Carmen E. Garza, (Doc. 29), enters this Judgment in compliance with Rule 58 of the Federal Rules of Civil Procedure. Petitioner's *Motion Under 28 U.S.C. § 2254 to Vacate, Set Aside, or Correct Sentence by a Person in State Custody*, (Doc. 1), *Motion for Order of Release from Custody; Second Request for Appointment of Counsel*, (Doc. 19), and *Motion to Produce; or in the Alternative-Issuance of Subpoena to April Perea, State Trial Jury Member–Pursuant to Rule 45(3)(c)(i), Fed. Rules of Civil Procedure*, (Doc. 26), are **DENIED**, and this case is **DISMISSED WITH PREJUDICE**. Additionally, pursuant to Rule 11 of the Rules Governing Section 2254 Proceedings for the United States District Courts, the Court **DENIES** a certificate of appealability.

IT IS SO ORDERED.

UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

CECIL BOYETT,

Petitioner,

No. CV 17-374 KG/CG

v.

R.C. SMITH, et al.,

Respondents.

PROPOSED FINDINGS AND RECOMMENDED DISPOSITION

THIS MATTER is before the Court on Petitioner Cecil Boyett's *Petition Under 28 U.S.C. § 2254 for Writ of Habeas Corpus by a Person in State Custody* (the "Petition"), (Doc. 1), filed March 27, 2017; Respondents R.C. Smith and Hector Balderas' *Amended Answer to Cecil Boyett's* Pro Se *Petition for Writ of Habeas Corpus (28 U.S.C. § 2254) [Doc. 1]* (the "Amended Answer"), (Doc. 22), filed November 20, 2017; the accompanying *Record Proper on Appeal* (the "Record), (Doc. 12), filed June 30, 2017; and Petitioner's *Reply to Respondent's Amended Answer to Cecil Boyett's Pro Se Petition for Writ of Habeas Corpus (28 U.S.C. Section 2254)* (the "Reply"), (Doc. 23), filed December 4, 2017. Also before the Court are Petitioner's *Motion for Order of Release from Custody; Second Request for Appointment of Counsel* (the "Motion for Release"), (Doc. 19), filed October 20, 2017; and Respondent's *Response in Opposition to Cecil Boyett's* Motion for Order of Release from Custody; Second Request for Appointment for Counsel *[Doc. 19]* (the "Opposition to Release"), (Doc. 20), filed October 25, 2017. United States District Judge Kenneth J. Gonzales referred this case to Chief Magistrate Judge Carmen E. Garza to perform legal analysis and recommend an ultimate disposition. (Doc. 5). Having considered the parties' filings and the relevant

APPENDIX C

law, the Court **RECOMMENDS** that Petitioner's Petition be **DENIED**, that the Motion for Release be **DENIED**, and that this case be **DISMISSED WITH PREJUDICE**.

I. Background

This case arises from Petitioner's trial and conviction related to the shooting death of Deborah Roach. On February 5, 2004, Petitioner shot Ms. Roach in the head, killing her, in front of his house. At trial, Petitioner pursued two theories in his defense: first, that he was completely innocent because he shot Ms. Roach in self-defense, defense of his home, and defense of his fiancée; and second, that he was innocent of first-degree murder because he was incapable of forming the specific intent required for first-degree murder. (Doc. 11-2 at 4-5). In support of these theories, Petitioner testified that he knew Ms. Roach regularly carried a gun, that he saw her draw her gun, and that he shot her before she could shoot him. *Id.* Petitioner also testified that he suffered serious brain injuries years earlier, and he theorized these injuries made him incapable of forming the requisite intent to murder Ms. Roach. *Id.* at 13-14. Petitioner also listed an expert witness he expected to testify in support of his incapacity theory. *Id.* at 4-5; *see* (Doc. 22-1 at 2). However, the night before her scheduled testimony, the expert witness informed Petitioner's counsel she would not testify on Petitioner's behalf after she read reports and other documents the prosecution provided her. (Doc. 22-1 at 2). Petitioner did not call any other experts or request a continuance to do so.

Still, Petitioner requested jury instructions on both of his theories. The trial court instructed the jury on self-defense and defense of another, but did not instruct on defense of habitation or inability to form specific intent. (Doc. 12-2 at 33-34). First, the trial court declined an instruction on defense of habitation because there was no

evidence Petitioner shot Ms. Roach inside his home. (Doc. 11-2 at 5). Second, the trial court rejected Petitioner's requested instruction on inability to form specific intent because it required expert testimony and none had been provided. *Id.*

Ultimately, the jury found Petitioner guilty of first-degree willful and deliberate murder in violation of NMSA 1978, Section 30-2-1(A)(1) (1994). (Doc. 11-1 at 1-2). Petitioner was sentenced to life in prison with parole eligibility after thirty years, to be followed by five years of parole. *Id.* Petitioner filed a motion for a new trial, arguing in part that he was prejudiced by the lack of expert testimony on his ability to form specific intent. (Doc. 22-1 at 2, 11-13). The trial court denied the motion and imposed the mandatory life-sentence. *Id.* at 25-26.

Petitioner appealed his conviction, arguing the trial court erred in part by denying Petitioner's requested jury instructions. (Doc. 11-1 at 22-23). The New Mexico Supreme Court affirmed on all grounds. (Doc. 11-2 at 1-21); *State v. Boyett*, 2008-NMSC-030, 144 N.M. 184, 185 P.3d 555. First, the court affirmed the denial of an instruction on defense of habitation. The court reasoned that, in New Mexico, defense of habitation requires evidence that the commission of a felony inside the home was imminent and deadly force was necessary to prevent the commission of the felony. *Boyett*, 2008-NMSC-030, ¶ 15. Such evidence was absent in Petitioner's case. *Id.*, ¶ 25. Second, the court agreed with the trial court that expert testimony was necessary to link Petitioner's brain injury and his alleged inability to form specific intent. *Id.*, ¶ 29. The trial court therefore appropriately denied the instruction. *Id.*

Petitioner then filed a petition for writ of habeas corpus in state court, claiming in part that he was denied his rights to effective assistance of counsel and to be present at

every stage of the trial. (Doc. 11-2 at 23-39). Pertinent to this case, Petitioner claimed his trial counsel was ineffective by failing to ask for a continuance or secure a different expert witness when his original expert dropped out. (Doc. 1 at 5). Petitioner also claimed that he was denied his right to be present at all critical stages of trial because a juror named April Perea was replaced with an alternate outside his presence. *Id.* at 7.

On April 13, 15, and 18, 2016, the Thirteenth Judicial District Court of New Mexico held evidentiary hearings on Petitioner's state habeas corpus petition and heard testimony from several witnesses. First, Petitioner testified that at the end of trial, the jurors were sworn in, the jury was dismissed for lunch, and when they returned an alternate juror was in the jury box and April Perea was seated in the gallery. (Doc. 11-3 at 14-17). Susan McLean, the prosecutor who tried Petitioner, testified Petitioner was mistaken; the jurors were sworn in, sequestered, and returned to court to render their verdict, and no juror was replaced. Ms. McLean testified the trial judge always polled the jurors by name, and April Perea was polled by name, as shown in the trial record. (Doc. 11-4 at 42-47).

Regarding Petitioner's inability to form specific intent, Dr. Susan Cave testified on Petitioner's behalf. (Doc. 11-3 at 17). Dr. Cave stated that if she had been called as an expert witness in Petitioner's trial, she would have testified that Petitioner could not form specific intent due to a combination of factors, including Petitioner's brain injuries and his admitted drug and alcohol use. *Id.* at 31-32. On cross examination, Dr. Cave opined that it was "highly likely" that Petitioner's "ability to form specific intent was likely impaired." *Id.* at 37. Dr. Cave's ultimate opinion, "to a reasonable degree of certainty," is that Petitioner was not capable of forming specific intent to kill. *Id.* at 52.

Next, Sheila Lewis, an attorney who represented Petitioner on appeal and whom the court qualified as an expert witness, testified that Petitioner's trial counsel's failure to secure an expert like Dr. Cave was not a tactical decision. (Doc. 11-4 at 7). Rather, given his proffered jury instructions, his statements as to his own intent, and the motion for a new trial, trial counsel ineffectively failed to follow through on presenting a defense, which prejudiced Petitioner. *Id.* at 12-13, 17-23. On questioning by the state court, Ms. Lewis agreed that a reasonable trial attorney could have decided to abandon the incapacity theory in favor of the self-defense theory, but she maintained that is not what Petitioner's trial counsel did in this case. *Id.* at 29-36.

Finally, Paul Kennedy testified as an expert witness in criminal defense litigation. (Doc. 22-1 at 31-71). In response to Ms. Lewis' testimony, Mr. Kennedy discussed the inherent tension between defenses based on self-defense and an inability to form specific intent. *Id.* at 43-46. Mr. Kennedy stated it can be difficult to explain to jurors how one can have the inability to form specific intent while still intending to engage in self-defense. *Id.*; *see id.* at 65. In Mr. Kennedy's opinion, Petitioner's trial counsel's decision to abandon the incapacity defense was a reasonable trial tactic. *Id.* at 48. Further, Mr. Kennedy believed the self-defense theory was stronger than the incapacity theory. *Id.* at 41-47.

Following the evidentiary hearings, the state court found Petitioner was not entitled to relief. (Doc. 11-5 at 17-25). Specifically, the state court found Petitioner's trial counsel pursued a plausible, rational trial strategy, therefore Petitioner received effective assistance, and no juror was replaced outside Petitioner's presence, therefore he was present at all stages of trial. *Id.* at 24-25. Petitioner filed a petition for writ of

certiorari with the New Mexico Supreme Court, (Doc. 11-5 at 27-37), which was denied, (Doc. 11-5 at 48). Petitioner subsequently filed the instant Petition.

The Petition contains four claims that have been exhausted and may be evaluated on their merits: (1) ineffective assistance of counsel due to trial counsel's failure to secure an expert witness on Petitioner's brain injuries; (2) denial of his right to be present at all stages of trial; (3) denial of due process arising from the denial of the defense of habitation jury instruction; and (4) denial of due process arising from the denial of the inability to form specific intent jury instruction. (Doc. 1 at 5-8). The Petition contained numerous unexhausted claims that Petitioner agreed to dismiss. (Doc. 18).

Respondents argue Petitioner is not entitled to relief on any of his exhausted claims. First, Respondents contend the state court correctly applied the law regarding ineffective assistance of counsel and did not make unreasonable factual findings. (Doc. 22 at 11-15). Regarding Petitioner's claim that a juror was replaced outside his presence, Respondent states Petitioner has provided no evidence establishing that occurred; in fact, the trial transcript shows otherwise. *Id.* at 15. Finally, Respondents argue the denial of Petitioner's requested jury instructions did not amount to a denial of due process. *Id.* at 16-18.

In his Reply, Petitioner maintains that his trial counsel was ineffective by failing to secure an alternate expert witness and that his trial was unfair because the trial court did not grant his requested instructions. (Doc. 23 at 2). Further, Petitioner reiterates his claim that April Perea was replaced outside his presence. Petitioner claims Ms. McLean lied at the evidentiary hearing and that the record of Ms. Perea being polled by name is incorrect. *Id.* at 10. Petitioner cites Mr. Kennedy's testimony that Petitioner's trial

counsel was "quite possibly" "very negligent," (Doc. 22-1 at 70), and he requests an evidentiary hearing to prove his claim of ineffective assistance. *Id.* at 16.

In addition to his Petition, Petitioner filed a Motion for Release, asking to either be released from state custody or appointed an attorney so he may factually and legally develop the claims in his Petition. (Doc. 19 at 1-8). Petitioner denies he is a danger to the community and states he would agree to conditions of release. *Id.* at 7. Respondents argue Petitioner has no freestanding right to counsel or a law library, and remind the Court it has already denied Petitioner counsel because he has adequately and intelligently pursued relief so far. (Doc. 20 at 1-2). Additionally, Respondents "take exception" to Petitioner's claim that he is not a danger to the community, given he has been convicted of first-degree willful, deliberate murder. *Id.*

II. Analysis

a. *Governing Law and Standards of Review*

Under 28 U.S.C. § 2254, a person in state custody may petition a federal court for relief on the ground that his detention violates the United States' Constitution or laws. § 2254(a). A petition under § 2254 may not be granted unless the state court judgment: (1) resulted in a decision 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 based on an unreasonable determination of the facts in light of the evidence presented. §§ 2254(d)(1)-(2). Federal courts must presume factual findings are correct, and a petitioner must present clear and convincing evidence to rebut that presumption. § 2254(e)(1).

A state court decision is "contrary to" clearly established law if it: (1) "applies a rule that contradicts the governing law set forth" in Supreme Court cases, or; (2) if it "confronts a set of facts that are materially indistinguishable" from a Supreme Court decision and "nevertheless arrives at a result different from" the Supreme Court decision. *Williams v. Taylor*, 529 U.S. 362, 405-06 (2000). Similarly, a state court decision constitutes an "unreasonable application" of federal law when a state "unreasonably applies" Supreme Court precedent "to the facts of a prisoner's case." *Id.* at 409. The state court decision must be more than incorrect or erroneous. *Renico v. Lett*, 559 U.S. 766, 773 (2010) (citation and quotation omitted). "Rather, the application must be 'objectively unreasonable.'" *Id.* (quoting *Williams*, 529 U.S. at 409). This imposes a "highly deferential standard of review," and state court decisions must be given the benefit of the doubt. *Id.* (citation and quotation omitted).

The Court must be "doubly deferential" to a state court's decision when a petitioner claims ineffective assistance of counsel and a state court has decided the claim against the petitioner on the merits. *Knowles v. Mirzayance*, 556 U.S. 111, 123 (2009). The Court must defer to the state court's determination that counsel's performance was not deficient and to counsel's decisions on how to represent the client. *See Crawley v. Dinwiddie*, 584 F.3d 916, 922 (10th Cir. 2009). In applying these standards, the question before the Court is whether a state court's decision was unreasonable, not simply incorrect. *Knowles*, 556 U.S. at 123.

b. Whether Petitioner is entitled to relief under § 2254

As discussed, Petitioner claims four grounds for relief: (1) ineffective assistance of counsel due to trial counsel's failure to call an expert witness to testify regarding

Petitioner's brain injury; (2) denial of his right to be present at each state of trial; (3) denial of due process due to denial of a defense of habitation jury instruction; and (4) denial of due process due to denial of an inability to form specific intent jury instruction. Respondents deny Petitioner is entitled to relief on any of these claims. The Court will address each in turn, discussing the parties' arguments, the state courts' findings and holdings, clearly established federal law, and whether Petitioner is entitled to relief.

1. Ineffective Assistance of Counsel

First, Petitioner contends his trial counsel rendered ineffective assistance by failing to secure an alternate expert witness when Petitioner's expected expert witness refused to testify. (Doc. 1 at 5; 15). Further, Petitioner claims the state court erred by ignoring Dr. Cave's testimony in denying Petitioner's state habeas petition. *Id.* Respondents assert that the state court's decision comported with and was not contrary to clearly established federal law. (Doc. 22 at 11-15).

In *Strickland v. Washington*, the Supreme Court announced that "the proper standard for attorney performance is that of reasonably effective assistance." 466 U.S. 668, 687 (1984). When a convicted defendant claims ineffective assistance, the defendant must first "show that counsel's representation fell below an objective standard of reasonableness." *Id.* at 688. Put differently, counsel's representation must have been "reasonable considering all the circumstances." *Id.*

In applying the objective standard of reasonableness to counsel's performance, a court gives considerable deference to an attorney's strategic decisions and the attorney "is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of professional judgment." *Bullock v. Carver*, 297 F.3d 1036,

1044 (10th Cir. 2002) (quoting *Strickland*, 466 U.S. at 690). "[S]trategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable; and strategic choices made after less than complete investigation are reasonably precise to the extent that reasonable professional judgments support the limitations on investigation." *Strickland*, 466 U.S. at 691.

In addition to ineffective assistance, the defendant must show that "deficiencies in counsel's performance" were "prejudicial to the defense." *Id.* at 692. Here, '[i]t is not enough for the defendant to show that the errors had some conceivable effect on the outcome of the proceeding." *Id.* at 693. Rather, the "defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* at 694.

In this case, the state court heard testimony from two attorneys. First, Ms. Lewis testified that Petitioner's trial counsel was ineffective by not asking for a continuance or otherwise obtaining another expert when Petitioner's first expert did not testify. (Doc. 11-4 at 2-3; 7). Ms. Lewis believed Petitioner's trial counsel clearly intended to call an expert witness and offer expert testimony, but failed to follow through on that intention. *Id.* at 17. On its own questioning, the state court asked Ms. Lewis whether a reasonable attorney could have thought Petitioner had a better chance of successfully arguing self-defense without arguing inability to form specific intent. *Id.* at 15. Ms. Lewis responded: "That is a legitimate tactical decision that [Petitioner's] attorney did not make." *Id.*

The state court also heard Mr. Kennedy's opinions favoring the self-defense argument. Mr. Kennedy testified that juries are "suspicious" of a defendant's inability to

form specific intent, especially where, as here, the inability results at least in part from drug and alcohol use. (Doc. 22-1 at 38, 43-44). Mr. Kennedy felt that Petitioner had "a lot to work with" on self-defense and that self-defense was the stronger argument. *Id.* at 44-45. Finally, Mr. Kennedy opined that Petitioner's trial counsel's actions were within the range of what a reasonably competent defense attorney would do. *Id.* at 48.

Ultimately, the state court concluded a reasonably competent trial counsel could have chosen to abandon the incapacity argument in favor of the self-defense argument. (Doc. 11-5 at 23). The state court found that, in light of all the circumstances, the available evidence better supported self-defense, and presenting both theories could have confused the jury and undermined counsel's credibility. *Id.* Further, it was reasonable to emphasize self-defense because it would have resulted in acquittal, while the incapacity defense would have only reduced Petitioner's conviction to second degree murder. *Id.* Accordingly, Petitioner's trial counsel provided reasonably effective assistance. *Id.* at 24.

The state court also found that Petitioner was not prejudiced by his trial counsel's performance. *Id.* at 24-25. First, the state court stressed Dr. Cave's testimony that Petitioner's ability to form specific intent was only "likely" impaired and that Petitioner took other actions requiring specific intent. *Id.* at 22. The court determined that, overall, Dr. Cave's testimony would not have supported an incapacity instruction because of Petitioner's other actions. *Id.* It was not reasonably probable, then, that the outcome of the trial would have been different if Petitioner had called an expert witness. *Id.* at 24.

On review, the Court agrees with the state court's analysis. As Mr. Kennedy explained, pursuing a self-defense theory instead of an incapacity theory is a

reasonable trial tactic because it can be difficult to explain to jurors how one can have the inability to form specific intent and still intentionally engage in self-defense. (Doc. 22-1 at 43-46, 65). While Ms. Lewis testified she thought Petitioner's trial counsel's failure to secure an expert on Petitioner's brain injuries was not a tactical decision, the Court must evaluate "the objective reasonableness of counsel's performance, not counsel's subjective state of mind." *Harrington v. Richter*, 562 U.S. 86, 110 (2011). Importantly, Ms. Lewis also testified that a reasonable trial attorney could have decided to abandon the incapacity theory in favor of the self-defense theory. (Doc. 11-4 at 7, 12-13, 17-23, 29-36). Further, the record supports a finding that Petitioner's counsel's decision not to pursue an incapacity theory was a tactical decision because, if successful, the incapacity theory could only have resulted in a second-degree murder conviction, while a self-defense theory could have resulted in acquittal. For these reasons, the Court finds that Petitioner's counsel's failure to call an expert witness to testify regarding Petitioner's brain injury did not fall below an objective standard of reasonableness and, therefore, Petitioner does not meet the first *Strickland* prong.

Having found that Petitioner did not satisfy the first *Strickland* prong, the Court does not need to reach the second prong. *See United States v. Taylor*, 492 Fed. Appx. 941, 945 (10th Cir. 2012) (unpublished). Nevertheless, the Court finds that Petitioner has failed to show there is a reasonable probability that, but for his counsel's alleged errors, the result of the proceeding would have been different. Here again, as Mr. Kennedy explained, presenting both the self-defense and incapacity theories to the jury risked confusing the jury and losing credibility by presenting conflicting evidence. (Doc. 22-1 at 43-46). Mr. Kennedy further testified that the self-defense theory was stronger

than the incapacity theory and juries are skeptical of incapacity arguments. *Id.* at 41-47. Additionally, the state court found that a jury instruction on lack of intent may not have been presented to the jury because evidence showed that Petitioner engaged in other activities that required an ability to form specific intent at the time of the shooting. (Doc. 11-5 at 6) (citing Doc. 11-3 at 41-44). The record, therefore, shows it is not reasonably probable that the outcome of the trial would have been different if counsel had called an expert witness and argued the incapacity theory.

Based on the foregoing, the Court finds that the state court's decision was not contrary to or an unreasonable application of clearly established federal law, and was not based on an unreasonable determination of the facts. §§ 2254(d)(1)-(2). The state court followed the *Strickland* standard, and the Court does not disagree with its conclusions. The Court therefore finds that Petitioner is not entitled to relief on his claim of ineffective assistance of counsel.

2. Right to be Present at Every Stage of Trial

Petitioner's second claim is that he was denied his right to be present at all stages of his trial. (Doc. 1 at 7). In particular, Petitioner claims a juror named April Perea was replaced with an alternate outside his presence. *Id.* at 27-29. Respondent answers that Ms. Perea was not replaced and that Petitioner has not provided clear and convincing evidence that she was. (Doc. 22 at 15).

"One of the most basic of the rights guaranteed by the Confrontation Clause is the accused's right to be present in the courtroom at every stage of his trial." *Illinois v. Allen*, 397 U.S. 337, 338 (1970). In the state habeas proceedings, the court heard Petitioner's testimony that he noticed Ms. Perea had been replaced by an alternate

following the jury's excusal for deliberations. (Doc. 11-3 at 13-15). Petitioner claimed that the jury was instructed and excused for lunch, and that when the jury returned to render a verdict, Ms. Perea was seated in the gallery and a male alternate had taken her place. *Id.* at 14-15. Petitioner therefore argued he was denied his right to be present at every stage of his trial because he was not present when Ms. Perea was excused and replaced.

The state court also heard testimony from Petitioner's prosecutor, Susan McLean. Ms. McLean testified that Ms. Perea was never excused, but that a female alternate was. (Doc. 11-4 at 43-44). Ms. McLean stated the trial judge always polled jurors by name, that he did so in Petitioner's trial, and that the trial record reflects that Ms. Perea was polled. *Id.* at 44. The trial transcript shows that the trial judge polled the jury by name, and that when the trial judge called "April Perea," the juror answered "Guilty." (Doc. 22-1 at 30-31).

In its decision, the state court recounted Petitioner's testimony, Ms. McLean's testimony, and the fact that the record showed Ms. Perea was polled. (Doc. 11-5 at 19). In light of this evidence, the state court concluded no juror was replaced outside Petitioner's presence. *Id.* at 24. Petitioner was therefore not denied his right to be present at all stages of trial. *Id.*

On review, the Court finds the state court's factual finding was not unreasonable in light of the evidence presented. Although Petitioner maintains that a juror was replaced, Petitioner's testimony was contradicted by Ms. McLean and the trial transcript itself. The state court's factual findings are presumed correct, and Petitioner must produce clear and convincing evidence to rebut that presumption. § 2254(e)(1).

Petitioner alleges Ms. McLean perjured herself and that the trial transcript is incorrect, (Doc. 23 at 10), but Petitioner has not provided any evidence supporting these allegations. Accordingly, the Court finds Petitioner is not entitled to relief on his claim that he was denied his right to be present at all stages of trial.

3. Denial of Due Process due to Denial of Jury Instructions

Petitioner's last claims are that he was denied due process when the trial court denied his requested jury instructions regarding defense of habitation and inability to form specific intent. (Doc. 1 at 8). Respondents assert that, in order to obtain relief, the denial of the instructions must have rendered the entire trial fundamentally unfair, and Petitioner cannot meet that burden. (Doc. 22 at 16-19). Petitioner replies that his trial was unfair, given the jury did not hear expert testimony that would have necessitated the instructions. (Doc. 23 at 17-18).

Generally, a defendant is entitled to a jury instruction "as to any recognized defense for which there exists evidence sufficient for a reasonable jury to find" in the defendant's favor. *Mathews v. United States*, 485 U.S. 58, 63 (1988) (citing *Stevenson v. United States*, 162 U.S. 313 (1896)). However, when a defendant asserts instructional error on collateral review, "[t]he question in such a collateral proceeding is 'whether the ailing instruction by itself so infected the entire trial that the resulting conviction violates due process.'" *Henderson v. Kibbe*, 431 U.S. 145, 154 (1977) (quoting *Cupp v. Naughten*, 414 U.S. 141, 147 (1973)). A defendant's burden is "especially heavy" when the alleged error is not that the trial gave an incorrect instruction, but that the trial court erred by not giving an instruction, because "[a]n omission, or an incomplete instruction, is less likely to be prejudicial than a

misstatement of law." *Id.* at 155. The significance of an instructions' omission "may be evaluated by comparison with the instructions that were given." *Id.* at 156.

At the conclusion of his trial, Petitioner requested instructions on self-defense, defense of another, defense of habitation, and inability to form specific intent. Although the trial court instructed the jury on self-defense and defense of another, (Doc. 12-2 at 33-34), the trial court denied Petitioner's requested instructions on defense of habitation and inability to form specific intent because there was insufficient evidence presented to support those instructions. *See Boyett*, 2009-NMSC-030, ¶¶ 14, 26. Importantly, the trial court instructed the jury on lesser-included offenses that do not contain a specific intent element. (Doc. 12-2 at 30-32, 44).

On Petitioner's direct appeal, the Supreme Court of New Mexico affirmed the trial court's denial of Petitioner's requested instructions. First, the court recognized that, under New Mexico law, "[a] defendant is entitled to an instruction on his or her theory of the case if evidence has been presented that is 'sufficient to allow reasonable minds to differ as to all elements of the offense.'" *Boyett*, 2008-NMSC-030, ¶ 12 (quoting *State v. Gonzales*, 2007-NMSC-059, ¶ 19, 143 N.M. 25, 172 P.3d 162). The court then held that Petitioner would have been entitled to a defense of habitation instruction "if some evidence reasonably tended to show that" Petitioner killed the victim "to prevent her from forcing entry into his home and committing a violent felony once inside." *Id.*, ¶ 22. In Petitioner's case, the evidence showed that the victim had retreated from Petitioner's front door before she was shot and that there was no evidence the victim was attempting to enter Petitioner's home. *Id.*, ¶ 23. Accordingly, Petitioner was not entitled to an instruction on defense of habitation. *Id.*, ¶ 25.

Next, the court addressed the denial of an instruction on inability to form specific intent. Under New Mexico law, the defense is available where the evidence establishes that a mental condition and surrounding circumstances show "the defendant was unable to form specific intent, and thus lacked 'any deliberate or premeditated design.'" *Id.*, ¶ 27. Expert testimony is not necessarily required, but it is necessary when "understanding the purported cause of a defendant's inability to form specific intent goes beyond common knowledge and experience and requires scientific or specialized knowledge." *Id.*, ¶ 28. The court stated this is especially true when the issue "involves complicated medical issues that are beyond the realm of common knowledge and experience." *Id.* ¶ 29. Although Petitioner testified about his brain injury, therapy, and symptoms, no witness "testified about how those facts show that [Petitioner] was unable to form specific intent at the time of the murder." *Id.*, ¶ 30. The court considered Petitioner's testimony insufficient to explain how his injury affected his ability to form specific intent. *Id.* The court therefore affirmed the trial court's denial of an instruction on ability to form specific intent. *Id.*

On review, the Court first finds that New Mexico's standard for entitlement to jury instructions is substantially the same as the standard announced by the Supreme Court. Under both standards, a defendant is entitled to an instruction if a "reasonable juror" or "reasonable mind" could find for the defendant given the evidence presented. *Compare Mathews*, 485 U.S. at 63 (holding a defendant is entitled to an instruction on a defense where a "reasonable jury" could find for the defendant on that theory); *with Boyett*, 2008-NMSC-030, ¶ 12 (stating a defendant is entitled to an instruction where "reasonable minds" could differ given the evidence). The Court therefore finds that the

New Mexico courts did not apply a standard that was contrary to or an unreasonable application of federal law.

Second, although the jury was not instructed on defense of habitation and inability to form specific intent, the jury was instructed on self-defense and defense of another. (Doc. 12-2 at 33-34). Additionally, the jury was instructed on lesser-included offenses that did not include the specific intent element. If the jury believed Petitioner could not or did not form specific intent, they could have convicted Petitioner of a lesser offense that did not require specific intent. Under these circumstances, Petitioner was able to present a defense and the jury had the opportunity to consider whether Petitioner formed the specific intent. The Court therefore finds that the denial of Petitioner's requested instructions did not "by itself so infect[] the entire trial that the resulting conviction violates due process." *Cupp*, 414 U.S. at 147. Accordingly, neither the trial court's nor the New Mexico Supreme Court's decisions resulted in a decision that was contrary to or an unreasonable application of clearly established federal law as announced by the Supreme Court.

In his Reply, Petitioner maintains that his trial was fundamentally unfair because expert testimony was not presented to the jury, and expert testimony would have supported his requested jury instructions. (Doc. 23 at 2). This is a different argument than the one Petitioner has pursued so far, which is that the denial of the jury instructions, not the lack of expert testimony, denied him due process. (Doc. 1 at 8). To the extent Petitioner reargues that his counsel's ineffective assistance rendered his trial unfair, the Court has already discussed that claim. To the extent Petitioner charges that his trial was fundamentally unfair because of the lack of expert testimony, this is a new

argument Petitioner has not previously raised, either in state court or in his Petition, therefore the Court will not consider it.

III. Conclusion

For the foregoing reasons, the Court finds that the state courts' decisions in this case were not contrary to or unreasonable applications of clearly established federal law, nor did they result in unreasonable determinations of fact in light of the evidence presented. Because Petitioner has not shown that his custody violates the federal Constitution or laws, his Motion for Release should also be denied. The Court therefore **RECOMMENDS** that Petitioner's *Petition Under 28 U.S.C. § 2254 for Writ of Habeas Corpus by a Person in State Custody* (Doc. 1), be **DENIED**; that Petitioner's *Motion for Order of Release from Custody; Second Request for Appointment of Counsel*, (Doc. 19) be **DENIED**; and that this case be **DISMISSED WITH PREJUDICE.**

THE PARTIES ARE FURTHER NOTIFIED THAT WITHIN 14 DAYS OF SERVICE of a copy of these Proposed Findings and Recommended Disposition they may file written objections with the Clerk of the District Court pursuant to 28 U.S.C. § 636(b)(1). **A party must file any objections with the Clerk of the District Court within the fourteen-day period if that party wants to have appellate review of the proposed findings and recommended disposition. If no objections are filed, no appellate review will be allowed.**

THE HONORABLE CARMEN E. GARZA
CHIEF UNITED STATES MAGISTRATE JUDGE

Additional material from this filing is available in the Clerk's Office.