

UNITED STATES COURT OF APPEALS  
FOR THE EIGHTH CIRCUIT

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No: 17-3808

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David D. Ewing

Petitioner - Appellant

v.

Ronda Pash

Respondent - Appellee

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Appeal from U.S. District Court for the Western District of Missouri - Kansas City  
(4:16-cv-01321-DW)

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**JUDGMENT**

Before SHEPHERD, ERICKSON, and GRASZ, Circuit Judges.

This appeal comes before the court on appellant's application for a certificate of appealability. The court has carefully reviewed the original file of the district court, and the application for a certificate of appealability is denied. The appeal is dismissed.

February 07, 2019

Order Entered at the Direction of the Court:  
Clerk, U.S. Court of Appeals, Eighth Circuit.

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/s/ Michael E. Gans

*Frederick B.*

**UNITED STATES COURT OF APPEALS  
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Appeal from U.S. District Court for the Western District of Missouri - Kansas City  
(4:16-cv-01321-DW)

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**ORDER**

The petition for rehearing en banc is denied. The petition for rehearing by the panel is also denied.

March 19, 2019

Order Entered at the Direction of the Court:  
Clerk, U.S. Court of Appeals, Eighth Circuit.

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/s/ Michael E. Gans

*Appendix A*

**IN THE UNITED STATES DISTRICT COURT FOR THE  
WESTERN DISTRICT OF MISSOURI  
WESTERN DIVISION**

DAVID D. EWING,

Petitioner,

vs.

RONDA PASH,

Respondent.

Case No. 4:16-cv-01321-DW-P

**ORDER**

Plaintiff is confined at the Crossroads Correctional Center in Cameron, Missouri. He has filed this case *pro se*, seeking relief pursuant to 28 U.S.C. § 2254. On November 21, 2017, the Court denied Petitioner's petition for writ of habeas corpus, explaining that Grounds 1 and 3 are procedurally barred and Ground 2 is without merit. (Doc. 14). Following the Court's Order, Plaintiff filed his *pro se* motion to alter or amend this Court's judgment pursuant to Rule 59(e). (Doc. 16).

Motions pursuant to Rule 59(e) "serve the limited function of correcting manifest errors of law or fact or to present newly discovered evidence." *Wells Fargo Bank, N.A. v. WMR e-PIN, LLC*, 653 F.3d 702, 714 (8th Cir. 2011) (quoting *Lowry v. Watson Chapel Sch. Dist.*, 540 F.3d 752, 761 (8th Cir. 2008)).

Plaintiff fails to set forth any manifest errors of law or fact in this Court's November 21, 2017, Order, or present any newly discovered evidence. Rather, Plaintiff reasserts similar arguments that were previously raised in his petition.

*SPENCER F.*

Therefore, for the reasons set forth in this Court's November 21, 2017, Order and because Plaintiff fails to set forth any appropriate reason to reconsider this Court's previous Order, it is **ORDERED** that Plaintiff's motion for reconsideration (Doc. 16) is DENIED.

**IT IS SO ORDERED.**

/s/ Gary A. Fenner  
GARY A. FENNER, JUDGE  
UNITED STATES DISTRICT COURT

Dated: December 14, 2017

**IN THE UNITED STATES DISTRICT COURT FOR THE  
WESTERN DISTRICT OF MISSOURI  
WESTERN DIVISION**

DAVID D. EWING,

Petitioner,

vs.

RONDA PASH,

Respondent.

Case No. 4:16-cv-01321-DW-P

**ORDER**

Petitioner, a convicted prisoner currently confined at the Crossroads Correctional Center in Cameron, Missouri, has filed *pro se* a petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254. Petitioner challenges his 2007 convictions and sentences for second-degree murder and first-degree assault, which were entered in the Circuit Court of Jackson County, Missouri.<sup>1</sup> The Missouri Court of Appeals, Western District, affirmed Petitioner's convictions on direct appeal. (Doc. 8-7). In 2013, Petitioner filed a motion for post-conviction relief in the Circuit Court of Jackson County, Missouri, which was denied following an evidentiary hearing. (Doc. 1). The Missouri Court of Appeals, Western District, affirmed the denial of Petitioner's motion for post-conviction relief. (Doc. 8-12). For the reasons set forth below, Petitioner's petition for writ of habeas corpus is denied, a certificate of appealability is denied, and this case is dismissed.

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<sup>1</sup>Petitioner was also convicted and sentenced to two three-year sentences for two counts of armed criminal action to be served concurrently with the 20-year sentence for second-degree murder. However, because Petitioner has completed the three-year sentences for armed criminal action, the convictions and sentences are not eligible under 28 U.S.C. § 2254(a)(1) for federal habeas corpus review. *See Maleng v. Cook*, 490 U.S. 488, 491-92 (holding although federal habeas corpus review does not require a prisoner to be "physically confined," a prisoner may not challenge a conviction once the sentence imposed has "fully expired").

*APPENDIX G.*

## **I. Statement of Facts**

In affirming the denial of post-conviction relief, the Missouri Court of Appeals, Western District, set forth the following facts:

For several months during 2005, Ewing resided in Independence, Missouri with his then girlfriend, Linda Sutton ("Sutton"). Ewing and Sutton eventually ended their relationship, and Sutton moved out of Ewing's residence and began dating Justin Spurgin ("Spurgin"). Both Sutton and Spurgin were drug users. On October 18, 2005, Sutton, Spurgin, Michael Potter ("Potter"), and Ronald Holt ("Holt") went to Ewing's residence to retrieve some of Sutton's belongings. Ewing was expecting Sutton but was at the laundromat when Sutton arrived. Sutton and Spurgin entered the residence with a key Sutton still had to the residence. Potter and Holt remained in the car. When Ewing returned to the residence and found Spurgin inside, he demanded that Sutton get Spurgin out of his house and ultimately held a gun to Spurgin's head. Spurgin had no weapon. Both Ewing and Sutton called the police, and Ewing left with the police after they arrived. Sutton, Spurgin, Potter, and Holt dispersed sometime thereafter. Ewing told the police that Sutton had told him that Spurgin and his friends were going to beat Ewing up. Ewing then asked the police if he could use a weapon on a trespasser. Ewing was informed that he could only use a weapon in such a case if he was in fear of serious physical injury or death.

A few hours later, Sutton, Spurgin, Potter, and Holt again went to Ewing's residence. Sutton did not expect Ewing to be home. Sutton and Spurgin went to the door, and, when Sutton found the screen door locked, she rang the doorbell. Sutton testified at Ewing's trial that Ewing opened the door with a knife in his hand and attacked Spurgin. Officer Eric Onstott ("Officer Onstott") responded to the scene and testified that, when he arrived, Spurgin had three cuts to his face and neck. Officer Onstott observed the knife used in the assault to be on the porch of the residence and the knife's sheath in Ewing's waistband. Spurgin had no weapon.

One month later, on November 19, 2005, at approximately 10:00 p.m., Ewing went to the home of Nathan and Deborah Koop and identified himself as "Chuck." Ewing was wearing all black, including black gloves. Nathan Koop ("Koop") testified that Ewing asked "about Justin Spurgin and Michael Potter" and said that he owed Potter money. Potter had previously resided at Koop's home but at that time was living out of Spurgin's car. Koop telephoned Spurgin and allowed Ewing to use his cellphone to speak with Spurgin and/or Potter. He heard Ewing discuss meeting Spurgin and Potter around midnight at the K-Mart off of I-70 and Noland Road.

Potter testified that, late on November 19, 2005, he, Spurgin, and Sutton were driving around in Spurgin's car when they received a telephone call from

Nathan Koop. Potter then spoke to a man who identified himself as "Chuck." The man said that he wanted to pay Potter for a "stereo job" that Potter had done for him and wanted to meet at the K-Mart near I-70 and Noland Road. Potter testified that he did not attempt to meet the man because he did not recognize the caller, knew of no one who owed him money, and was, therefore, suspicious.

Potter testified that, thereafter, in the early morning hours of November 20, 2005, Sutton wanted to visit a friend in Sugar Creek, so he, Sutton, and Spurgin drove to the friend's residence. Potter testified that, once at the residence, Sutton did not want to wake the household children by knocking on the door, so she tried to telephone the friend instead. Potter testified that Sutton was in the front passenger seat, he was in the back seat rummaging on the floor for a missing marijuana pipe, and Spurgin, who had just searched the trunk for the missing pipe, was getting ready to get back into the driver's seat. Potter testified that, as Spurgin was standing at the door getting ready to get in, Potter heard someone say, "Are you Mike?" The dome light was on in the vehicle, making it hard for Potter to see outside of the car. Potter then heard a gunshot, saw a flash of light, and jumped to the floorboard of the vehicle. He then heard another gunshot and realized that he had been hit. A bullet went through Potter's left thumb and hit his collarbone. Potter testified that he saw Spurgin lying by the driver's side front door, breathing hard with what sounded like a rattle in his lungs.

Sutton testified similarly at Ewing's trial. She testified that, just prior to Ewing approaching their vehicle, she was searching for a telephone book to call her friend, and Spurgin was looking under the seat for her phone book. She stated that she did not see Ewing approach until she heard someone ask, "Are you Mikey?" Sutton testified that, when she looked up, Ewing had a gun pointed at Spurgin's head. According to Sutton, Ewing then shot Spurgin in the head and next fired the gun toward Potter. Spurgin died as the result of a single gunshot wound to his head. An unopened butterfly knife was later found on the ground near Spurgin at the scene.

Following the shooting, Ewing fled the scene. The police later interviewed Ewing who initially denied involvement in the shootings. However, after Ewing's brother informed police that Ewing had hidden a gun at the brother's residence, Ewing admitted to shooting Spurgin and Potter. Detective Terry Dorman ("Detective Dorman") of the Independence Police Department testified that Ewing told him that, after spotting Spurgin's car, Ewing parked his vehicle a street over from where Spurgin, Potter, and Sutton were located and then walked to their vehicle. Ewing said that he was wearing all black, that he stood and watched the car's occupants, and that they never heard him when he approached. Ewing told Detective Dorman that, prior to shooting Spurgin and Potter, he thought that he observed Spurgin down between the door and the seat and thought maybe he was bending down for something or reaching down for something. Ewing also indicated that he thought Potter was reaching for something.

At trial, Ewing argued that he was acting in self-defense when he shot Spurgin and Potter. Ewing's trial counsel proffered a self-defense instruction that went to the jury based on MAI-CR 3d 306.06. The jury found Ewing guilty of one count of murder in the second degree for the shooting death of Justin Spurgin, one count of assault in the first degree for shooting Michael Potter, and two counts of armed criminal action for his use of a deadly weapon in both crimes. The court followed the recommendations of the jury and sentenced Ewing to a total of thirty-five years of imprisonment for his crimes. This Court affirmed Ewing's convictions in *State v. Ewing*, 407 S.W.3d 94 (Mo. App. W.D. 2013).

(Doc. 8-12).

## II. Standard of Review

In conducting habeas review pursuant to 28 U.S.C. § 2254, a federal court is limited to deciding whether a claim that was adjudicated on the merits in state court proceedings (1) resulted in a decision that is contrary to, or involved an unreasonable application of, clearly established federal law, as determined by the Supreme Court, or (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the state court proceeding. 28 U.S.C. § 2254(d). Before the state court findings may be set aside, a federal court must conclude that the state court's findings of fact lack even fair support in the record. *Marshall v. Lonberger*, 459 U.S. 422, 432 (1983). Credibility determinations are left for the state court to decide. *Graham v. Solem*, 728 F.2d 1533, 1540 (8th Cir. en banc), *cert. denied*, 469 U.S. 842 (1984). It is Petitioner's burden to establish by clear and convincing evidence that the state court findings are erroneous. 28 U.S.C. § 2254(e)(1).<sup>2</sup> Because the state court's findings of fact have fair support in the record and because Petitioner has failed to establish by clear and convincing evidence that the state court findings are erroneous, the Court defers to and adopts those factual conclusions.

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<sup>2</sup> In a proceeding instituted by an application for writ of habeas corpus by a person in custody pursuant to a judgment of a State court, a determination of a factual issue made by a State court shall be presumed to be correct. The applicant shall have the burden of rebutting the presumption of correctness by "clear and convincing evidence." 28 U.S.C. § 2254(e)(1).



### **III. Analysis**

Petitioner asserts the following three grounds for habeas corpus relief: (1) improper and defective self-defense instructions were presented to the jury, thereby improperly lowering the State's burden of disproving self-defense; (2) the prosecution failed to establish "beyond a reasonable doubt that Petitioner did not act in lawful self-defense," and therefore the "trial court erred in overruling defense motion for judgment of acquittal at the close of all evidence and accepting guilty verdicts"; and (3) "ineffective assistance of trial counsel" where Petitioner's counsel failed to object and jointly proffered the self-defense instruction that "lessened the State's burden of proof" and "misstated substantive law." (Docs. 1 at 5-8; 13 at 15).

Respondent argues that Grounds 1 and 3 are procedurally barred from federal habeas corpus review and that the state court's determination as to Ground 2 was a reasonable application of clearly established federal law and a reasonable determination in light of the evidence presented at trial. The Court addresses these arguments below.

#### **A. Grounds 1 and 3 are procedurally barred from federal habeas corpus review.**

Respondent argues Grounds 1 and 3 are procedurally defaulted, and therefore ineligible for federal habeas review, after the Missouri Court of Appeals—rendering separate judgments on Petitioner's direct appeal (Ground 1) and post-conviction relief appeal (Ground 3)—denied Petitioner relief based on state procedural grounds. (Docs. 1 at 5-9; 8 at 8-9).

Federal habeas review is barred under the "adequate and independent state ground doctrine" if the "last state court rendering a judgment in the case rests its judgment on the procedural default." *Harris v. Reed*, 489 U.S. 255, 262 (1989). A state procedural bar is independent and adequate when it is "firmly established and regularly followed" at the time the

procedural bar is applied by the state court. *Crawford v. Minnesota*, 498 F.3d 581, 854 (8th Cir. 2007) (citing *Ford v. Georgia*, 498 U.S. 411, 424 (1991)).

However, federal habeas review is available notwithstanding state procedural default where the petitioner demonstrates “cause for the default and actual prejudice as a result of the alleged violation of federal law, or . . . show[s] that failure to consider the claims will result in a fundamental miscarriage of justice.” *Wiles v. Jones*, 960 F.2d 751, 753 (8th Cir. 1992) (citing *Coleman v. Thompson*, 501 U.S. 722, 749-50 (1991)). To show cause, a petitioner must show that “some objective factor external to the defense impeded counsel’s efforts.” *Cornman v. Armontrout*, 959 F.2d 727, 729 (8th Cir. 1992) (citing *Murray v. Carrier*, 477 U.S. 478, 488 (1986)). Additionally, the fundamental miscarriage of justice exception for federal habeas review is only satisfied with “evidence of [petitioner’s] actual innocence.” *Schleeper v. Groose*, 36 F.3d 735, 735 (8th Cir. 1994) (citing *Sawyer v. Whitley*, 505 U.S. 333, 338 (1992)). However, a habeas petitioner is required to show actual innocence by presenting “new reliable evidence that was not presented at trial” such that “it is more likely than not that no reasonable juror would have convicted him in light of the new evidence.” *Weeks v. Bowersox*, 119 F.3d 1342, 1350-51 (8th Cir. 1997).

**1. Ground 1 is procedurally defaulted.**

In Ground 1, Petitioner argues the trial court erred in failing to properly instruct the jury on self-defense. Petitioner asserts the instruction omitted the mandatory language required under MAI-CR3D 306.06 defining “initial aggressor” when the jury was required to find Petitioner was not the initial aggressor. Petitioner further argues the jury instructions allowed the jury to find Petitioner acted in self-defense only where it found Petitioner “reasonably believed he was in

imminent danger of death or serious physical injury from the acts of Justin Spurgin *and* Michael Potter.” (Docs. 1 at 5; 13 at 9-10) (emphasis added).

Petitioner fails to introduce clear and convincing evidence that the State, and not Petitioner jointly with the State, proffered the allegedly defective jury instruction. On direct appeal, the Missouri Court of Appeals for the Western District held that Petitioner necessarily “waived appellate review by [jointly] proffering the instruction he now contends was erroneous.” (Doc. 8-7 at 6-8). It is firmly and clearly established in Missouri courts that appellate review of a jury instruction is waived upon proffering the jury instruction. *State v. Bolden*, 371 S.W.3d 802, 806 (Mo. 2012) (“This Court has long held that a defendant cannot complain about an instruction given at his request”) (citing *State v. Leisure*, 796 S.W.2d 875, 877 (Mo. 1990)).

Therefore, because the record fairly supports the conclusion by the Missouri Court of Appeals that Petitioner jointly submitted the jury instruction and failed to offer any evidence to rebut the presumption of correctness, this Court defers to the Missouri Court of Appeals’ factual conclusion that Petitioner jointly proffered the jury instruction in question. Therefore, Ground 1 is procedurally barred from federal habeas review.

However, federal habeas review may be available notwithstanding the state procedural bar if Petitioner demonstrates cause and prejudice or if a failure to review the case will result in a fundamental miscarriage of justice. *See Wiles*, 960 F.2d at 753. Here, Petitioner fails to introduce any cognizable external objective factor that impeded counsel’s efforts establishing cause for the default. Although Petitioner argues actual prejudice will result from withholding federal habeas corpus review on Ground 1, because Petitioner fails to demonstrate a sufficient cause, the cause and actual prejudice exception to the state procedural bar does not here apply. (Doc. 13 at 19;

*See Scroggins v. Lockhart*, 934 F.2d 972, 974-75 (8th Cir. 1991) (citing *Engle v. Issac*, 456 U.S. 107, 129 (1982))).

Lastly, Petitioner fails to meet the strict standard of actual innocence to invoke the fundamental miscarriage of justice exception. Petitioner relies solely on evidence presented at trial and fails to introduce any new evidence upon which it is more likely than not that a reasonable jury would find Petitioner not guilty. As a result, Ground 1 is procedurally barred from federal habeas corpus review and is therefore denied.

**2. Ground 3 is procedurally defaulted.**

Petitioner seeks habeas relief on Ground 3 claiming ineffective assistance of trial counsel. Petitioner argues trial counsel failed to object to and jointly proffered a self-defense instruction that misstated substantive law. Petitioner states the instruction required the jury to find that Petitioner reasonably believed he was in imminent danger of death or serious physical injury from both Spurgin and Potter, and failed to comply with the mandatory language of MAI-CR3d 306.06 defining “initial aggressor.” Respondent argues that Ground 3 is procedurally barred from federal habeas review because the Missouri Court of Appeals denied Petitioner relief on state procedural grounds.

Missouri Supreme Court Rule 84.04(d)(1)(B) requires appellants to “state concisely the legal reasons for the appellant’s claim of reversible error.” A point relied on that “asserts several error claims in a single point” is not concisely stated, and results in a multifarious point that fails to preserve an issue for appellate review. *Wilma G. James Trust v. James*, 487 S.W.3d 37, 52 (Mo. Ct. App. 2016); *see also Peters v. Johns*, 489 S.W.3d 262, 268 n.8 (Mo. banc 2016); *Hines v. Smith*, 172 S.W.3d 437, 439 n.4 (Mo. Ct. App. 2005). However, the court may still address the point relied on *ex gratia* and attempt to resolve the issues on the merits. *Spradling v. Treasurer*

of the State, 415 S.W.3d 126, 134 (Mo. Ct. App. 2013) (citing *Atkins v. McPhetridge*, 213 S.W.3d 116, 120 (Mo. Ct. App. 2006)). Nevertheless, when a state court clearly and expressly denies relief on state procedural grounds, an alternative ruling based on the merits through *ex gratia* review of the point relied on does not lift the procedural default. *Taylor v. Norris*, 401 F.3d 883, 886 (8th Cir. 2005); *Harris v. Reed*, 489 U.S. 255, 264 n.10 (1989).

In Ground 3, Petitioner presents an ineffective-assistance-of-counsel claim arguing Petitioner's trial counsel failed to object to and jointly proffered a self-defense instruction that: (1) misstated substantive law, and (2) failed to comply with the applicable Missouri Approved Instructions. (Docs. 13 at 32-33; 8-12 at 8). In a footnote, the Missouri Court of Appeals clearly and expressly held that Petitioner preserved nothing for appellate review by presenting two discrete complaints in the same point, resulting in a multifarious point in violation of Missouri Supreme Court Rule 84.04. (Doc. 8-12 at 8). Because the Court of Appeals prefers to address claims on the merits, the Court of Appeals proceeded *ex gratia* to review Petitioner's ineffective-assistance-of-counsel claim. *Id.* However, *ex gratia* review alone is insufficient to overcome default on state procedural grounds. Petitioner does not allege he can overcome the state procedural default on Ground 3 by demonstrating either cause and prejudice or a fundamental miscarriage of justice. Therefore, the state procedural bar precludes this claim from federal habeas review under 28 U.S.C. § 2254 and therefore, Ground 3 is denied.

**B. Ground 2 is without merit.**

In Ground 2, Petitioner argues the trial court erred in overruling a defense motion for judgment of acquittal at the close of evidence because the State failed to establish beyond a reasonable doubt that Petitioner did not act in lawful self-defense. (Docs. 1 at 7; 8 at 11; 13 at 24). Respondent asserts the "state court's determination was consistent with and a reasonable

application of clearly established [federal law]" and was a reasonable determination given the evidence presented at trial, and therefore the state court's judgment is entitled to deference. (Doc. 8 at 17).

On direct appeal, the Missouri Court of Appeals, Western District, denied Ground 2 as follows:

In Ewing's second point on appeal, he contends that the court erred in overruling his motion for judgment of acquittal because the State failed to prove, beyond a reasonable doubt, that he did not act in self-defense.

In reviewing the sufficiency of the evidence, we accept as true all evidence favorable to the State, and "[a]ll evidence and inferences to the contrary are disregarded." *State v. Crawford*, 68 S.W.3d 406, 407-408 (Mo. banc 2002). Our review is "limited to determining whether there is sufficient evidence from which a reasonable juror might have found the defendant guilty beyond a reasonable doubt." *Id.* at 408. Ewing was entitled to acquittal as a matter of law, based on his self-defense claim, only if there was "undisputed and uncontradicted evidence clearly establishing self-defense." *State v. Henderson*, 311 S.W. 3d 411, 414 (Mo. App. 2010). If there was conflicting evidence at Ewing's trial, or if different inferences could have reasonably been drawn from the evidence, his self-defense claim was a question for the jury. *Id.*

Pursuant to section 563.031.1, RSMo 2000, a person may "use physical force upon another person when and to the extent he reasonably believes such force to be necessary to defend himself or a third person from what he reasonably believes to be the use or imminent use of unlawful force by such other person" unless he was the initial aggressor. "A person may not use deadly force upon another person ... unless he reasonably believes that such deadly force is necessary to protect himself or another against death, serious physical injury, rape, sodomy or kidnapping or serious physical injury through robbery, burglary or arson. § 563.031.2, RSMo 2000.

Ewing does not contest that the evidence was sufficient to establish that he caused the death of Justin Spurgin by shooting him or that he was aware that his conduct was practically certain to cause Spurgin's death. He claims, however, that the State failed to prove that he did not act in self-defense when he killed Spurgin.

Likewise, Ewing does not contest that the evidence was sufficient to establish that he attempted to kill or cause serious physical injury to Michael Potter by shooting him. He claims, however, that the State failed to prove that he did not act in self-defense when he shot Potter. Hence, Ewing was only entitled to have his motion for acquittal granted for murder in the second degree if there was undisputed and uncontradicted evidence that clearly established, with regard to killing Justin Spurgin, that Ewing was not the initial aggressor and that he reasonably believed that deadly force was necessary to protect himself from the imminent use of unlawful force. Ewing was only entitled to acquittal for assault in the first degree for shooting Michael Potter if there was undisputed and uncontradicted evidence that clearly established that Ewing was not the initial aggressor and that the shooting was reasonable based on his reasonable belief that he needed to protect himself from the use or imminent use of unlawful force.

On appeal, Ewing argues that he reasonably believed that Spurgin and Potter were reaching for weapons when he killed Spurgin and wounded Potter. He contends that the record shows that the victims were drug dealers and used methamphetamine and infers that they may have, therefore, been aggressive and may have been carrying weapons. He references the butterfly knife that was found at the scene of his crime and suggests that Spurgin "must have had it in his hand" when Ewing shot Spurgin. Ewing argues in his brief that, "more than once, Sutton told him that the men were going to assault him," suggesting that fear motivated his behavior when he shot both Spurgin and Potter. Appellant studiously avoids any discussion concerning the "initial aggressor" segment of the self-defense submission.

While Ewing attempts on appeal to prove that he shot Spurgin and Potter out of fear, we defer to the credibility findings of the jury and will not review the jury's factual findings relating to Ewing's claim of self-defense. *State v. Pulley*, 356 S.W.3d 187, 191 (Mo. App. 2011). The jury heard Ewing's claim that he saw Spurgin and Potter reaching for something. The jury also heard testimony that Spurgin and Potter were, in fact, searching for something. The jury heard that both Spurgin and Potter were searching for a marijuana pipe and that Spurgin may have also been looking for Sutton's address book. The jury heard that a knife was recovered from the scene. The jury chose not to believe Ewing's claim that, because the two were reaching for something, he shot them out of fear and in self-defense, and the record supports the jury's determination.

Ewing states that he told police after the shootings that he pursued Potter because he wanted to know who was responsible for stealing a coin collection that had belonged to his deceased father. He states that he told police that he wanted to speak with Potter about the coins and that he went to Potter's previous residence to find him and identified himself as "Chuck." He states that he told police that he spoke with Potter over the telephone and told him that he owed him \$300 and arranged to meet at a K-Mart parking lot. He states that he told police that he planned to meet Potter and the others at K-Mart so he would know what Potter looked like but that he planned to leave and talk to him alone another time.

Ewing's claims are belied by his actions. Ewing said that he wanted to speak with Potter regarding stolen coins. He spoke with Potter on the telephone while at the Koops' residence but did not ask about coins. Instead, he created an alias and a ruse to lure Spurgin and Potter into a K-Mart parking lot at night. When they did not show up at K-Mart, he pursued them. After spotting Spurgin's parked car, Ewing parked a block away and then approached the car on foot with a gun in his waistband. He stood and watched the victims, and they did not hear his approach. The record reflects that the victims had no advance warning prior to Ewing firing his gun, other than hearing, "Are you Mike?" Ewing ran from the scene, hid the murder/assault weapon at his brother's residence in Leavenworth, Kansas, and enlisted his brother to provide an alibi. Ewing denied involvement in the crime until his brother implicated him in the crimes and advised police of the location of the weapon used in the crime. Only then did Ewing confess to the shootings and claim that he fired his gun in Spurgin's and Potter's direction because he believed they were reaching for "something."

We find sufficient evidence from which a jury could reasonably conclude that Ewing did not act in self-defense. While Ewing's trial strategy provided a basis for the jury to consider his claim of self-defense, the jury rejected his claim, as it was free to do. *Pully*, 356 S. W.3d at 191. Point two is denied.

(Doc. 8-7 at 9-12).

A writ of habeas corpus is an "extraordinary remedy" that is reserved for "cases of special urgency." *Hensley v. Mun. Court, San Jose Milpitas Judicial Dist., Santa Clara Cty., Cal.* 411 U.S. 345, 351 (1973). As noted above, federal habeas corpus review under 28 U.S.C. § 2254



is limited to determining whether the state-adjudication of the claim (1) resulted in a decision that was contrary to clearly established federal law or that involved an unreasonable application of established federal law, or (2) resulted in an unreasonable determination of the facts in light of the evidence presented in the State court proceeding. 28 U.S.C. § 2254(d). Under this standard of review, the factual findings of state courts are entitled to a “high measure of deference.” *Sumner v. Mata*, 455 U.S. 591, 597-98 (1982); see *Williams v. Roper*, 695 F.3d 825, 830 (8th Cir. 2012). It is the petitioner’s burden to rebut the “presumption of correctness” of the state court’s findings with clear and convincing evidence. 28 U.S.C. § 2254(e)(1). Furthermore, to overturn a state court’s decision, a reviewing court must find insufficient evidence “to justify a rational trier of the facts to find guilt beyond a reasonable doubt.” *Jackson v. Virginia*, 443 U.S. 307, 312-13 (1979); see *Cavazos v. Smith*, 565 U.S. 1, 2 (2011). In other words, before the state court findings may be set aside, a federal court must conclude that the state court’s findings lack even fair support in the record. *Marshall*, 459 U.S. at 432.

The Missouri Court of Appeals found that despite Petitioner’s “trial strategy [that] provided a basis for the jury to consider his claim of self-defense,” a reasonable jury could conclude Petitioner did not act in self-defense in light of the testimony and other inculpatory evidence presented at trial. (Doc. 8-7 at 12). Inconsistencies in Petitioner’s explanation for setting up the nighttime meeting with Spurgin and Potter, actively looking for them when they did not show up at the meeting time, parking a block away and approaching the vehicle on foot, and denying involvement until implicated by his brother who led police to the weapon Petitioner had hidden following the shooting, provided a substantial factual basis for a reasonable jury to conclude beyond a reasonable doubt that Petitioner did not act in self-defense.

Therefore, because the Missouri Court of Appeals properly applied the deferential review standard of *Jackson* and because the state courts' determination as to Ground 2 did not result in a "decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States" or in "a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the state court proceeding," *see* 28 U.S.C. § 2254(d)(1) and (2), Ground 2 is denied.

#### **IV. Certificate of Appealability**

Under 28 U.S.C. § 2253(c), the Court may issue a certificate of appealability only "where a petitioner has made a substantial showing of the denial of a constitutional right." To satisfy this standard, Petitioner must show that a "reasonable jurists" would find the district court ruling on the constitutional claim(s) "debatable or wrong." *Tennard v. Dretke*, 542 U.S. 274, 276 (2004). Because Petitioner has not met this standard, a certificate of appealability will be denied.

#### **V. Conclusion**

For the foregoing reasons, Petitioner's petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254 is denied, a certificate of appealability is denied, and this case is dismissed.

**IT IS SO ORDERED.**

/s/ Greg Kays  
GREG KAYS, CHIEF JUDGE  
UNITED STATES DISTRICT COURT

Dated: November 21, 2017