DESIGNATION OF EXHIBIT'S IN APPENDIX

Appendix A: Sixth Circuit Opinion and Order, and Mandate.

Appendix B: United States District Court Opinion and Order.

Appendix C: Michigan Supreme Court Order.

Appendix D: Michigan Court of Appeals Order.

Appendix E: Wayne County, Michigan Trial Court Opinion and Order.

Appendix F: Michigan's Self-Defense Act.

Appendix G: Michigan's Standard Criminal Jury Instruction 2d 7.15.

Appendix H: Statement of Facts Taken From Habeas Petition.

Appendix I: Michigan Trial Court Self-Defense Instruction.

OPINION AND ORDER OF THE SIXTH CIRCUIT
COURT OF APPEALS

APPX A

NOT RECOMMENDED FOR FULL-TEXT PUBLICATION
File Name: 19a0112n.06

No. 17-2473

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

KEVIN MICHAEL-DORMAN BELTOWSKI,

Petitioner-Appellant,

v.

SHAWN BREWER, Warden,

Respondent-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MICHIGAN

Before: KETHLEDGE, WHITE and BUSH, Circuit Judges.

KETHLEDGE, Circuit Judge. Kevin Beltowski appeals the district court's denial of his habeas petition, arguing that a jury instruction at his trial violated due process and that his counsel provided ineffective assistance. We reject both arguments and affirm.

I.

Beltowski and his friend, Timothy Moraczewski, ran a marijuana grow house in Detroit. On the evening of September 26, 2010, Beltowski encountered Moraczewski at the house. Soon the two men began to argue about their marijuana operation. In the midst of the argument, Moraczewski aimed a rifle at Beltowski and fired a shot past his head. During the ensuing struggle, Beltowski choked Moraczewski with the rifle's shoulder strap.

Minutes later, Beltowski called Moraczewski's brother, Jeffrey, to tell him about the fight. During that call, Beltowski said that he had choked Moraczewski "until he turned purple" and then had held the strap "for another thirty seconds." (Beltowski later maintained that he released the

strap seconds after Moraczewski passed out.) Beltowski also told Jeffrey that Moraczewski might still be alive, so Jeffrey rushed over to the house—where he found Moraczewski lying on a couch with the rifle strap twisted around his neck. According to Jeffrey, the strap was twisted so tightly that he had to rotate the rifle four times to loosen the strap. Jeffrey rushed Moraczewski to the hospital, where Moraczewski was declared dead. Soon thereafter, the State charged Beltowski with murder.

At trial, Beltowski argued that he had acted in self-defense. The trial court instructed the jury on self-defense under Michigan law without objection. The jury found Beltowski guilty of second-degree murder. On direct appeal, Beltowski challenged his conviction on various grounds, none of which concerned the self-defense instruction. In state post-conviction proceedings, however, Beltowski argued that the instruction violated due process. The Wayne County Circuit Court rejected that argument, and the Michigan Court of Appeals and Michigan Supreme Court denied Beltowski's application for an appeal.

Beltowski thereafter filed a petition for a writ of habeas corpus under 28 U.S.C. § 2254, arguing among other things that the self-defense instruction violated due process and that his counsel provided ineffective assistance. The district court denied the petition. This appeal followed.

II.

We review a district court's denial of a habeas petition de novo. *See Mendoza v. Berghuis*, 544 F.3d 650, 652 (6th Cir. 2008). Although the State argues that Beltowski's claims are procedurally defaulted, we cut to the merits because a procedural analysis would only complicate the case. *See Storey v. Vasbinder*, 657 F.3d 372, 380 (6th Cir. 2011).

Beltowski claims that the jury instruction on self-defense violated due process. The Wayne County Circuit Court rejected this claim on the merits, which Beltowski argues was "an unreasonable application of" clearly established Supreme Court precedent. 28 U.S.C. § 2254(d)(1). To succeed on that argument, he must show that no "fairminded" jurist could have rejected his claim that the instruction violated due process. *Harrington v. Richter*, 562 U.S. 86, 101 (2011) (internal quotation marks omitted).

The Supreme Court has made clear that "not every ambiguity, inconsistency, or deficiency in a jury instruction" violates due process. *Middleton v. McNeil*, 541 U.S. 433, 437 (2004) (per curiam). Rather, the error "must be so egregious" that it rendered "the entire trial fundamentally unfair." *White v. Mitchell*, 431 F.3d 517, 533 (6th Cir. 2005). And few instructional errors "violate fundamental fairness." *Estelle v. McGuire*, 502 U.S. 62, 73 (1991) (internal quotation marks omitted). Moreover, fundamental fairness is the type of "general standard" where under § 2254(d)(1) state courts have particular "leeway . . . in reaching outcomes in case-by-case determinations." *Yarborough v. Alvarado*, 541 U.S. 652, 664 (2004).

Beltowski argues that the self-defense instruction violated due process in four respects. First, the trial court instructed the jury that "the person claiming self-defense must not have acted wrongfully and brought on the assault." Under Michigan law, a person cannot claim self-defense if he was "the initial aggressor." *People v. Riddle*, 649 N.W.2d 30, 35 n.8 (Mich. 2002). Beltowski asserts that the jury instruction in his case was "overly broad" because, he says, the jury could have found that he acted wrongfully and brought on the assault even if he was not the initial aggressor. *See* Beltowski Br. at 27. In support, he proposes various hypothetical scenarios purporting to show that the jury could have improperly rejected his self-defense argument. But a jury instruction does not violate due process simply because there is a hypothetical "possibility that the jury misapplied

the instruction." *Waddington v. Sarausad*, 555 U.S. 179, 191 (2009) (internal quotation marks and alterations omitted). Here, as the Wayne County Circuit Court noted, the instruction "essentially describe[s] a person who is the aggressor[] or initiator of an altercation." Hence the instruction was fair enough for constitutional purposes.

Second, the trial court instructed the jury that "the defendant must have honestly and reasonably believed that he had to use force to protect himself from the imminent unlawful use of force by another." Beltowski asserts that the instruction required the jury to assess whether Moraczewski's actions were unlawful rather than whether Beltowski reasonably believed the actions to be unlawful. But the instruction here almost exactly tracked the language in Michigan's self-defense statute. *See* Mich. Comp. Laws § 780.972. And both the statute and the instruction required the jury to assess the reasonableness of Beltowski's belief, not the lawfulness of Moraczewski's actions. *See People v. Orlewicz*, 809 N.W.2d 194, 201 (Mich. Ct. App. 2011). Moreover, the trial court specifically instructed the jury that so long as Beltowski's "belief was honest and reasonable" he could defend himself even if it turned out later that "he was wrong about how much danger he was in." Hence this argument too is meritless.

Third, the trial court instructed the jury that "the right to defend [oneself] only lasts as long as it seems necessary for the purpose of protection." Under Michigan law, a person may act in self-defense only if he "honestly and reasonably believes" that the use of force "is necessary." Mich. Comp. Laws § 780.972. Beltowski objects that the words "protection" and "seems" appear nowhere in the statute. But these words are simply another way of saying that the person must reasonably believe that the act of self-defense is necessary. *See Riddle*, 649 N.W.2d at 39. Hence this argument also fails.

Finally, Beltowski argues that the trial court should have included certain language that appears in Michigan's model jury instructions. But an "omission" or "incomplete instruction" is less likely to violate due process "than a misstatement of the law." *Henderson v. Kibbe*, 431 U.S. 145, 155 (1977). And a federal court may not grant habeas relief simply because an instruction deviated from a state's model jury instructions. *See Estelle*, 502 U.S. at 72. Here, the self-defense instruction "as a whole" shows that these omissions did not render Beltowski's entire trial fundamentally unfair. *See Sarausad*, 555 U.S. at 191 (internal quotation marks omitted). Thus, the state court reasonably found that the instruction did not violate due process.

Beltowski also argues that his counsel provided ineffective assistance by failing to argue that the self-defense instruction violated his constitutional rights. But that argument fails because, as shown above, such an argument would lack merit. *See Shaneberger v. Jones*, 615 F.3d 448, 452 (6th Cir. 2010).

The district court's judgment is affirmed.

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No: 17-2473

Filed: April 03, 2019

KEVIN MICHAEL-DORMAN BELTOWSKI

Petitioner - Appellant

v.

SHAWN BREWER, Warden

Respondent - Appellee

MANDATE

Pursuant to the court's disposition that was filed 03/12/2019 the mandate for this case hereby issues today.

COSTS: None

OPINION AND ORDER OF THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN, SOUTHERN DIVISION

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

KEVIN MICHAEL-DORMAN BELTOWSKI,

Petitioner,

Case No. 5:16-cv-14224
Hon. John Corbett O'Meara

v.

SHAWN BREWER,

Respondent.
_____/

OPINION AND ORDER (1) DENYING PETITION FOR WRIT OF HABEAS CORPUS, AND (2) GRANTING PARTIAL CERTIFICATE OF APPEALABILITY

This is a habeas case filed by a Michigan prisoner under 28 U.S.C. § 2254. Petitioner Kevin Michael-Dorman Beltowski was convicted after a jury trial in the Wayne Circuit Court of second-degree murder, MICH. COMP. LAWS § 750.317. Petitioner was sentenced as a third-time habitual felony offender to 20 to 40 years in prison.

The petition raises six substantive claims and makes two additional procedural arguments: (1) the trial court erroneously instructed the jury on self-defense, (2) insufficient evidence was presented at trial to sustain the verdict, (3) the trial judge's conduct deprived Petitioner of a fair trial, (4) newly discovered evidence shows that voluntary drug use was a substantial contributing cause of the victim's death, (5) the prosecutor engaged in misconduct, (6) Petitioner was denied the effective assistance of trial counsel, (7) Petitioner is entitled to an evidentiary hearing, and (8) Petitioner has demonstrated cause to excuse any state court procedural defaults.

The Court finds that Petitioner's claims are without merit. Therefore, the

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petition will be denied. The Court will, however, grant Petitioner a certificate of appealability with respect to his self-defense jury instruction claim, but it will deny a certificate of appealability with respect to his other claims.

I. Background

This case involves the death of Timothy Moraczewski occurring on September 26, 2010. Moraczewski was killed at a marijuana grow-house in Detroit he operated together with Petitioner. The cause of death was asphyxiation. The victim was found by his brother and another man with a nylon strap attached to a rifle that was tightly twisted around his neck. Petitioner admitted he fought with the victim on the date of his death, but he claimed the death was the result of an accident or self-defense after the victim attacked him. The prosecutor's theory was that during the physical altercation Petitioner intentionally killed the victim by continuing to strangle him with the rifle strap after the victim lost consciousness.

At trial, John Bechinski testified he was the forensic pathologist who performed the autopsy on the victim. Dkt. 5-5, at 72. He opined that the cause of death was asphyxia, and the manner of death was homicide. Id. Bechinski noted there was a ligature mark on the victim's neck, indicating that he did not die as the result of manual strangulation, but an implement was used to cut-off blood flow to his head. Id, at 76. Bechinski testified that in cases of strangulation, a person will typically lose consciousness in ten to fifteen seconds, and if pressure is continued to be applied death will typically occur within a few minutes. Id., at 79.

Bechinski also did a toxicology analysis on the victim, and he found the presence of hydrocodone and alprazolam (Vicodin and Xanax). Id., at 84. Vicodin is an opiate, and both drugs are sedatives that depress the central nervous system. Id., at 84-85. The levels for both drugs were elevated, meaning the victim may have been sedated at the time of his death. Id., at 88. Bechinski nevertheless opined that asphyxia was the cause of death, and that it was not an overdoes. Id., at 88-89. Bechinski could not say whether the medications were a contributing cause of death. Id., at 89.

Bechinski also noted abrasions and bruises all over the victim's body consistent with him having been in a fight. Id., at 91-92. Bechinski examined the nylon strap of a rifle provided by the police, and he opined that it was consistent with the injury to the victim's neck. Id., at 95.

Among other things, defense counsel cross-examined Bechinski about the drugs found in the victim's system. Dkt. 5-6, at 9-10. Bechinski conceded that he did not know the victim's tolerance for the drugs. Id. Bechinski could not say how the drugs affected the victim. Id., at 11.

Jeffrey Moraczewski testified he was the victim's brother. Id, at 50-51. Moraczewski knew Petitioner for seventeen years, and he had worked for Petitioner's roofing company. Id., at 52-53. Moraczewski testified the victim also worked for and had been long-time friends with Petitioner. Id., at 54.

Aside from the roofing business, Petitioner ran a marijuana grow operation at a house located in Detroit. Id., at 57-58. Petitioner financed the operation by renting the house and providing the equipment, and Petitioner stayed at the house to watch

over the operation. Id., at 58-59. The operation was going on for about two years at the time of the victim's death. Id., at 61.

Moraczewski explained that his brother had a bad knee and bad back from roofing, so he worked exclusively at the grow operation. Id., at 62. The victim took pain medications as a result of his roofing injuries. Id., at 63-64. Moraczewski believed Petitioner and the victim shared equally in the profits from the grow house. Id., at 66.

At the time of his brother's death, Moraczewski testified that there was tension between Petitioner and the victim. Id., at 67. Petitioner wanted to start a second grow house without the victim. Id., 68. Petitioner planned to remove the equipment from the house where the victim stayed and move it to a second house where Petitioner's brother would take over operations. Id., at 68. Petitioner spoke to Moraczewski about how he would need to sneak the equipment out of the house, and that the house was in foreclosure anyway. Id., at 69-70. Another source of tension between the two men was the fact Petitioner and the victim were competing over the affections of the same women. Id., at 71-75.

On Sunday evening, September 26, 2010, Moraczewski received a phone call from Petitioner's number which he initially ignored. Id., 82. A few seconds later Moraczewski received a text message from Petitioner stating, "911. Call me now." Id., at 83. Moraczewski called Petitioner back. Petitioner told Moraczewski that he just had a fight with the victim, and "I choked your brother out with his own fuckin' gun." Id., at 86. Petitioner explained to Moraczewski that "I choked him out until he turned purple. And I held it for another thirty seconds." Id.

Petitioner told Moraczewski the fight started when Petitioner told the victim he was going to remove the grow equipment. Id., at 88. The victim was angry and shot a round into the wall next to Petitioner with his rifle. Id., at 89. The men then began to fight, and Petitioner got on top of the victim. Id. Petitioner said he was able to unsheathe the victim's knife from his side. Petitioner pointed the knife at the victim's face, but then he threw it across the room. Id., at 92-93. Petitioner did not tell Moraczewski there was a struggle for control of the rifle. Id., at 98.

Petitioner told Moraczewski that when he was choking his brother with the rifle strap, the victim tried to "tap out," meaning he was indicating he wanted to give-up. Id., at 100. Petitioner told Moraczewski he responded to the victim, "Do you think I'm gonna let you tap out this time, bitch?" And then he continued to choke the victim for another thirty seconds. Id., at 101. Petitioner told Moraczewski that his brother was "not as strong as he thinks he is. He's a pussy." Id.

Moraczewski asked Petitioner if he killed his brother. Id., at 102. Petitioner answered that the victim was still breathing when he left the house. Id., at 102. Petitioner told Moraczewski with a sense of urgency that he better go over to the house, however, to see if the victim was still alive. Id., at 102. Moraczewski was very concerned, and he immediately called his sister and brother-in-law so they could go together to the house. Id., at 102-03.

Shortly thereafter Moraczewki arrived at the house with his brother-in-law. They went inside and found the victim lying on a couch. Id., at 107-13. Items were thrown everywhere. Id., at 114. The victim's body was twisted in a strange position. Id.,

at 114. Moraczewski saw a strap wrapped around his brother's neck. Id. He appeared to be dead. Id., at 116. Moraczewski tried to take the strap off, but it was too tight to even fit a finger underneath it. Id., at 117. Finally, he rotated the rifle attached to the strap four times to loosen and remove it. Id., at 119-122. They then drove the victim to a near-by hospital where he was declared dead. Id., at 123. Moraczewski called Petitioner to tell him that the victim was dead, and Petitioner responded by text, stating, "Tell me this is a joke." Id., at 105. Moraczewski subsequently told the police everything Petitioner told him and what he saw when he arrived at the grow house. Id., at 132 ff.

Michael Mitchell testified he was Jeffrey Moraczewski's brother-in-law. Dkt. 5-7, at 23. He had known the victim for eighteen years, and he had known Petitioner for about seven years. Id., at 24. He testified that on the date of his death, he received a text message from the victim at 5:45 p.m., lamenting the Detroit Lion's recent loss. Id., at 29-30. About fifteen to twenty minutes later, he got the message from Moraczewski about Petitioner's call. Id., at 31, 35. Moraczewski picked him up and they drove to the victim's house. Id. They got to the house around 6:30 p.m. Id., at 34.

Mitchell saw the victim lying on the couch. Id., at 35. He appeared to be. Id., at 35-36. Mitchell saw the strap attached to the victim's neck and the rifle on his back. Id. He could not get his finger between the strap and the victim's neck. Id., at 38. Mitchell heard Moraczewski yell, "You didn't loosen the strap," as if he were speaking to Petitioner. Id., at 39-40. The strap was twisted around the back of the victim's neck, and they had to rotate the rifle at least three times to remove it. Id., at 42.

Detroit Police Officer Frank Hilbert testified he spoke with Moraczewski at the hospital, and Moraczewski told him what Petitioner told him on the phone. Id., at 124-147. Moraczewski told Hilbert that Petitioner said he choked-out the victim after they had a fight. Id., 148. Moraczewski told Hilbert about Petitioner's statements regarding wrapping the gun around victim's neck and holding it there for thirty seconds. Id, at 148-49. He continued to twist the strap until the victim's lips and face turned purple. Id., at 150.

Defense counsel examined Detroit Police Officer Allen Williams about the lack of forensic evidence collected at the scene. Id., at 148-170.

Gerald Kapinsky testified for the defense. Kapinsky said he was friends with both Petitioner and the victim. Dkt. 5-9, at 66-104. Kapinsky stopped his relationship with the victim because Kapinsky was concerned about his and his family's safety. Id., at 74. The victim had a reputation of being "different, weird . . . kind of scary," Id., at 78-79, wanting "to go out and, and beat somebody up," and he was "psychotic." Id., at 81. The victim carried a rifle and knife at all times, and he had shot four or five males with birdshot from a shotgun at Finney High School which was located directly across the street from the grow house. When Tim was at the grow house he was always armed. Id., at 121. Kapinsky testified that when the victim was on Vicodin he was "definitely stronger," but the Xanax made him slow down. Id., at 123. The victim had a big bottle of Vicodin that he would "eat" every morning. Id.

Petitioner testified in his own defense. He testified that the day before the incident, he tried to come to the grow house, but the victim told him to come the next

day. Id., at 191. When Petitioner arrived the next day just before 6:00 p.m., the victim had a rifle slung over his neck and a knife strapped to his side. The victim was agitated and was angry about Petitioner's visit. Id.

Petitioner testified the grow operation needed to be moved because the house was in foreclosure. Petitioner suggested to the victim they split up the operation with the victim keeping the plants and Petitioner taking the equipment. Id., at 198. The victim became very angry at this suggestion, so Petitioner sat on the couch because he did not want to fight. Id., at 201-204. Nevertheless, the victim pointed the rifle at Petitioner and said, "You think I'm gonna let you walk out of here, like that . . . tell me I won't shoot you." Id., at 204-207. The victim tried to fire the rifle, but the safety was on. He then fired a shot past Petitioner's head that hit the wall. Id., at 207-208. Subsequent investigation, in fact, discovered a bullet hole through a wall in the house.

Petitioner threw his hands in the air and told the victim to take everything, and the victim stepped back. Id., at 208. Petitioner then tried to leave the house, but the victim grabbed him at the door and said, "You're not going anywhere." Id. The two men began to wrestle and landed on the couch. Id., at 211. Petitioner testified he grabbed the barrel of the rifle as the victim began to point it at him. Id., at 211. Petitioner fell on top of the victim, and he kept telling the victim to stop as he attempted to point the rifle at him. Id., at 213-14.

When the victim did not stop, Petitioner felt his life was in danger, so he let go of the rifle and grasped the strap and applied pressure. Id., at 214. Petitioner testified he never twisted the strap like a tourniquet. Id., at 217. The victim rolled over and

stood up, but Petitioner managed to hold onto the strap. Id, at 218-19. The victim tried to "tap" and give up, but Petitioner did not release the pressure on the strap because he was afraid for his life. Id., at 219-20.

Petitioner pulled the victim back onto him and they both fell onto the couch. Petitioner was lying on his back, and the victim was lying on top of him with his back to Petitioner. Id., at 221-22. Petitioner could see the side of the victim's face and saw that he lost consciousness, and he held the strap tight against his neck for another three second. Id., at 223. Petitioner saw and heard that the victim still breathing, so he found his keys and left the house. Id., at 223-24.

On cross-examination, Petitioner testified he left the house as soon as the victim lost consciousness. Dkt. 5-10, at 78. He denied he told Jeffrey that he continued to apply pressure for an additional thirty seconds after the victim was unconscious. Id., at 78. He denied he twisted the strap around the victim's neck on purpose, and he did not know it was twisted when he left the house. Id., at 81.

Once he was back in his truck Petitioner called the victim's brother, believing the victim was still alive. Dkt. 5-9, at 226. Petitioner asked him to contact the victim and attempt to reason with him. When Petitioner learned that Jeffrey did not hear back from the victim, Petitioner said he should go to the house and check on him. Id., at 229.

Based on this evidence the jury found Petitioner guilty of second-degree murder, and he was sentenced as indicated above.

Following his conviction and sentence, Petitioner filed a claim of appeal in the

Michigan Court of Appeals. His appellate brief raised four claims:

> I. The cumulative effect of the prosecutor's misconduct denied defendant a fair trial.
>
> II. Trial court error infringed on defendant's due process rights to a fair trial.
>
> III. Ineffective assistance of counsel denied Defendant a fair trial.
>
> IV. The cumulative effect of error requires that appellant be granted a new trial.

The Michigan Court of Appeals affirmed in an unpublished opinion. *People v. Beltowski*, No. 304254, 2012 WL 4800241 (Mich. Ct. App. Oct 9, 2012).

Petitioner subsequently filed an application for leave to appeal in the Michigan Supreme Court, raising the same claims as in the Michigan Court of Appeals, and adding an additional claim:

> I. Defendant-Appellant's appellate counsel was ineffective where she failed to raise non-frivolous issues on appeal and failed to offer Defendant-Appellant the necessary assistance he needed to file a timely Standard 4 supplemental brief on appeal.

The Michigan Supreme Court denied the application because it was not persuaded that the questions presented should be reviewed by the Court. *People v. Beltowski*, 493 N.W.2d 968 (Mich. 2013) (table).

Petitioner subsequently returned to the trial court and filed a motion for relief from judgment. The motion raised five claims:

> I. Defendant Beltowski was denied due process of law and a fair trial when an erroneous self-defense instruction was given, which deprived him of the defense by instructing the jury that he could not claim self-defense if: (1) he "acted wrongfully," (2) "brought on the assault," (3) "and was limited to using self- defense only, to protect himself from the

imminent unlawful use of force by another," and (4) only for such time "as it seems necessary for the purpose of protection."

II. Newly discovered evidence that high levels of hydrocodone and alprazolam ingested by the deceased significantly contributed to his death requires a retrial.

III. The verdict was against the great weight of evidence.

IV. Defendant Beltowski was denied his right to effective assistance of counsel when 1) he failed to investigate and present toxicology evidence that the high levels of hydrocodone and alprazolam significantly contributed to the death, 2) failed to object to an erroneous jury instruction on self-defense, and 3) failed to object to specific instances of professional misconduct in the prosecutor's closing argument.

V. The prosecutor engaged in misconduct in his closing argument by vouching for his witness and arguing matters not in evidence. Defendant Beltowski has met the procedural requirements of good cause and actual prejudice under MCR 6.508(D) and an evidentiary hearing is required.

The trial court denied the motion for relief from judgment. Dkt. 5-18. The court found that review of Petitioner's new claims were barred under Michigan Court Rule 6.508(D)(3), and because he had failed to demonstrate "merit in any of the . . . arguments posited." Id., at 8.

Petitioner filed an application for leave to appeal in the Michigan Court of Appeals, raising the same claims. The Michigan Court of Appeals denied the application for failure to establish entitlement to relief under Rule 6.508(D). *People v. Beltowski*, No. 326192 (Mich. Ct. App. June 22, 2015). Petitioner then applied for leave to appeal in the Michigan Supreme Court, but that court also denied leave to appeal with citation to Rule 6.508(D). *People v. Beltowski*, 882 N.W.2d 130 (Mich. 2016) (table).

II. Standard of Review

28 U.S.C. § 2254(d), as amended by The Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), imposes the following standard of review for habeas cases:

> An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim–
>
> > (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
> >
> > (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

A state court adjudication is "contrary to" Supreme Court precedent under § 2254(d)(1) "if the state court applies a rule that contradicts the governing law set forth in [Supreme Court] cases" or "if the state court confronts a set of facts that are materially indistinguishable from a decision [of the Supreme Court] and nevertheless arrives at a [different result]." *Lockyer v. Andrade*, 538 U.S. 63, 73 (2003) (internal quotation marks omitted).

Under the "unreasonable application" clause of § 2254(d)(1),

> even clear error will not suffice. Rather, as a condition for obtaining habeas corpus from a federal court, 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.

White v. Woodall, ___ U.S. ___, 134 S. Ct. 1697, 1702, 188 L. Ed. 2d 698 (2014) (citations, quotation marks, and alterations omitted).

"When reviewing state criminal convictions on collateral review, federal judges are required to afford state courts due respect by overturning their decisions only when there could be no reasonable dispute that they were wrong." *Woods v. Donald*, ___ U.S. ___, 135 S. Ct. 1372, 1376, 191 L. Ed. 2d 464 (2015). "Federal habeas review thus exists as 'a guard against extreme malfunctions in the state criminal justice systems, not a substitute for ordinary error correction through appeal.'" *Id.* (quoting *Harrington v. Richter*, 562 U.S. 86, 102-03 (2011)). "[W]hether the trial judge was right or wrong is not the pertinent question under AEDPA." *Renico v. Lett*, 559 U.S. 766, 778 n.3 (2010). The question is whether the state court's application of federal law was "objectively unreasonable." *White*, 134 S. Ct. at 1702. In short, the standard for obtaining federal habeas relief is "difficult to meet . . . because it was meant to be." *Burt v. Titlow*, ___ U.S. ___, 134 S. Ct. 10, 16, 187 L. Ed. 2d 348 (2013)(internal quotation marks omitted).

III. Analysis

A. Procedural Default

Respondent contends that several of Petitioner's claims are procedurally defaulted because the errors were not preserved at trial or on direct appeal. Under the procedural default doctrine, a federal habeas court will not review a question of federal law if a state court's decision rests on a substantive or procedural state law ground that is independent of the federal question and is adequate to support the judgment.

See *Coleman v. Thompson*, 501 U.S. 722, 729 (1991). However, procedural default is not a jurisdictional bar to review of a habeas petition on the merits. See *Trest v. Cain*, 522 U.S. 87, 89 (1997). Additionally, "federal courts are not required to address a procedural-default issue before deciding against the petitioner on the merits." *Hudson v. Jones*, 351 F. 3d 212, 215 (6th Cir. 2003) (citing *Lambrix v. Singletary*, 520 U.S. 518, 525 (1997)). It may be more economical for the habeas court to simply review the merits of the petitioner's claims, "for example, if it were easily resolvable against the habeas petitioner, whereas the procedural-bar issue involved complicated issues of state law." *Lambrix*, 520 U.S. at 525. In the present case, the Court deems it more efficient to proceed directly to the merits, especially because Petitioner alleges that his attorneys were ineffective for failing to preserve the defaulted claims.

B. Jury Instructions

Petitioner first claims his trial was rendered fundamentally unfair when the trial court deviated from the language of Michigan's Standard Jury Instructions and erroneously instructed the jury on the law of self-defense. This claim was raised in the state courts in Petitioner's motion for relief from judgment. The trial court found the claim defaulted under Michigan Court Rule 6.508(D)(3), but it also found that Petitioner had failed to demonstrate plain error. Aside from its procedural default argument, Respondent asserts that the rejection of the claim for "plain error" by the state trial court did not involve an unreasonable application of established Supreme Court law. See *Fleming v. Metrish*, 556 F.3d 520, 532 (6th Cir. 2009) (holding that

claim reviewed for "plain error" is entitled to AEDPA deferential standard); c.f. *Frazier v. Jenkins*, 770 F.3d 485, 497 n. 5 (6th Cir. 2014) (stating in dicta that plain error review is not an adjudication on the merits).

The trial court instructed the jury on self-defense as follows:

> The defendant does not have to prove that he acted in self-defense; instead, the prosecutor must prove, beyond a reasonable doubt, that the defendant did not act in self-defense.
>
> The defendant claims that he acted in lawful self-defense.
>
> A person has the right to use force to defend himself under certain circumstances.
>
> If the defendant is found to have acted in lawful self-defense, his actions are justified, and he is not guilty of homicide, murder, first degree, premeditated, of Timothy Moraczewski, and the less serious offense of murder second degree, and voluntary manslaughter of Timothy Moraczewski.
>
> You should consider all the evidence and use the following rules to decide whether the defendant acted in lawful self-defense. Remember to judge the defendant's conduct according to how the circumstances appeared to him at the time he acted.
>
> First, at the time he acted, the defendant must not have been engaged in the commission of a crime.
>
> Second, when he acted, the defendant must have honestly and reasonably believed that he had to use force to protect himself from the imminent unlawful use of force by another.
>
> If his belief was honest and reasonable, he could act at once, to defend himself, even if it turns out later that he was wrong about how much danger he was in.
>
> Third, a person is only justified in using the kind of force that was appropriate to the attack made and the circumstances as he saw them.
>
> When you decide whether the force used was what seemed

necessary, you should consider whether the defendant knew about any other ways of protecting himself. But you may also consider how the excitement of the moment effected the choice the defendant made.

Fourth, the right to defend one's self only lasts as long as it seems necessary for the purpose of protection.

Fifth, the person claiming self-defense must not have acted wrongfully and brought on the assault.

However, if the defendant only used words, that does not prevent him from claiming self-defense if he was attacked.

Dkt. 5-11, at 99-101.

Petitioner raises multiple objections to this instruction. First, he asserts the fifth listed element that the defendant not act "wrongfully" to be able to claim self-defense is overly broad because self-defense is only precluded under Michigan law when the defendant is committing a crime. Petitioner asserts that as instructed the jury might have erroneously rejected the defense if it believed Petitioner merely acted morally wrongfully. Second, Petitioner likewise asserts that the fifth element of the instruction erroneously precludes self-defense if the defendant "brought on the assault." He asserts that under this language the jury might have erroneously rejected the defense if it believed Petitioner "brought on the assault" by coming over the house to remove the equipment. Third, Petitioner asserts that the instruction erroneously required the decedent to use unlawful force for Petitioner to claim self-defense, and the jury was never instructed on how to determine whether the use of force by the victim was lawful. Fourth, Petitioner asserts that the instruction erroneously instructed the jury that self-defense is available only "as long as it seems necessary for the purposes of

protection." Petitioner asserts that the instruction fails to define what is meant by "seems necessary" and "protection." Finally, Petitioner asserts that the instruction failed to include language that self-defense permits the use of deadly force, and it failed to list factors for the jury to consider in determining whether the accused had a reasonable belief of death or serious bodily injury.

The trial court rejected the claim in the alternative on the merits as follows:

> Under the facts of this case, this Court is persuaded that the error involved here was not decisive of the outcome. Defendant presents winding arguments regarding the trial court instructing the jury that if he acted wrongfully or brought on the assault, he would not be afforded the right to claim self-defense, which erroneously precludes his use of self-defense. However, both of these terms essentially describe a person who is the aggressor, or initiator of an altercation cannot turn around and escalate or use deadly force, if the other person chooses to fight back. Here, the jury was given the choice to either believe the events as testified to by the defendant, or as laid before them by the prosecution. Conversely, if the jury did believe the defendant, he would have been protected under the [Self-Defense Act], even if he used deadly force. Ultimately, the jury did not believe the defendant's testimony, and deemed him the aggressor in this situation. As such, this Court finds there was no error with defendant's jury instructions, and defendant is unable to avoid forfeiture of this issue because he has not established that he was prejudiced by the court's plain error . . . . In light of the trial court's instructions and the evidence presented, there is no basis for concluding that the error seriously affected the fairness, integrity or public reputation of judicial proceedings.

Dkt. 5-18, at 5.

This decision, though failing to address each of Petitioner's objections to the self-defense instruction individually, did not involve an unreasonable application of clearly established Supreme Court law. The burden of establishing that an instructional error warrants habeas relief rests with a habeas petitioner, and the

burden is a heavy one. The question in a collateral proceeding–such as Petitioner's motion for relief from judgment or this habeas proceeding–is not merely whether the challenged "instruction is undesirable, erroneous, or even 'universally condemned,' but [whether] it violated some right which was guaranteed . . . by the Fourteenth Amendment." *Donnelly v. DeChristofo*, 416 U.S. 637, 643 (1974). In other words, the relevant inquiry is "whether the ailing instruction so infected the entire trial that the resulting conviction violates due process." *Estelle v. McGuire*, 502 U.S. 62, 72 (1991) (quotation omitted).

When assessing the propriety of a challenged instruction, a court must not view the instruction in isolation but must consider it within the context of the entire jury charge and the evidence introduced at trial. *Jones v. United States*, 527 U.S. 373, 391 (1999). An incomplete instruction is less likely to be prejudicial than an instruction that misstates the law. *Henderson v. Kibbe*, 431 U.S. 145, 154-55 (1977). Every ambiguity, inconsistency or deficiency in a jury instruction does not, standing alone, necessarily constitute a violation of due process. *Waddington v. Sarausad*, 555 U.S. 179, 190 (2009). To warrant habeas relief, it is not enough that there might be some "slight possibility" that the jury misapplied the instruction. *Id.* at 191.

Petitioner's argument has some force. The instruction read by the trial court deviated from Michigan's standard instruction on self-defense and the language of Michigan's Self-Defense Act. See Mich. Comp. Laws 780.972(1); Michigan Criminal Jury Instructions 2d, 7.15. The Self-Defense Act allows a person to use deadly force if: (1) he is not engaged in the commission of a crime at the time he uses force, (2) he is

at a place he has a legal right to be, and (3) he honestly and reasonably believes that the use of deadly force is necessary to prevent immanent death or great bodily harm to himself of another person. *Id.* The statute modified the traditional duty to retreat rule, but did not replace the common law right to self-defense. *People v. Guarjardo*, 300 Mich. App. 26, 38 (2013).

Petitioner posits a number of hypothetical findings the jury might have made that would have led them to erroneously reject self-defense under the instructions as read. He asserts that the jury might have found that Petitioner acted "wrongfully" and "brought on the assault" by going to the house and arguing with the victim, and as a result rejected self-defense under the trial court's fifth instructed element of self-defense though such a finding does not negate a valid self-defense claim under Michigan law. He similarly asserts that the jury–without further guidance–might have found that the victim's use of force was lawful, thus erroneously precluding self-defense under the trial court's second instructed element. Finally, Petitioner hypothesizes that the jury might have rejected the defense under the erroneous belief that force was no longer required "for purposes of protection," an undefined term of the instructed fourth element.

Given the evidence presented at trial and the arguments presented by the parties at trial, however, there is no reasonable probability that the jury rejected Petitioner's self-defense claim on any of these hypothetical bases. This might be a different case if Petitioner had shot the victim and instantly killed him during the course of an active fight. In such a case there might have been close questions about

whether Petitioner honestly and reasonably was in fear for his life while the victim was conscious and armed and fighting. But the evidence presented at trial indicates Petitioner rendered the victim unconscious by strangling him with the rifle strap. The medical examiner testified that a person would have been rendered unconscious, and obviously helpless, after ten to fifteen seconds of being strangled with a ligature. Petitioner told the victim's brother minutes after the incident that he "choked out" the victim, and he held the strap tight for another thirty seconds after he passed-out.

The problem for Petitioner and his defense is the period of time after he rendered the victim helpless. At that point, the victim was unconscious and no longer presented a threat. According to Petitioner, the victim was still breathing and he immediately left without knowing that the rifle strap was wrapped around the victim's neck. But this testimony runs contrary to the testimony of the victim's brother who said that Petitioner told him that he continued to choke the victim for another thirty seconds after he lost consciousness. Though Petitioner testified that the victim's brother was lying about this statement, the brother told a police officer the same thing hours after the incident at the hospital. Additionally, both the victim's brother and Mitchell found the victim with the strap twisted around his neck so tightly that they could not get their fingers underneath it.

Given this evidence, there is no substantial probability that the jury erroneously rejected self-defense because it thought that Petitioner's conduct after he rendered the victim unconscious was merely "wrongful," that the victim was using lawful force at that point (he was unconscious), or that the continued use of force was required for

"purposes of protection." That is, none of the hypothetical findings posited by Petitioner applied to the facts of the case after Petitioner rendered the victim unconscious and helpless. After Petitioner refused to allow the victim to "tap out," a reasonably debatable act of self-defense turned into a clear case of murder.

The Supreme Court has held that in determining whether to grant relief to a habeas petitioner based upon an erroneous jury instruction, a reviewing court must determine whether the instruction had a substantial and injurious effect or influence on the jury's verdict. *Hedgpeth v. Pulido*, 555 U.S. 57, 61-62 (2008). The Court concludes that Petitioner is not entitled to habeas relief because any errors in the self-defense instruction did not have a substantial and injurious effect or influence on the verdict in light of the lack of evidence to support Petitioner's self-defense claim and the strong evidence indicating that Petitioner murdered the victim after he rendered him unconscious.

C. Sufficiency of the Evidence

Petitioner asserts in his second claim there was insufficient evidence presented at trial to prove he did not act in self-defense. He also asserts the great weight of the evidence was contrary to the jury's verdict. Neither claim presents a cognizable issue.

With respect to the great weight of the evidence, Petitioner's argument is a state-law claim that is not reviewable by a federal court in a habeas proceeding. See *Nash v. Eberlin*, 258 F. App'x 761, 764 n.4 (6th Cir. 2007); *Cukaj v. Warren*, 305 F. Supp. 2d 789, 796 (E.D. Mich. 2004) ("A federal habeas court . . . has no power to grant

habeas relief on a claim that a state conviction is against the great weight of the evidence.").

With respect to the sufficiency of the evidence to disprove self-defense, the claim is non-cognizable on habeas review because it cannot be supported by clearly established by Supreme Court law. Under Michigan law, self-defense is an affirmative defense. See *People v. Dupree*, 486 Mich. 693, 704, 712 (2010). "An affirmative defense, like self-defense, 'admits the crime but seeks to excuse or justify its commission. It does not negate specific elements of the crime.'" *People v. Reese*, 491 Mich. 127, 155, n. 76 (2012)(quoting *Dupree*, 486 Mich. at 704, n. 11). Although under Michigan law the prosecutor is required to disprove a claim of self-defense or defense of others, See *People v. Watts*, 61 Mich. App. 309, 311 (1975), "[p]roof of the nonexistence of all affirmative defenses has never been constitutionally required. . . ." See *Smith v. United States,* 568 U.S. 106, 133 S. Ct. 714, 719 (2013) (quoting *Patterson v. New York*, 432 U.S. 197, 210 (1977)). The Supreme Court and the Court of Appeals for the Sixth Circuit have rejected the argument that the Constitution requires the prosecution to disprove self-defense beyond a reasonable doubt. See *Gilmore v. Taylor*, 508 U.S. 333, 359 (1993)(Blackmun, J., dissenting) ("In those States in which self-defense is an affirmative defense to murder, the Constitution does not require that the prosecution disprove self-defense beyond a reasonable doubt"); *Martin v. Ohio*, 480 U.S. 228, 233-36 (1987); see also *Allen v. Redman*, 858 F. 2d 1194, 1197 (6th Cir.1988) (explaining that habeas review of sufficiency-of-the-evidence claims is limited to elements of the crimes as defined by state law and citing *Engle v. Isaac*, 456 U.S. 107 (1982), and *Duffy v.*

Foltz, 804 F.2d 50 (6th Cir. 1986)). Therefore, "the due process 'sufficient evidence' guarantee does not implicate affirmative defenses, because proof supportive of an affirmative defense cannot detract from proof beyond a reasonable doubt that the accused had committed the requisite elements of the crime." *Caldwell v. Russell*, 181 F.3d 731, 740 (6th Cir. 1999).

In any event, even if this claim was cognizable Petitioner would not be entitled to habeas relief. The critical inquiry on review of the sufficiency of the evidence to support a criminal conviction is, "whether the record evidence could reasonably support a finding of guilt beyond a reasonable doubt." *Jackson v. Virginia*, 443 U.S. 307, 318 (1979). The relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *Id.* at 318-19 (internal citation and footnote omitted)(emphasis in the original). A federal court may grant habeas relief only if the state court decision was an objectively unreasonable application of the *Jackson* standard. See *Cavazos v. Smith*, 565 U.S. 1, 2 (2011). For a federal habeas court reviewing a state court conviction, "the only question under *Jackson* is whether that finding was so insupportable as to fall below the threshold of bare rationality." *Coleman v. Johnson*, 566 U.S. 650, 132 S. Ct. 2060, 2065 (2012).

As indicated above, under Michigan law one acts lawfully in self-defense if he honestly and reasonably believes that he is in danger of serious bodily harm or death as judged by the circumstances as they appeared to the defendant at the time of the act. *Blanton v. Elo*, 186 F.3d 712, 713, n. 1 (6th Cir. 1999)(citing *People v. Heflin*, 434

even anger" are insufficient to show bias. *Id.* at 555-56.

1. Questioning Medical Examiner

Petitioner asserts the following exchange with the trial judge during the examination of the medical examiner was improper and prejudiced his defense:

> Q. (Prosecutor): If that [strap] was put around your neck, right now, would that be loose?
>
> A. Um, if it were just strung around my neck?
>
> Q. Correct.
>
> A. It would be loose?
>
> Q. Thank you. In order to cause strangulation, or, or the tourniquet example that we gave you, would that weapon have to be turned, because of this, the length of the strap?
>
> A. Yes.
>
> Q. This -- is that an adjustable strap, sir?
>
> A. It does not appear to be. It appears to be knotted at both of its attachment sites.
>
> Q. Okay. Knotted at both attachment sites?
>
> A. Yes, sir.
>
> Q. Okay.
>
> THE COURT: Um, I have to beg to differ with you. This is an adjustable strap. Does it not have a buckle on it?
>
> THE WITNESS: There is a buckle. However--
>
> THE COURT: Is it just one strap?

THE WITNESS: It is one strap.

THE COURT: But isn't it looped at one end?

Dkt. 5-6, at 40-41.

The Michigan Court of Appeals' decision rejecting this claim was reasonable:

> While the trial court made an inappropriate statement, the trial court reinforced that it was within the province of the jury to ultimately decide issues of fact concerning the strap. For example, after the trial court "publish[ed] the rifle" for the jury, it stated, "Now, if this sling is adjustable, do not move it right now." The trial court then signaled to the jury that it could "do with it what you wish" with the rifle and strap during deliberations. Most importantly, the fact that the trial court believed that the strap was adjustable did not obviously contradict defendant's testimony that the strap was loose as he left the Cadieux residence, and, therefore, defendant has failed to establish prejudice from the comment.
>
> Additionally, the jury was later instructed to disregard any of the trial court's comments. The trial court also instructed the jury regarding its role in determining the facts of the case. Because jurors are presumed to follow such instructions, *Matuszak*, 263 Mich. App. at 58, and for the reasons discussed above, defendant has failed to establish that the comments constituted plain error affecting substantial rights.

Beltowski, 2012 WL 4800241, at *5.

As noted by the state appellate court, the trial court's observation that the rifle strap appeared to be adjustable was favorable to the defense. The prosecutor was attempting to elicit testimony from the medical examiner that because the strap was *not* adjustable–that is, it could not be lengthened–twisting it around an object would necessarily tighten it like a tourniquet. The trial judge thought the strap appeared to be adjustable–opening the possibility that it could be lengthened and loosened despite twisting. The questioning did not prejudice the defense, and the rejection of the claim

was reasonable.

2. Jury Request to Review Evidence

Petitioner next asserts the trial court committed error in its response to the deliberating jury's request to review testimony. During deliberations the jury sent out two notes requesting to see the video statement of Jeffrey Moraczewski and a copy of Petitioner's testimony. The trial judge allowed the jury to see the video statement of Moraczewski but denied the jury's request with respect to Petitioner's testimony. The Michigan Court of Appeals found the claim was without merit because preparing the 270-pages of testimony would have caused a significant delay in deliberations, and in any event, the prosecutor's thorough cross-examination of Petitioner was more harmful than beneficial to the defense. *Beltowski*, 2012 WL 4800241, at *5-6.

This claim fails because it cannot be supported by clearly established Supreme Court law. There is no federal constitutional law which requires that a jury be provided with witness testimony. See *Bradley v. Birkett*, 192 F. App'x. 468, 477 (6th Cir. 2006). No United States Supreme Court decision requires judges to re-read testimony of witnesses or to provide transcripts of their testimony to jurors upon their request. See *Friday v. Straub*, 175 F. Supp.2d 933, 939 (E.D. Mich. 2001). A habeas petitioner's claim that a state trial court violated his right to a fair trial by refusing to grant a jury request for transcripts is therefore not cognizable in a habeas proceeding. *Bradley*, 192 F. App'x. at 477; *Spalla v. Foltz*, 615 F. Supp. 224, 233-34 (E.D. Mich. 1985). The claim is without merit.

3. Denial of Motion for Mistrial

Finally, Petitioner asserts the trial court erred in failing to grant Petitioner's motion for a mistrial after the prosecutor elicited testimony Petitioner provided Vicodin to his employees and the victim. He asserts the failure to grant a mistrial indicates the trial judge was biased against him.

In discussing the related prosecutorial misconduct claim, the Michigan Court of Appeals found a curative instruction was sufficient to remedy any unfair prejudice caused by the improper question:

> Regarding one of the instances of challenged conduct, the trial court instructed the jury to disregard questions relating to defendant providing his work crew Vicodin. That instruction is presumed to have been sufficient to cure any prejudice. *People v. Long*, 246 Mich. App. 582, 588 (2001).

Beltowski, 2012 WL 4800241, at *3.

Petitioner fails to cite clearly established Supreme Court law standing for the proposition that a trial judge's decision to remedy an improper question by instructing a jury to disregard the testimony instead of granting a mistrial indicates reversible bias on the part of the trial judge. Indeed, Petitioner cites no authority at all in support of his argument the trial court was required to grant a mistrial to maintain impartiality. See Dkt. 1; Petition, at 41-42.

Petitioner's third claim is therefore without merit.

E. Newly Discovered Evidence

Petitioner next argues he has newly discovered evidence indicating that the high

meaning that "any special susceptibility of the victim to the injury at issue" does not exonerate a defendant. *People v. Fluhart*, 2016 Mich. App. LEXIS 763, *7 n 1 (2016) quoting *People v. Brown*, 197 Mich. App. 448, 451-52 (1992). Second, the evidence indicated that even without the drugs the victim would not have regained consciousness because Petitioner left the strap tightly wound around the victim's neck preventing any blood flow. This claim does not state a basis for granting habeas relief.

F. Prosecutorial Misconduct

Petitioner's next claim asserts three allegations of prosecutorial misconduct. Petitioner claims the prosecutor (1) improperly injected evidence regarding Petitioner providing drugs to his work crew, (2) vouched for the credibility of its witnesses, and (3) argued facts not supported by the evidence.

To be entitled to habeas relief on a prosecutorial misconduct claim, the petitioner must show that the prosecutor's conduct so infected the trial so as to render the conviction fundamentally unfair. *Parker v. Matthews*, 567 U.S. 37 (2012); *Gillard v. Mitchell*, 445 F.3d 883, 897 (6th Cir. 2006) (citing *Donnelly v. DeChristoforo*, 416 U.S. 637, 643 (1974)). If the misconduct was harmless, then as a matter of law, there was no due-process violation. See *Greer v. Miller*, 483 U.S. 756, 765 & n.7 (1987). In federal habeas, this means asking whether the error "had substantial and injurious effect or influence in determining the jury's verdict." *Brecht v. Abrahamson*, 507 U.S. 619, 623, 637-38 (1993) (quoting *Kotteakos v. United States*, 328 U.S. 750, 776 (1946)); see also *Fry v. Pliler*, 551 U.S. 112, 121-22 (2007).

After reciting the controlling constitutional standard, the Michigan Court of Appeals rejected each of Petitioner's allegations during his appeal of right. It found the questions regarding the drug use at Petitioner's roofing business and the fact he ran a marijuana grow house did not render his trial unfair because they "were issues inextricably part of defendant's and the prosecution's theories at trial." *Beltowski*, 2012 WL 4800241, at *2. The Court also found the trial court's curative and limiting instructions cured any potential prejudice. *Id.* With respect to the vouching claim, the state court found the projector's statement that Jeffery Moraczewski had nothing to lose by lying because he had already lost his brother was a permitted argument based on the facts of the case. *Id.*, at *2-3. Finally, the state court found the prosecutor improperly argued facts not in evidence by referring to the fact a state trooper had recently been killed by a drive high on marijuana. *Id.* The court, however, found the comment was not sufficiently prejudicial to deny Petitioner his right to a fair trial. *Id.*, at *3.

The state court adjudication of this claim was not objectively unreasonable. As correctly stated by the state court, the comment of the prosecutor did not suggest any hidden knowledge that the victim's brother was testifying truthfully. *Johnson v. Bell*, 525 F.3d 466, 482 (6th Cir. 2006). Next, the fact Petitioner and the victim operated the grow house together was a central piece of the factual backdrop of the crime explaining the reason for the confrontation between the two men. While the same is not true with respect to the allegation Petitioner provided pain medications to the victim and his roofing crew, it is difficult to see why this would have necessarily rendered Petitioner's

trial fundamentally unfair given the fact the jury was aware that both the Petitioner and the victim were engaged in a marijuana manufacturing operation. Finally, the comment a state trooper had recently been killed by a person high on marijuana was unnecessary and gratuitous, but it was not objectively unreasonable to find this isolated remark did not deny Petitioner his right to a fundamentally unfair trial. See e.g. *Joseph v. Coyle*, 469 F. 3d 441, 474 (6th Cir. 2006). This claim is without merit.

G. Ineffective Assistance of Trial Counsel

Petitioner next asserts his trial counsel was ineffective for a number of reasons. First, he asserts his attorney failed to object to the introduction of unsolicited testimony from a police officer that Petitioner volunteered to turn himself in until an arrest warrant was issued. He asserts his counsel was ineffective for allowing the defense private investigator to display the victim's militia and military books at the crime scene and then photograph them, allowing the prosecutor to argue they staged the scene. Petitioner asserts counsel was ineffective for failing to object to the alleged prosecutorial and trial judge misconduct discussed above. He asserts his attorney should have hired a toxicology expert as discussed above. And finally, Petitioner asserts his counsel should have objected to the erroneous self-defense instruction.

Under clearly established Supreme Court law, counsel is ineffective when his performance falls below an objective standard of reasonableness and thereby prejudices his client. See *Strickland v. Washington*, 466 U.S. 668, 687-88, 691-92 (1984). To satisfy the performance element, a defendant must point to some action "outside the

wide range of professionally competent assistance." *Id.* at 690. To satisfy the prejudice element, "[t]he 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." *Id.* at 694. In habeas, a reviewing federal court must apply a doubly deferential standard of review: "[T]he question [under § 2254(d)] is not whether counsel's actions were reasonable. The question is whether there is any reasonable argument that counsel satisfied *Strickland's* deferential standard." *Harrington v. Richter*, 562 U.S. 86, 105 (2011).

None of Petitioner's claims merit relief. Petitioner first complains his attorney's questioning of the officer in charge resulted in the unsolicited testimony that Petitioner agreed to turn himself in to police once an arrest warrant was issued:

> Q. (Defense Counsel): Officer, in the conversation I had with you, shortly after the incident, was the contents of the conversation largely, let me know when the warrant issues, we'll turn him in?
>
> A. That was part of it.
>
> Q. But you asked me, would he turn himself in beforehand, right?
>
> A. I asked, I was askin' I needed to talk to him to get his version of the story. And you said you would --
>
> Q. I -- that he would turn himself in when a warrant's [sic] issued, right?
>
> A. Yes.

Dkt. 5-8, at 187).

This was obviously a case of trial strategy. Defense counsel in this passage was trying to establish that Petitioner was cooperative with the police investigation, a point

made to support his self-defense claim. The fact that the question included the detail that the turn-over would occur once the warrant issued was a technical one not germane to the point being made, and it is very likely a fine-point that had no impact on the jury. If counsel did not elicit the testimony, he would have missed the opportunity to support his claim that Petitioner cooperated with police. *Strickland* cautions reviewing court's from second-guessing such tactical decisions.

Next, Petitioner asserts his counsel was ineffective for allowing his private investigator to display the victim's militia and military books at the crime scene and then photograph them, suggesting that the victim was a dangerous man. Petitioner asserts this conduct allowed the prosecutor to argue in closing argument that the defense team staged the scene. This was another tactical decision insulated by the *Stickland* standard. The fact that the victim possessed books about guns and similar material supported the defense narrative that he was a "crazy" and violent man. This defense was advanced in part by the private investigator taking photographs of the materials found at the scene. The fact that in order to take the photographs the investigator moved the books around merely allowed for a weak and rather unpersuasive argument that the scene was staged. Counsel was not ineffective for eliciting the investigator's testimony.

Petitioner next asserts his counsel was ineffective for failing to object to the alleged prosecutorial and trial judge misconduct discussed above. But as discussed above, both of these claims are without merit. Counsel cannot be deemed ineffective for failing to raise a meritless objection. See *Bradley v. Birkett*, 192 F. App'x. 468, 475

(6th Cir. 2006). Nor is there a reasonable probability the result of the proceedings would have been different had counsel objected to the alleged errors. The allegations that might have drawn a sustained objection–the prosecutor's comment regarding the slain state trooper and the evidence regarding Petitioner supplying drugs to his work crew–were not substantial parts of the prosecutor's case without which there was a reasonable probability of acquittal.

Petitioner next asserts his attorney should have hired a toxicology expert. But as discussed above, the proffered report from Dr. Commissariss states only that the drugs in the victim's system may have prevented him from regaining normal breathing after the victim was strangled to the point of passing out. Dkt. 1, Exhibit D. The report fails to account for the fact that the rifle strap was still tightly constricting the victim's neck after he passed-out. The same thing is true for the expert's opinion that the drugs may have made the victim more aggressive. Even if that is true, the victim was certainly no longer aggressive after he lost consciousness and Petitioner continued to apply pressure for another thirty seconds and then left him helpless with the strap tightly constricting his neck. That is the critical passage of time that turned a case of arguable self-defense into murder. Counsel did not perform deficiently by failing to hire a toxicologist, nor was he prejudiced by the failure to offer the testimony similar to that contained in the Commissariss report.

Finally, Petitioner asserts his counsel should have objected to the erroneous self-defense instruction. But again, for the reasons stated above, there is no reasonable probability that the result of the proceeding would have been different had the

standard jury instruction on self-defense been read to the jury. Given the specific factual scenario involved here–where Petitioner continued to strangle the victim even after he lost consciousness and then left him with his neck still constricted by the strap–the evidence did not support a self-defense claim, and there is no reasonable probability he would have been acquitted on that basis even if the slight errors in the instructions discussed above had been cured.

Petitioner has failed to demonstrate that he was denied the effective assistance of trial counsel.

H. Evidentiary Hearing

Finally, Petitioner requests an evidentiary hearing. The request is stated broadly. He does not state which claims require a hearing or what evidence he wishes to present. Nevertheless, in *Cullen v. Pinholster*, 563 U.S. 170 (2011), the Supreme Court held that a federal court's review of a state court decision is limited to the record that was before the state court because the federal habeas scheme was designed to leave "primary responsibility with the state courts." *Id.* at 181-82. Consequently, "[i]t would be contrary to that purpose to allow a petitioner to overcome an adverse state-court decision with new evidence introduced in a federal habeas court and reviewed by that court in the first instance effectively de novo."*Id.* at 182. Put simply, "review under § 2254(d)(1) focuses on what a state court knew and did." *Id.*

Because the Court has determined that Petitioner's claims are without merit even considering the evidence proffered to the state courts, he is not entitled to an

the Court's conclusion Petitioner has not met the standard for a certificate of appealability with respect to all but one of his claims because they are completely devoid of merit. The Court finds, however, that jurists of reason could debate whether Petitioner is entitled to relief on his jury instruction claim. Therefore, the Court grants a certificate of appealability only with respect to Petitioner's claim that the trial court's erroneous jury instruction on self-defense denied Petitioner a right to fair trial and had a substantial impact on the verdict.

V. Conclusion

Accordingly, the Court 1) **DENIES WITH PREJUDICE** the petition for a writ of habeas corpus, 2) **GRANTS** a certificate of appealability with respect to Petitioner's jury instruction claim, but 3) **DENIES** a certificate of appealability with respect to his other claims.

s/John Corbett O'Meara
United States District Judge

Date: November 14, 2017

I hereby certify that a copy of the foregoing document was served upon the parties of record on this date, November 14, 2017, using the ECF system and/or ordinary mail.

s/William Barkholz
Case Manager

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

KEVIN MICHAEL-DORMAN BELTOWSKI,

Petitioner,

Case No. 5:16-cv-14224
Hon. John Corbett O'Meara

v.

SHAWN BREWER,

Respondent.
_____/

JUDGMENT

The above titled case came before the Court on a Petition for Writ of Habeas Corpus. In accordance with the Opinion and Order entered on November 14, 2017;

(1) The Petition for Writ of Habeas Corpus is **DENIED**.

(2) A certificate of appealability is **GRANTED** with respect to his first claim, regarding the self-defense jury instruction.

(3) A certificate of appealability is **DENIED** with respect to his remaining claims.

Dated at Ann Arbor, Michigan, this 14th, day of November 2017.

DAVID J. WEAVER
CLERK OF THE COURT

BY: s/William Barkholz
DEPUTY CLERK

APPROVED:

s/John Corbett O'Meara
United States District Judge

ORDER OF THE MICHIGAN SUPREME COURT

APPX C

Order

Michigan Supreme Court
Lansing, Michigan

July 26, 2016

Robert P. Young, Jr.,
Chief Justice

152158

Stephen J. Markman
Brian K. Zahra
Bridget M. McCormack
David F. Viviano
Richard H. Bernstein
Joan L. Larsen,
Justices

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellee,

v

SC: 152158
COA: 326192
Wayne CC: 10-011466-FC

KEVIN MICHAEL-DORMAN BELTOWSKI,
Defendant-Appellant.

_____/

On order of the Court, the application for leave to appeal the June 22, 2015 order of the Court of Appeals is considered, and it is DENIED, because the defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D).

I, Larry S. Royster, Clerk of the Michigan Supreme Court, certify that the foregoing is a true and complete copy of the order entered at the direction of the Court.

July 26, 2016

Clerk

s0718

Exhibit K

ORDER OF THE MICHIGAN COURT OF APPEALS

Order

Michigan Supreme Court
Lansing, Michigan

November 30, 2016

Robert P. Young, Jr.,
Chief Justice

152158(16)

Stephen J. Markman
Brian K. Zahra
Bridget M. McCormack
David F. Viviano
Richard H. Bernstein
Joan L. Larsen,
Justices

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellee,

v

SC: 152158
COA: 326192
Wayne CC: 10-011466-FC

KEVIN MICHAEL-DORMAN BELTOWSKI,
Defendant-Appellant.

_____/

On order of the Court, the motion for reconsideration of this Court's July 26, 2016 order is considered, and it is DENIED, because it does not appear that the order was entered erroneously.

p1121

I, Larry S. Royster, Clerk of the Michigan Supreme Court, certify that the foregoing is a true and complete copy of the order entered at the direction of the Court.

November 30, 2016

Clerk

Exhibit L

OPINION AND ORDER OF THE WAYNE COUNTY, MICHIGAN
CIRCUIT COURT, CRIMINAL DIVISION

STATE OF MICHIGAN
IN THE THIRD JUDICIAL CIRCUIT COURT
FOR THE COUNTY OF WAYNE

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff,

Hon. James A. Callahan
Case# 10-011466-FC

KEVIN MICHAEL-DORMAN BELTOWSKI,

Defendant,

_____/

A TRUE COPY
CATHY M. GARRETT
WAYNE COUNTY CLERK
BY _____ DEPUTY CLERK

OPINION

On April 13, 2011, following a jury trial, defendant, Kevin Beltowski, was convicted of **second-degree murder**, contrary to **MCL 750.317.** On April 27, 2011, defendant was sentenced as a habitual offender, pursuant to **MCL 769.11**, to twenty (20) to forty (40) years' incarceration for his murder conviction. On October 9, 2012, Michigan's Court of Appeals affirmed defendant's conviction and sentence. April 29, 2013, Michigan's Supreme Court denied defendant's application for leave to appeal, because the court was not persuaded that the questions presented should be reviewed by the Court. Defendant now brings a motion for relief from judgment pursuant to **MCR 6.500**. The prosecution has not filed a response.

Defendant alleges six errors: [1] Defendant argues he was denied due process of law and a fair trial when an erroneous self-defense instruction was given, depriving him of the defense by instructing the jury he could not claim self-defense. [2] Defendant claims newly discovered evidence that high levels of hydrocodone and alprazolam ingested by the

Exhibit H

deceased significantly contributed to his death requires a retrial. [3] Defendant claims the verdict is against the great weight of the evidence. [4] Defendant argues his right to effective assistance of counsel was denied when his trial counsel failed to investigate and present toxicology evidence that the deceased ingested high levels of hydrocodone and alprazolam which defendant believes contributed to his death. Counsel also failed to object to the erroneous jury instruction on self-defense, and failed to object to specific instances of prosecutorial misconduct in the prosecutor's closing argument. [5] The prosecutor engaged in misconduct in his closing argument by vouching for his witness and arguing matters not in evidence. [6] Defendant claims he has met the procedural requirements of good cause and actual prejudice under **MCR 6.508(D)** and an evidentiary hearing is required.

MCR 6.508(D) provides in relevant part:

> The Defendant has the burden of establishing entitlement to the relief requested. The court may not grant relief to the Defendant if the motion:
>
> (2) Alleges grounds for relief which were decided against the Defendant in a prior appeal or proceeding under this subchapter, unless the Defendant establishes,
>
> (3) Alleges grounds for relief, except jurisdictional defects, which could have been raised on appeal from the conviction and sentence or in a prior motion under this subchapter, unless the Defendant demonstrates
>
> (a) Good cause for failure to raise such grounds on prior appeals or in the prior motion, and,
>
> (b) Actual prejudice from the alleged irregularities that support the claim for relief. As used in this rule, "actual prejudice" means that,
>
> (i) In a conviction following a trial, but for the alleged error the Defendant would have had a reasonably likely chance for an acquittal;

(iii) Or that the irregularity was so offensive to the maintenance of a sound judicial process it should not be allowed to stand regardless of its effect on the outcome of the case.

The court may waive the "good cause" requirement of sub-rule (D) (3) (a) if it concludes that there is a significant possibility that the Defendant is innocent of the crime.

Defendant first argues he is entitled to have his conviction reversed due to the trial court's alleged use of erroneous jury instructions regarding self-defense. Defendant claims he was deprived of his self-defense when the jury was instructed he could not claim self-defense, if the jury believed 1] he acted wrongfully; 2] he brought on the assault; and, 3] he was limited to using self-defense only, to protect himself from the imminent unlawful use of force by another; and, 4] only for such time as it seems necessary for the purpose of protection. Defendant failed to object to the court's jury instructions regarding his claim of self-defense. Accordingly, this Court's analysis of the alleged instructional error requires that it is addressed using the standard of review for unpreserved claims of error. As a general rule, issues that are not properly raised before a trial court cannot be raised on appeal absent compelling or extraordinary circumstances. *Napier v. Jacobs,* 429 Mich 222, 235, 414 NW2d 862 (1987) (failure to raise a claim of insufficiency of the evidence); *Moskalik v. Dunn,* 392 Mich 583, 592, 221 NW2d 313 (1974) (failure to object to an erroneous jury instruction); *People v. DerMartzex,* 390 Mich 410, 416–417, 213 NW2d 97 (1973) (failure of the defendant to request a limiting instruction on admissibility of prior-acts evidence); *People v. Farmer,* 380 Mich 198, 208, 156 NW2d 504 (1968) (failure to raise the issue of the involuntariness of a confession). The law does not require that a defendant receive a perfect trial, only a fair one. Accordingly, Michigan's Supreme Court has recognized the importance of an incentive for criminal defendants to raise objections at a

time when the trial court has an opportunity to correct the error, which could thereby obviate the necessity of further legal proceedings and would be by far the best time to address a defendant's constitutional and non-constitutional rights. *Napier, supra.*

A plain, *unpreserved* error may not be considered by an appellate court for the first time on appeal unless the error could have been decisive of the outcome or unless it falls under the category of cases, yet to be clearly defined, where prejudice is presumed or reversal is automatic. *Napier, Moskalik, DerMartzex,* and *Farmer, supra.* In order to establish plain error and avoid forfeiture, defendant must show that 1) an error occurred; 2) the error was plain; and 3) the plain error affected defendant's substantial rights. *People v. Pesquera,* 244 Mich App 305, 316; 625 NW2d 407 (2001). Failure to timely raise error thus requires defendants to establish prejudice in order to avoid the forfeiture of an issue. *People v Grant,* 445 Mich 535, 551-52; 520 NW2d 123, 130 (1994). Defendant argues the trial court completely precluded his right to self-defense by using the Self-Defense Act, (hereinafter known as SDA), by imposing language from the SDA to defeat a common law right of self-defense, as the SDA only addresses the duty to retreat outside one's home. Defendant argues the trial judge through this erroneous instruction precluded defendant's common law right to self-defense. However, this Court considers the jury instructions as a whole to determine whether the court omitted an element of the offense, misinformed the jury on the law, or otherwise presented erroneous instructions. *People v. Hartuniewicz,* 294 Mich App 237, 242; 816 NW2d 442 (2011). [T]he trial court is required to instruct the jury concerning the law applicable to the case and fully and fairly present the case to the jury in an understandable manner. *People v. Mills,* 450 Mich 61, 80, 537 NW2d 909 (1995), mod 450 Mich 1212, 539 NW2d 504 (1995). Yet, not all instructional errors warrant relief.

This Court must affirm a defendant's conviction, if the instructions "fairly presented the issues to be tried and adequately protected the defendant's rights." *People v Goree*, 296 Mich App 293, 301-02; 819 NW2d 82, 87-88 (2012).

Under the facts of this case, this Court is persuaded that the error involved here was not decisive of the outcome. Defendant presents winding arguments regarding the trial court instructing the jury that if he acted wrongfully or brought on the assault, he would not be afforded the right to claim self-defense, which erroneously precludes his use of self-defense. However, both of these terms essentially describe a person who is the aggressor, or initiator of an altercation cannot turn around and escalate or use deadly force, if the other person chooses to fight back. Here, the jury was given the choice to either believe the events as testified to by the defendant, or as laid before them by the prosecution. Conversely, if the jury did believe the defendant, he would have been protected under the SDA, even if he used deadly force. Ultimately, the jury did not believe the defendant's testimony, and deemed him the aggressor in this situation. As such, this Court finds there was no error with defendant's jury instructions, and defendant is unable to avoid forfeiture of this issue because he has not established that he was prejudiced by the court's plain error, nor has he demonstrated prejudice necessary to preserve an issue that was not raised before the trial court. In light of the trial court's instructions and the evidence presented, there is no basis for concluding that the error seriously affected the fairness, integrity or public reputation of judicial proceedings. Indeed, it would be the reversal of a conviction such as this which would have that effect. "Reversal for error, regardless of its effect on the judgment, encourages litigants to abuse the judicial process and bestirs the

public to ridicule it." Accordingly, it is unnecessary to address the standard of reversal in this case of unpreserved, plain error. *Grant, supra.*

Defendant next argues newly discovered evidence, stemming from a report generated from Dr. Commissaris, pharmacologist/toxicologist, who reviewed the toxicology report of Timothy Moraczewski, decedent, and provided a copy of said report to defendant on June 19, 2014. A new trial is warranted on the basis of newly discovered evidence when the defendant satisfies a four-part test: "(1) 'the evidence itself, not merely its materiality, was newly discovered'; (2) 'the newly discovered evidence was not cumulative'; (3) 'the party could not, using reasonable diligence, have discovered and produced the evidence at trial'; and (4) the new evidence makes a different result probable on retrial. *People v Terrell*, 289 Mich App 553, 559; 797 NW2d 684, 688 (2010).

Defendant's use of the toxicologist report from his own expert, Dr. Commissaris, does not meet the requirements of new evidence, as this report could have been obtained during his trial, or during his appeal of right with the use of reasonable diligence. The toxicology report along with the autopsy report was issued by the Wayne County Medical Examiner Office and utilized during the defendant's trial. Moreover, the evidence posited by Dr. Commissaris would not lead to a different result on probable retrial, as the jury did not believe the defendant loosened the rifle straps that were found tightly around the decedent's neck when he was found dead in his home by his brother, Jeffrey Moraczewski. Thus, defendant's theory being supported by Dr. Commissaris, that he released the pressure around the decedent's neck and the high concentration of an opiate drug like hydrocodone suppressed the complainant's respiratory recovery process, which led to his

death via suffocation.[1] However, this theory is only plausible if the decedent wasn't still in a state of strangulation. According to the testimony of Jeffrey Moraczewski, the decedent was "found" with the shoulder strap of the rifle twisted and tight around his neck. In fact, Michael Mitchell testified that Jeff had to untwist the strap three revolutions in order to remove it from around the complainant's neck. As the defendant was in a state of strangulation for more than 3 -5 minutes[2], his death is consistent with strangulation rather than from opiate induced suffocation. As such, defendant fails to meet the criteria for establishing merit for a new trial.

Defendant next argues the verdict was against the great weight of the evidence. Defendant specifically argues insufficient evidence for a reasonable trier of fact to conclude that he did not act in self-defense. Since the verdict was against the great weight of the evidence, it is a miscarriage of justice and a new trial should be ordered. Under a sufficiency review, the reviewing court must view the evidence in the light most favorable to the prosecution, and determine whether the evidence was sufficient to justify a rational trier of fact in finding proof beyond a reasonable doubt. *People v. Wolfe*, 440 Mich 508 (1992). Defendant avers his behavior before and after the incident, which killed the decedent, was consistent with self-defense and the prosecution failed to disprove beyond a reasonable doubt he acted in self-defense, when defendant choked out the decedent with the decedent's own gun.

---

[1] A human being's recovery process is an uncontrolled part of our respiratory system, which is triggered by the increased presence of carbon monoxide in the blood.

[2] The last text received from complainant was t 5:45 pm. Defendant did not call Jeffrey Moraczewski until 6pm, but actual communication between the two did not occur until sometime thereafter. This time frame establishes a full 15 minutes prior to any possible removal of the rifle strap, with actual removal likely occurring sometime much later.

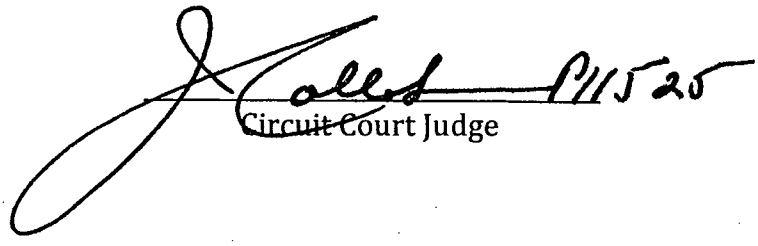
For the reasons stated in the preceding issue regarding newly discovered evidence, this Court finds the evidence sufficient for 2nd degree murder, whereas the jury could have determined the defendant intended to kill the decedent, because the decedent was found by his brother with the rifle strap still tightly wrapped around his neck, resulting in extended strangulation and asphyxia as described by the Wayne County Examiner Office. Defendant's recitation of his trial testimony is insufficient support that his murder conviction was against the great weight of the evidence. Based upon the testimony of all the witnesses, there was more than enough evidence to convict the defendant for 2nd degree murder.

Defendant's fourth, and fifth arguments have been raised during defendant's appeal of right, in an unpublished opinion, *People v. Beltowski*, Docket# 304254, October 9, 2012. As such, defendant is prohibited from re-litigating all of these issues during a subsequent motion or appeal. Appellate court's decisions are binding on courts of equal or subordinate jurisdiction during subsequent proceedings in the same case. It is well settled that whatever has been decided upon in one appeal cannot be re-examined in a subsequent appeal of the same suit. *People v. Peters*, 205 Mitch App 312; 517 NW2d 773 (1994); *Supervisors v. Kennicott*, 94 US 498, 499 (U.S. 1877); **MCR 6.508(D)**.

Defendant's final argument is that he met the procedural requirements of good cause and actual prejudice under **MCR 6.508(D)**. However, as this Court has not found merit in any of the previous arguments posited by the defendant, his final issue must fail from lack of prior support from the crux of his previous arguments. Thus, this Court finds defendant's arguments fail to meet the heavy burden under **MCR 6.508 (D) (3) (a)** good

cause and actual prejudice as required by the court rules. **MCR 6.508(D) (3).** Therefore, defendant's motion for relief from judgment is **DENIED**.

Dated: _____



Circuit Court Judge

STATE OF MICHIGAN
IN THE THIRD JUDICIAL CIRCUIT COURT
FOR THE COUNTY OF WAYNE

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff,

Hon. James A. Callahan
Case# 10-011466-FC

KEVIN MICHAEL-DORMAN BELTOWSKI,

Defendant,
_____/

ORDER

At a session of this Court held in the Frank Murphy Hall of Justice on SEP 16 2014

PRESENT: HON. Hon. James A. Callahan
Circuit Court Judge

In the above-entitled cause, for the reasons set forth in the foregoing Opinion;

IT IS HEREBY ORDERED that Defendant's Motion for Relief from Judgment is **DENIED**.

Circuit Court Judge

Exhibit I

STATE OF MICHIGAN, SELF-DEFENSE ACT

B. SELF-DEFENSE AND INSTRUCTIONS.

In 1975 the Michigan Court of Appeals, commenting on self-defense recognized that "For over one hundred years, Michigan law has acknowledged the right of a person to act upon a reasonable belief that he is in danger of death or serious bodily harm." *People v. Shelton, 64 Mich App 154, 157 (1975).* Self-defense is an affirmative defense that legally, "justifies otherwise punishable criminal conduct. . . if the defendant honestly and reasonably believes his life is in imminent danger or there is a threat of serious bodily harm and that it is necessary to exercise deadly force to prevent such harm to himself." *People v. Dupree, 486 Mich 693, 707 (2010)*; *People v. McFlin, 434 Mich 482, 508-09 (1990)*; *People v. Guajardo, 300 Mich App 26, 35-36 (2013)*; *People v. Orlewicz, 293 Mich App 96, 102 (2011).*

The Self-Defense Act (SDA) codified the circumstances in which a person may use deadly force in self-defense. *MCL 780.972(1)* provides:

> An individual who has not or is not engaged in the commission of a crime at the time he or she uses deadly force may use deadly force against another individual anywhere he or she has the legal right to be with no duty to retreat if either of the following applies:
>
> (a) The individual honestly and reasonably believes that the use of deadly force is necessary to prevent the immanent death of or imminent great bodily harm to himself or herself or to another individual (emphasis added).

STATE OF MICHIGAN. STANDARD CRIMINAL JURY INSTRUCTION
SECOND EDITION 7.15

CJI 2d 7.15 Use of Deadly Force in Self-Defense

(1) The defendant claims that [he/she] acted in lawful self-defense. A person has the right to use force or *even take a life to* defend [himself/herself] under certain circumstances. If a person acts in lawful self-defense, that person's actions are justified and [he/she] is not guilty of [state crime].

(2) You should consider all the evidence and use the following rules to decide whether the defendant acted in lawful self-defense. Remember to judge the defendant's conduct according to how the circumstances appeared to [him/her] at the time [he/she] acted.

(3) First, at the time [he/she] acted, the defendant must have honestly and reasonably believed that [he/she] was in danger of being [killed/seriously injured/sexually assaulted]. If the defendant's belief was honest and reasonable, [he/she] could act immediately to defend [himself/herself] even if it turned out later that [he/she] was wrong about how much danger [he/she] was in. In deciding if the defendant's belief was honest and reasonable, you should consider all the circumstances as they appeared to the defendant at the time.

(4) Second, a person may not kill or seriously injure another person just to protect [himself/herself] against what seems like a threat of only minor injury. The defendant must have been afraid of [death/serious physical injury/sexual assault]. When you decide if the defendant was afraid of one or more of these, you should consider all the circumstances: [the condition of the people involved, including their relative strength/whether the other person was armed with a dangerous weapon or had some other means of injuring the defendant/the nature of the other person's attack or threat/whether the defendant knew about any previous violent acts or threats made by the other person].

(5) Third, at the time [he/she] acted, the defendant must have honestly and reasonably believed that what [he/she] did was immediately necessary. Under the law, a person may only use as much force as [he/she] thinks is necessary at the time to protect [himself/herself]. When you decide whether the amount of force used seemed to be

> necessary, you may consider whether the defendant knew about any other ways of protecting [himself/herself], but you may also consider how the excitement of the moment affected the choice the defendant made.

CJI 2d 7.15 essentially mirrors *MCL 780.972(1)*. Beltowski was assured by his trial counsel that *CJI 2d 7.15* would be read to the jury. However, discussions regarding instructions were had in chambers and not on the record. *CJI 2d 7.15* was essential to Petitioner's defense.

Generally, the trial courts are not required to strictly adhere to the standard instructions. That rule developed out of case law where the standard instruction did not accurately represent the law. See, *People v. Petrella, 424 Mich 221, 227 (1985).* However, a substantial deviation from a standard instruction that *correctly* states the law is compelling proof that the instruction given in a particular case is erroneous. See, *People v. Richardson, 490 Mich 115, 119 (2011)* (*CJI 2d 7.16* accurately states the law).

Finally, the Michigan courts have not hesitated to reverse when jury instructions on self-defense are conflicting with the law or are confusing. *People v. Burkard, 374 Mich 430 (1965); People v. Wright, 144 Mich 586 (1906); People v. Shelton, 64 Mich App 154, 158 (1975).*

C. THE SELF-DEFENSE INSTRUCTION GIVEN.

The entire instruction given in the present case was:

STATEMENT OF FACTS FROM HABEAS CORPUS PETITION

On November 30, 2016 the Michigan Supreme Court denied reconsideration (Appendix, Exhibit L).

Factual Background

By way of summary, the case involved the death of Timothy Moraczewski on September 26, 2010 by asphyxia. Petitioner Beltowski was the owner of a roofing company, Everlast Home Improvement, and Moraczewski worked for him in the business. The two men were also close friends and conducted a marijuana grow operation at a house that Moraczewski lived at on Cadieux in Detroit. The prosecutor claimed Petitioner and Moraczewski had been feuding and Petitioner wanted to terminate their business relationship and then killed Moraczewski by strangling him. The defense theory was that the deceased was wearing a rifle with a strap across his neck and chest. An argument ensued followed by a fight. During the fight the rifle strap became twisted around Moraczewski's neck. Petitioner held on to the strap until he thought he could leave safely. Petitioner argued he did not intend to kill the deceased and any actions he took were in self-defense. Moraczewski had been abusing Xanax and Vicodin, becoming unstable and violent. When Petitioner said he was ending their drug business, Moraczewski became angry and fired a rifle at Petitioner.

The following morning Beltowski met and retained counsel. Having discussed an appropriate time to turn himself in when charges were brought, Beltowski did in fact turn himself in with counsel present to face the charges and present his defense at trial (Vol. VII, p. 166).

Before trial, a plea offer was communicated and approved by the decedent's family (ST, 04/27/11, p. 25). Beltowski did not wish to entertain any type of plea offer, even in the face of life without parole for a first degree murder charge. He refused to accept the generous offer of five (5) to fifteen (15) years for manslaughter, maintaining his innocence (Vol. I, p. 6-8).

At trial the prosecution called Dr. JOHN BECHINSKI, a forensic pathologist previously employed an Assistant Medical Examiner at Wayne County (Vol. II p. 63).[1] On September 29, 2010, he performed an autopsy on Timothy Moraczewski (*id.* at 71). The deceased was 34 years old and weighed 173 pounds. Dr. Bechinski testified the cause of death was asphyxia (*id.* at 72, 100). He described asphyxia as a condition when the body does not have enough oxygen. Strangulation is a form of asphyxia (*id.* at 75). A ligature mark was found on the neck of the deceased (*id.* at 76). If pressure is applied through a ligature, then blood that runs into the head is blocked. Eventually, a person may be rendered unconscious within 10 to 15 seconds

[1]Trial was held on April 4 a.m./p.m., April 5, 6, 7, 8, 11, 12 and 13 and are designated as Volumes I, II, III, IV, V, VI, VII, VIII, and IX, respectively.

and death will ensue within 3 to 5 minutes (*id.* at 78-79). Dr. Bechinski testified there was no way to determine how long there was a constant source of pressure from the ligature (*id.* at 81). The examination of the body was consistent with ligature strangulation (*id.* at 83).

A toxicology examination revealed Xanax and Vicodin present in the body of the deceased (*id.* at 84). The levels of both drugs were high (Vol. III, p. 10). Dr. Bechinski could not determine whether the drugs contributed to the death (Vol. II, at 89). The deceased also had multiple scrapes, abrasions and contusions, consistent with a fight (*id.* at 91-92). The doctor could not determine when any of the injuries sustained occurred or how they occurred (*id.* at 103-106). Dr. Bechinski also could not tell if the strap from the rifle was twisted or knotted or how long pressure was placed by use of the strap (Vol. III, p. 16). Finally, Dr. Bechinski could not tell how long the deceased was unconscious before he died (*id.* at 29-30). The 3 to 5 minute time frame testified to was from "the literature" the doctor consulted. There was no way to determine if a tourniquet was used in this case (*id.* at 37).

JEFFREY MORACZEWSKI, the brother of Timothy, used to work for Petitioner and knew him for 17 years (Vol. III, p. 52). Petitioner owned a roofing company and Timothy worked for Petitioner for 12 years (*id.* at 54). They were good friends and at one time best friends. In fact, Petitioner had bought Timothy a car and

phone (*id.* at 183). Timothy and Petitioner had a marijuana grow operation at 5525 Cadieux in Detroit (*id.* at 58). Petitioner funded the operation while Timothy lived at the house and maintained the operation and they would split the profits 50/50 (*id.* at 59, 66). Timothy was taking Vicodin for several years before his death (*id.* at 64). At some point, Timothy and the Petitioner were not getting along and Petitioner wanted to move the equipment out of the Cadieux house because the house was going into foreclosure (*id.* at 67, 188). Jeff approved of the plan because it would get Timothy out of the business (*id.* at 69). In fact, Timothy had been involved in a number of marijuana grow operations at different houses (*id.* at 189-190).

On September 26, 2010, Jeff received a phone call at around 6:00 p.m. from Petitioner, which Jeff ignored (*id.* at 82-83). That call was followed by a text stating "call me now 911." Jeff called Petitioner who explained that he and Timothy "had just got in a huge fight" and Petitioner had "choked out your brother with his own fuckin gun" (*id.* at 86). Jeff claimed the Petitioner said that he choked him until he turned purple and held it for thirty seconds so he could not get up (*id.* at 87). Petitioner explained that the fight began after he told Timothy that he was taking some of the equipment out of the house (*id.* at 87). In response, Tim grabbed the gun and fired a round into the wall near the Petitioner. Tim said, if Petitioner wanted to "throw down, let's do this" (*id.* at 89). While the two wrestled, Petitioner ended on

top. While on top of Tim, Petitioner pulled a knife from Tim's side sheath, pointed it at Tim's face and said, "this is not how it's supposed to be, Tim" (*id.* at 92). Petitioner then threw the knife across the room. Timothy usually carried a knife in a sheath (*id.*). When Petitioner was choking Timothy, Timothy tried to "tap out" which means give up (*id.* at 100). Jeff claimed Petitioner told Jeff that when Timothy tried to "tap out," he was not going to let Timothy tap out this time (*id.* at 100-101). Jeff claimed Petitioner continued to hold Timothy until he did not get up. Jeff claimed Petitioner also said Timothy was not as strong as he thought he was. When Jeff asked Petitioner if he had killed Timothy, he said when he left, Timothy was breathing (*id.* at 102). Jeff said Petitioner told Jeff he needed to go over to the house where Timothy was to make sure he was alive (*id.* at 102-103). Later, when Jeff sent a text message to Petitioner telling him Timothy was dead, Petitioner send a text message back saying "Tell me your joking, what should I do?" (*id.* at 105).

At the house on Cadieux, Jeff saw Timothy laying on the couch (*id.* at 113). It appeared there had been a struggle inside the house because there was "stuff thrown everywhere" (*id.* at 114). Timothy was sitting on a cushion, twisted at the waist, with his chest on a cushion. There was blood on his chin (*id.* at 114). The shoulder strap of the rifle was around his neck and the rifle was at the back of his neck (*id.* at 114-115). The strap was twisted and tight around the neck and Timothy was not breathing

(*id.* at 116-119). Timothy was taken to the hospital by his brother (*id.* at 123). When Jeff told Petitioner in a text message that Timothy was dead, Petitioner responded, "No fuckin way" (*id.* at 136).

On cross-examination, Jeff said Timothy took Vicodin every day (*id.* at 152). Jeff knew that Timothy had been growing marijuana since he was 15 years old (*id.* at 161-162). He had marijuana grow operations at other houses beside Cadieux (*id.* at 163). Jeff expressed concern to Petitioner about Timothy's continued drug use and how it was affecting his personality (*id.* at 165). Timothy was "always short-tempered" and he always kept weapons in the house which included a pistol grip shotgun and .22 rifle (*id.* at 165, 168, 182). Timothy had also underwent Navy Seal fitness training (*id.* at 178). He had a sign on the front door of the Cadieux house that stated, "smile for the camera, trespassers will be shot, no exceptions" (*id.* at 181). There were many throwing knives kept in the living room (*id.* at 206).

MICHAEL MITCHELL, Jeffrey's brother-in-law, was texting with Timothy on the day he died. The last text from Timothy was at 5:45:41 p.m. (Vol. IV, p. 29-30). Subsequently, Jeff came by Michael's house to pick him up and go over to Timothy's house on Cadieux (*id.* at 31). When they entered the house, Timothy was laying across a piece of the couch, kind of twisted (*id.* at 35). He appeared dead and there was a rifle on his back (*id.*). When they tried to get the rifle off, they discovered the strap on the rifle was around his neck tight (*id.* at 37-38). Jeff yelled out "you

didn't loosen the strap" as if speaking to the Petitioner (*id.* at 39-40). Jeff untwisted the strap three revolutions and removed the rifle (*id.*). They then took Timothy to the hospital.

Samples taken from rifle and strap did not reveal any DNA material from Petitioner Beltowski (*id.* at 95-96).

Five CD's of Wayne County Jail telephone calls involving Petitioner Beltowski were admitted (Vol. V, p. 15-16, 22).[2] The calls covered a period the of October 18th through March 1, 2011. The rifle was admitted as Exhibit 11.

Evidence technicians from the Detroit Police Department went to the Cadieux house. A small pocket knife was on the landing inside and the living room was cluttered with a bow and arrow, fishing equipment and a lot of outdoor items (*id.* at 29). On the sofa was a loaded .22 rifle with a sling and a loaded .12 gauge shotgun nearby (*id.* at 30, 32, 70, 117, 123). It appeared a struggle had occurred in that room (*id.* at 31). Two .22 shell casing were found along with a black bag and ammo belt with ammunition for the shotgun was found (*id.* at 34, 37). Two suspected bullet holes were located in the living room wall (*id.* at 42). An exit hole for one of the holes in the living room was located in the adjoining bedroom (*id.* at 45).

The prosecution rested and a motion for directed verdict was denied.

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[2]The CD's contained 80 hours of jail calls.

The defense first called the officer-in-charge, Officer Allen Williams. Williams was aware that a knife was involved in the incident, but did not direct law enforcement to collect any knives at the scene (*id.* at 154). No fingerprint analysis was requested (*id.* at 155). No tests were requested to determine if a firearm had been recently fired (*id.* at 156-157). The bullet hole in the wall was directly over the couch (*id.* at 159).

A subsequent investigation by the defense revealed bullet holes around the frame of the window at the front of the Cadieux house (*id.* at 207-207). It appeared that a shot had been fired from the inside. Inside, a knife and a spent casing was located in the living room (*id.* at 211). The house across the street was photographed with two bullet holes in the front window (*id.* at 215).

GERALD KAPINSKY, was a friend of both Petitioner Beltowski and Tim Moraczewski. Kapinsky stopped his relationship with Tim because Kapinsky was concerned about his and his family's safety (*id.* at 74). Timothy had a reputation of being "different, weird . . . kind of scary" (*id.* at 78-79) and wanting "to go out and, and beat somebody up" and was psychotic (*id.* at 81). Timothy carried a rifle and knife all the time and had shot four or five black males with a shotgun at Finney High School across the street. When Tim was in the house on Cadieux, he was always armed (*id.* at 121). When Timothy was on Vicodin he was "definitely stronger," but

the Xanax made him slow down and mumble (*id.* at 123). Timothy had a big bottle of Vicodin that he would "eat" every morning (*id.*).

Petitioner KEVIN BELTOWSKI, 40, took the stand in his own defense. Beltowski owned a roofing company, Everlast Home Improvement (*id.* at 150). Beltowski and Tim Moraczewski were the best of friends and Tim was one of Beltowski's crew foremen for years (*id.* at 151). Tim supplemented his income by growing marijuana and became heavily involved with Vicodin and stopped roofing (*id.* at 153). Tim would eat 10 to 15 Vicodin a day to boost his energy. To offset the effects of the Vicodin, Tim started taking Xanax. When he was taking the drugs together, he could not drive and would stay home as a recluse (*id.* at 156). Tim's mood swings were terrible and his anger was unpredictable (*id.* at 156-157). Beltowski gave Tim money, a cell phone and a company vehicle and tried to help Tim with his drug problem (*id.* at 159, 161-162). Eventually, Tim asked Beltowski to help him financially with his grow operation. Tim was obsessed with the Navy Seals and would wash himself down with cold water in the basement (*id.* at 164). At the Cadieux house, Beltowski helped install the equipment to grow marijuana. Tim boarded the windows and blocked off doors for security (*id.* at 165). Tim also kept a lot of weapons in the house including knives, a riot pistol grip shotgun, a short barrel shotgun and an assault rifle (*id.* at 167). Tim always carried a knife in a sheath

and often had the rifle with a sling around his neck while he worked (*id.* at 167). Tim would fire his rifle into the vacant house across the street to scare off drug dealers and squatters (*id.* at 169-170). During an attempted break-in, Tim surprised three men at the back door, ordered them across the street, made them beg for their lives and then shot them in the legs with bird shot (*id.* at 172). He then began to take steroids and work out at the gym and began the Navy Seal Training Program (*id.* at 180-181).

Beltowski also saw Tim attack a friend, Mario, pummel him and threaten to stab him (*id.* at 182-183). Tim would dress up in a Ghillie suit that a sniper wears causing his brother Jeff to say Tim "lost his mind" (*id.* at 188). Tim "fancied himself as a killer" and bragged about hurting people (*id.* at 188).

The day before the incident, Beltowski tried to come to the Cadieux house to work, but Tim told him to come the next day around seven or eight (*id.* at 191). They had a disagreement about the time Beltowski would come. Just before 6 p.m., Beltowski arrived and pulled into the driveway (*id.* at 193). When Beltowski told Tim he left the door to his truck open, Tim said "Nobody's fuckin with that truck around here. I'm security" (*id.* at 195). Tim had the rifle slung over his neck and his knife in his sheath at his side. Tim was aggravated and agitated and started to give Beltowski a hard time about not being there. The marijuana operation needed to move because the house was in foreclosure and had to be sold. Beltowski suggested

they split up the operation with Tim keeping the plants and Beltowski taking the equipment (*id.* at 198). Tim became very angry so Beltowski sat on the couch because he did not want to fight and was afraid of Tim (*id.* at 201-204). Tim pointed the rifle saying, "you think I'm gonna let you walk out of here, like that . . . tell me I won't shoot you" (*id.* at 204-207). He tried to fire the rifle, but the safety was on. Then he fired a shot past Beltowski's head (*id.* at 207-208). When Beltowski threw up his hands and told Tim to take everything, Tim stepped back (*id.* at 208). As Beltowski was at the front door leaving, Tim grabbed Beltowski, said "you're not going anywhere." They struggled until they landed on a nearby couch (*id.* at 211). Beltowski grabbed the barrel as Tim tried to point it at him (*id.* at 211). As they struggled over the rifle and wrestled on the couch, they fell with Beltowski on top (*id.* at 212-213). Tim was still attempting to point the weapon at him and Beltowski held Tim down with the weapon while repeatedly commanding Tim to stop, "it's not supposed to be like this" (*id.* at 213). When Tim did not stop, Beltowski felt it was "do or die." Beltowski then released the rifle and grasped the strap to apply pressure by pulling them apart (*id.* at 214). Beltowski never twisted the strap like a tourniquet (*id.* at 217). As Tim rolled over and stood up, Beltowski never let the strap go (*id.* at 218-219). At that point, Tim indicated he was giving up by "tapping" (*id.* at 219). Beltowski did not let up the pressure with the strap because he was afraid for his life

and if he let go, Tim would get one of the weapons in the house and kill him (*id.* at 220). Tim stood upright and twisted away from Beltowski. Beltowski pulled Tim back into him and they both fell onto the couch. Beltowski's back was on the couch with Tim on top of him. Tim's back was on Beltowski's chest, and Tim tried to get the strap off his neck and drifted off into unconsciousness. Tim's face being in Beltowski's line of site, he saw and heard Moraczewski breathing (*id.* at 220-223). Beltowski released pressure, rolled Tim over and got up. Fearing for his life, Beltowski ran out of the house (*id.* at 224).

In the truck he called Jeff believing Tim was still alive (*id.* at 226). Beltowski then asked Jeff to contact Tim to attempt to reason with him. When Jeff did not hear back from Tim, Beltowski said he should go to Cadieux and check on him (*id.* at 229). When Jeff sent a text message saying Tim was dead, Beltowski was in disbelief (*id.* at 230).

Pictures of scratches on his face and hands and an eye injury to Beltowski were introduced (*id.* at 234-235). The text messages between Beltowski and Tim before Beltowski arrived at Cadieux were testified to by Beltowski (Vol. VII, p. 6-19). Beltowski was shocked when he was told Tim was dead and never intended to kill him (*id.* at 47). When Beltowski left, he observed slack in the strap, between the rifle and Tim's neck (*id.* at 48). As soon as Tim was unconscious, Beltowski left the

house. He did not continue to apply pressure for thirty seconds after Tim lost consciousness (*id.* at 78). Beltowski believed in hindsight that the weight of the gun maintained the pressure on the unintentionally twisted strap. Not knowing the strap was twisted, he did not unwrap it (*id.* at 80-81). However, before Beltowski left the house, he saw and heard Tim breathing (*id.* at 188-191).

The Petitioner's defense was self-defense and accidental death. The case was essentially a credibility contest between the brother and Petitioner. The central issue was whether the jury believed the victim was enraged and unpredictable, being left disabled and unconscious with a loose strap when Petitioner exited the home, as the defense asserted or the victim was simply was "sleepy and docile" found with a tight strap around his neck, as the prosecutor claimed. Dr. Bechinski bolstered the prosecution's claim by classifying the drugs as central nervous system depressants, without any expert knowledge of the effects of the drugs. Additionally, without Dr. Commissaris' expert opinion the jury likely accepted the brother's testimony that the strap was tight around the neck of the deceased, the only *plausible* cause of death presented by an expert at trial.

For these reasons Petitioner was prejudiced by not presenting an expert to support both his defenses that the victim was aggressive, and that he could have died with a loose strap around his neck as the Petitioner testified.

WAYNE COUNTY, MICHIGAN CIRCUIT COURT'S
SELF-DEFENSE INSTRUCTION IN THIS CASE

The defendant does not have to prove that he acted in self-defense; instead, the prosecutor must prove, beyond a reasonable doubt, that the defendant did not act in self-defense.

The defendant claims that he acted in lawful self-defense.

A person has the right to use force to defend himself under certain circumstances.

If the defendant is found to have acted in lawful self-defense, his actions are justified, and he is not guilty of homicide, murder, first degree, premeditated, of Timothy Moraczewski, and the less serious offense of murder second degree, and voluntary manslaughter of Timothy Moraczewski.

You should consider all the evidence and use the following rules to decide whether the defendant acted in lawful self-defense. Remember to judge the defendant's conduct according to how the circumstances appeared to him at the time he acted.

First, at the time he acted, the defendant must not have been engaged in the commission of a crime.

Second, when he acted, the defendant must have honestly and reasonably believed that he had to use force *to protect himself from the imminent unlawful use of force by another.*

If his belief was honest and reasonable, he could act at once, to defendant himself, even if it turns out later that he was wrong about how much danger he was in.

Third, a person is only justified in using the kind of force that was appropriate to the attack made and the circumstances as he saw them.

When you decide whether the force used was what seemed necessary, you should consider whether the defendant knew about any other ways of protecting himself. But you may also consider how the excitement of the moment effected the choice the defendant made.

Fourth, *the right to defend one's self only lasts as long as it seems necessary for the purpose of protection.*

Fifth, *the person claiming self-defense must not have acted wrongfully and brought on the assault.*

However, if the defendant only used words, that does not prevent him from claiming self-defense if he was attacked.

(Vol. VIII, 4-12-11 pp 99-101, emphasis added).

What the trial court did in this case was to completely preclude Petitioner's right to self-defense by inserting language that defeats a common law right of self-defense when the SDA only addresses the duty to retreat outside one's home. The SDA only created the right to stand one's ground and not retreat which did not exist at common law. However, as the Act itself expressly states it did not abrogate a defendant's common law right to self-defense. In this case, the trial judge through this erroneous instruction, precluded Petitioner's common law right to self-defense.

1. ACTED WRONGFULLY.

Simply put, a self-defense claim cannot be precluded if the defendant "acted wrongly or brought on the assault." Both conditional terms are unsupported by the law and are overly broad and vague. By statute, a person has the duty to retreat if he is committing a crime, but not for any "wrong." A wrong is much broader than the commission of the crime because it includes a civil wrong or tort, violation of a right, or even a moral wrong. A wrong may simply be a mistake, something considered