No. 20-

In the Supreme Court of the United States

DAVID ABRAM ANAYA,

Petitioner,

v.

BOBBY LUMPKIN,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

In *Missouri* v. *Frye*, 566 U.S. 134 (2012), and *Lafler* v. *Cooper*, 566 U.S. 156 (2012), this Court held that a defendant who rejects a proffered plea deal as a result of counsel's deficient performance may demonstrate prejudice by showing that there is a reasonable probability that the defendant would have accepted the plea and, as particularly relevant here, that there is no "particular fact or intervening circumstance" suggesting that the plea would have been withdrawn by the prosecution or rejected by the trial court. In this case, however, the Fifth Circuit held that a petitioner under 28 U.S.C. § 2254 may not prevail on a *Lafler/Frye* claim even where the record contains no reason to think that the plea would have been withdrawn or rejected *and the State does not dispute that fact*. Breaking from three other circuits, and acknowledging that Petitioner had "compelling arguments," the court held that *Frye* and *Lafler* are unclear as to whether a defendant must present some sort of additional, "affirmative proof"—beyond his uncontested characterization of the record—that excludes every possible reason that the plea might have been withdrawn or rejected. The question presented is:

Whether this Court's decisions clearly establish that a defendant can show he was prejudiced by his counsel's deficient performance causing him to reject a plea offer where the defendant contends without contradiction by the State that the record reveals no particular facts or intervening circumstances suggesting that the State would have withdrawn, or the trial court would have rejected, the plea.

PARTIES TO THE PROCEEDING

Petitioner here, Petitioner-Appellant below, is David Abram Anaya.

Respondent here, Respondent-Appellee below, is Bobby Lumpkin, Director, Texas Department of Criminal Justice, Correctional Institutions Division.

RELATED PROCEEDINGS

The proceedings directly related to this case are:

- *Anaya* v. *Lumpkin*, No. 18-11203, U.S. Court of Appeals for the Fifth Circuit. Judgment entered September 25, 2020. Rehearing denied November 12, 2020.
- *Anaya* v. *Davis*, No. 2:15-CV-234, U.S. District Court for the Northern District of Texas, Amarillo. Judgment entered August 30, 2018.
- Petition for Writ of Certiorari, *Anaya* v. *Texas*, 136 S. Ct. 195 (2015) (No. 15-5166). Judgment entered October 5, 2015.
- *Anaya* v. *Texas*, Nos. WR-80, 336-01 & WR-80, 336-02; Texas Court of Criminal Appeals (Collateral Review). Judgment entered April 8, 2015.
- *Anaya* v. *Texas*, Nos. 59,854-02-A & 59,877-02-A; 47th District Court of Texas (Collateral Review). Judgment entered March 12, 2015.
- *Anaya* v. *Texas*, Nos. 07-10-00462-CR & 07-10-00463-CR, Texas Court of Criminal Appeals (Direct Review). Judgment entered March 12, 2014.

- *Anaya* v. *Texas*, Nos. 07-10-00462-CR & 07-10-00463-CR, Court of Appeals of Texas (Direct Review). Judgment entered August 15, 2012.
- *Texas* v. *Anaya*, Nos. 59,854-A & 59,877-A, 47th District Court of Texas. Sentenced October 7, 2010.

TABLE OF CONTENTS

Page

TABLE OF CONTENTS
(continued)

Page

TABLE OF AUTHORITIES

Page(s)

FEDERAL CASES

TABLE OF AUTHORITIES
(Continued)

Page(s)

TABLE OF AUTHORITIES
(Continued)

Page(s)

OTHER AUTHORITIES

PETITION FOR A WRIT OF CERTIORARI

Petitioner respectfully petitions for a writ of certiorari to the United States Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

The opinion of the court of appeals, Pet. App. 1a, is reported at 976 F.3d 545. The order of the court of appeals denying panel rehearing, Pet. App. 62a, is not reported. The opinion of the district court, Pet. App. 21a, and the findings, conclusions, and recommendation of the magistrate judge, Pet. App. 23a, are not reported.

JURISDICTION

The judgment of the court of appeals was entered on September 25, 2020. The petition for panel rehearing was denied on November 12, 2020. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Sixth Amendment to the United States Constitution provides, in relevant part: "the accused shall . . . have the Assistance of Counsel for his defence."

The Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), Pub. L. 104-132, 104, 110 Stat. 1214, 1219 (codified at 28 U.S.C. § 2254), provides in relevant part:

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

> merits in State court proceedings unless the adjudication of the claim—
>
> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
>
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

INTRODUCTION

This case presents a recurring question that has divided the courts of appeals: how a defendant claiming that his counsel's deficient performance caused him to reject a plea offer can show that he was prejudiced because the prosecution would not have withdrawn, and the trial court would not have rejected, the plea. This Court has already applied *Strickland*'s prejudice standard—a "reasonable probability" that the outcome would have been different but for counsel's misadvice—in the context of rejected pleas. In *Missouri* v. *Frye* and *Lafler* v. *Cooper*, the Court held that in order to show prejudice from a plea rejected as a result of counsel's deficient performance, a defendant must show that: (1) he would have accepted the plea offer but for counsel's deficient performance, (2) the plea would have been entered without the prosecution canceling it or the trial court refusing to accept it, and (3) the conviction or sentence, or both, under the offer's terms would have been less severe than under the judgment and sentence that in fact were imposed. 566 U.S. at 147; 566 U.S. at 164. The Court further explained that the second prong—the only prong of the prejudice analysis at issue here—is not meant to pose an insurmountable

barrier to relief: "[I]n most instances it should not be difficult to make an objective assessment as to whether or not a particular fact or intervening circumstance would suffice, in the normal course, to cause prosecutorial withdrawal or judicial nonapproval of a plea bargain." *Frye*, 566 U.S. 134, 149 (2012); see also *Lafler*, 566 U.S. at 164.

Following that guidance, several courts of appeals have found that, if there are no particular facts or intervening circumstances in the record indicating that the prosecution may have withdrawn the plea or the trial court may have rejected it, then a defendant has shown there is a reasonable probability that the plea would have been entered.

In this case, where Petitioner asserted that the record reveals no particular facts or intervening circumstances suggesting the State would have withdrawn the plea or the trial court would have rejected it, and the State did not contest the accuracy of that characterization, the Fifth Circuit broke from those other courts of appeals. Falling back on the deferential standard of review set forth in 28 U.S.C. § 2254, the Fifth Circuit held that because *Frye*'s standard is "not so clear," Mr. Anaya's uncontested characterization of the trial record was insufficient in the absence of undefined "affirmative proof" of the absence of any possible reason that the plea might have been withdrawn or rejected. Pet. App. 17a-20a. The Fifth Circuit did not attempt to define what type of evidence would constitute such "affirmative proof."

The decision below is an outlier among the courts of appeals, and it upholds a state-court decision that is contrary to, and an unreasonable application of, this Court's clearly established precedent. In *Lafler* itself, the Court expressly approved the Sixth Circuit's

conclusion that the defendant had established prejudice largely on the basis of his own testimony—without requiring the defendant to produce affirmative evidence of the *absence* of *any* possible fact or circumstance that could potentially have led the plea to be withdrawn or rejected.

That is the same showing that Petitioner made here. He reviewed the entirety of the record—including the plea offer, the trial briefing and transcripts, and the State appellate and postconviction records—and explained that it contained none of the particular facts or intervening circumstances courts have identified as indicating the plea would have been withdrawn or rejected. See Appellant's Br. 39-41; Appellant's Reply Br. 19-23. The State did not contest that assertion or identify any facts or circumstances to the contrary. See Pet. App. 17a; Appellee's Br. 27-29. Yet, contrary to *Lafler*, *Frye*, and multiple other circuits, the Fifth Circuit said that was not enough. Pet. App. 17a-20a. It is entirely unclear—and neither the Fifth Circuit nor the State attempted to define (Pet App. 17a)—what further, "affirmative proof" would be required or sufficient to meet the *Lafler*/*Frye* standard. Indeed, it is difficult to imagine what more could be required: Speculating as to all other possible facts or circumstances and arguing that those are not present in the record either? Seeking extra-record, non-public evidence such as data on other plea offers in the defendant's jurisdiction, the State's rate of withdrawing plea offers, or the trial court's rate of rejecting plea offers? It is even more difficult to imagine how a prisoner in state court proceeding pro se could find such evidence. In practice, then, the state court's decision, as affirmed by the Fifth Circuit, imposes an insurmountable burden to show prejudice

in the context of a plea offer that was rejected due to counsel's misadvice.

The Court should grant review to address this circuit conflict and harmonize application of a recurring question under *Frye* and *Lafler*.

STATEMENT

1. In 2009, Petitioner David Anaya ("Mr. Anaya") was indicted in Texas on charges of murder and assault with an aggravated weapon. Pet. App. 1a. The state offered Mr. Anaya a plea bargain with concurrent sentences of 30 years for the murder charge and 15 years for the aggravated assault charge. Pet. App. 2a; 20a n.75. Because Mr. Anaya had previously been convicted of two felonies, he was a felon in possession of a firearm at the time of the offense conduct. Pet. App. 8a. The state's plea offer therefore listed, and took into account, Mr. Anaya's prior felony convictions. See Electronic Record on Appeal 1391-92 (5th Cir. Sept. 18, 2018).

From the outset, Mr. Anaya did not deny the underlying facts charged in the indictment—he admitted that he shot the victim. Pet. App. 2a-3a. He believed, however, that he had acted in self-defense. *Id.* Because self-defense was the *only* issue in the case, Mr. Anaya's discussions with his counsel centered on the viability of his self-defense claim. *Id.*; *id.* at 11a.

2. Under Texas law, a defendant's reasonable act of self-defense is a defense to the offenses of murder and aggravated assault with a deadly weapon. Tex. Penal Code Ann. §§ 9.31; 9.32 (West 2007). With respect to the duty to retreat, as the Fifth Circuit explained, the statute provides that in certain circumstances the defendant need not retreat, prohibits a factfinder in those circumstances from considering

whether the defendant failed to retreat, and requires the factfinder to presume that the defendant acted reasonably in using force. Pet. App. 7a. In other circumstances, however, the statute provides that the factfinder may consider the defendant's failure to retreat, and may not presume that the defendant acted reasonably in using force. Pet. App. 8a. Because Mr. Anaya was a felon in possession of a firearm at the time of the offense, it was indisputable that the jury could consider his failure to retreat, and that his belief that deadly force was necessary would not be presumed reasonable. Pet. App. 8a.

3. As the Fifth Circuit further held, although the governing statute, and the application of the law to the facts of Mr. Anaya's case, were entirely clear, counsel misadvised Mr. Anaya that his failure to retreat "did not matter or make a difference" for his self-defense claim. Pet. App. 8a. On that understanding of the law, Mr. Anaya rejected a plea offer from the state. Pet. App. 8a-9a.

Predictably, the centerpiece of the state's case was that because he was in a car at the time he shot the victim, Mr. Anaya easily could have retreated, and his failure to do so was fatal to his self-defense claim. Pet. App. 8a. The jury convicted Mr. Anaya on both counts and sentenced him to 40 and 99 years respectively—effectively a life sentence. Pet. App. 20a n.75.

4. a. Mr. Anaya filed a direct appeal of his convictions and sentences in Texas court. Pet. App. 3a. The state intermediate appellate court affirmed Mr. Anaya's convictions. *Id.* The Texas Court of Criminal Appeals ("TCCA") refused both of Mr. Anaya's petitions for discretionary review, and Mr. Anaya did not seek certiorari review by this Court. *Id.*

b. Mr. Anaya sought collateral review of his convictions by filing an application for state habeas corpus, claiming, as relevant here, that his trial counsel rendered ineffective assistance by misadvising him on the law of self-defense and the duty to retreat thereby causing him to reject the state's plea offer. Pet. App. 3a.

In support of his application, Mr. Anaya submitted affidavits from himself, his wife, and his father and mother, "each of which support[ed] his assertion that he would not have rejected the plea if he knew his failure to retreat would be presented to the jury." Pet. App. 8a. And although Mr. Anaya's counsel submitted an affidavit addressing other claims made by Mr. Anaya, Pet. App. 8a, the affidavit "didn't even attempt to refute the accusation that he failed to correctly inform Anaya about the role of retreat," Pet. App. 9a.

The TCCA denied Mr. Anaya's application without written order, Pet. App. 32a, and this Court denied Mr. Anaya's petition for certiorari in his state habeas case, Pet. App. 3a. Mr. Anaya also filed a subsequent application for state habeas corpus, which the TCCA denied as successive. Pet. App. 3a.

c. Mr. Anaya then sought collateral review in federal court, contending that he received ineffective assistance of counsel in plea negotiations. A defendant claiming ineffective assistance of counsel during plea negotiations must show that (1) "counsel's representation fell below an objective standard of reasonableness," and (2) "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Lafler*, 566 U.S. at 162–63. To show a reasonable probability that the result of the proceeding would have been different, a defendant

must show that (1) he would have accepted the plea offer but for counsel's deficient performance, (2) the plea would have been entered without the prosecution's canceling it or the trial court's rejecting it, and (3) the conviction or sentence, or both, under the offer's terms would have been less severe than under the judgment and sentence that in fact were imposed. *Lafler*, 566 U.S. at 147; *Frye*, 566 U.S. at 164.

Here, the district court, adopting the magistrate judge's findings and conclusions, rejected Mr. Anaya's claim of ineffective assistance of counsel. Pet. App. 21a. The district court assumed Mr. Anaya's counsel rendered deficient performance, but held that Mr. Anaya failed to show he was prejudiced by that deficient performance. Pet. App. 45a. Specifically, the district court held that it was "questionable" whether Mr. Anaya would have accepted the plea offer, "[b]ased on [his] insistence at trial of no wrong doing on his part and that he was justified in using deadly force against the victim." Pet. App. 47a.

The district court also held that Mr. Anaya failed to demonstrate a reasonable probability that the plea would have been entered without the prosecution's withdrawing it or the trial court's rejecting it, because "the record is silent as to this issue." Pet. App. 48a.

Finally, the district court found that Mr. Anaya could make the showing that there was a reasonable probability that but for counsel's errors the result of the proceeding would have been different, because Mr. Anaya received 40- and 99-year sentences instead of 15- and 30-year sentences. Pet. App. 49a n.12.

d. The Fifth Circuit granted Mr. Anaya a certificate of appealability on his claim that he received ineffective assistance of counsel when his counsel misadvised him on a central point of Texas law, thereby

causing him to reject his plea offer and receive a significantly longer sentence at trial. Pet. App. 3a-4a.

As to counsel's deficient performance, the Fifth Circuit held that it had "no trouble concluding that Mr. Anaya satisfied § 2254(d)'s heavy burden on *Strickland*'s performance prong." Pet. App. 19a. Counsel's "performance was deficient and there can be no reasonable argument otherwise," Pet. App. 11a, the court held, because Mr. Anaya's "whole defense was self-defense," self-defense "was the only issue at trial," and counsel's misadvice on the duty to retreat meant that Mr. Anaya "couldn't fully understand the risks of rejecting the State's plea offer because he didn't know that his status as a felon in possession of a weapon would move the goalpost at trial," Pet. App. 11a-12a.

As to the first prong of the prejudice inquiry—whether Mr. Anaya would have accepted the State's plea offer—the Fifth Circuit explained that Mr. Anaya submitted affidavits from himself, his wife, his father, and his mother, "each of which support[ed] his assertion that he would not have rejected the plea if he knew his failure to retreat would be presented to the jury." Pet. App. 8a. The court further noted that although Mr. Anaya's counsel submitted an affidavit addressing other claims made by Mr. Anaya, Pet. App. 8a, the affidavit "didn't even attempt to refute the accusation that he failed to correctly inform Anaya about the role of retreat," Pet. App. 9a. The court also rejected the State's argument that Mr. Anaya's affidavits were not competent evidence that he would have accepted the plea offer because they were not contemporaneous. Pet. App. 13a-16a. The court reasoned that in *Lafler*, the Sixth Circuit rejected the state's argument that the defendant could not show prejudice with his own "self-serving statement,"

particularly where there was a significant disparity between the sentence under the plea offer and the sentence exposure at trial, and that "this rationale was affirmed by the Supreme Court." Pet. App. 15a (quoting *Cooper* v. *Lafler*, 376 F. App'x 563, 571 (6th Cir. 2010)). The court held that Mr. Anaya could satisfy part one of Frye's prejudice test with the affidavits he provided, but did not definitively decide the issue. Pet. App. 16a.[1]

The court also held that Mr. Anaya satisfied the third prong of the prejudice test—that the end result would have been more favorable under the plea. Pet. App. 20a n.75.

With respect to the second prong of the prejudice inquiry, the Fifth Circuit held that Mr. Anaya "has compelling arguments, but ultimately the law is murky." Pet. App. 13a. To meet his burden to show that the plea would not have been withdrawn or rejected, Petitioner pointed to the record—including the plea offer, the trial briefing and transcripts, and the State appellate and postconviction briefing—and

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[1] Although the Fifth Circuit saw no need to conclusively answer this question, there can be no real doubt that Petitioner made the necessary showing that he would have accepted the plea. As the Fifth Circuit explained, Mr. Anaya submitted multiple affidavits averring that he would have accepted the plea, and his counsel "didn't even attempt to refute the accusation that he failed to correctly inform Anaya about the role of retreat." Pet. App. 8a-9a. And, as the Fifth Circuit reasoned, Mr. Anaya's affidavits are precisely the same type of evidence this Court approved in *Lafler*. Pet. App. 15a-16a. Given this Court's and the Fifth Circuit's reasoning, there is no serious question that Mr. Anaya's multiple uncontradicted affidavits, corroborated by the facts of his case and the significant disparity in the two sentences, are sufficient to show he would have accepted the plea but for counsel's misadvice.

explained that it contained none of the particular facts or intervening circumstances courts have identified as indicating the plea would have been withdrawn or rejected. See Appellant's Br. 39-41; Appellant's Reply Br. 19-23. For instance, there was only one plea offer that the state never withdrew. The plea expressly took into account the seriousness of the crime and Petitioner's prior felony convictions. The plea also offered a sentence within the statutory range. There was no indication that the trial court was aware of the rejected plea. Nor did the trial court opine on the appropriateness of the jury's sentence, or suggest that a lesser sentence would have been inadequate. The State did not contest Mr. Anaya's assertion that there were no facts or circumstances suggesting the plea would have been withdrawn or rejected, nor did it respond with any contrary assertion or identify any contrary facts or circumstances of its own. See Pet. App. 17a; Appellee's Br. 27-29. Indeed, it did not even argue, as the State, that the State would have withdrawn the plea. Appellee's Br. 27-29.

Despite this uncontested showing, the Fifth Circuit held that "this is where the law gets too murky for Anaya to convincingly demonstrate an unreasonable application of federal law." Pet. App. 17a. The court conceded that the Fifth Circuit has never addressed how a defendant can make the second prong of the prejudice showing under *Lafler*/*Frye*—"whether affirmative evidence is needed." Pet. App. 19a. The court also acknowledged that the State did not "propose an alternative theory or suggest what evidence would suffice, other than to argue that Anaya must provide *affirmative* proof that demonstrates there are no particular facts or intervening circumstances." Pet. App. 17a. And the court declined to contend with the conflicting decisions of other courts

of appeals. Pet. App. 19a. At bottom, then, the Fifth Circuit's decision effectively requires additional, undefined "affirmative proof" even where the defendant's characterization of the total absence of facts or circumstances in the record is undisputed.

REASONS FOR GRANTING THE PETITION

The Court should grant certiorari to review the Fifth Circuit's outlier decision holding that in order to demonstrate prejudice under *Lafler* and *Frye*, it is insufficient for a Section 2254 petitioner to identify that the record before the court contains no indication of any particular fact or intervening circumstance that would have caused the plea to be withdrawn or rejected, even where the State *does not contest the accuracy of that statement*. The Fifth Circuit has thus effectively imposed on habeas petitioners the burden of offering additional "affirmative proof" of the *absence* of *any* of the myriad possible facts or circumstances that *might* lead a plea to be withdrawn or rejected, even where the record reveals no such facts or circumstances. It is unclear how petitioners might go about satisfying that burden. But there is no doubt that it will be insurmountable in practice.

In effectively imposing that undefined requirement, the decision below breaks from the decisions of several other circuits. Those circuits have correctly read *Frye* and *Lafler* to mean that, in cases where there are no particular facts or intervening circumstances suggesting that the prosecution would have withdrawn, or the court would have rejected, the plea offer in question, the defendant has shown there is a reasonable probability that the plea would have been entered.

The decision below also affirms a state-court decision that is contrary to, and an unreasonable

application of, *Strickland, Frye*, and *Lafler*. It is well-established that *Strickland*'s prejudice standard requires a defendant to show only "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland* v. *Washington*, 466 U.S. 668, 694 (1984). And *Frye* and *Lafler*—which apply *Strickland* in the context of rejected plea offers and in the context of AEDPA review of federal- and state-court convictions—make perfectly clear that the requisite prejudice inquiry is an "objective assessment as to whether or not a particular fact or intervening circumstance would suffice, in the normal course, to cause prosecutorial withdrawal or judicial nonapproval of a plea bargain." *Frye*, 566 U.S. at 149 (Section 2255); see also *Lafler*, 566 U.S. at 164 (Section 2254). The state court's requirement of additional, undefined "affirmative proof" even beyond the uncontested showing that there are no particular facts or intervening circumstances suggesting the plea would not have been entered directly contradicts *Frye* and *Lafler* and turns *Strickland*'s reasonable-probability standard into a virtual-certainty standard.

Accordingly, the decision below is not only an outlier and wrong, it renders hollow the promise of *Frye* and *Lafler* for a defendant challenging his state-court conviction on the ground that he received ineffective assistance of counsel that caused him to reject a plea offer and receive a much higher sentence at trial.

I. This Court Should Review the Court of Appeals' Outlier Holding That *Lafler* and *Frye* Require Section 2254 Petitioners to Proffer Additional, "Affirmative Proof" That the Plea Would Have Been Entered

To show prejudice from counsel's deficient performance leading to a rejected plea offer, a defendant must establish that there is a "reasonable probability" that (1) the defendant would have accepted the plea offer but for counsel's deficient performance, (2) the plea would have been entered without the prosecution's canceling it or the trial court's rejecting it, and (3) that the conviction or sentence, or both, under the offer's terms would have been less severe than under the judgment and sentence that in fact were imposed. *Frye*, 566 U.S. at 147; *Lafler*, 566 U.S. at 164. As to the second required showing—that the prosecution would not have withdrawn, and the court would not have rejected, the plea offer—"[i]t can be assumed that in most jurisdictions prosecutors and judges are familiar with the boundaries of acceptable plea bargains and sentences," "[s]o in most instances it should not be difficult to make an objective assessment as to whether or not a particular fact or intervening circumstance would suffice, in the normal course, to cause prosecutorial withdrawal or judicial nonapproval of a plea bargain." *Frye*, 566 U.S. at 149. The *Lafler* Court applied this standard and affirmed the Sixth Circuit's holding that the defendant there had met his burden to show prejudice even without any affirmative proof of the sort the Fifth Circuit apparently contemplated. See 566 U.S. at 174 (citing *Cooper* v. *Lafler*, 376 F. App'x at 571-72).

Despite that clear guidance, the Fifth Circuit held, contrary to other circuits, that *Lafler* and *Frye* are "murky" as to the required prejudice showing. Pet. App. 13a. The Fifth Circuit therefore upheld the state court's apparent conclusion that a defendant cannot meet his burden to show prejudice even where he identifies that there are no particular facts or intervening circumstances in the record suggesting the plea would have been withdrawn or rejected and the State does not dispute that characterization. The Fifth Circuit's decision splits with three other courts of appeals on its interpretation of *Frye* and *Lafler*; upholds a state-court decision that is contrary to, and an unreasonable application of, this Court's clearly established precedent; and defies common sense, making it impossible for state-habeas petitioners ever to prevail on ineffective-assistance claims under *Lafler* and *Frye*.

A. The Court Of Appeals' Decision Conflicts with the Decisions of Multiple Other Circuits.

The Fifth Circuit's decision creates a circuit conflict on an important and recurring application of *Frye* and *Lafler* that requires this Court's intervention. Specifically, the Fifth Circuit's conclusion that *Frye* and *Lafler* are unclear as to whether "affirmative proof" beyond an uncontested absence of record evidence is required to show prejudice conflicts with the decisions of three other courts of appeals. Those other circuits correctly understand *Frye* and *Lafler*'s prejudice inquiry to be satisfied by the absence of any particular facts or intervening circumstances in the record suggesting the plea would have been withdrawn or rejected.

1. In *Cooper* v. *United States*, 660 F. App'x 730, 736-37 (11th Cir. 2016) (per curiam), the defendant

challenged his conviction on the ground that his counsel was ineffective during plea negotiations, causing him to reject a plea offer. The court held that the defendant established that the plea would have been entered because "there is no indication that the government would have withdrawn the plea," and "no indication that the court would not have accepted its terms." *Id.* at 736-37.

In so holding, the Eleventh Circuit agreed with the magistrate judge, who found that the defendant met his burden under the second prong of *Lafler*'s prejudice test because there was "no indication of any intervening circumstance that would have caused the prosecution to withdraw the offer, and the government does not contend that there was," Report & Recommendations, 2:11-CV-14429, Dkt. No. 45 at 19 (S.D. Fla. Mar. 28, 2013), and there was "nothing unusual about the plea agreement in this case that would lead to the conclusion that the court would not have accepted its terms," *id*.

2. Similarly, in *Faison* v. *United States*, 650 F. App'x 881, 884-85 (6th Cir. 2016), the Sixth Circuit held that the defendant "has demonstrated that [counsel's] alleged actions prejudiced him," *id.* at 887. The court reasoned that "[a]t the rearraignment hearing, nothing suggested that the court would not have accepted such an agreement or that the agreement was otherwise unavailable." *Id.*

3. Likewise, in *United States* v. *Dickerson*, 546 F. App'x 211, 212 (4th Cir. 2013), the Fourth Circuit held that the district court abused its discretion in denying the defendant an evidentiary hearing on his claim that counsel rendered deficient performance in advising him to reject a plea offer. Citing *Lafler*, the court concluded that the defendant made a sufficient showing

that, absent counsel's advice, "he would have accepted a plea that would have been accepted by the court." *Id.* at 214. The government argued that the defendant could not make that showing because the plea offer contained an appellate waiver, the defendant could not show that he would have accepted an offer with an appellate waiver, and the government would have withdrawn the offer without an appellate waiver. *Id.* The court rejected the argument, holding that "there is nothing in the record to support a finding that the government conditioned its offer on [the defendant's agreeing to an appellate] waiver, that counsel deemed it important in [the defendant's] case to avoid waiver of the right to appeal, or that counsel's advice to reject the offer was on that basis." *Id.*

That these other circuits' decisions arose under Section 2255 does not undermine the circuit split.[2] The Eleventh, Sixth, and Fourth Circuits correctly understood *Frye* and *Lafler* to hold that pointing to the absence in the record of any "intervening fact" or "particular circumstance" indicating the plea may have been withdrawn or rejected is sufficient to show a reasonable probability that the plea would have been entered. The Fifth Circuit, by contrast, incorrectly believed *Frye* and *Lafler* to be unclear on that question, and so held that the state court's decision could not be unreasonable. Based on the other circuits' understanding that *Frye* and *Lafler* are clear, if they were presented with a state-court decision holding that the absence of any particular facts is insufficient to show the plea would have been entered, they would likely hold that such a decision is contrary to *Frye* and *Lafler*. Indeed, for the reasons set forth below (*infra* 18-24),

[2] *Frye* was a Section 2255 case, *Lafler* was a Section 2254 case, and both cases articulated the same prejudice standard.

the state court's decision is plainly contrary to, or at the very least an unreasonable application of, *Frye* and *Lafler*.

B. The State Court's Decision, as Affirmed by the Fifth Circuit's Outlier Holding, is Contrary to, and an Unreasonable Application of, Clearly Established Law

Review is also warranted because the Fifth Circuit is on the wrong end of the circuit split. Specifically, the Fifth Circuit's decision wrongly affirms a state-court decision[3] that is contrary to, and an unreasonable application of, clearly established precedent of this Court. A state court's decision is contrary to clearly established law where the court "applies a rule different from the governing law set forth in [the Court's] cases," or "decides a case differently than [the Court has] done on a set of materially indistinguishable facts." *Bell* v. *Cone*, 535 U.S. 685, 694 (2002); see also *Williams* v. *Taylor*, 529 U.S. 362, 405-06 (2000). And a state court's decision is an unreasonable application of clearly established law where the state court correctly identifies the governing legal principle but unreasonably applies it to the facts of the particular case. *Bell*, 535 U.S. at 694. Because the Fifth Circuit found that Petitioner had established or made a strong showing with respect to every other required element of the

[3] Where, as here, the state court denies a habeas application without written order, the denial is a decision on the merits subject to deference under Section 2254. See *Cullen* v. *Pinholster*, 563 U.S. 170, 187 (2011). Accordingly, "a habeas court must determine what arguments or theories . . . could have supporte[d] the state court's decision; and then it must ask whether it is possible fairminded jurists could disagree that those arguments or theories are inconsistent with the holding in a prior decision of this Court." *Id.* at 188 (internal citation omitted).

Strickland analysis, the only argument that could have supported the state court's decision is the one that the Fifth Circuit itself identified—i.e., that Petitioner failed to present "affirmative proof" that the plea would not have been withdrawn or rejected, beyond making an uncontested showing that there were no facts or circumstances in the record suggesting the plea would have been withdrawn or rejected. That conclusion is contrary to, and an unreasonable application of, this Court's precedent.

1. The requirement that a defendant proffer "affirmative proof" that the plea would have been entered, even where it is undisputed that there are no particular facts or intervening circumstances suggesting otherwise, is contrary to *Frye* and *Lafler*. Those cases make clear that the prejudice inquiry in the context of rejected pleas is a holistic, objective one intended to identify "intervening circumstances" or "particular facts" that would cause a plea *not* to be entered.

The *Frye* Court declined to impose such an insurmountable requirement, holding instead that "[i]t can be assumed that in most jurisdictions prosecutors and judges are familiar with the boundaries of acceptable plea bargains and sentences," "[s]o in most instances it should not be difficult to make an objective assessment as to whether or not a particular fact or intervening circumstance would suffice, in the normal course, to cause prosecutorial withdrawal or judicial nonapproval of a plea bargain." 566 U.S. at 149.

And in *Lafler* (a Section 2254 case), the Court expressly affirmed the Sixth Circuit's holding that the defendant had shown prejudice—specifically, that the State would not have withdrawn, and the trial court would not have rejected, the plea. 566 U.S. at 174 (citing *Cooper* v. *Lafler*, 376 F. App'x at 571-72). The

Sixth Circuit, in a passage approvingly cited by this Court, relied only on the defendant's own testimony that he would have accepted the plea, and the difference between the sentence the defendant received and what he would have received under the plea. See *Cooper* v. *Lafler*, 376 F. App'x at 571-72. The Sixth Circuit also rejected the State's proffered reason that the trial court might not have accepted the plea—there, the defendant's refusal to admit intent to kill. See *id.* Having satisfied itself that the one potential circumstance in the record did not indicate the plea would have been rejected, the court did not require the defendant to demonstrate the absence of any *other* possible reason the plea might have been rejected. See *id.* And the court also rejected the State's argument that the defendant was required to produce "additional evidence" beyond his own testimony, explaining that requiring a higher quantum of evidence "would contradict the Supreme Court's holdings that petitioner need only establish a 'reasonable probability' that the result would have been different." *Id.* at 571. Again, this Court cited that reasoning in affirming the Sixth Circuit's prejudice holding. *Lafler*, 566 U.S. at 174.

Together, *Lafler* and *Frye* leave no doubt that a defendant may demonstrate a "reasonable probability" that the court would have entered the plea simply by explaining that the record does not contain any evidence of "particular fact[s] or intervening circumstance[s]" that would have caused the plea to be withdrawn or rejected, where the State does not dispute the absence of any such evidence in the record.

2. That nothing more is required follows from the well-established *Strickland* standard, which requires only a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding

would have been different." 466 U.S. at 694. A "reasonable probability" is *less* than "more likely than not." *Id.* at 693. It is, as this Court has held over and over again, only "a probability sufficient to undermine confidence in the outcome." *Id.*; see, e.g., *Sears* v. *Upton*, 561 U.S. 945, 952 & n.8 (2010); *Wiggins* v. *Smith*, 539 U.S. 510 534 (2003); *Williams*, 529 U.S. at 391.

In the context of plea bargains, it is an unreasonable application of *Strickland*'s reasonable-probability standard to require "affirmative proof" that the plea would have been entered where it is undisputed that there are no facts in the record suggesting the plea would have been withdrawn or rejected. This Court has repeatedly recognized that its decisions in this area are premised on the "simple reality" that plea bargaining is "central" to the criminal justice system, because the overwhelming majority of convictions are the result of plea bargains. See *Frye*, 566 U.S. at 143-44; *Lafler*, 566 U.S. at 169-70; *Padilla* v. *Kentucky*, 559 U.S. 356, 372 (2010). In practice, once a State offers a plea bargain, there is necessarily a reasonable probability that if the defendant accepts the plea, it will be entered, barring special circumstances. That follows from two features of the plea-bargaining system: First, a prosecutor has an obligation to offer plea terms that are appropriate in light of the offense, the applicable sentencing scheme, and any other relevant considerations.[4] Second, as this Court has repeatedly recognized (*supra* 21), the vast majority of criminal cases

[4] See, e.g., Criminal Justice Standards for the Prosecution Function 3-5.6 (Am. Bar Ass'n 4th Ed. 2017), *available at* https://www.americanbar.org/groups/criminal_justice/standards/ProsecutionFunctionFourthEdition/; Texas Disciplinary Rules of Professional Conduct 3.09 (Feb. 26, 2019), *available at* https://www.texasbar.com/AM/Template.cfm?Section=News_and

are resolved by guilty pleas, which demonstrates that as a practical matter trial courts are accepting the pleas proposed to them. That is no doubt why *Lafler* and *Frye* framed this inquiry in terms of a negative—the absence of any particular facts or intervening circumstances suggesting that the plea might have been withdrawn or rejected. Indeed, recognizing these realities, commentators studying *Frye* and *Lafler* have catalogued the difficulties of obtaining data or other information with respect to the plea-bargaining process, and explained that requiring a defendant to offer such evidence would not only distort the prejudice inquiry, but also effectively render it impossible to meet the *Lafler/Frye* prejudice standard.[5]

That is precisely what happened here. Petitioner made his showing by reviewing the entire record, including the plea offer, the trial briefing and transcripts, and the State appellate and postconviction records, and demonstrating that it contained no particular facts or intervening circumstances suggesting the plea would have been withdrawn or rejected. See Appellant's Br. 39-41; Appellant's Reply Br. 19-23. There was only one plea offer that the State never withdrew.

_Publications_Home&ContentID=27271&Template=/CM/ContentDisplay.cfm.

[5] See Andrea Kupfer Schneider & Cynthia Alkon, *Bargaining in the Dark: The Need for Transparency and Data in Plea Bargaining*, 22 New Crim. L. Rev. 434, 446-49 (2019); Joel Mallord, *Putting Plea Bargaining on the Record*, 162 U. Pa. L. Rev. 683, 696-97 (2014); Jenia Iontcheva Turner, *Effective Remedies for Ineffective Assistance*, 48 Wake Forest L. Rev. 949, 970-71 (2013); Carissa Byrne Hessick, *Proving Prejudice for Ineffective Assistance Claims After* Frye, 25 Fed. Sent. Rep. 147, 147-48 (2012); Darryl K. Brown, Lafler, Frye *and Our Still-Unregulated Plea Bargaining System*, 25 Fed. Sent. Rep. 131, 132 (2012).

The plea offer took into account the seriousness of the crime and Petitioner's prior felony convictions. The plea also offered a sentence within the statutory range. The trial court did opine on the appropriateness of the jury's sentence, or suggest that a lesser sentence would have been inadequate. The State did not contest these assertions or identify any facts or circumstances to the contrary. See Pet. App. 17a; Appellee's Br. 27-29. Neither the Fifth Circuit nor the State even attempted to articulate what more Petitioner could have done to meet his burden, Pet. App. 17—whether Petitioner should have guessed at other potential facts not in the record, or sought extra-record evidence, such as evidence of the rates of the State's withdrawal of plea bargains or the rates of the trial court's rejection of plea bargains. If the former, proving a negative would presumably require a defendant to imagine every fact that could possibly lead to withdrawal or rejection of a plea and rebut each of those facts. If the latter, such evidence is often nonexistent or nonpublic. The state court's decision thus erects a virtually insurmountable barrier to proving this prong of the prejudice inquiry.

That this requirement is untenable is especially obvious here, in the context of habeas challenges to state convictions, which of course represent the vast majority of convictions. Defendants rarely have counsel in state postconviction proceedings. See, e.g., *Roe* v. *Flores-Ortega*, 528 U.S. 470, 492-93 (2000). As a result, defendants likely will not be able to make this showing in state postconviction proceedings. And, unlike Section 2255, Section 2254 generally limits federal-court review to the record that was before the state court that adjudicated the claim on the merits. See 28 U.S.C. § 2254(d)(1); *Pinholster*, 563 U.S. at 187. In practice, that means a defendant who was convicted in

state court and has an otherwise meritorious ineffective-assistance claim under *Frye* and *Lafler* cannot even argue for an evidentiary hearing in federal court where he (or, more likely at that stage, his counsel) could find and introduce "affirmative proof" that the State would not have withdrawn, and the court would not have rejected, the plea offer that he would have accepted but for his counsel's misadvice. That outcome is an unreasonable application of *Strickland*, and directly contrary to this Court's decisions in *Frye* and *Lafler*. It also makes the *Lafler*/*Frye* right illusory for the vast majority of defendants.

C. This Case is a Good Vehicle to Resolve an Important and Recurring Question Under *Lafler* and *Frye*

1. This case is an ideal vehicle for the Court to ensure consistent and correct application of *Frye* and *Lafler* to a recurring question under AEDPA. Because the Fifth Circuit held, even on state-habeas review, that Petitioner's counsel rendered deficient performance, Pet. App. 19a, the question presented is narrow and clearly defined. What is more, the case presents a pure question of law, because Petitioner's sole contention is that he need not have offered further proof than what he pointed to in the record. Rather, it is sufficient to show prejudice under a straightforward application of *Frye*, *Lafler*, and *Strickland* that there are no intervening circumstances or particular facts suggesting that the State would have withdrawn, or the trial court would have rejected, the plea. And, as explained above (*supra* 3, 22), it is uncontested that there are no such particular facts or intervening circumstances here.

2. Nor does the AEDPA context pose any barrier to granting certiorari in this case. The Court has not

hesitated to grant review in cases where a petitioner was required to overcome AEDPA standards, including Section 2254's contrary to/unreasonable application clause. See, e.g., *Brumfield* v. *Cain*, 576 U.S. 305 (2015); *Wood* v. *Allen*, 558 U.S. 290 (2010); *Wiggins*, 539 U.S. at 510; *Williams*, 529 U.S. at 362. Indeed, *Lafler* itself was a Section 2254 case. 566 U.S. at 162. Where, as here, a state court's decision is contrary to, or an unreasonable application of, this Court's clearly established precedent, review is warranted to set aside that decision. *Lafler* and *Frye* leave no doubt that a defendant may demonstrate a reasonable probability that the plea would have been entered where he establishes that he would have accepted the plea, there is a significant disparity between the sentence offered and the sentence received, and there is no reason to think that the sort of facts or circumstances discussed in *Lafler* and *Frye* would have caused the plea to be withdrawn or rejected. Yet the Fifth Circuit has declared that those decisions are unclear as to the showing necessary to demonstrate prejudice. Not only is that conclusion wrong; it will also effectively prevent habeas petitioners across the country from obtaining relief on a *Frye/Lafler* claim under Section 2254. Faced with such claims, States will undoubtedly point to the decision below as conclusive evidence that a state court's rejection of a defendant's prejudice showing on the grounds presented here cannot possibly be contrary to, or an unreasonable application of, *Lafler* and *Frye*. This Court's review is warranted.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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April 12, 2021

APPENDIX

APPENDIX A

No. 18-11203

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

DAVID ABRAM ANAYA,
Petitioner-Appellant,

v.

BOBBY LUMPKIN, Director, Texas Department of Criminal Justice, Correctional Institutions Division,
Respondent-Appellee.

Appeal from the United States District Court for the Northern District of Texas, USDC No. 2:15-CV-234,
Sidney A. Fitzwater, U.S. District Judge

FILED September 25, 2020

Before BARKSDALE, HAYNES, and WILLETT, Circuit Judges.

OPINION

DON R. WILLETT, Circuit Judge:

David Anaya was charged with murder and aggravated assault. He rejected the State's plea deal and opted instead for a jury trial. He didn't deny that he shot the victim. He insisted instead that he fired in self-defense. But Anaya's lawyer did not tell Anaya that, because he was a felon in possession of a weapon, the jury could consider his failure to retreat under Texas law. So now Anaya brings a habeas claim for ineffective assistance of counsel. The district court denied Anaya relief. Because of the rigorous deference we owe the state court's judgment on collateral review, we AFFIRM.

I

Late one night in Potter County, Texas, a group of five teenagers heard gunshots as they were leaving a club. They ran to their car, where they found a man, beaten and bloody, leaning up against it. One of the teens threw the man off the car so they could leave.

David Anaya left the same club at about the same time. He noticed a crowd in the parking lot and saw "flashes of a gun in the air." A group was "pounding on somebody with their feet." Anaya went to investigate. By the time Anaya got close enough to the scene, he found his brother on the ground, brutally beaten, wounded, and bleeding. Anaya gathered his brother, put him in the front seat of his car, and put his brother's gun in the console. Anaya wanted to leave before police arrived because he was on parole.

While driving down Amarillo Boulevard, Anaya pulled up alongside the car full of teens from the club. One of the teens testified that Anaya accused them of attacking his brother. Anaya says that the front passenger in the other car was making "aggressive gestures" and that someone in the back seat pointed a gun at Anaya through the window. Anaya then fired his brother's gun at them, he claims, in self-defense. One of the teen passengers was struck in the temple and died. The police recovered a black toy gun from the teenagers' car, but the owner of the toy gun denied having brandished it. An investigator testified that the toy gun resembled a semi-automatic gun—its blue and orange coloring had been scratched off to make it look real.

The State offered Anaya a plea bargain: 30 years for murder and 15 years for aggravated assault. Anaya did not deny the underlying facts in the indictment but claimed he was acting in self-defense.

So Anaya's discussions with his lawyer, Rus Bailey, centered on the viability of a self-defense claim at trial. That was Anaya's only defense. The State provided Bailey with a list of Anaya's convictions and made clear it planned to use those convictions at trial to enhance Anaya's punishment. Because of those prior convictions, at the time of the shooting, Anaya was a felon in possession of a firearm. This meant that the jury could consider Anaya's failure to retreat in evaluating the reasonableness of his actions.[1]

The jury convicted Anaya of both assault and felony murder. He was sentenced to 40 and 99 years, respectively. Anaya appealed, and the state intermediate appellate court affirmed. The Texas Court of Criminal Appeals refused Anaya's petitions for review. And he did not seek certiorari from the Supreme Court of the United States.

Anaya pursued an ineffective assistance of counsel claim in three state habeas proceedings, the last dismissed as successive. The TCCA denied relief, and the Supreme Court denied certiorari.[2] All of Anaya's state habeas petitions were denied without written orders. Anaya applied to the federal district court for habeas relief.[3] The district court adopted the magistrate judge's written findings, conclusions, and recommendation—the only written opinion in Anaya's habeas proceedings—and denied a Certificate of Appealability. We granted Anaya a COA on one issue: Anaya's ineffective assistance of counsel claim that his counsel misdescribed the law of self-defense,

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[1] Tex. Penal Code Ann. § 9.32(c), (d).

[2] *Anaya v. Texas*, 577 U.S. 885, 136 S. Ct. 195, 193 L.Ed.2d 154 (2015).

[3] *See* 28 U.S.C. § 2254.

which impaired Anaya's ability to make an informed decision on the viability of his only defense and the State's plea offer.

II

When a state court denies a habeas application without a written order—as is the case here—that decision is an adjudication on the merits subject to deference under 28 U.S.C. § 2254(d).[4] When a district court denies a § 2254 application, we review the district court's findings of fact for clear error and its conclusions of law de novo, "applying the same standard of review to the state court's decision as the district court."[5] We also review mixed questions of law and fact de novo.[6]

To obtain relief under § 2254(d), Anaya must establish that the state court's adjudication of his claim "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 "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."[7]

III

The Sixth Amendment right to counsel extends to the plea-bargaining process, where defendants are "entitled to the effective assistance of competent

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[4] *Register v. Thaler*, 681 F.3d 623, 626 n.8 (5th Cir. 2012).

[5] *Robertson v. Cain*, 324 F.3d 297, 301 (5th Cir. 2003) (citation omitted).

[6] *Id.*

[7] 28 U.S.C. § 2254(d).

counsel."[8] In fact, we have "observed that providing counsel to assist a defendant in deciding whether to plead guilty is 'one of the most precious applications of the Sixth Amendment.'" [9] That's because the overwhelming majority of federal and state convictions are the result of guilty pleas.[10] The Supreme Court has repeatedly reminded us that, because our criminal justice system has become "for the most part a system of pleas, not a system of trials," the "critical point for a defendant" is often plea negotiation, not trial.[11] And because "horse trading between prosecutor and defense counsel determines who goes to jail and for how long," plea bargaining "is not some adjunct to the criminal justice system; it *is* the criminal justice system."[12]

Anaya's ineffective assistance of counsel claim—based on Bailey's advice at plea bargaining—is governed by the two-part test established in *Strickland v. Washington*.[13] Under *Strickland*, a defendant who claims ineffective assistance of counsel

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[8] *Lafler v. Cooper*, 566 U.S. 156, 162, 132 S.Ct. 1376, 182 L.Ed.2d 398 (2012) (quoting *McMann v. Richardson*, 397 U.S. 759, 771, 90 S.Ct. 1441, 25 L.Ed.2d 763 (1970)).

[9] *United States v. Rivas-Lopez*, 678 F.3d 353, 356 (5th Cir. 2012) (cleaned up) (quoting *United States v. Grammas*, 376 F.3d 433, 436 (5th Cir. 2004)).

[10] *Missouri v. Frye*, 566 U.S. 134, 143, 132 S.Ct. 1399, 182 L.Ed.2d 379 (2012) ("Ninety-seven percent of federal convictions and ninety-four percent of state convictions are the result of guilty pleas.").

[11] *Id.* at 143–44, 132 S.Ct. 1399 (quoting *Lafler*, 566 U.S. at 170, 132 S.Ct. 1376).

[12] *Id.* (emphasis in original) (quoting Scott & Stuntz, *Plea Bargaining as Contract*, 101 Yale L.J. 1909, 1912 (1992)).

[13] *See id.* at 140, 132 S.Ct. 1399.

must show: (1) "that counsel's representation fell below an objective standard of reasonableness,"[14] and (2) that the deficiency was "prejudicial to the defense."[15] The inquiry is highly deferential to counsel.[16] And in the habeas context, we do not start with a clean slate but must give deference to the state court under § 2254(d).[17] We address each *Strickland* prong in turn, applying the requisite "doubly deferential" standard of review "that gives both the state court and the defense attorney the benefit of the doubt."[18]

A

First, the performance prong. To show deficient performance under *Strickland*, Anaya must show that Bailey "made errors so serious that counsel was not functioning as the 'counsel' guaranteed by the Sixth Amendment."[19] We must "indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance."[20]

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[14] 466 U.S. 668, 688, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984).

[15] *Id.* at 692, 104 S.Ct. 2052.

[16] *Id.* at 690, 104 S.Ct. 2052 ("[C]ounsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment."); *see also Cullen v. Pinholster*, 563 U.S. 170, 189, 131 S.Ct. 1388, 179 L.Ed.2d 557 (2011).

[17] *See Mejia v. Davis*, 906 F.3d 307, 315 (5th Cir. 2018) (citing *Harrington v. Richter*, 562 U.S. 86, 105, 131 S.Ct. 770, 178 L.Ed.2d 624 (2011)).

[18] *Burt v. Titlow*, 571 U.S. 12, 15, 134 S.Ct. 10, 187 L.Ed.2d 348 (2013) (citation omitted).

[19] *United States v. Kayode*, 777 F.3d 719, 723 (5th Cir. 2014) (quoting *Strickland*, 466 U.S. at 687, 104 S.Ct. 2052).

[20] *United States v. Kelly*, 915 F.3d 344, 350 (5th Cir. 2019) (quoting *Strickland*, 466 U.S. at 689, 104 S.Ct. 2052).

But counsel's "[s]ilence" "on matters of great importance, even when answers are readily available," is "fundamentally at odds with the critical obligation of counsel to advise the client of 'the advantages and disadvantages of a plea agreement.'"[21] To be sure, in the habeas world of double deference, "'the question is not whether counsel's actions were reasonable,' but 'whether there is any reasonable argument that counsel satisfied *Strickland*'s deferential standard.'"[22] Anaya claims that Bailey was silent on a matter of great importance—Anaya's entire defense—that would have radically altered his plea decision. We agree, and conclude there is no reasonable argument to the contrary.

Under Texas's self-defense statute, juries are generally prohibited from considering a defendant's failure to retreat in assessing the reasonableness of his belief that deadly force was necessary.[23] But there are important caveats to that general rule. Relevant here, it only applies if the actor was "*not engaged in criminal activity* at the time the deadly force [wa]s used."[24] If the actor was not engaged in criminal activity, the jury "*may not consider* whether the actor failed to retreat,"[25] and the actor's belief that deadly force was necessary is "*presumed to be reasonable*."[26]

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[21] *Padilla v. Kentucky*, 559 U.S. 356, 370, 130 S.Ct. 1473, 176 L.Ed.2d 284 (2010) (quoting *Libretti v. United States*, 516 U.S. 29, 50–51, 116 S.Ct. 356, 133 L.Ed.2d 271 (1995)).

[22] *Mejia*, 906 F.3d at 315 (quoting *Harrington*, 562 U.S. at 105, 131 S.Ct. 770).

[23] Tex. Penal Code Ann. § 9.32(d).

[24] *Id.* § 9.32(c) (emphasis added).

[25] *Id.* § 9.32(d) (emphasis added).

[26] *Id.* § 9.32(b)(3) (emphasis added).

In contrast, if the defendant is engaged in criminal activity at the time force is used, the jury can consider his failure to retreat before using deadly force.[27] And such a person's belief that deadly force was necessary is no longer presumed reasonable.[28]

At the time of the shooting, Anaya was engaged in criminal activity because he was a felon in possession of a firearm. As a result: (1) The jury was permitted to consider his failure to retreat and (2) his belief that deadly force was necessary was not presumed to be reasonable. The State made Anaya's failure to retreat central to its case, contending that, because Anaya was driving a car when he fired his gun, he could have easily retreated.

Anaya claims that his decision to reject the State's plea offer turned on the viability of his self-defense claim. He admitted from the get-go that he shot the victim, so his whole theory rested on self-defense. Anaya claims that Bailey told him he had a "viable defense"—that Bailey would argue Anaya's conduct was reasonable because Anaya thought his life was in danger. But Anaya avers that Bailey never informed him of the role his failure to retreat would play at trial under Texas law. In fact, Anaya claims, Bailey told him that "it did not matter or make a difference if [Anaya] had the ability to retreat." Anaya filed affidavits from himself, his wife, mother, and father—each of which supports his assertion that he would not have rejected the plea if he knew his failure to retreat would be presented to the jury. Bailey submitted a responsive affidavit and argued that it was Anaya's decision to go to trial and that Bailey

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[27] *See id.* § 9.32(c).

[28] *Id.* § 9.32(b).

never guaranteed any result. But Bailey's affidavit didn't even attempt to refute the accusation that he failed to correctly inform Anaya about the role of retreat.

Bailey's understanding of the self-defense statute was clearly wrong. But was Bailey's advice so gravely in error that he was acting outside the "wide range of reasonable professional assistance?" [29] Running throughout *Strickland* cases is a distinction between strategic choices, which are "virtually unchallengeable,"[30] and "[a]n attorney's ignorance of a point of law."[31] When ignorance of a key point of law is combined with failure to do basic research, that's a "quintessential example of unreasonable performance under *Strickland*."[32]

Our *Strickland* precedent in the context of plea negotiations is clear that a defendant must have "a full understanding of the risks of going to trial."[33] Otherwise, "he is unable to make an intelligent choice of whether to accept a plea or take his chances in court."[34] Plea negotiations are full of high stakes and hard choices. Pitch perfect counsel is neither expected nor required. But having competent counsel means being "aware of the relevant circumstances and the likely consequences" of going to trial.[35] Counsel is de-

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[29] *See Kelly*, 915 F.3d at 350.

[30] *Strickland*, 466 U.S. at 690, 104 S.Ct. 2052.

[31] *Hinton v. Alabama*, 571 U.S. 263, 274, 134 S.Ct. 1081, 188 L.Ed.2d 1 (2014).

[32] *Id.*

[33] *Grammas*, 376 F.3d at 436 (quoting *Teague v. Scott*, 60 F.3d 1167, 1171 (5th Cir. 1995)).

[34] *Id.* (quoting *Teague*, 60 F.3d at 1171).

[35] *Rivas-Lopez*, 678 F.3d at 356; *see also*

ficient when a defendant charges onward to trial "with a grave misconception as to the very nature of the proceeding and possible consequences."[36]

Anaya's primary support is *Padilla v. Kentucky*. There, counsel told the defendant that he wouldn't be deported if he pleaded guilty to drug distribution.[37] But the conviction required deportation, so his guilty plea made "deportation virtually mandatory."[38] The Supreme Court found that, because the answer was readily available and the law was clear, counsel's "duty to give correct advice [was] equally clear."[39] Anaya also directs us to *Lafler v. Cooper* and *Hinton v. Alabama*. In *Lafler*, the defendant rejected a plea offer because his counsel advised him that "the prosecution would be unable to establish intent to murder [the victim] because she had been shot below the waist."[40] There, the Supreme Court did no analysis on the performance prong because all parties agreed that counsel was deficient.[41] In *Hinton*, the lawyer failed to request funding in order to replace an inadequate expert because the lawyer mistakenly believed he had received all of the funding he could get under

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436 ("When the defendant lacks a full understanding of the risks of going to trial, he is unable to make an intelligent choice of whether to accept a plea or take his chances in court." (quoting *Teague*, 60 F.3d at 1171)).

[36] *Beckham v. Wainwright*, 639 F.2d 262, 267 (5th Cir. Unit B 1981).

[37] *Padilla*, 559 U.S. at 359, 130 S.Ct. 1473.

[38] *Id.*

[39] *Id.* at 369, 130 S.Ct. 1473.

[40] 566 U.S. at 161, 132 S.Ct. 1376.

[41] *Id.* at 163, 132 S.Ct. 1376.

Alabama law.[42] A "cursory investigation" would have revealed that he could be reimbursed for "any expenses reasonably incurred."[43]

Here, Bailey's performance was deficient and there can be no reasonable argument otherwise in light of *Padilla*, *Lafler*, and *Hinton*.[44] Anaya couldn't fully understand the risks of rejecting the State's plea offer because he didn't know that his status as a felon in possession of a weapon would move the goalpost at trial. Bailey's silence on a "matter[ ] of great importance" was "fundamentally at odds" with his critical obligation "to advise the client of 'the advantages and disadvantages of a plea agreement.'"[45] And Bailey's failure to advise Anaya on the law of retreat wasn't a strategic decision. There were no difficult questions about how much to investigate or how to balance competing evidence.[46] Bailey knew Anaya was a felon in possession of a weapon—thus engaged in criminal activity—and Bailey failed to advise Anaya of the crucial difference that fact would make at trial.

Anaya's whole defense was self-defense. This was the *only* issue at trial. And Bailey's silence on a central component of the self-defense statute meant that

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[42] 571 U.S. at 274, 134 S.Ct. 1081.

[43] *Id.*

[44] *Mejia*, 906 F.3d at 315 (explaining 28 U.S.C. § 2254's standard).

[45] *See Padilla*, 559 U.S. at 370, 130 S.Ct. 1473 (quoting *Libretti*, 516 U.S. at 50–51, 116 S.Ct. 356); *see also id.* (noting that, under *Strickland*, there is "no relevant difference 'between an act of commission and an act of omission.' " (quoting *Strickland*, 466 U.S. at 690, 104 S.Ct. 2052)).

[46] *See Strickland*, 466 U.S. at 690–91, 104 S.Ct. 2052.

Anaya couldn't appreciate the extraordinary risks of passing up the State's offer. Under *Strickland*'s performance prong, Bailey's representation fell outside the "wide range of reasonable professional assistance."[47] Under § 2254(d)'s standard, the contrary conclusion would be an unreasonable application of the Supreme Court's precedent in *Padilla*, *Lafler*, and *Hinton*.

B

Now, the prejudice prong, viewed again with the requisite double deference. Here, Anaya's claim fails. Under *Strickland*'s prejudice prong, Anaya must show that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different."[48] A "reasonable probability" is "a probability sufficient to undermine confidence in the outcome."[49] It's "less than a preponderance of the evidence."[50]

In *Missouri v. Frye*, the Supreme Court established a three-part test for demonstrating prejudice in the context of a rejected plea offer.[51] The defendant must show that, but for his counsel's error, there is a "reasonable probability" that (1) the defendant "would have accepted the earlier plea offer had [he] been afforded effective assistance of counsel"; (2) the "plea would have been entered without the prosecution

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[47] *Kelly*, 915 F.3d at 350 (quoting *Strickland*, 466 U.S. at 689, 104 S.Ct. 2052).

[48] *Lafler*, 566 U.S. at 163, 132 S.Ct. 1376 (quoting *Strickland*, 466 U.S. at 694, 104 S.Ct. 2052).

[49] *Dale v. Quarterman*, 553 F.3d 876, 880 (5th Cir. 2008) (quoting *Strickland*, 466 U.S. at 693–94, 104 S.Ct. 2052).

[50] *Id.* (quoting *Strickland*, 466 U.S. at 693–94, 104 S.Ct. 2052).

[51] *Frye*, 566 U.S. at 147, 132 S.Ct. 1399.

canceling it or the trial court refusing to accept it, if they had the authority to exercise that discretion under state law"; and (3) "the end result of the criminal process would have been more favorable by reason of a plea to a lesser charge or a sentence of less prison time."[52]

Here, the parties dispute what evidence is needed to demonstrate a reasonable probability that these three parts of the *Frye* test are satisfied. Anaya has compelling arguments, but ultimately the law is murky. Because it's possible that "fairminded jurists could disagree" over what is required to demonstrate prejudice under *Frye*, Anaya cannot surmount the hurdle of § 2254(d).[53]

We address each part of *Frye*'s prejudice test in turn.

1

First, would Anaya have accepted the plea offer? Anaya argues that his unrebutted affidavit testimony is sufficient to show a reasonable probability he would have accepted the plea but for his counsel's erroneous advice. According to the State, the Supreme Court made clear in *Lee v. United States* that this standard cannot be met based purely on "*post hoc* assertions from a defendant about how he would have pleaded but for his attorney's deficiencies."[54] Rather, courts must "look to contemporaneous evidence to

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[52] *Id*.

[53] *See Harrington*, 562 U.S. at 102, 131 S.Ct. 770 (explaining that § 2254(d) "preserves authority to [provide habeas relief] in cases where there is no possibility fairminded jurists could disagree that the state court's decision conflicts with [the Supreme Court's] precedents").

[54] —— U.S. ——, 137 S. Ct. 1958, 1967, 198 L.Ed.2d 476 (2017).

substantiate a defendant's expressed preferences."[55] So, the State argues, Anaya's affidavits aren't competent evidence.

But the State takes the above quotes from *Lee* out of context. The full context makes clear that *Lee* imposed standards for overturning an *accepted* plea deal, not standards for obligating the government to offer again a plea *rejected* by the defendant. Here's the *Lee* language in context:

> Surmounting *Strickland*'s high bar is never an easy task, and the strong societal interest in finality has *special force* with respect to *convictions based on guilty pleas*. Courts should not *upset a plea* solely because of *post hoc* assertions from a defendant about how he would have pleaded but for his attorney's deficiencies. Judges should instead look to contemporaneous evidence to substantiate a defendant's expressed preferences.[56]

The State argues that the same considerations should apply to a defendant, like Anaya, who *rejected* his plea. But the State is wrong. We can't export the *Lee* standard—the need for contemporaneous evidence—from the context of "convictions based on guilty pleas." Here's why: The standard for evaluating a *Strickland* claim when the defendant seeks to upset a guilty plea was first laid out in 1985 in *Hill v. Lockhart*.[57] But, in 2012, the Supreme Court issued two opinions on the same day—*Lafler v. Cooper* and *Missouri v. Frye*—that governed *Strickland* analysis in the context of rejected plea offers. In *Frye*, the

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[55] *Id.*

[56] *Id.* (emphasis added) (cleaned up).

[57] 474 U.S. 52, 106 S.Ct. 366, 88 L.Ed.2d 203 (1985).

Court was careful to note that *Hill* was still good law when applied to upsetting convictions based on *accepted* pleas.[58] But the Court explicitly disavowed a single "means for demonstrating prejudice ... during plea negotiations."[59] And the Court formulated a new, unique prejudice test for our context here—*rejected* pleas.[60] The Court's application of that new prejudice standard in *Lafler* makes clear that *Lee* is inapposite.

In *Lafler*, the Supreme Court didn't do its own prejudice analysis; instead, the Court relied on the Sixth Circuit's reasoning under the prejudice prong.[61] There, the defendant relied only on his "uncontradicted" testimony that "had he known that a conviction for assault with intent to commit murder was possible, he would have accepted the state's offer."[62] And the Sixth Circuit rejected Michigan's argument—identical to the State's argument here—that the defendant "cannot show prejudice with his own 'self-serving statement.'"[63] Moreover, the Sixth Circuit explained that even if the defendant's assertion needed independent corroboration, the "significant disparity between the prison sentence under the plea offer and exposure after trial lends credence to petitioner's claims."[64] The same is true here. And this rationale was affirmed by the Supreme Court.

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[58] *Frye*, 566 U.S. at 148, 132 S.Ct. 1399.

[59] *Id.*

[60] *Id.*

[61] *Lafler*, 566 U.S. at 174, 132 S.Ct. 1376.

[62] *Cooper v. Lafler*, 376 F. App'x 563, 571 (6th Cir. 2010) (unpublished).

[63] *Id.*

[64] *Id.*

Plus, if the *Lee* Court wanted to augment the prejudice test articulated in *Frye* and *Lafler*, one would expect the Court to have connected the dots. But *Lee*—decided five years after *Lafler* and *Frye*—didn't even cite *Frye* and only once cited *Lafler*. The *Lee* dissent, however, heavily discussed both. And the majority responded in a footnote:

> The dissent also relies heavily on [*Frye* and *Lafler*]. Those cases involved defendants who alleged that, but for their attorney's incompetence, they would have *accepted* a plea deal—not, as here and as in *Hill*, that they would have rejected a plea. In both *Frye* and *Lafler*, the Court highlighted this difference.... *Frye* and *Lafler* articulated a *different* way to show prejudice, suited to the context of pleas not accepted, not an *additional* element to the *Hill* inquiry.[65]

Lee affirmed what *Frye* and *Lafler* made clear: *Accepted* and *rejected* pleas arise in different contexts and require distinct tests. So *Lee*'s requirement for contemporaneous evidence is simply irrelevant in this context. There may be other reasons to doubt Anaya's affidavits, but their non-contemporaneous nature is not a problem under *Frye* and *Lafler*. Anaya could potentially satisfy part one of *Frye*'s prejudice test with the affidavits he has provided.

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[65] *Lee*, 137 S. Ct. at 1965 n.1 (emphasis in original); *see also Lafler*, 566 U.S. at 163–64, 132 S.Ct. 1376 ("In contrast to *Hill*, here the ineffective advice led not to an offer's acceptance but to its rejection. Having to stand trial, not choosing to waive it, is the prejudice alleged."); *Frye*, 566 U.S. at 148, 132 S.Ct. 1399 ("*Hill* does not, however, provide the sole means for demonstrating prejudice arising from the deficient performance of counsel during plea negotiations.").

2

On to part two: Would the plea have been entered? Under this part of *Frye*'s test, Anaya must demonstrate that his "plea would have been entered without the prosecution canceling it or the trial court refusing to accept it, if they had the authority to exercise that discretion under state law."[66] The district court concluded that the record was "silent" on these two questions, so Anaya failed to show a reasonable probability that this part of the *Frye* prejudice test was satisfied. And this is where the law gets too murky for Anaya to convincingly demonstrate an unreasonable application of federal law. Anaya argues that part two of *Frye*'s prejudice test is satisfied if there is no "particular fact" or "intervening circumstance" that would cast doubt on the presumption that the prosecution would have maintained the offer and the court would have accepted it. His contention appears to be that his burden here is simply to point to the record and show the *absence* of these particular facts or intervening circumstances. The State's primary response is that it is Anaya's burden to show that the plea would have been entered. But Anaya doesn't disagree with the State on *who* bears the burden; his fight is over *what* he needs to show to satisfy that burden. The State doesn't propose an alternative theory or suggest what evidence would suffice, other than to argue that Anaya must provide *affirmative* proof that demonstrates there are no particular facts or intervening circumstances.

The governing cases are not a paradigm of clarity. In *Frye*, the Court explained that if the prosecution has discretion to cancel an offer or if the trial court has discretion to refuse it, defendants must show

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[66] *Frye*, 566 U.S. at 147, 132 S.Ct. 1399.

"there is a reasonable probability neither the prosecution nor the trial court would have prevented the offer from being accepted or implemented."[67] The *Frye* Court then provided a framework for conducting this inquiry:

> It can be assumed that in most jurisdictions prosecutors and judges are familiar with the boundaries of acceptable plea bargains and sentences. So in most instances it should not be difficult to make an objective assessment as to whether or not a *particular fact* or *intervening circumstance* would suffice, in the normal course, to cause prosecutorial withdrawal or judicial nonapproval of a plea bargain. The determination that there is or is not a reasonable probability that the outcome of the proceeding would have been different absent counsel's errors *can be conducted within that framework*.[68]

If this were a case involving a non-deferential standard of review, we would need to explore this question in more depth.

However, we must apply the doubly deferential standard of § 2254(d) to our *Strickland* inquiry. And under § 2254(d), "an *unreasonable* application of federal law is different from an *incorrect* application."[69] To obtain relief, Anaya must show that the state court's ruling "was so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for

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[67] *Id.* at 148, 132 S.Ct. 1399.

[68] *Id.* at 149, 132 S.Ct. 1399 (emphasis added).

[69] *Williams v. Taylor*, 529 U.S. 362, 365, 120 S.Ct. 1495, 146 L.Ed.2d 389 (2000) (emphasis in original).

fairminded disagreement."[70] As the Supreme Court has made clear, this standard is hard to meet "because it was meant to be."[71] Section 2254(d) authorizes us to grant habeas relief only "in cases where there is no possibility fairminded jurists could disagree that the state court's decision conflicts with [the Supreme Court's] cases."[72] That's the extent of our authority.[73]

We had no trouble concluding that Anaya satisfied § 2254(d)'s heavy burden on *Strickland*'s performance prong. But here, assuming Anaya's view of the *Frye* framework is correct, it is not "well understood and comprehended" that defendants bear no burden to supply *affirmative proof* that the prosecution would not withdraw the plea or that the court would have accepted it. Our own precedent is clear that Anaya carries the burden to make this showing.[74] But we have never articulated how a defendant does so—whether affirmative evidence is needed. And Anaya points to no published case from any circuit that absolves the defendant of the need to supply affirmative proof of some kind.

Anaya has no doubt satisfied the third part of the *Frye* prejudice test—that "the end result of the criminal process would have been more favorable by reason of a plea to a lesser charge or a sentence of less

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[70] *Harrington*, 562 U.S. at 103, 131 S.Ct. 770.

[71] *Id.* at 102, 131 S.Ct. 770.

[72] *Id.*

[73] *Id.*

[74] *Rivas-Lopez*, 678 F.3d at 359 ("[T]here is a burden on [defendant] to show that there was a reasonable probability that the prosecution would not have withdrawn the plea offer and that the court would have accepted its terms.").

prison time."[75] But because the law on the burden of proof in part two of *Frye*'s prejudice test is not so clear as to foreclose the possibility of fairminded disagreement, we cannot grant Anaya the relief he requests.

IV

For these reasons, we AFFIRM.

[75] *See Frye*, 566 U.S. at 147, 132 S.Ct. 1399. Part three is easily satisfied here: The plea offered Anaya 30 years for murder and 15 for aggravated assault. His ultimate sentences were for 40 years and 99 years respectively.

APPENDIX B

No. 2:15-CV-234-D

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS,
AMARILLO DIVISION

DAVID ABRAM ANAYA, Petitioner,

v.

LORIE DAVIS, Director, Texas Department of Criminal Justice, Correctional Institutions Division, Respondent.

[Filed] August 30, 2018

ORDER

SIDNEY A. FITZWATER, UNITED STATES DISTRICT JUDGE

After making an independent review of the pleadings, files, and records in this case, the August 3, 2018 findings, conclusions, and recommendation of the magistrate judge, and petitioner's August 16, 2018 objection, the court concludes the magistrate judge's findings and conclusions are correct. It is therefore ordered that petitioner's objection is overruled, the recommendation of the magistrate judge is adopted, and the petition for a writ of habeas corpus is denied. Petitioner's August 16, 2018 motion for appointment of counsel is also denied.

Considering the record in this case and pursuant to Fed. R. App. P. 22(b), Rule 11(a) of the Rules Governing Section 2254 Proceedings in the United States District Courts, and 28 U.S.C. § 2253(c), the court denies a certificate of appealability. The court adopts and incorporates by reference the magistrate judge's findings, conclusions, and recommendation filed in this case in support of its finding that the

petitioner has failed to show (1) that reasonable jurists would find this court's "assessment of the constitutional claims debatable or wrong," or (2) that reasonable jurists would find "it debatable whether the petition states a valid claim of the denial of a constitutional right" and "debatable whether [this court] was correct in its procedural ruling." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000).

If petitioner files a notice of appeal,

( ) petitioner may proceed *in forma pauperis* on appeal.

(X) petitioner must pay the $505.00 appellate filing fee or submit a motion to proceed *in forma pauperis.*

SO ORDERED.

August 30, 2018

/s/ *Sidney A. Fitzwater*
Sidney A. Fitzwater
United States District Judge

APPENDIX C

No. 2:15-CV-234-D

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS,
AMARILLO DIVISION.

DAVID ABRAM ANAYA, Petitioner,

v.

LORIE DAVIS, Director, Texas Department of Criminal Justice, Correctional Institutions Division, Respondent.

[Filed] August 3, 2018

FINDINGS, CONCLUSIONS AND RECOMMENDATION TO DENY PETITION FOR A WRIT OF HABEAS CORPUS

LEE ANN RENO, UNITED STATES MAGISTRATE JUDGE

Before the Court is the Petition for a Writ of Habeas Corpus by a Person in State Custody filed by petitioner DAVID ABRAM ANAYA. For the following reasons, petitioner's habeas application should be DENIED.

I.

PROCEDURAL HISTORY

On August 13, 2009, petitioner was charged by grand jury Indictment in Potter County, Texas, with the first-degree felony offense of murder in violation of Texas Penal Code § 19.02. *State v. Anaya*, No. 59,854-A [ECF 14-16 at 9]. The Indictment alleged petitioner, on or about May 31, 2009:

> [D]id then and there intentionally or knowingly cause the death of an individual, namely

Eric Mireles, by shooting him with a firearm.

That same date, the grand jury, by separate Indictment, charged petitioner with the second-degree felony offense of aggravated assault with a deadly weapon in violation of Texas Penal Code § 22.02. *State v. Anaya*, No. 59,877-A [ECF 15-5 at 8]. The Indictment alleged petitioner, on or about May 31, 2009:

> [D]id then and there intentionally or knowingly threaten Steven Sifuentez with imminent bodily injury, and did then and there use or exhibit a deadly weapon, to-wit: a firearm, during the commission of the assault.

Petitioner was tried in a joint trial before a jury for the indicted offenses in the 47th Judicial District Court of Potter County; on October 6, 2010, the jury found petitioner guilty of both the murder offense and the aggravated assault with a deadly weapon offense as alleged in the Indictments. On October 7, 2010, the jury assessed petitioner's punishment at 99 years and 40 years confinement, respectively, in the Texas Department of Criminal Justice, Correctional Institutions Division.

Petitioner filed a direct appeal of his convictions and sentences to the Court of Appeals for the Seventh District of Texas. On August 15, 2012, the state intermediate appellate court affirmed petitioner's convictions. *Anaya v. State*, Nos. 07-10-00462-CR, 07-10-00463-CR. [ECF 15-9 at 66]. On October 30, 2013, the Texas Court of Criminal Appeals (TCCA) granted petitioner leave to file an out-of-time petition for discretionary review [PDR] in each case. *In re Anaya*, Nos. 80,336-01, 80,336-02 [ECF 15-10]. On March 12, 2014, the TCCA refused both of petitioner's petitions. *Anaya v. State*, PD-1568-13,

PD-1569-13 [ECF 14-8].[1] Petitioner did not seek certiorari review by filing petitions with the United States Supreme Court.

Petitioner sought collateral review of his Potter County convictions by filing state habeas corpus petitions. On April 8, 2015, the TCCA denied petitioner's state habeas applications on the merits without written order. *In re Anaya*, Nos. 80,336-03, 80,336-04 [ECF 15-14; 15-18]. On October 5, 2015, the United States Supreme Court denied certiorari review of both of petitioner's state habeas cases. *Anaya v. Texas,* 136 S.Ct. 195 (2015). Petitioner attempted to again challenge his convictions by filing subsequent state habeas applications. On July 1, 2015, the TCCA dismissed both writ applications as successive. *In re Anaya*, Nos. 80,336-05, 80,336-06 [ECF 15-23; 15-25].

On July 17, 2015, petitioner purportedly placed the instant federal application for habeas corpus in the prison mailing system. Petitioner's application was received by this Court and files-tamped on July 23, 2015. [ECF 3]. On October 27, 2015, respondent filed an answer to petitioner's habeas application opposing relief. [ECF 13]. On November 9, 2015, petitioner filed a reply to respondent's answer. [ECF 16].

II.

FACTUAL HISTORY

The state intermediate appellate court summarized the evidence in petitioner's case as follows:

In the early morning hours of May 31, 2009,

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[1] The record submitted by respondent appears to only include the PDR refusal as to petitioner's murder conviction; however, review of the TCCA website reflects that court refused PDRs in both cases on March 12, 2014.

> Angelica Alvarez drove her younger brother Eloy, her boyfriend Markous Sifuentez, his younger brother Steven Sifuentez and the victim in this case, Eric Mireles, to an after-hours club.[2] According to Angelica, upon entering the club they encountered [petitioner], whom she did not know, and he warned them not to cause trouble. She testified that he name-dropped gang affiliation and asserted the club was his. Leaving her brother, she and her passengers left the club to visit a friend's house. At approximately 3:30 a.m., they returned to pick up Eloy.
>
> According to the evidence, [petitioner's] half-brother, Anthony Escoto, who had been involved in a fight earlier, fired a gun in the club parking lot and was jumped and severely beaten by a group of club patrons. Eloy testified that gunshots caused the patrons to head to their respective cars and scurry from the parking lot before police arrived. Eloy, Angelica and Markous ran to Angelica's car to leave.[3]
>
> As they attempted to leave, Anthony was leaning against Angelica's car, bleeding from wounds he sustained in the melee. Markous threw him off so they could leave. Angelica was in the driver's seat, Markous was in the front seat, Steven was seated behind Angelica, Eric was sitting in the middle of the back seat and Eloy was seated behind Markous. After

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[2] Angelica had graduated from high school the day before and was out celebrating.

[3] Steven and Eric had remained in the car when they returned to the club to pick up Eloy.

leaving the parking lot they were driving along Amarillo Boulevard. Angelica and several of the occupants of her car testified similarly that [petitioner's] car pulled up beside her car and one of its occupants shouted at them about "jumping" his brother. They then heard gunshots which resulted in Eric being shot and killed.

[Petitioner] testified during the guilt/innocence phase. According to his version of the events, while he was inside the club, he heard that Anthony was outside fighting and went to intervene. After that initial fight, [petitioner] went back inside the club until closing time.[4] After the club closed, [petitioner], his girlfriend and a friend of hers got in his car to leave. He noticed a crowd gather in the parking lot and saw "flashes of a gun in the air." He observed a group "pounding on somebody with their feet" and exited his car to see if Anthony was involved. He found Anthony badly beaten and carried him to his car and placed him in the front seat. He took Anthony's gun and placed it on the console between the seats. Because he was on parole he wanted to leave before police arrived. He further testified that when he pulled up alongside Angelica's car,[5] the front passenger was making aggressive gestures and someone in the back

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[4] Anthony had been banned from the club and remained outside.

[5] The female passenger in [petitioner's] car testified that [petitioner] wanted to know who attacked his brother and passed several cars after leaving the club to reach Angelica's car which was easily identifiable because it had "Class of '09" painted on the rear window.

seat pointed a gun at him through the rear passenger window. According to his testimony, he then shot at Angelica's car to defend himself. During the investigation, a black toy gun was found under the seat of Angelica's car. Eloy testified the gun was his but claimed he was unaware it was in the car at the time of the shooting. A Special Crimes Unit investigator testified that prints were not recoverable from the toy gun. He also testified it resembled a semi-automatic and that the blue and orange coloring indicating it was a toy had been scratched or sanded off to make it look more like a real weapon.

Markous testified that after they left the club they drove along Amarillo Boulevard. At one point he noticed car lights approaching and observed a red Camaro driven by [petitioner] pull up beside Angelica's car. Both cars had the windows rolled down. [Petitioner] accused the occupants of Angelica's car of being the persons who had "jumped" Anthony and threatened that if they jumped his brother, they jump him. He then pointed a gun out the driver's side window and fired at Angelica's car. Eloy testified that [petitioner] had his left hand on the steering wheel and fired out the driver's window with his right hand. After shots were fired, Eloy realized that Eric had sustained a gunshot wound to his right temple and had fallen onto his lap. Markous instructed Angelica to take off and they drove to a residence belonging to Eric's cousin, where Eric had been living.

They took Eric's body out of the car and placed it on the driveway. They then hid Angelica's

car behind the residence to avoid detection in case [petitioner] had followed them. Markous banged on the front door of the residence until Eric's cousin answered. She observed the body on her driveway and called 911. Officers were dispatched to the residence to investigate at approximately 4:10 a.m.

After the shooting, [petitioner], at Anthony's direction, drove around looking for Anthony's girlfriend. When they found her, Anthony got into her car and left with her. [Petitioner] then drove with his girlfriend to a park where they remained until later that morning. After he drove his girlfriend home, he went home to rest. An investigation of the shooting led a member of the Special Crimes Unit to [petitioner's] home. After being questioned about the incident at the club, [petitioner] denied being there; however, he voluntarily went to the police department to answer questions and he consented to a search of his car. He was cooperative until he was informed someone had been shot following the incident at the club. He then terminated the interview and requested counsel. The investigator testified there was not enough information to hold [petitioner] at that time and he was released. Following a positive identification by witnesses, an arrest warrant for [petitioner] was issued later that afternoon.

[Petitioner] testified he went to his sister's home after leaving the police department and later had her drop him off at a park so he could think. He had a duffle bag packed, which included the gun used in the shooting. He walked to a nearby gas station and asked

> someone with New Mexico license plates for a ride. He was given a ride to Albuquerque where he exchanged the gun for lodging. He remained there until his arrest on August 4, 2009.
>
> Numerous law enforcement officers testified about the investigation. Special Crimes Unit investigators determined that Angelica's car had two bullet holes in the rear passenger door and the medical examiner testified that Eric died from a gunshot wound to the head from an undetermined range.

[ECF 14-12 at 2-5].

III.

PETITIONER'S ALLEGATIONS

Petitioner contends his confinement is in violation of the Constitution and laws of the United States because he was denied his right to effective assistance of counsel at trial. Specifically, petitioner alleges trial counsel was ineffective because of his failure to:

> 1. object to the wording of the retreat provision in the trial court's instruction on self-defense in the jury charge;
>
> 2. accurately advise petitioner on the applicable law concerning deadly force in defense of person to enable petitioner to adequately evaluate the State's plea offers;
>
> 3. request the trial court include an instruction on the justification of "necessity" in the jury charge; and
>
> 4. request the trial court instruct, in the jury charge, that reasonable doubt as to whether petitioner acted in self-defense required peti-

tioner be acquitted.

IV.

STANDARD OF REVIEW

Under 28 U.S.C. § 2254(d), a writ of habeas corpus on behalf of a person in custody under a state court judgment shall not be granted with respect to any claim that was adjudicated on the merits in state court proceedings unless he shows the prior adjudication:

> 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.

28 U.S.C. § 2254(d). A decision is contrary to clearly established federal law if the state court arrives at a conclusion opposite to that reached by the United States Supreme Court on a question of law or if the state court decides a case differently than the Supreme Court has on a set of materially indistinguishable facts. *Williams v. Taylor*, 529 U.S. 362, 405-06 (2000); *see also Hill v. Johnson*, 210 F.3d 481, 485 (5th Cir. 2000), *cert. denied*, 532 U.S. 1039 (2001). A state court decision will be an unreasonable application of clearly established precedent if it correctly identifies the applicable rule but applies it objectively unreasonably to the facts of the case. *Williams*, 529 U.S. at 407-08; *see also Neal v. Puckett*, 286 F.3d 230, 236, 244-46 (5th Cir. 2002) (en banc per curiam), *cert. denied*, 537 U.S. 1104 (2003). A determination of a factual issue made by a state court

shall be presumed to be correct. 28 U.S.C. § 2254(e)(1). The applicant has the burden of rebutting this presumption of correctness by clear and convincing evidence. *Hill*, 210 F.3d at 485. When the Texas Court of Criminal Appeals denies relief on a state habeas corpus application without written order, such ruling is an adjudication on the merits that is entitled to this presumption. *Ex parte Torres*, 943 S.W.2d 469, 472 (Tex. Crim. App. 1997).

Whether a state court's decision resulted from an unreasonable legal or factual conclusion does not require that there be an opinion from the state court explaining the state court's reasoning. *Harrington v. Richter*, 562 U.S. 86, 98 (2011). Where a state court's decision is unaccompanied by an explanation, the habeas petitioner's burden still must be met by showing there was no reasonable basis for the state court to deny relief. *Id.* This is so whether or not the state court decision reveals which of the elements, in a multi-part claim, it found insufficient. Section 2254(d) applies when a "claim," not a component of one, has been adjudicated. *Id.*

Here, petitioner filed state habeas applications challenging the constitutionality of his murder and aggravated assault convictions and sentences alleging the same grounds alleged in the instant federal habeas petition. On April 8, 2015, the TCCA denied petitioner's state habeas applications without written order. *Ex parte Anaya*, WR 80,336-03, WR 80,336-04. The rulings of the TCCA constitute adjudications of petitioner's claims on the merits. *See Bledsue v. Johnson,* 188 F.3d 250, 257 (5th Cir. 1999). Consequently, this Court's review is limited to a determination of whether petitioner has shown the state court's decisions that petitioner was not denied effective assistance of trial counsel was based on an un-

reasonable determination of the facts in light of the evidence before the state court, or was contrary to, or involved an unreasonable application of, clearly established federal law, as determined by the United States Supreme Court.

V.

MERITS

EFFECTIVENESS OF COUNSEL

In her October 27, 2015 Answer, respondent thoroughly and accurately briefed statutory and case law regarding the applicable standards of review for claims of ineffective assistance of counsel. [ECF 13 at 11-12]. The Court will not repeat respondent's recitations regarding these well-accepted standards of review, except to again note an ineffective assistance of counsel claim requires petitioner show defense counsel's performance was both deficient and prejudicial under the two-pronged standard of *Strickland v. Washington*, 466 U.S. 668, 689 (1984). If a petitioner fails to show either the deficiency or prejudice prong of the *Strickland* test, then this Court need not consider the other prong. *Id.* at 697. Moreover, when a state prisoner asks a federal court to set aside a conviction or sentence due to ineffective assistance of counsel, the federal court is required to use the "doubly deferential" standard of review that credits any reasonable state court finding of fact or conclusion of law and presumes defense counsel's performance fell within the bounds of reasonableness. *Burt v. Titlow*, 571 U.S. 12, 15 (2013).

As petitioner's ineffective assistance of counsel claims were adjudicated on the merits in his state habeas proceedings, the denials of relief are considered to have been based on factual determinations. Consequently, these state court adjudications will not

be overturned unless they are objectively unreasonable in light of the evidence presented in the state court proceedings. *Miller-El v. Cockrell*, 537 U.S. 322, 340, 123 S. Ct. 1029, 1041 (2003). A state-court factual determination is not unreasonable merely because the federal court would have reached a different conclusion in the first instance. *Burt*, 134 S. Ct. at 15. Section 2254(e)(1) provides that a determination of a factual issue made by a state court shall be presumed to be correct. The petitioner has the burden of rebutting this presumption of correctness by clear and convincing evidence. *Canales v. Stephens*, 765 F.3d 551, 563 (5th Cir. 2014). When the Texas Court of Criminal Appeals denies relief in a state habeas corpus application without written order, it is an adjudication on the merits and is entitled to this presumption. *Ex parte Torres*, 943 S.W.2d 469, 472 (Tex. Crim. App. 1997); *Singleton v. Johnson*, 178 F.3d 381, 384 (5th Cir. 1999) (recognizing this Texas state writ jurisprudence).

1. Failure to Object to Retreat Provisions in Jury Charge Instructions on Self-Defense[6]

In the charge to the jury at the close of the guilt-innocence phase of petitioner's trial, the trial court instructed the jury on self-defense and the use of deadly force in defense of person as follows:

Our law provides that it is a defense to the

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[6] The portions of the jury charge here in issue, in both petitioner's aggravated assault and murder cases, used nearly-identical language except for substituting the elements of the aggravated assault offense in place of the elements of the murder offense where applicable. [ECF 15-5 at 95-98]. Therefore, in addressing each of petitioner's grounds, the undersigned will only reference and/or quote the jury charge in petitioner's murder case, noting any other differences in the charges' language by footnote.

> offense of Murder if the defendant reasonably acted in self-defense. The State is not required to negate the existence of a defense.[7]
>
> * * *
>
> A person is justified in using deadly force against another if the defendant reasonably believes the force is immediately necessary to protect the defendant against the other's use or attempted use of unlawful deadly force.
>
> *A person is under a duty to retreat to avoid the necessity of defending himself with deadly force unless there is evidence before you that the person using deadly force:*
>
> *(1) had a right to be present at the location where the force was used,*
>
> *(2) did not provoke the person against whom the force was used, and*
>
> *(3) was not engaged in criminal activity at the time the force was used.*

[ECF 14-16 at 109-10] (emphasis added). At the time of the incident in question, the Texas Penal Code provided a person was justified in using deadly force against another only under certain limited circumstances, and that:

> (c) A person who has a right to be present at the location where the deadly force is used, who has not provoked the person against whom the deadly force is used, and who is not engaged in criminal activity at the time the

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[7] The jury charge in the aggravated assault case included the language, "however, the State must prove each and every element of the offense beyond a reasonable doubt." [ECF 15-5 at 96].

> deadly force is used is not required to retreat before using deadly force as described by this section.

Tex. Penal Code Ann. § 9.32(c) (2009). The statute further provided that if a person was not required to retreat because he met the conditions under subsection (c), then a jury could not consider that person's failure to retreat in determining whether that person reasonably believed the use of deadly force was immediately necessary to protect that person against the other's use or attempted use of unlawful deadly force. Tex. Penal Code Ann. § 9.32(d) (2009).

During the charge conference, counsel in both of petitioner's cases argued that although the retreat provision in the jury charge "track[ed] the law" or "track[ed] the statute" of the Texas Penal Code, such law was unconstitutionally vague because of the language "who is not engaged in criminal activity at the time the deadly force is used." [ECF 15-17 at 28-30]. The trial court overruled counsels' objections.

By his first ground, petitioner argues counsel was deficient for failing to object to the wording of the retreat provision used by the trial court in its instruction as to when deadly force may be used in defense of person. Specifically, petitioner argues counsel should have asserted the objection that the retreat provision set forth above "did not track the statutory definition." Petitioner contends he was prejudiced by counsel's failure to assert the "statutory tracking" objection because the trial court would have sustained counsel's objection and redrafted the provision to precisely mirror the statute. Petitioner concludes not only that counsel's failure to make such an objection allowed the improperly-worded retreat provision with regard to the use of deadly force to be presented to the jury, but also that the inclusion of such a

non-statutory provision constituted "an improper comment on the weight of the evidence [by the trial court] that embraced that under all circumstances petitioner had a duty to retreat."[8]

Petitioner raised this ground in his applications for state habeas relief. During the state habeas proceedings, counsel filed an affidavit stating, "Defense counsel did object to the inclusion of duty to retreat language in the self-defense instruction" and attached the portions of the transcript wherein both counsel made the unconstitutionally vague objection to the one sentence of the retreat provision. [ECF 15-17 at 26-30]. The state habeas trial court did not enter findings of fact or conclusions of law on petitioner's state habeas applications. The TCCA denied petitioner's habeas applications without written orders, determinations on the merits of petitioner's claim.

While the retreat provision in the trial court's jury charge on the use of deadly force, for the most part, tracked the language of the statute verbatim, it did not *precisely* conform to the language of the statute. Instead, the charge provision indicated a duty to retreat before using deadly force exists unless certain circumstances are met while the statute indicates no duty to retreat exists if these same certain circumstances are met. The undersigned finds this slight variance in the court's charge was a distinction without a difference. However, if counsel had asserted a "statutory tracking" objection to the language of the provision, there is a reasonable probability the trial court would have sustained the objection and

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[8] It is unclear if petitioner is also contending that the trial court should not have provided any instruction whatsoever on retreat, regardless of how it was worded.

modified the instruction to *precisely* match the statutory language. Therefore, for purposes of this ground, the undersigned will presume, without specifically finding, petitioner has shown counsel was deficient for failing to assert a "statutory tracking" objection to the wording of the retreat provision in the use of deadly force in defense of person portion of the jury charge.

Petitioner has not, however, shown he was prejudiced by any deficiency on the part of either counsel in failing to make a "statutory tracking" objection. The slight variation in the trial court's charge did not improperly impose a "general duty to retreat" as provided under the pre-2007 version of the statute.[9] *Cf. Morales v. State*, 357 S.W.3d 1 (Tex. Crim. App. 2011). Nor was the wording of the charge so non-conforming with the statute that it constituted a comment on the weight of the evidence by the trial court. *Cf. id.* Under either the charge's language or the language of the statute, petitioner did not have a duty to retreat if the provisions applied.

Further, the trial court's instructions to the jury immediately after the retreat provision here at issue clarified:

> Therefore, if you find, that the defendant had a right to be present at the location where the

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[9] Prior to 2007, the Texas self-defense statute provided that in order to establish a valid claim of self-defense, the defendant had to establish not only that the victim used deadly force against him, but also that "a reasonable person in the [defendant's] situation would not have retreated" prior to using deadly force in response. Tex. Penal Code Ann. § 9.32(a)(2) (West 2006). This provision was deleted from the statute in 2007 and, in its place, the Texas Legislature enacted the above quoted sections 9.32(c) and (d) to the Penal Code, providing that a person does not have a duty to retreat if certain circumstances are met.

> force was used; did not provoke the person against whom the force was used and was not engaged in criminal activity, then the defendant had no duty to retreat.
>
> However, if you find, that the defendant did not have a right to be present at the location where the force was used; or did provoke the person against whom the force was used; or was engaged in criminal activity, then the defendant did have a duty to retreat; and you may consider whether the defendant's failure to retreat made his conduct under the circumstances as viewed from his stand point reasonable.

These provisions made it clear petitioner had "no duty to retreat" if and when the specified conditions were met, but had a "duty to retreat" when those conditions were not met. Petitioner has not demonstrated that even if counsel had made the "statutory tracking" objection, the objection had been sustained and the provision on retreat modified to read precisely as the statute is worded, that there is a reasonable probability that the result of the proceeding would have been different. Petitioner has not shown he was prejudiced by trial counsels' failure to make the specific "statutory tracking" objection. Thus, petitioner has not demonstrated he was denied effective assistance of counsel with regard to this claim.

Moreover, petitioner has not demonstrated the state habeas courts' determinations that petitioner was not denied effective assistance of counsel with regard to this issue and under these circumstances was an unreasonable application of *Strickland*. A fair-minded jurist, given the evidence of petitioner's guilt, could have reasonably concluded petitioner was not prejudiced by any deficiency in counsel's perfor-

mance in this regard or by the inclusion of the challenged language in the charge. Nor has petitioner shown the state habeas court's determination of this ineffective assistance claim 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). Petitioner's claim of ineffective assistance of counsel under Ground One is without merit and should be denied.

Petitioner's first and second grounds claim various error and resultant ineffective assistance of counsel with regard to the requirement or non-requirement to retreat when asserting a person is justified in using force or deadly force against another. Whether there is or is not a duty to retreat, and whether the actor does or does not retreat, is simply a fact the jury may or may not consider (depending upon whether the various conditions are met) in determining the reasonableness of the actor's belief that force or deadly force was immediately necessary to protect the actor against the other's use or attempted use of unlawful force or deadly force. The principal question, first and foremost, before this jury was whether petitioner was acting in self-defense when he used force or deadly force against the victims. In assessing 99-and 40-year sentences, the jury clearly rejected petitioner's self-serving assertion, unsupported by any other evidence and, in fact, contradicted by all of the other testimony, that his killing of the victim and/or shooting a firearm toward the other vehicle was in self-defense. The issue of retreat had no bearing on the verdict because the jury, in all likelihood, did not reach the issue of the reasonableness of petitioner's actions. Therefore, any claims petitioner asserts herein with regard to the issue of retreat, even if supported, in all probability, would not have affected

the jury's verdict because the jury clearly rejected petitioner's claim of self-defense or any other justification of petitioner's conduct excluding his criminal responsibility. Even so, the undersigned addresses petitioner's second claim below.

2. Misadvice Affecting Decision to Reject Plea Offer

On February 22, 2010, the State offered petitioner plea bargains of thirty (30) years for the murder charge, and fifteen (15) years for the aggravated assault charge in exchange for his guilty plea in each case.[10] [ECF 15-17 at 57-58; 15-22 at 49-50]. Petitioner avers he rejected the State's offers "and opted to take his chances at trial because he believed he was justified in using deadly force in terms of self defense." [ECF 4 at 8]. Petitioner acknowledges it was his decision to reject the State's proposed offers, but argues his decision was based upon incorrect legal advice he received from defense counsel. Consequently, by his second ground, petitioner argues he was denied effective assistance of counsel during the pre-trial plea negotiations.

Petitioner contends trial counsel's representation was deficient because he erroneously told petitioner "it didn't make any difference if he retreated" because "the duty to retreat did not make a difference in determining whether petitioner was justified in using deadly force."[11] [ECF 4 at 8-9]. Petitioner maintains that if he had been advised as to the correct state of

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[10] The offer included that petitioner would be assessed a $5,000 fine for the murder charge and a $2,500 fine for the aggravated assault with a deadly weapon charge.

[11] Petitioner does not allege defense counsel advised him to reject the plea offer or advised petitioner could not be convicted at trial if he asserted self-defense and deadly force in defense of person.

the law, *i.e.*, that if certain conditions were not present, then a jury could consider his failure to retreat in determining the reasonableness of his belief that the use of deadly force was immediately necessary, he then "would have accepted the State's plea bargain offer" instead of proceeding to trial. [ECF 4 at 9]. Petitioner thus argues he was prejudiced by defense counsel's deficient performance because but for counsel's incorrect legal advice regarding the relevance of retreat and its possible bearing on whether petitioner was justified in using deadly force in self-defense, he would have accepted the State's plea offers and received lesser sentences of 30- and 15-years.

Petitioner raised this ground in his applications for state habeas relief. During the state habeas proceedings, petitioner filed his own affidavit as well as affidavits from his then wife, his mother, and his father, stating defense counsel advised he thought that petitioner was justified in using deadly force in self-defense, that petitioner had a " 'viable defense' in taking [his] case before a jury," and that whether petitioner retreated or not was irrelevant to whether he was justified in using deadly force in self-defense. [ECF 15-17 at 51-56; 15-22 at 43-48]. The affiants further attested that if defense counsel had properly advised that the law "required" petitioner to retreat before using deadly force, petitioner would have accepted the State's plea offers of 30- and 15-year sentences. In response to petitioner's claims and tendered affidavits, defense counsel submitted his own affidavit stating:

> I fully advised [petitioner] on all possible outcomes of a trial. I advised him of the entire range of punishment and all possible defenses. I also explained the risks associated with taking a case to trial. I never guaranteed any re-

> sult to [petitioner]. I presented [petitioner] with all plea bargain offers from the state and thoroughly explained them to him. "It was [petitioner's] decision to have his cases tried to a jury."

[ECF 15-17 at 27]. The state habeas trial court did not enter findings of fact or conclusions of law on petitioner's state habeas applications. The TCCA denied petitioner's habeas applications without written orders, thereby finding petitioner's ineffective assistance of counsel claim on this basis was without merit.

"If a plea bargain has been offered, a defendant has the right to effective assistance of counsel in considering whether to accept it." *Lafler v. Cooper*, 566 U.S. 156, 168 (2012). Here, in the four (4) affidavits submitted by petitioner in the state habeas proceedings, the affiants all attested defense counsel was of the opinion petitioner was justified in using deadly force in self-defense and that his failure to retreat was irrelevant in making that determination (and presumably advised petitioner and the affiants of his position). In his responsive affidavit, defense counsel did not specifically address petitioner's allegation of misadvice concerning the law on retreat and the use of deadly force. Instead, defense counsel globally asserted he explained all plea offers and (properly) advised petitioner on all possible defenses, the range of punishment, the risks associated with taking a case to trial, and all possible outcomes of a trial, without ever guaranteeing any result to petitioner. Petitioner, however, points to a statement defense counsel made during closing argument at the guilt-innocence phase of trial as conclusive evidence that counsel misadvised petitioner as to the law on the use of deadly force and the duty to retreat during pretrial plea ne-

gotiations. During closing counsel stated:

> The point is with this whole thing, when it comes to murder and deadly force and reasonable belief – [w]hen it talks about [petitioner's] reasonable belief their life was in danger, the self-defense issue kicks in, but they have the duty to retreat if three things crop up; they shouldn't have been there, they provoked it, they were engaged in criminal activity at the time it was done. But in this situation I don't care if you believe any of those things apply....[Because] I don't think it makes any difference because a bullet will chase you wherever you go, and it doesn't take much to turn a barrel. So the big question comes down to this is, you've got one man that tells you he fired a gun at that car so they wouldn't shoot him....But you still have a right to defend yourself if you reasonably believe that you might be killed yourself. [ECF 14-19 at 76-77].

The undersigned does not interpret counsel's argument as a misstatement of the law, *i.e.*, that the failure to retreat is irrelevant in determining whether a person was justified in using deadly force in self-defense. Rather, the undersigned interprets counsel's statement simply to be that even if the jury found petitioner was under a duty to retreat by finding certain conditions were present, that his belief that deadly force was immediately necessary was still reasonable, despite his failure to retreat, because even if he had attempted to retreat, he still could have easily been shot and he reasonably believed he would be shot or killed if he did not fire his gun. This statement is not evidence, much less conclusive evidence, that counsel misadvised petitioner or the affiants as to the law during pre-trial plea negotiations.

However, there are four (4) unrebutted, albeit self-serving, affidavits before the Court that defense counsel did, in fact, misadvise petitioner on the state of the law with regard to retreat, in using deadly force in self-defense and, possibly, as to the likelihood of success in asserting such a justification for petitioner's actions. Although the undersigned is of the opinion petitioner has not proven counsel's advice with respect to the use of deadly force in defense of person was so seriously misleading or incorrect that he was not functioning as the counsel guaranteed petitioner by the Sixth Amendment or that such representation fell below an objective standard of reasonableness, the undersigned will find, solely for purposes of this discussion, that counsel's pre-trial representation of petitioner was deficient.

Even assuming defense counsel was deficient in his representation of petitioner during the plea negotiation process by incorrectly advising petitioner when and if retreat is relevant in determining when a person is justified in using deadly force against another, petitioner has failed to show he was prejudiced by any such deficiency. To show prejudice from ineffective assistance of counsel where a plea offer has been rejected because of counsel's deficient performance, petitioner must demonstrate a reasonable probability:

> 1. he would have accepted the earlier plea offer had he been afforded effective assistance of counsel;
>
> 2. the plea would have been entered without the prosecution canceling it or the trial court refusing to accept it, if they had the authority to exercise that discretion under state law; and
>
> 3. that the end result of the criminal process

> would have been more favorable by reason of a plea to a sentence of less prison time.

See Missouri v. Frye, 566 U.S. 134, 147-49 (2012).

Here, petitioner and the other affiants on his behalf, all attested petitioner would have accepted the State's offer of 30- and 15-year sentences and pleaded guilty had defense counsel properly advised that the law "required" petitioner to retreat before using deadly force. Again, the law is not so "black and white;" it does not simply require one to retreat before using deadly force, and does not mandate a conviction if one does not retreat before using deadly force. Only if none of the deadly force justifications apply and a person is thus not justified in using deadly force, is that person required to retreat. *See Hill v. State*, 2010 WL 2540603 *4 (Tex.App.--Austin June 25, 2010, no pet.). Moreover, the failure to retreat is then only considered in determining the reasonableness of the person's belief that the use of deadly force was immediately necessary. If petitioner had been advised of this precise state of the law, it is questionable whether he would have accepted the State's 30-year plea offer for his guilty plea on this basis alone.

Moreover, by his sworn testimony, petitioner insisted he did not place the gun in the console for easy access or pursue the victims to exact revenge for his brother. Petitioner further insisted he had a legitimate right to be present at the location where he used deadly force. Petitioner maintained he did not provoke the victim, did not swerve his car toward the victims' car, and was not otherwise engaging in criminal activity at the time he used deadly force. Petitioner insisted that although he fired shots directly toward the victims' car at close range, he did not intend or attempt to shoot anyone in the other car [ECF

14-19 at 61], but that he did reasonably believe deadly force was immediately necessary to protect himself against the victims' use or attempted use of unlawful deadly force. Petitioner insisted that every other witness, all of whom testified in direct conflict with petitioner's testimony, including certain passengers in his car, were lying. Petitioner also testified he did not have time to stop the car to end the encounter, and that even if he had stopped the car, the individuals in the other car still would have shot petitioner. Petitioner further testified he had never told anyone he believed he was defending himself by shooting at the other car until he took the stand at trial and testified as such. [ECF 14-19 at 66].

Based on petitioner's insistence at trial of no wrong doing on his part and that he was justified in using deadly force against the victim, petitioner's assertion that he would have accepted the State's offer and entered guilty pleas to murder and aggravated assault is questionable and even highly suspect. Based on petitioner's testimony, the Court questions the credibility of petitioner's self-serving, after-the-fact affidavits that he would have pled guilty to murder and aggravated assault "3g" offenses, and accepted 30- and 15-year sentences without a chance to appeal instead of proceeding to trial to challenge the charges.

Lastly, the Court notes petitioner does not request as relief in this proceeding that the State be ordered to reoffer the plea agreement, or that he be resentenced to 30- and 15-year sentences as if he had accepted the proposed plea offer and pleaded guilty. Instead, petitioner asserts his conviction should be overturned and his case remanded to the state trial court for a new trial. A request that he be returned to the position he was in but for counsel's deficient advice would more effectively support his assertion that

he would have accepted the State's plea offer if counsel had advised his failure to retreat could be considered by the jury in determining the reasonableness of his beliefs and actions.

The undersigned finds petitioner has not shown a reasonable probability that he would have accepted the State's 30-year plea offer for murder had counsel advised that the circumstances in which it is statutorily permissible to defend oneself with deadly force were not present here, that petitioner thus had a duty to retreat, and that his failure to retreat could be considered by the jury in determining whether he reasonably believed deadly force was immediately necessary to protect himself against the victim's use of unlawful deadly force.

Petitioner must also demonstrate a reasonable probability that his guilty plea and the recommended sentences would have been entered without the prosecution canceling it or the trial court accepting it. As noted in *Frye*, 566 U.S. at 148-49, this showing is of particular importance because a defendant has no right to be offered a plea, *see Weatherford v. Bursey*, 429 U.S. 545, 561 (1977), nor a federal right that the judge accept it. *Santobello v. New York*, 404 U.S. 257, 262 (1971). Although citing *Lafler v. Cooper*, 566 U.S. 156 (2012) in both his memorandum and his reply, petitioner does not reference or address his requirement to make this showing. Moreover, the record is silent as to this issue and reflects no indication as to whether the State would have proceeded with their plea offers in this "particularly egregious" case or whether the state trial court would have accepted a 30- and 15-year sentences in exchange for petitioner's guilty pleas. Petitioner has not demonstrated a reasonable probability that his guilty pleas and the

recommended sentences would have been entered.[12]

Petitioner has not demonstrated that absent counsel's constitutionally deficient advice, he would have accepted the State's offer to plead guilty to the offenses of murder and aggravated assault and receive 30- and 15-year unappealable sentences rather than going to trial to contest the charges. Nor has petitioner demonstrated any guilty pleas and the recommended sentences would have been entered. Petitioner has not demonstrated he was prejudiced by any misadvice from defense counsel during the pre-trial plea process.

Again, this Court is delegated the duty of determining whether the state habeas courts reasonably concluded counsel was not deficient or that petitioner was not prejudiced by any deficiency on counsel's part. In that regard, petitioner contends the "[s]tate habeas fact finding that petitioner's trial attorney did not give him false advice is unreasonable." Petitioner argues there is "clear and convincing evidence that the State court's fact finding is completely wrong on this issue," citing counsel's closing argument and petitioner's submitted affidavits as evidence that counsel firmly believed retreat was a non-issue in whether petitioner was justified in using deadly force in self-defense and so advised petitioner. [ECF 4 at 9]. Petitioner contends he has presented "overwhelming evidence" that "the State court was clearly unreasonable" in finding counsel gave petitioner "correct advice on the issue." [ECF 4 at 9-10].

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[12] Petitioner must also show a reasonable probability that the end result of the criminal process would have been more favorable by reason of a plea to a sentence of less prison time. As petitioner received 99- and 40-year sentences for his conduct, this showing can be made.

This Court is unable to determine if the state habeas courts denied petitioner's claim on the deficiency prong or on the prejudice prong of the *Strickland* test, or both. It is clear, however, that the state courts' resolution of petitioner's claim did not require the courts make a factual finding as to the precise advice given by defense counsel to petitioner concerning retreat, or his advice as to whether petitioner was justified in using deadly force in self-defense. Petitioner's family member affidavits, and his own, do not conclusively establish the state courts' decision to deny relief on this ineffective assistance of counsel claim was based on an unreasonable determination of the facts, or was contrary to or involved an unreasonable application of *Strickland*. Petitioner has not made the necessary showing to meet the AEDPA standard for granting federal habeas relief. *See* 28 U.S.C. § 2254(d). Petitioner's claim of ineffective assistance of counsel under Ground Two is without merit and should be denied.

3. Failure to Request Instruction on "Necessity" in the Jury Charge

As noted previously, during closing argument defense counsel stated:

> What would have happened if [petitioner] had slammed on the brake? The gun still could have gone off. Sped up? The gun could have still gone off. Because guns are used by line of sight and it's not because of your sight. It's whatever they are aimed at. And it doesn't take much to turn a gun.
>
> * * *
>
> The point is with this whole thing, when it comes to murder and deadly force and reasonable belief – [w]hen it talks about [peti-

> tioner's] reasonable belief their life was in danger, the self-defense issue kicks in, but they have the duty to retreat if three things crop up; they shouldn't have been there, they provoked it, they were engaged in criminal activity at the time it was done. But in this situation I don't care if you believe any of those things apply....[Because] I don't think it makes any difference because a bullet will chase you wherever you go, and it doesn't take much to turn a barrel. So the big question comes down to this is, you've got one man that tells you he fired a gun at that car so they wouldn't shoot him.

[ECF 14-19 at 76-77].

By his third ground, petitioner argues defense counsel was deficient for failing to request the trial court include an instruction on the justification defense of "necessity" in the jury charge.[13] Petitioner argues "[i]t was objectively unreasonable not to request the necessity instruction because it was the only defensive instruction that conformed with trial counsel's [above-quoted closing] argument ... that a

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[13] Section 9.22 of the Texas Penal Code, addressing Necessity as a justification excluding criminal responsibility, provided, at the time of petitioner's charged offense:

Conduct is justified if:

(1) the actor reasonably believes the conduct is immediately necessary to avoid imminent harm;

(2) the desirability and urgency of avoiding the harm clearly outweigh, according to ordinary standards of reasonableness, the harm sought to be prevented by the law proscribing the conduct; and

(3) a legislative purpose to exclude the justification claimed for the conduct does not otherwise plainly appear.

person's duty to retreat makes no difference." Petitioner maintains that "if the given jury charge on self defense was correct ... the only way petitioner could have been acquitted according to his counsel's closing argument was to have found him justified by a necessity defense." [ECF 4 at 11]. Petitioner appears to argue he was prejudiced by petitioner's failure to request a jury instruction on necessity because "[t]he trial court would have been required to give this instruction if requested by trial counsel" and, based on petitioner's testimony "that he was in imminent fear for his life when someone pointed a gun at him, along with the evidence ... that a toy BB gun ... was in fact discovered in the backseat of the vehicle where the victim was seated clearly shows that a jury would have found the possibility of this defense viable." [ECF 4 at 10, 11-12].

Petitioner raised this ground in his applications for state habeas relief. In his affidavit submitted during state habeas proceedings, defense counsel stated:

> I did not request a necessity instruction in the Jury Charge because after carefully reviewing the facts of the case and consulting co-counsel I did not see a legal basis for a necessity instruction in the Jury Charge.

[ECF 15-17 at 27]. The state habeas trial court did not enter findings of fact or conclusions of law on petitioner's state habeas applications. The TCCA denied petitioner's habeas applications without written orders, determinations on the merits of petitioner's claim.

The defense of necessity allows for "the situation where physical forces beyond the actor's control rendered illegal conduct the lesser of two evils." *United States v. Bailey*, 444 U.S. 394, 410 (1980). The de-

fense is designed to spare a person from punishment if he "reasonably believed that criminal action was necessary to avoid a harm more serious than that sought to be prevented by the statute defining the offense." *Id.* However, if there was a "reasonable, legal alternative to violating the law, 'a chance both to refuse to do the criminal act and also to avoid the threatened harm,' the defense will fail." *Id.* (citations omitted).

Here, petitioner appears to argue he was forced to violate the law, *i.e.*, shoot three (3) rounds from a firearm at an occupied vehicle in close proximity to prevent the greater harm of a firearm he testified he viewed in the vehicle from possibly being fired toward his vehicle. Even assuming as true petitioner's testimony that he observed a firearm inside the vehicle with which he was driving parallel at night, there were multiple reasonable and legal alternatives available to petitioner rather than reaching into the console of the car, obtaining a firearm and raising it to fire multiple rounds into the other vehicle. Because petitioner had legal alternatives to breaking the law, his conduct was not justified by the doctrine of necessity.

Petitioner has not demonstrated that if such a request had been made, the trial court would have included an instruction on "necessity" in the jury charge. When the use of deadly force in self-defense is the conduct that is allegedly "immediately necessary" under the necessity defense, the defense of necessity does not apply, and any entitlement to a jury instruction is determined by section 9.32 (self-defense) or section 9.33 (defense of a third person). *See Whipple v. State*, 281 S.W.3d 482, 503 (Tex. App.–El Paso 2008, pet. ref'd). Moreover, counsel's arguments during closing, even if construed as an argument for a

necessity defense, did not constitute evidence and would not have warranted an instruction on necessity. As the evidence did not raise the defensive issue of necessity and, even if it had, the defense of necessity would not have been applicable under Texas law, counsel cannot be faulted for not requesting a jury instruction on necessity, *i.e.*, for performing a meritless and fruitless act.

Petitioner has not shown counsel was deficient for failing to request the trial court include an instruction on necessity in the jury charge. Nor has petitioner shown he was prejudiced by trial counsel's failure to request a defensive instruction for necessity. Namely, petitioner has not demonstrated it is reasonably likely that the outcome of the case would have been different if defense counsel had requested an instruction on necessity. Not only is it unlikely the trial court would have granted such a request, but it is also not reasonably likely the jury would have given any merit to such an instruction based on the totality of the evidence presented at trial and the jury's complete rejection of petitioner's self-defense justification, as evidenced by the jury sentencing petitioner to 99 years.

Moreover, petitioner has not demonstrated the state habeas courts' determination that petitioner was not denied effective assistance of counsel with regard to this issue was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the United States Supreme Court, or 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). Petitioner's claim of ineffective assistance of counsel under Ground Three is without merit and should be denied.

4. Failure to Request Instruction on "Reasonable Doubt" as to Self-Defense

At the time of petitioner's offense and at the time of his trial, section 2.03(d) of the Texas Penal Code provided:

> If the issue of the existence of a defense is submitted to the jury, the court shall charge that a reasonable doubt on the issue requires that the defendant be acquitted.

At the conclusion of the guilt-innocence phase of petitioner's trial, the trial court submitted the issue of whether petitioner acted in self-defense and was justified in using deadly force to the jury. In its charge to the jury, the trial court instructed, as relevant:

> Our law provides that it is a defense to the offense of Murder if the defendant reasonably acted in self-defense. The State is not required to negate the existence of a defense.[14]
>
> * * *
>
> Now if you find from the evidence, beyond a reasonable doubt that on or about the 31st day of May, 2009, in Potter County, Texas, the defendant, DAVID ABRAN ANAYA, did then and there knowingly or intentionally cause the death of an individual, namely, Eric Mireles, by shooting him with a firearm then you will find the defendant guilty. Unless you so find from the evidence beyond a reasonable doubt thereof, you will acquit the defendant and say

[14] Again, the charge in the aggravated assault case added the language, "however, the State must prove each and every element of the offense beyond a reasonable doubt." [ECF 15-5 at 96].

by your verdict "Not Guilty."

Or ***if you find from the evidence beyond a reasonable doubt*** that on or about the 31st day of May, 2009, in Potter County, Texas, the defendant, David Abran Anaya, did then and there cause the death of an individual, namely Eric Mireles, by shooting him with a firearm, but you further find from the evidence ***that the Defendant reasonably believed as viewed from his standpoint alone, that deadly force when and to the degree used, if it was, was immediately necessary to protect himself against the use or attempted use of unlawful deadly force by Eric Mireles or another individual, you will acquit the defendant of the offense of murder.***

* * *

The burden of proof in all criminal cases rests upon the State throughout the trial and never shifts to the defendant.

All persons are presumed to be innocent and no person may be convicted of an offense unless each element of the offense is proved beyond a reasonable doubt.... The law does not require a defendant to prove his innocence or produce any evidence at all. The presumption of innocence alone is sufficient to acquit the defendant unless the jurors are satisfied beyond a reasonable doubt of the defendant's guilt after careful and impartial consideration of all the evidence in the case.

The prosecution has the burden of proving the defendant guilty and it must do so by proving each and every element of the offense charged

> beyond a reasonable doubt and, if it fails to do so, you must acquit the defendant.
>
> * * *
>
> In the event you have a reasonable doubt as to the defendant's guilt after considering all the evidence before you, and these instructions, you will acquit him and say by your verdict "Not Guilty."

[ECF 14-16 at 109-12] (emphasis added). As seen above, the trial court did not specifically instruct the jury that if there was "a reasonable doubt" on the self-defense or use of deadly force issues, that petitioner was to "be acquitted." Instead, the trial court instructed the jury that if it found "beyond a reasonable doubt" that petitioner met the self-defense and use of deadly force provisions, that it must acquit petitioner.

Petitioner contends the trial court failed to instruct the jury, "specifically in the paragraph applying the law of self defense, to acquit should there be reasonable doubt with respect to any defense." [ECF 4 at 15]. Citing section 2.03(d), petitioner states it is "clear and without ambiguity that a defendant is entitled to a reasonable doubt instruction ... on self defense." [ECF 4 at 14]. Petitioner argues the jury charge references to reasonable doubt "in proving the elements of a crime or in general to a person's guilt/innocence was insufficient" to ensure the jury knew it had "a duty to acquit [petitioner] if there [was] a reasonable doubt as to ... self defense." [*Id.*]. Petitioner contends the jury charge in the self-defense application section "should have stated if a reasonable doubt existed on the issue of self defense the jury should give the defendant the benefit of the doubt and acquit." [*Id.*]

By his fourth ground, petitioner argues counsel

was deficient because he failed to request the trial court instruct the jury that "if they had a reasonable doubt as to if petitioner acted in self defense" they should acquit petitioner. [ECF 3 at 7]. Petitioner contends he was prejudiced by defense counsel's failure to request such an instruction because such a request would have been granted, and the charge would have included the reasonable doubt instruction in the self-defense paragraphs. Petitioner appears to argue that the "conspicuous absence" of an explicit reasonable doubt instruction in the self-defense paragraphs may have caused the jury to infer that the reasonable doubt standard requiring acquittal was not applicable to the self-defense issue. Petitioner maintains counsel's deficiency "deprived petitioner of the fundamental right to have his self defense claim decided fairly by an impartial jury." [ECF 4 at 16]. Petitioner concludes there is a reasonable probability that but for defense counsel's deficiency, the outcome of his trial would have been different.

Petitioner did not raise this claim until his 5th and 6th state habeas applications, which were dismissed by the state court as abusive/successive; therefore, this claim is unexhausted and procedurally barred from consideration by this Court. Petitioner asserts this Court should, nonetheless, hear his claim under *Martinez v. Ryan*, 566 U.S. 1 (2012) and *Trevino v. Thaler*, 569 U.S. 413 (2013). In *Trevino*, the United States Supreme Court held that the Texas procedural bar on successive or subsequent state habeas applications "will not bar a federal habeas court from hearing a substantial claim of ineffective assistance at trial if, in the initial-review collateral proceeding, there was no counsel or counsel in that proceeding was ineffective." *Trevino*, 569 U.S. at 429 (*quoting Martinez v. Ryan*, 566 U.S. at 17). Here, petitioner

proceeded *pro se* in his state collateral habeas proceedings and was not represented by counsel.

Considering petitioner's unexhausted claim of ineffective assistance of trial counsel, the Court finds it should be denied for lack of merit. The Court acknowledges there is a reasonable probability that if trial counsel had requested the trial court include the precise instruction mandated by section 2.03(d) in the jury charge, that the trial court would have granted counsel's request and included such an instruction in the jury charge. Therefore, for purposes of this discussion, the Court will presume petitioner has shown counsel was deficient for failing to request the precise instruction.

Petitioner has not shown, however, that he was prejudiced by trial counsel's failure to request the additional instruction. The trial court's charge, although not precisely stating the jury must acquit petitioner if it had "reasonable doubt" on his self-defense theory or whether he was justified in using deadly force, did state the jury must acquit petitioner if it found "beyond a reasonable doubt" that petitioner met the self-defense and use of deadly force provisions. As noted by respondent, a fair reading of the entire charge made it clear reasonable doubt related to self-defense as well as all other issues. Moreover, in its closing statement, the State acknowledged it had the burden of proof in the case and specifically had to disprove petitioner's claim of self-defense. When considered with the overwhelming evidence of petitioner's guilt, petitioner cannot show any deficiency on the part of defense counsel in failing to request this specific instruction prejudiced him, *i.e.*, the Court finds no reasonable probability that the jury would have found petitioner acted in self-defense or was justified in using deadly force and would have

acquitted petitioner.

Moreover, petitioner has not demonstrated the state habeas courts' determination that petitioner was not denied effective assistance of counsel with regard to this issue was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the United States Supreme Court, or 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). Petitioner's claim of ineffective assistance of counsel under Ground Four is without merit and should be denied.

VI.

RECOMMENDATION

For the above reasons, it is the RECOMMENDATION of the United States Magistrate Judge to the United States District Judge that the petition for a writ of habeas corpus filed by petitioner DAVID ABRAM ANAYA be DENIED.

VII.

INSTRUCTIONS FOR SERVICE

The United States District Clerk is directed to send a copy of this Findings, Conclusion and Recommendation to each party by the most efficient means available.

IT IS SO RECOMMENDED.

ENTERED August 3, 2018

/s/ Lee Ann Reno
Lee Ann Reno
United States
Magistrate Judge

*** NOTICE OF RIGHT TO OBJECT ***

Any party may object to these proposed findings, conclusions and recommendation. In the event parties wish to object, they are hereby NOTIFIED that the deadline for filing objections is fourteen (14) days from the date of filing as indicated by the "entered" date directly above the signature line. Service is complete upon mailing, Fed. R. Civ. P. 5(b)(2)(C), or transmission by electronic means, Fed. R. Civ. P. 5(b)(2)(E). **Any objections must be filed on or before the fourteenth (14th) day after this recommendation is filed** as indicated by the "entered" date. *See* 28 U.S.C. § 636(b); Fed. R. Civ. P. 72(b)(2); *see also* Fed. R. Civ. P. 6(d).

Any such objections shall be made in a written pleading entitled "Objections to the Findings, Conclusions and Recommendation." Objecting parties shall file the written objections with the United States District Clerk and serve a copy of such objections on all other parties. A party's failure to timely file written objections shall bar an aggrieved party, except upon grounds of plain error, from attacking on appeal the unobjected-to proposed factual findings, legal conclusions, and recommendation set forth by the Magistrate Judge and accepted by the district court. *See Douglass v. United Services Auto. Ass'n*, 79 F.3d 1415, 1428-29 (5th Cir. 1996) (en banc), *superseded by statute on other grounds*, 28 U.S.C. § 636(b)(1), *as recognized in ACS Recovery Servs., Inc. v. Griffin*, 676 F.3d 512, 521 n.5 (5th Cir. 2012); *Rodriguez v. Bowen,* 857 F.2d 275, 276-77 (5th Cir. 1988).

APPENDIX D

No. 18-11203

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

DAVID ABRAM ANAYA,
Petitioner-Appellant,

v.

BOBBY LUMPKIN, Director, Texas Department of Criminal Justice, Correctional Institutions Division,
Respondent-Appellee.

[FILED November 12, 2020]

Before BARKSDALE, HAYNES, and WILLETT, *Circuit Judges*.

PER CURIAM:

IT IS ORDERED that the petition for rehearing is DENIED.