IN THE

SUPREME COURT OF THE UNITED STATES

BRENT CURTIS SCHWERTZ,	)	
PETITIONER,	)	
	)	
VS.	)	NO.
	)	
RICHARD JENNINGS,	)	
RESPONDENT.	)	

INDEX TO APPENDICES (VOLUME I.)

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UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No: 19-1631

Brent Curtis Schwertz

Petitioner - Appellant

v.

Richard Jennings, Warden

Respondent - Appellee

Appeal from U.S. District Court for the Western District of Missouri - Springfield
(6:18-cv-03342-MDH)

JUDGMENT

Before COLLOTON, BOWMAN, and STRAS, Circuit Judges.

This appeal comes before the court on appellant's application for a certificate of appealability. The court has carefully reviewed the original file of the district court, and the application for a certificate of appealability is denied. The appeal is dismissed. The appellant's motion for leave to proceed on appeal in forma pauperis is denied as moot.

June 06, 2019

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

/s/ Michael E. Gans

UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF MISSOURI
SOUTHERN DIVISION

BRENT CURTIS SCHWERTZ,	)	
	)	
Petitioner,	)	
	)	Case No. 18-3342-CV-S-MDH-P
vs.	)	
	)	
RICHARD JENNINGS,	)	
	)	
Respondent.	)	

ORDER DENYING PETITION FOR WRIT OF HABEAS CORPUS, AND DENYING THE ISSUANCE OF A CERTIFICATE OF APPEALABILITY

Petitioner, a convicted state prisoner currently confined at the Potosi Correctional Center in Mineral Point, Missouri filed *pro se* a petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254. Petitioner challenges his 2013 conviction and sentence for first-degree murder and armed criminal action, which were entered in the Circuit Court of Pulaski County, Missouri. Petitioner's conviction was affirmed on direct appeal. Doc. 10-12. Petitioner's motion for post-conviction relief filed pursuant to Mo. Sup. Ct. R. 29.15 was denied following an evidentiary hearing (Doc. 10-16, pp. 112-28), and that denial was affirmed on appeal (Doc. 10-19). For the reasons set forth below, Petitioner's petition for writ of habeas corpus is denied, a certificate of appealability is denied, and this case is dismissed.

I. Background

Before the state court findings may be set aside, a federal court must conclude that the state court's findings of fact lack even fair support in the record. *Marshall v. Lonberger*, 459 U.S. 422, 432 (1983). Credibility determinations are left for the state court to decide. *Graham v. Solem*, 728 F.2d 1533, 1540 (8th Cir. en banc), *cert. denied*, 469 U.S. 842 (1984). It is Petitioner's burden to establish by clear and convincing evidence that the state court findings are erroneous. 28 U.S.C. § 2254(e)(1).[1]

APP. B
1-15

[1]"In a proceeding instituted by an application for writ of habeas corpus by a person in custody pursuant to a judgment of a state court, a determination of a factual issue made by a State court shall be presumed to be correct. The applicant

The state court's findings of fact have fair support in the record, and Petitioner has failed to establish by clear and convincing evidence that the state court findings are erroneous. Consequently, the Court defers to and adopts the following facts set forth by the Missouri Court of Appeals, Southern District, in affirming Petitioner's conviction and sentence:

> Tracy Weber ("Victim") planned to break off her engagement to Schwertz on the evening of February 11, 2010. Victim's two sons, Nick Weber and Ben Weber, and daughter-in-law, Tara Weber, were aware of this and repeatedly attempted to contact Victim that evening, with no response. Victim usually answered phone calls and text messages promptly and her failure to do so worried Tara. After the fourth or fifth call and text, Victim finally answered. Tara could tell Victim was upset because her voice was shaking and she sounded nervous. Tara asked if she had talked to Schwertz, but Victim kept repeating that she could not talk right then. Eventually, Nick took the phone from Tara and asked Victim in a semi-joking manner if Schwertz was holding her at gunpoint, to which Victim responded, "Yes."
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> Nick told Victim he was going to call the police and ended the call. Nick contacted the Phelps County Sheriff's Department and officers responded to Schwertz's house. While officers were responding to the residence, Nick also called Ben to alert him that Victim was being held at gunpoint.
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> After speaking with Nick, Ben attempted to call Victim several times, but Victim did not answer. When Victim finally answered, Ben asked Victim if she was okay, and she said "No." Ben then heard a scream and a loud noise he identified as a gunshot. Ben testified that other than the scream and the gunshot, he did not hear any other noises in the background, such as voices or a struggle.
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> Officer Christian Butler ("Officer Butler"), with the Phelps County Sheriff's Department, received a dispatch to respond to Schwertz's house because there was a suspect at the residence holding a woman at gunpoint. Two other officers also responded. When Officer Butler arrived, he saw through the window of Schwertz's front door that Schwertz was pacing back and forth holding a handgun and a telephone. Officer Butler opened the front door and yelled, "sheriff's department." Schwertz turned toward Officer Butler and raised his gun to the door window aiming the gun at Officer Butler. Officer Butler yelled at Schwertz to drop the gun several times, but Schwertz refused. Officer Butler retreated and found cover behind the front door.
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> Schwertz then opened the front door, but he no longer had the gun in his hand so Officer Butler holstered his gun and drew his taser. He ordered Schwertz to get on the ground, but Schwertz refused and started backing up inside the house. Officer Butler followed and commanded Schwertz to get on the ground twice more but

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shall have the burden of rebutting the presumption of correctness by "clear and convincing evidence." 28 U.S.C. § 2254(e)(1).

> Schwertz refused, at which time Officer Butler deployed his taser striking Schwertz. Officer Butler asked Schwertz if anyone else was in the house and Schwertz responded that Victim was inside the house. Officer Butler asked if Victim was hurt and Schwertz said, "yes, I shot her in the chest." Officers found Victim lying on the floor with a gunshot wound to the chest. Victim was airlifted to a hospital in Springfield, where she later died.
>
> . . . .
>
> Schwertz testified in his own defense. He testified he loaded and pointed a gun at Victim to scare her into giving him back her engagement ring. When Victim would not return the ring, he loaded a bullet into the chamber to scare her. Schwertz testified that Victim lunged for the gun, they struggled, and the gun accidentally "went off."
>
> Schwertz admitted he did not call 911 or an ambulance for Victim. Instead, he called his father to ask him to call 911. He admitted he did not tell his father where he and Victim were making it impossible for his father to direct first responders to their location. Victim only received treatment after Officer Butler and two other officers arrived at Schwertz's residence.
>
> The jury found Schwertz guilty of first-degree murder and armed criminal action. The trial court sentenced Schwertz to concurrent terms of life imprisonment without the possibility of parole and forty years' imprisonment, respectively.

Doc. 10-12, pp. 2-7 (alterations added, footnote omitted).

II. Discussion

Petitioner raises the following twenty-seven grounds for relief: (1) trial counsel was ineffective for failing to investigate, research, present evidence, and argue that the gun involved was known to defectively discharge without having the trigger pulled; (2) trial counsel was ineffective for failing to request state funds to retain a different firearms expert witness; (3) the trial court erred in denying a motion for mistrial based on a question regarding Petitioner's post-arrest silence; (4) trial counsel was ineffective for not attempting to suppress a "pre-Miranda statement" by Petitioner that he had shot the victim in the chest; (5) the State committed six *Brady*[2] violations;[3] (6) trial counsel was ineffective for

[2] *Brady v. Maryland*, 373 U.S. 83 (1963).

[3] Petitioner contends the State: (a) withheld an article regarding a specific gun's potential for firing without the pull of the trigger; (b) withheld gunshot residue tests from the hands of the victim; (c) released the victim's rings to her family without allowing the defense to determine its usefulness; (d) withheld phone records; (e) improperly released the victim's body to her family without allowing the defense to determine the usefulness of such evidence; and (f)

failing to refute the State's theory that Petitioner fabricated his accidental shooting explanation; (7) trial counsel was ineffective for failing to call five witnesses[4]; (8) trial counsel was ineffective for failing to request state funds to retain additional expert witnesses[5]; (9) trial counsel was ineffective for failing to provide Petitioner assistance under the Americans with Disabilities Act; (10) trial counsel was ineffective for failing to submit instructions regarding defense of property or self-defense; (11) the trial court erred by overruling his motion for judgment of acquittal at the close of the State's evidence; (12) trial counsel was ineffective for failing to object to testimony pursuant to a motion in limine; (13) trial counsel was ineffective for failing to present evidence regarding the victim's mental health history; (14) trial counsel was ineffective for failing to call an expert to testify on cellphone reception; (15) trial counsel was ineffective for failing to inform Petitioner that he had not properly investigated the "defective handgun;" (16) through (19) trial counsel was ineffective for failing to address various issues with the jury;[6] (20) trial counsel was ineffective for failing to ask the court to take judicial notice of the victim's wrongful death suit; (21) trial counsel failed to research other states' bans of "unsafe" firearms; (22) trial counsel was ineffective for failing to object during closing arguments; (23) and (24) the prosecutor made "improper comments" during closing arguments; (25) the preliminary hearing court failed to record the preliminary hearing; (26) the motion court failed to individually address

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improperly released the victim's other personal belongings without allowing the defense to determine its usefulness. Doc. 1, pp. 31-42.

[4] Petitioner asserts trial counsel was ineffective for failing to present testimony from the following people: (a) Michelle Pichette, a corrections officer who would have allegedly testified Petitioner told her the shooting was an accident; (b) Kelly Johnson, a CPR instructor who would have testified about the proper protocol for CPR and calling 911; (c) Brenda Mitchell, an ambulance dispatcher who would have testified about ambulance drivers having difficulty locating homes in Petitioner's rural area; (d) Mickey Hopson, a special education teacher who would have testified that Petitioner was diagnosed with several learning and attention disabilities; and (e) Diane Mahaney, a counselor who would have testified that Petitioner was diagnosed with an emotional disorder. Doc. 1, pp. 46-49.

[5] Petitioner asserts trial counsel should have retained experts on the following: (a) accident reconstruction, (b) forensic reconstruction animation, (c) blood splatter, (d) distance, (e) CPR, (f) learning disabilities, and (g) extreme emotional disturbance. Doc. 1, pp. 50-51.

[6] In Grounds 16-19, Petitioner asserts trial counsel was ineffective for: (16) and (17) failing to request that the court sequester the jury; (18) failing to move for a mistrial because jurors overheard conversations at the judge's podium; and (19) failing to move for a mistrial because of an incident between jurors and the bailiff in the hallway. Doc. 1, pp. 82-85.

Petitioner's "190 pro se claims;" and (27) the cumulative errors made by the trial court, trial counsel, and prosecutor amount to a constitutional violation. Doc. 1. Respondent argues that Grounds 2 and 4-27 are procedurally defaulted and, alternatively, are without merit and that Grounds 1 and 3 are without merit. Doc. 10, p. 1-2. Petitioner has submitted a reply thereto. Doc. 19. The Court addresses each of Petitioner's grounds for relief below.

A. Grounds 2, 4-27 are procedurally defaulted.

The Court first addresses Respondent's contention that Grounds 2 and 4-27 are procedurally defaulted. "A habeas petitioner is required to pursue all available avenues of relief in the state courts before the federal courts will consider a claim." *Sloan v. Delo*, 54 F.3d 1371, 1381 (8th Cir. 1995), *cert. denied*, 516 U.S. 1056 (1996). "[S]tate prisoners must give the state courts one full opportunity to resolve any constitutional issues by invoking one complete round of the State's established appellate review process" before presenting those issues in an application for habeas relief in federal court. *O'Sullivan v. Boerckel*, 526 U.S. 838, 845 (1999). "If a petitioner fails to exhaust state remedies and the court to which he should have presented his claim would now find it procedurally barred, there is a procedural default." *Sloan,* 54 F.3d at 1381.

Grounds 2, 4, 5(b)-(f), 7(a)-(c), 8(a), 8(e)-(g), 9, 13, 16-19, and 22-24 were raised in Petitioner's Rule 29.15 post-conviction proceedings but were not raised on appeal after that motion was denied. Doc. 10-16, pp. 53-54, 59, 63-64, 68-71, 77, 79-82; Doc. 10-17, pp. 15-25. Grounds 5(a), 6, 7(d)-(e), 8(b)-(d), 10-12, 14-15, 20-21, and 25-27 were not presented in Petitioner's Rule 29.15 post-conviction proceedings. Doc. 10-16, pp. 43-99. As a result, Grounds 2 and 4-27 are procedurally defaulted. *Sweet v. Delo*, 125 F.3d 1144, 1149 (8th Cir. 1997) (recognizing that failure to present claims in the Missouri Courts at any stage of direct appeal or post-conviction proceedings is a procedural default), *cert. denied*, 523 U.S. 1010 (1998). A federal court may not review procedurally defaulted claims "unless the prisoner can demonstrate cause for the default and actual prejudice as a result of the alleged violation of federal law, or demonstrate that failure to consider the claims will

result in a fundamental miscarriage of justice." *Coleman v. Thompson*, 501 U.S. 722, 750 (1991). Under the cause and prejudice test, cause "must be something *external* to the petitioner, something that cannot fairly be attributed to him." *Id.* at 753 (emphasis in original).

Petitioner attempts to excuse the default of Grounds 2 and 4-27 by claiming that post-conviction counsel was ineffective for failing to raise these claims in his initial Rule 29.15 proceedings or for failing to raise the claims in his post-conviction appeal. Doc. 1, p. 4; Doc. 19, p. 21. Originally, in *Coleman, supra*, the United States Supreme Court held that, because there is no constitutional right to counsel in a state post-conviction proceeding, an attorney's ignorance or inadvertence in a post-conviction proceeding does not qualify as cause to excuse a procedural default. *Coleman*, 501 U.S. at 752-54. In *Martinez v. Ryan*, 566 U.S. 1 (2012), however, the Court recognized a "narrow exception" to *Coleman* by holding that "[i]nadequate assistance of counsel at initial-review collateral proceedings may establish cause for a prisoner's procedural default of a claim of ineffective assistance at trial." *Martinez*, 566 U.S. at 9.

Initially, Petitioner cannot use *Martinez* to excuse the procedural default of Grounds 2, 4, 5(b)-(f), 7(a)-(c), 8(a), 8(e)-(g), 9, 13, 16-19, and 22-24 because these grounds were raised in Petitioner's post-conviction motion and defaulted in his post-conviction appeal. Doc. 10-16, pp. 43-102, 112-128.[7] The *Martinez* Court held that its holding did not "concern attorney errors in other kinds of proceedings, including appeals from initial-review collateral proceedings . . ." *Martinez*, 566 U.S. at 16. Accordingly, "*Martinez* offers no support . . . for the contention that the failure to preserve claims on appeal from a postconviction proceeding can constitute cause." *Arnold v. Dormire*, 675 F.3d 1082, 1087 (8th Cir. 2012). The *Arnold* Court explained that, because "Arnold's multiple ineffective assistance claims were litigated in his initial-review collateral proceeding, but not preserved on appeal

7 Petitioner's amended post-conviction motion incorporated by physical attachment all the claims and facts set forth in Petitioner's original Form 40. Doc. 10-16, pp. 44, 48-85. The motion court addressed Petitioner's pro se claims in its findings of facts and conclusions of law denying Plaintiff's motion for post-conviction relief. *Id.* at 121-128.

. . . Arnold has already had his day in court; deprivation of a second day does not constitute cause." *Id.* Insofar as Petitioner argues that post-conviction counsel failed to preserve certain issues regarding these grounds in his Rule 29.15 motion proceedings or that the motion court failed to properly consider these issues, Petitioner fails to establish ineffective assistance under *Martinez*, as set forth below.

As to Grounds 5(a), 6, 7(d)-(e), 8(b)-(d), 10-12, 14-15, 20-21, and 25-27, to excuse the procedural default of a claim of ineffective assistance of trial counsel under *Martinez*, Petitioner must establish that either (1) "the state courts did not appoint counsel in the initial-review collateral proceeding for a claim of ineffective assistance at trial," or (2) "appointed counsel in the initial-review collateral proceeding . . . was ineffective under the standards of *Strickland v. Washington*, 466 U.S. 668 (1984)." *Martinez*, 566 U.S. at 14. To satisfy the second circumstance, "the assistance rendered must have been constitutionally substandard and prejudice must have resulted therefrom." *Evans v. Luebbers*, 371 F.3d 438, 445 (8th Cir. 2004) (citing *Strickland*, 466 U.S. at 687). Furthermore, "[t]o overcome the default, a prisoner must also demonstrate that the underlying ineffective-assistance-of-trial-counsel claim is a substantial one, which is to say that the prisoner must demonstrate that the [underlying] claim has some merit." *Martinez*, 566 U.S. at 14.

Petitioner fails to establish that post-conviction counsels' alleged failures meet the *Strickland* standard of ineffective assistance. Instead, the record of Petitioner's post-conviction proceedings, including Petitioner's amended post-conviction motion and the evidentiary hearing transcript, illustrates that Petitioner's post-conviction counsel performed a full review of Petitioner's case and was familiar with the evidence presented at trial and the relevant legal issues. Doc. 10-14; Doc. 10-16, pp. 43-150. Accordingly, Petitioner fails to establish that post-conviction counsel's decision to raise certain issues in the amended post-conviction motion and omit others was not a reasonable exercise of professional judgment, particularly where post-counsel also incorporated Petitioner's *pro se* claims within the amended motion. *See Gee v. Groose,* 110 F.3d 1346, 1352 (8th Cir.1997) ("Reasonable appellate strategy requires an attorney to limit the appeal to those issues counsel

determines have the highest likelihood of success."). In light of the presumption that post-conviction counsel acted reasonably and the conclusory nature of Petitioner's allegations of misconduct, Petitioner fails to show that post-conviction counsel provided ineffective assistance by not asserting the claims underlying Grounds 2 and 4-27. Furthermore, Petitioner fails to establish that he was prejudiced by post-conviction counsel's failure to raise those claims or that the underlying claims of ineffective assistance of trial counsel are "substantial" ones for purposes of *Martinez*.

Petitioner's ancillary claims and allegations in his petition and reply similarly fail to establish cause for the procedural default of Grounds 2 and 4-27. Doc. 1; Doc. 19. Any allegation by Petitioner that any of the above claims of trial court error or prosecutorial misconduct were defaulted as a result of ineffective assistance of direct appeal counsel fail for the same reasons set forth herein. As a result, Petitioner fails to excuse the procedural default of Grounds 2 and 4-27.

Petitioner fails also to show that a fundamental miscarriage of justice will result if his defaulted claims are not considered. *See Abdi v. Hatch*, 450 F.3d 334, 338 (8th Cir. 2006) (a petitioner must present new evidence that affirmatively demonstrates that he is actually innocent of the crime for which he was convicted in order to fit within the fundamental miscarriage of justice exception), *cert. denied,* 549 U.S. 1036 (2006). As a result, Grounds 2 and 4-27 are procedurally defaulted and are denied.

B. Ground 1 is without merit.

In Ground 1, Petitioner argues that trial counsel was ineffective for failing to investigate, research, present evidence, and argue that the gun involved was known to defectively discharge without having the trigger pulled. Doc. 1, p. 6. For Petitioner to successfully assert a claim for ineffective assistance of trial counsel, petitioner must demonstrate that his attorney's performance "fell below an objective standard of reasonableness" and that "the deficient performance" actually prejudiced him. *Strickland*, 466 U.S. at 687-88. "A court considering a claim of ineffective assistance of counsel must apply a 'strong presumption' that counsel's representation was within the 'wide range' of reasonable professional assistance." *Harrington v. Richter*, 562 U.S. 86, 104 (2011) (quoting *Strickland*, 466 U.S.

at 689). Petitioner must show "that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." *Strickland*, 466 U.S. at 687.

To satisfy the prejudice prong, a petitioner must "show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceedings would have been different." *Id.* at 694. Moreover, this Court may not grant habeas relief unless the state appellate court's decision "was contrary to, or an unreasonable application of, the standard articulated by the [United States] Supreme Court in *Strickland*." *Owens v. Dormire*, 198 F.3d 679, 681 (8th Cir. 1999), *cert. denied*, 530 U.S. 1265 (2000).

The Missouri Court of Appeals, Southern District, set forth the *Strickland* standard and denied Ground 1 as follows:

> Trial counsel's theory of the case was that Schwertz had pulled the trigger of the gun by accident, without meaning to shoot Victim. Trial counsel's credited testimony at the post-conviction hearing was that he did not investigate whether the gun had a "hair trigger" or could fire without the trigger being pulled, because this was "never [Schwertz]'s story[.]" Rather, Schwertz had told trial counsel that he had gotten the gun out to scare Victim into giving his engagement ring back, that he and Victim reached for the gun at the same time, and that he shot Victim when he "pulled the trigger by accident[.]"
>
> The credited testimony at the motion hearing demonstrates that the issue of "the gun going off by itself or having [a] hair trigger," never came up in trial counsel's investigation of the case or discussions with Schwertz. Schwertz never told trial counsel that he did not pull the trigger. In fact, Schwertz called his father after the shooting and said he had shot Victim; he also told police he had shot Victim; and he testified at trial that "there was no doubt he had shot [Victim;]" and that his finger had been on the trigger. The motion court found trial counsel's testimony credible, noting that Schwertz had told "witnesses, trial counsel, and the jury that he did pull the trigger and shoot the victim."
>
> Trial counsel put Green on the stand to corroborate Schwertz's story that he had problems with the gun after Victim was shot. When Green tested Schwertz's gun, it "malfunctioned" in that "it did not chamber the cartridges consistently like it should[,]" and did not "eject the expended cartridge cases like it consistently should after each shot."

Trial counsel did not investigate whether the gun had a "hair trigger" or went off without the trigger being pulled because nothing in Schwertz's version of events or Green's report indicated that this would be helpful. Trial counsel's strategic decision to pursue an investigation and defense based on Schwertz accidentally pulling the trigger, as opposed to the gun having a defective "hair trigger" or firing spontaneously, was not unreasonable, and was not ineffective assistance of counsel. *Tisius*, 519 S.W.3d at 425.

Further, as the motion court correctly indicated, Schwertz failed to demonstrate that the investigation of such a defense would have been helpful:

> 22. Kathleen Green testified that the Bryco Jennings Model Nine is not known in the firearms community to fire without the trigger being pulled. She testified that she had seen and tested many Bryco Jennings Model Nine handguns in her lab and had never seen one fire without the trigger having been pulled. She testified that most of the time the Model Nines function without complication, but on occasion they fail to properly chamber rounds. This Court found her testimony credible.
>
> 23. The articles to which [Schwertz] cites for the proposition that Model Nines are known to discharge without the trigger being, pulled, the AFTE Journals for Summer 1999 and Spring 2001, do not support his claim. The Summer 1999 article regards a Model 59, a different weapon than the one used in this case. That article was about a malfunction on the magazine safety and the trigger would still need to be pulled to make the gun fire. While the Spring 2001 article is about the Model Nine, it discusses two specific guns with a combination of a worn sear and another problem. Even in the case of the two specific guns discussed, the trigger would still need to be pulled to make the gun fire. The 2003 product liability suit to which [Schwertz] refers is also irrelevant, as the gun at issue in that case was a Model 38.
>
> 24. Even if the Model Nine was known to be defective and even if that defect caused the weapon to discharge without the trigger being pulled, evidence of such a defect would still be irrelevant to this case, as the murder weapon was seized and tested. This gun never, in the two years it was in possession of the lab, fired without the trigger being pulled and, in fact, struggled to chamber rounds and eject casings. Kathleen Green found the trigger pull on the murder weapon to be 8.5 to 9 pounds, which is within the normal range for the weapon and by no means qualified as a 'hair trigger.' While she did not specifically test the gun for accidental discharge, she had no reason to suspect, from her examination, that such a test was necessary.

> Schwertz was not prejudiced by trial counsel's strategic decision not to investigate or present such evidence. *Barton*, 432 S.W.3d at 759. The motion court did not clearly err in rejecting Schwertz's Rule 29.15 motion. Point denied. The judgment of the motion court is affirmed.

Doc. 10-19, pp. 7-10 (alterations added).

It was reasonable for the state appellate court to find that trial counsel was not ineffective for failing to investigate and present evidence on the theory that the gun fired without the trigger being pulled. Petitioner fails to establish that it was unreasonable for the state appellate court to find that trial counsel's actions amounted to reasonable trial strategy or, alternatively, that Petitioner was not prejudiced by trial counsel's alleged failures. *See Blackmon v. White*, 825 F.2d 1263, 1265 (8th Cir. 1987) ("T]he courts must resist the temptation to second-guess a lawyer's trial strategy; the lawyer makes choices based on the law as it appears at the time, the facts as disclosed . . . and his best judgment as to the attitudes and sympathies of judge and jury."); *see also Shaw v. U.S.*, 24 F.3d 1040, 1042 (8th Cir. 1994) (trial counsel's reasonable trial strategies cannot constitute ineffective assistance, even if they are unsuccessful). Because the state courts' determinations as to Ground 1 did not result in "a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States" or in "a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding," *see* 28 U.S.C. § 2254(d)(1) and (2), Ground1 is denied.

C. Ground 3 is without merit.

In Ground 3, Petitioner argues that the trial court erred in denying a motion for mistrial based on testimony from the responding officer, which Petitioner claims amounts to comments on his post-arrest silence. Doc. 1, p. 20. "Questions regarding admissibility of evidence are matters of state law, and they are reviewed in federal habeas inquiries only to determine whether an alleged error infringes upon a specific constitutional protection or is so prejudicial as to be a denial of due process." *Rousan v. Roper*, 436 F.3d 951, 958 (8th Cir.), *cert. denied*, 549 U.S. 835 (2006) (quoting *Logan v. Lockhart*,

994 F.2d 1324, 1330 (8th Cir.1993)). Petitioner must show that "the alleged improprieties were so egregious that they fatally infected the proceedings and rendered his entire trial fundamentally unfair." *Id.*

The Missouri Court of Appeals, Southern District, denied Ground 3 as follows:

> The record before us fails to demonstrate any abuse of discretion by the trial court. In context, we note the record reflects Officer Butler testified he received a call related to the shooting, that he drove to and entered Schwertz's home, and that he tasered Schwertz when he refused to comply with Officer Butler's instructions to get on the ground. Officer Butler indicated that after Schwertz was subdued, another responding officer placed Schwertz in handcuffs. Officer Butler then testified that when Schwertz was asked whether there was anyone else in the house, he indicated that Victim was in the house and that he had shot her in the chest.
>
> Officer Butler then testified as follows:
>
> > [Prosecutor:] Before [Schwertz was transported to jail], were you there in the kitchen with him for a while [sic]?
> >
> > [Officer Butler:] Yes, I was.
> >
> > [Prosecutor:] How long were you there?
> >
> > [Officer Butler:] With Mr. Schwertz, I want to guess approximately a minute to two minutes.
> >
> > [Prosecutor:] At any time when you showed up there, did he ever ask you to go help [Victim]?
> >
> > [Officer Butler:] Not that I can recall.
> >
> > [Prosecutor:] Well, would you have remembered that?
> >
> > [Officer Butler:] I would say I would, yes.
> >
> > [Prosecutor:] Did he say—and did he say anything else to you there that night?
> >
> > [Officer Butler]: No, sir.
>
> It was at this point counsel for Schwertz moved for a mistrial.
>
> After hearing thorough argument from both sides, the trial court stated:

> I didn't interpret the question and answer to elicit some sort of refusal by Mr. Schwertz to speak or to stand on his Fifth Amendment rights or to be silent in that way and, I don't—I don't believe the—the statement that was elicited to be harmful in that way, [defense counsel], that you are—that you are fearful of and, thus, I'm going to deny the request for mistrial.
>
> . . . .

Schwertz argues that the trial court abused its discretion when it denied his motion for mistrial because Officer Butler was asked whether Schwertz said anything else to him on the night of the shooting. Schwertz's point presupposes that this was prejudicial because the testimony suggested to the jury that if the shooting was an accident, as Schwertz claimed, he would have immediately told Officer Butler. We disagree.

The trial court's denial of Schwertz's request for a mistrial was not an abuse of discretion. The trial court, after hearing counsel for Schwertz's initial objection and argument, granted his request for a recess so that the parties would have an opportunity to research and brief the issue, and to present further argument the following day. The trial court received briefs, reviewed relevant case law, and heard extensive argument from both parties. It was only after this that the trial court denied Schwertz's motion for a mistrial indicating that the trial court did not believe the question was meant to elicit or that the actual testimony dealt with Schwertz's right to remain silent.

In addition, after electing not to grant a mistrial, the trial court asked Schwertz's counsel whether he requested any alternative curative action—he declined. The trial court prompted Schwertz's counsel with examples of possible curative actions the trial court would be willing to grant—again, Schwertz's counsel declined.

Under these circumstances, the trial court's ruling was not clearly against the logic of the circumstances before it and was not so arbitrary and unreasonable as to shock our sense of justice and indicate a lack of careful consideration. *Ward*, 242 S.W.3d at 705.

Schwertz points to *State v. Graves*, 27 S.W.3d 806 (Mo. App. W.D. 2000), for the proposition that the State may not use post-arrest, pre-*Miranda* silence as affirmative proof of guilt outside of impeachment. *Graves* is distinguishable. In *Graves*, there was no issue as to a mistrial and the State attempted to use *Graves*' silence as affirmative proof of her guilt.

The trial court's ruling was not clearly against the logic of the circumstances before it, and was not so arbitrary and unreasonable as to shock our sense of justice and indicate a lack of careful consideration by the trial court. *Ward*, 242 S.W.3d at 705.

Point denied. The judgment of the trial court is affirmed.

Doc. 10-12, pp. 8-10 (alterations added, footnote omitted).

Petitioner fails to establish that the state court made an objectively unreasonable determination in finding that Petitioner was not sufficiently prejudiced by Officer Butler's testimony. *See Fry v. Pliler*, 551 U.S. 112, 119 (2007) ("[W]hen a state court determines that a constitutional violation is harmless, a federal court may not award habeas relief under § 2254 unless *the harmlessness determination itself* was unreasonable.") (emphasis in original). In assessing the prejudicial impact of a constitutional error in a state-court criminal trial, Petitioner must establish that the error had a "substantial and injurious effect or influence in determining the jury's verdict." *Yang v. Roy*, 743 F.3d 622, 626 (8th Cir. 2014) (internal quotation omitted). "A 'substantial and injurious effect' occurs when the court finds itself in 'grave doubt' about the effect of the error on the jury's verdict." *See Toua Hong Chang v. Minnesota*, 521 F.3d 828, 832 n.2 (8th Cir.), *cert. denied*, 129 S. Ct. 314 (2008) (quoting *O'Neal v. McAninch*, 513 U.S. 432, 435 (1995)). "'Grave doubt' exists where the issue of harmlessness is 'so evenly balanced that [the court] feels [itself] in virtual equipoise as to the harmlessness of the error.' *Id.* (alterations in original).

Insofar as the trial court denied Petitioner's motion for mistrial, the trial court made reasonable determinations that the evidence challenged by Petitioner was admissible in light of the specific circumstances of Petitioner's case. Further, due to the limited nature of Officer Butler's testimony and the otherwise inculpatory evidence presented at trial, this Court finds that Petitioner fails to establish that the alleged error has a substantial and injurious effect in determining the jury's verdict. Because the state courts' determinations as to Ground 3 did not result in "a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States" or in "a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding," *see* 28 U.S.C. §2254(d)(1) and (2), Ground 3 is denied.

III. Certificate of Appealability

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

Accordingly, it is **ORDERED** that:

(1) the petition for writ of habeas corpus is denied;

(2) the issuance of a certificate of appealability is denied; and

(3) this case is dismissed.

/s/ Douglas Harpool
DOUGLAS HARPOOL
UNITED STATES DISTRICT JUDGE

Dated: March 11, 2019.

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No: 19-1631

Brent Curtis Schwertz

Appellant

v.

Richard Jennings, Warden

Appellee

Appeal from U.S. District Court for the Western District of Missouri - Springfield
(6:18-cv-03342-MDH)

ORDER

The petition for rehearing denied as overlength.

August 07, 2019

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

/s/ Michael E. Gans