No. _____

# In The
# Supreme Court of the United States

_____ ∆ _____

WYSINGO TURNER,

Petitioner,

v.

CHRISTINE BRANNON-DORTCH,
Warden, Pontiac Correctional Center,

Respondent.

_____ ∆ _____

**Petition for a Writ of Certiorari to the United States Court of Appeals, Seventh Circuit**

_____ ∆ _____

## PETITION FOR WRIT OF CERTIORARI

_____ ∆ _____

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## QUESTION PRESENTED FOR REVIEW

Whether a state court's decision that a criminal defendant can be falsely accused during his state criminal murder trial of "illegally" possessing outside of his home a legal firearm for the purpose of self defense is a reasonable application of clearly established federal law.

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## OPINIONS BELOW

The opinion of the Court of Appeals for the Seventh Circuit, affirming the denial of Wysingo Turner's petition for writ of habeas corpus is currently unpublished. *Turner v. Brannon-Dortch*, 20-3419 (7th Cir. Jan. 3, 2022) A copy of this opinion is reproduced in Appendix A. (App. 2). The memorandum opinion and order of the United States District Court for the Northern District denying the petition is also unpublished and is reproduced in Appendix B. (App. 13). The opinion of the Illinois Appellate Court for the First District affirming Wysingo Turner's conviction is cited as People v. Turner, 2015 IL App (1st) 133649 and can be found in Appendix D (App. 28).

## JURISDICTION

The United States Court of Appeals for the Seventh Circuit issued its opinion on January 3, 2022. This court has jurisdiction under 28 U.S.C. Sec. 1254(1). The United States District Court for the Northern District of Illinois, Eastern Division had jurisdiction over Wysingo Turner's habeas petition under 28 U.S.C. § 2254.

## CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution, amend. XIV:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

United States Constitution, amend. II:

A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed.

## STATEMENT OF THE CASE

Wysingo Turner, a 63 year old retired firefighter (Dkt #7, R. III, 79-81) with no prior criminal record, was charged with the first degree murder for the death of Krystal Rodney. Wysingo Turner testified that the death occurred accidently during the course

of a struggle over a gun and that he struggled over the gun because he was in fear for his life. The jury was instructed as to self defense,

## The Trial

Wysingo Turner testified in his own behalf. (Dkt #7, R. III, 78). At the time of trial he was 63 years old. He graduated from Chicago State University where he was president of his senior class. (Dkt #7, R. III, 79-80). After he graduated he worked for State Senator Richard Newhouse for 10 years. He was also a commissioned first lieutenant in the Illinois National Guard. (Dkt #7, R. III, 80). After working for Senator Newhouse, he worked for the Chicago Fire Department for 25 years before retiring. (Dkt #7, R. III, 80-81). He was married for 26 years , had two children and seven grandchildren. (Dkt #7, R. III, 82).

Wysingo Turner testified that one of his grandchildren is Yashon Gandy. Although Yashon was not a natural grandchild, he had a "very special place in my heart" because he was present at Yahson Gandy's birth. (Dkt #7, R. III, 82). Yashon's mother, Sylvia Gandy, was like a daughter to

Wysingo Turner. He took care of her since she was about seven years old (Dkt #7, R. III, 82-83). He had dated Carolyn, Sylvia's daughter, for about ten years. (Dkt #7, R. III, 83).

In August of 2010 Wysingo Turner had hernia surgery and a tooth extraction. (Dkt #7, R. III, 83-84). On August 10, 2010, Wysingo received a telephone call from Sylvia Gandy, asking him to take Yashon to get his shots for school. Although Wysingo still felt weak and "pretty beat up" (Dkt #7, R. III, 85) from the surgery and the tooth extraction, he agreed. (Dkt #7, R. III, 84). At that time, he weighed about 150 pounds. (Dkt #7, R. III, 84-85).

After getting the phone call, Wysingo went to his car and went to pick up Yashon and Sylvia to take Yashon to get his shots. When he arrived, he was told Sylvia and Yashon got into his car and were joined as well by Krystal Rodney and her son. (Dkt #7, R. III, 85). While they were en route, Wysingo was told by Sylvia that he needed to take Krystal somewhere else. (Dkt #7, R. III, 85-86). Wysingo protested that because of his surgery he did not "feel like taxing." Sylvia and Krystal then cursed Wysingo

out. Wysingo then pulled in front of a police station, and reported the confrontation to the police. (Dkt #7, R. III, 86). Wysingo went into the police station and spoke to the desk sergeant. (Dkt #7, R. III, 86-87). The desk sergeant called for three more officers, who then helped Wysingo to remove all of the people in his car. (Dkt #7, R. III, 87-88).

At about 10:30 or 11:00 a.m. on August 12, 2010, Wysingo returned to 7019 south Justine. (Dkt #7, R. III, 88). He went there to explain to Yashon why he had had to "abruptly" put Yashon out of Wysingo's car. (R. III, 89). Wysingo saw Yashon riding on his bicycle. Wysingo stopped to speak with him. (Dkt #7, R. II, 92). While Wysingo was speaking with Yashon, Krystal Rodney kicked Wysingo in the shoulder. Wysingo attempted to testify that Krystal Rodney said to Wysingo: "I'm going to kill you, motherfucker," (Dkt #7, R. III, 93), but an objection to this evidence was sustained. (Dkt #7, R.III, 93-99).

After Krystal kicked him, Wysingo left and got in his car. (R. III, 99). He testified that he kept a pistol in his car. (Dkt #7, R. III, 99-100). Wysingo then went to Ogden

Park and stayed there for two or three hours. (Dkt #7, R. III, 100).

At around three p.m., Wysingo returned to 7019 south Justine to visit Queen Spencer. He believed that she would be the "only person to eradicate what was becoming a volatile situation." (Dkt #7, R. III, 101). He got out of the car, and put his gun on his left front side.

(Dkt #7, R. III, 101-02).

Wysingo walked down the gangway towards Queen Spencer's bedroom on the first floor. (Dkt #7, R. III, 102). As Wysingo was nearing the end of the gangway, he was approached by Krystal Rodney. (Dkt #7, R. III, 103). She snatched the gun Wysingo had on his left side. (Dkt #7, R. III, 104).

Wysingo began struggling for the gun. He believed that his life was in danger and that Krystal Rodney was going to kill him. (Dkt #7, R. III, 104). Krystal Rodney had the gun in her right hand. Wysingo grabbed Krystal Rodney's wrist with his left hand. Krystal Rodney was trying to point the gun in Wysingo's face. At the time of the

struggle, Wysingo felt Krystal Rodney was trying to kill him.

During this struggle, the gun discharged. (Dkt #7, R. III, 105). Wysingo did not pull the trigger. He did not shoot Crystal. (Dkt #7, R. III, 105-06). As Krystal fell, Wysingo grabbed the gun. He went into shock. He "vaguely" remembered getting into his car, driving to Marquette and being arrested. (Dkt #7, R. III, 106).

Wysingo explained that he kept a gun his car for protection, because "this is Englewood." (Dkt #7, R. III, 106-07). He said that he put the gun on his left side because he is right handed. He armed himself with the gun because "it's a lot of thugs that hang out in that basement." (Dkt #7, R. III, 107).

Wysingo indicated that he encountered Krystal Rodney two thirds of the way down the gangway between the buildings at 7019 and 7021 Justice. (Dkt #7, R. III, 108).

On cross-examination, Wysingo testified that the gun was a Magnum .45 revolver, loaded with three rounds. Wysingo loaded it eight years before, and never had occasion to fire it. (Dkt #7, R. III, 110).

The prosecutor then asked the following series of questions:

"Q: And it's a revolver, correct?

A: That is correct.

Q: And you say you carried it in your car for protection?

A. Yes, I do.

Q. And it's against the law to carry your gun in the car, isn't it?

MR. HILL: Objection, Your Honor.

THE COURT: Overruled.

THE WITNESS:

A. No, it's not.

MS. MURTAUGH:

Q. And it's against the law to carry a loaded gun on the streets of the City of Chicago

when you're driving your car, correct?

A. No.

Q. And you think that you are entitled to just break that law, correct?

A. I never known it was a law."

(Dkt #7, R. III, 110-11).

At the time of these events, Wysingo Turner had a valid Illinois Firearms Identification card and his firearm was legally registered. (Dkt #7, R. C II, 258).

Demar'J Bankston testified. (Dkt #7, R. II, 17). At the time he testified, he was 14 years old. In August of 2010, when he was 12 years old, he lived with his mother Krystal DeShawn Rodney. (Dkt #7, R. II, 18). On August 12, 2013, Bankston was living with his mother on Justine Street in the basement house of a woman named "Queen." (Dkt #7, R. II, 19).

Bankston had known Wysingo Turner for a couple of years. On August 12, Wysingo Turner came to the Justine Street house in the early afternoon. (Dkt #7, R. II, 20). He was driving a silver BMW. (Dkt #7, R. II, 20). Turner spoke to Krystal DeShawn Rodney. Bankston did not hear what was said. Turner then left in the silver BMW. (Dkt #7, R. II, 21).

Bankston claimed that Turner returned. He could not remember if the time was the early or later afternoon. (Dkt #7, R. II, 21-22). Bankston claimed that when Turner came back, Bankston was outside with "Queen and my little cousin and me."

Turner was driving the same car. He parked the car in front of "the tree, like a sidewalk," beside the house. Turner asked Bankston where Bankston's "auntie" Silvia was. (Dkt #7, R. II, 22). Turner had a beer bottle with him. (Dkt #7, R. II, 22-23).

Bankston told Turner that he did not know where Sylvia went, and that she was not at home.

Turner then asked Bankston where his mother was. Bankston told Turner that Turner's mother was in the basement. Turner was outside the car. He put the bottle in the trunk. (Dkt #7, R. II, 23).

According to Bankston, Turner next went to the basement window. He pulled up his pants and knocked on the window. Krystal DeShawn Rodney came out of the back. (Dkt #7, R. II, 24).

Turner and Rodney were arguing. Turner pulled out a gun. Bankston said that Turner held the gun up to Rodney with his right arm extended. Rodney said: "I am sorry." Turner shot Rodney in the neck (Dkt #7, R. II, 26) and then went and gave some money to Bankston's "little cousin." (Dkt #7, R. II, 26-27). Bankston saw his

mother fall to the ground (Dkt #7, R. II, 27) in the gangway. (Dkt #7, R. II, 28).

Turner walked to the silver BMW with the gun in his hand. He got in and drove off. (Dkt #7, R. II, 27). Bankston went to a neighbor's house and told him to call the police. (Dkt #7, R. II, 28). He identified Turner in open court. (Dkt #7, R. II, 28-29).

During closing argument, the prosecutor argued:

> "Let's just talk about a couple of things. "I drove with a loaded gun in my car. I always drive with a loaded gun in my car." Apparently, he doesn't care about the law, because he can pick and choose the law that he does or does not want to follow, because he's Wysingo Turner. He is driving around, he says with a loaded gun in his car all that time."

(Dkt #7, R. IV, 9/28/2012, 83).

The jury found Wysingo Turner guilty of first degree murder and found that he personally discharged a firearm which caused the death of another person. (Dkt

#7, R. IV, 9/28/2012, 110). After a motion for new trial was denied (Dkt #7, R. IV, 11/5/13, 48-49), Wysingo Turner was sentenced to 35 years in prison for first degree murder, with an additional 25 years for the personal discharge finding, for a total of 60 years. (Dkt #7, R. IV, 11/5/13, 64-65).

## The Appeals

On his state direct appeal, Wysingo Turner raised six federal constitutional claims, all of which were rejected by the Illinois appellate court. People v. Turner, 2015 IL App (1st) 133649-U, ¶¶ 19-40, ¶¶ 47-52. (App. 35-46, 49-52). These claims included the claim that Wysingo Turner's second amendment right to bear arms was infringed by cross-examination and closing argument about his allegedly illegal possession of gun, ¶¶ 47-52. (App. 49-52).

With respect to the second amendment claim, the appellate court reasoned that the prosecutor's cross-examination and argument did not violate the United States Supreme Court's decision in *Dawson v. Delaware*, 503 U.S. 159 (1992) because Wysingo's possession of a gun was relevant to the proceeding. ¶ 52. (App. 51-52). The

Illinois Supreme Court denied a timely petition for leave to appeal. (Dkt # 7-5, A-27).

Wysingo Turner filed this petition for writ of habeas corpus relief, (Dkt # 1) which was denied by the district court. (Dkt # 17, A-13-26). Applying the "fair- minded" jurist standard (A-17-18), the court found that neither a right to bear arms outside the home (A-20-24), nor the application of Dawson to second amendment rights was clearly established (A-23-25) and therefore denied habeas relief. The district court did, however, issue a certificate of appealability. (A-25-26).

The Seventh Circuit affirmed the district court. The court did not address the issue of whether a right to bear arms outside the home was "clearly established." (A-8-9) because this Court's Second Amendment decisions were "simply in the background." (A-9). As to Dawson, the court found that Dawson was distinguishable because the defendant's racist beliefs were irrelevant to any issue at the sentencing proceeding, whereas Turner's possession of a gun, even if constitutionally protected, was relevant. (A-10-11). As to the argument that the

legality of Turner's possession of a gun was irrelevant, the court found that although "that may be so," the prosecutor's use of the illegality to "draw an improper character-propensity inference" raised only an error of state evidence law, not a federal constitutional violation. (A-12).

This petition followed.

## REASONS FOR GRANTING THE PETITION

### I.

### THIS COURT SHOULD GRANT THE PETITION TO DETERMINE WHETHER WYSINGO TURNER'S SECOND AMENDMENT RIGHT TO BEAR ARMS WAS VIOLATED BY EVIDENCE AND ARGUMENT THAT HIS POSSESSION OF A LICENSED FIREARM FOR SELF-DEFENSE WAS "ILLEGAL"

This Court should grant certiorari to determine whether is an unreasonable application of federal law clearly established by this Court's decisions in District of Columbia v. Heller, 554 U.S. 570 (2008), McDonald v. City of Chicago, 561 U.S. 742 (2010), and Dawson v. Delaware, 503 U.S. 159 (1992) for a state court to decide that a

defendant who legally possesses a firearm for the purpose of self-defense can, consistent with the second amendment, be accused in his criminal murder trial of illegally possessing that firearm In the alternative, this Court should remand this case to the Seventh Circuit in light of this Court's pending decision in New York State Rifle & Pistol Association, Inc. v. Bruen , No. 20-843.

Wysingo Turner's petition was filed after April 24, 1996, and is therefore governed by the Antiterrorism and Effective Death Penalty Act ("AEDPA"), 28 U.S.C. § 2254. *Woodford v. Garceau*, 538 U.S. 202, 210 (2003). Under AEDPA, this court should grant relief when the state court's decision was "contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States" or "was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d); *Wiggins v. Smith*, 539 U.S. 510, 520 (2003). "[C]learly established Federal law" includes only the Supreme Court's "applicable holdings," not

its dicta. See *Carey v. Musladin*, 549 U.S. 70 (2006).

There need not be a narrow Supreme Court holding precisely on point, however. A state court can render a decision that is "contrary to" or an "unreasonable application" of Supreme Court law by "ignoring the fundamental principles established by [that Court's] most relevant precedents." *Abdul-Kabir v. Quarterman*, 550 U.S. 233 (2007).

A state court's decision is " 'contrary to' federal law if it fails to apply the correct controlling Supreme Court authority or comes to a different conclusion ... [from] a case involving materially indistinguishable facts." *Pirtle v. Morgan*, 313 F.3d 1160, 1167 (9th Cir. 2002) (citing *Bell v. Cone*, 535 U.S. 685, 694 (2002)). A state court's decision is an "unreasonable application" of Supreme Court law if "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. This Court has held that "a federal habeas court making the 'unreasonable application' inquiry should ask whether the state court's application of

clearly established federal law was objectively unreasonable." *Williams v. Taylor,* 529 U.S. 362, 409 (2000).

This Court has recognized a distinction between mere "obiter dicta" and "the well-established rationale upon which the Court based the results of its earlier decisions. When an opinion issues for the Court, it is not only the result but also those portions of the opinion necessary to that result." *Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 66–67 (1996). Indeed, stare decisis directs the Supreme Court to adhere not only to the "holdings of [its] prior cases, but also to their explications of the governing rules of law." *County of Allegheny v. American Civil Liberties Union, Greater Pittsburgh* Chapter, 492 U.S. 573, 668 (1989)(Kennedy, J., concurring and dissenting). A state court's decision is " 'contrary to' federal law if it fails to apply the correct controlling Supreme Court authority or comes to a different conclusion ... [from] a case involving materially indistinguishable facts." *Pirtle v. Morgan*, 313 F.3d 1160, 1167 (9th Cir. 2002) (citing *Bell v. Cone*, 535 U.S. 685, 694 (2002)).

A state court's decision is an "unreasonable application" of Supreme Court law if "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. This Court has held that "a federal habeas court making the 'unreasonable application' inquiry should ask whether the state court's application of clearly established federal law was objectively unreasonable." *Williams v. Taylor*, 529 U.S. 362, 409 (2000).

In cases where the state court adjudicates the federal claim summarily but where there is no "reasoned state-court decision on the merits," the federal court "must determine what arguments or theories ... could have supported the state court's decision; and then it must ask whether it is possible fairminded jurists could disagree that those arguments or theories are inconsistent with the holding in a prior decision of this Court." *Sexton v. Beaudreaux*, 138 S. Ct. 2555, 2558 (2018), quoting *Harrington v. Richter*, 562 U.S. 86, 102 (2011)(Emphasis supplied).

However, where the state court does issue an opinion on the merits, AEDPA requires a federal court to "train its attention on the particular reasons – both legal and factual – why state courts rejected a state prisoner's claims." *Wilson v. Sellers*, 138 S. Ct. 1188, 1191-92 (2018), quoting *Hittson v. Chatman*, 576 U.S. ——, ——, 135 S.Ct. 2126, 2126, (2015) (Ginsburg, J., concurring in denial of certiorari). This "straightforward inquiry" requires a federal court to review the "specific reasons given by the state court" and to defer "to those reasons if they are reasonable." *Wilson,* 138 U.S. at 1192.

This Court's decision in *Wilson* strongly suggests that if the state court's expressed reasons are unreasonable, there is no longer an AEDPA bar, and the federal court should decide the federal question de novo, without further deference to either the reasoning of the state courts, or to the state court's ultimate judgment. Accord, *Lafler v. Cooper*, 566 U.S. 156, 173 (2012)(finding no AEDPA bar where state court correctly identified Strickland standard for ineffective assistance of counsel in the context of a plea bargain but then failed to apply it by rejecting claim on

basis that plea was knowing and voluntary).

In *Wilson*, this Court faced the question of the standard for review of a state court decision which summarily affirms a reasoned lower state court decision. The Court rejected the application of the Richter standard – whether any reasonable arguments or theories could have supported the state court's decision; and whether it was possible fairminded jurists could disagree that those arguments or theories were inconsistent with the holding in a prior decision of this Court:

> "In our view, however, Richter does not control here. For one thing, Richter did not directly concern the issue before us—whether to "look through" the silent state higher court opinion to the reasoned opinion of a lower court in order to determine the reasons for the higher court's decision. Indeed, it could not have considered that matter, for in Richter, there was no lower court opinion to look to. That is because the convicted defendant sought to raise his federal constitutional claim

for the first time in the California Supreme Court (via a direct petition for habeas corpus, as California law permits). *Id.*, at 96, 131 S.Ct. 770.

"For another thing, Richter does not say the reasoning of *Ylst* does not apply in the context of an unexplained decision on the merits. To the contrary, the Court noted that it was setting forth a presumption, which "may be overcome when there is reason to think some other explanation for the state court's decision is more likely." Richter, supra, at 99–100, 131 S.Ct. 770. And it referred in support to *Ylst*, 501 U.S., at 803, 111 S.Ct. 2590.

"Further, we have "looked through" to lower court decisions in cases involving the merits. See, e.g., *Premo v. Moore*, 562 U.S. 115, 123–133, 131 S.Ct. 733, 178 L.Ed.2d 649 (2011) ; Sears v. Upton, 561 U.S. 945, 951–956, 130 S.Ct. 3259, 177 L.Ed.2d 1025 (2010) (per curiam ). Indeed, we decided one of those cases, Premo, on the same day we decided Richter . And in our opinion in Richter we

> referred to Premo . 562 U.S., at 91, 131 S.Ct. 770. Had we intended *Richter* 's "could have supported" framework to apply even where there is a reasoned decision by a lower state court, our opinion in Premo would have looked very different. We did not even cite the reviewing state court's summary affirmance. Instead, we focused exclusively on the actual reasons given by the lower state court, and we deferred to those reasons under AEDPA. 562 U.S., at 132, 131 S.Ct. 733 ("The state postconviction court's decision involved no unreasonable application of Supreme Court precedent")."

138 S. Ct. at1195-96.

In this case, the Illinois court correctly identified the issue as to whether the prosecution violated Wysingo Turner's second amendment right to bear arms when the prosecution cross-examined him about whether he knew whether it was illegal to carry a gun in his car and then used that cross-examination to argue in closing that he was a scofflaw with a general criminal propensity. *People v.*

*Turner*, 2015 IL App (1st) 133649, ¶ 48. And although it did not mention Heller and McDonald, the Illinois court did not dispute the principle that the second amendment includes a right to bear arms outside the home. Nor could it have – since the Illinois Supreme Court had so held in *People v. Aguilar*, 2013 IL 112116, ¶ 22. But the Illinois court failed to reasonably apply Heller and McDonald because it failed to address the issue of whether Wysingo Turner's second amendment rights were violated by the prosecutor's cross-examination and argument that Turner's gun possession was illegal and demonstrated a general criminal propensity.

With respect to the issue of the violation of a specific constitutional right by the admission of evidence and argument impinging on that right in a criminal prosecution, the Illinois state court correctly cited *Dawson v. Delaware*, 503 U.S. 159 (1992), for its specific holding that the defendant's first and fourteenth amendment rights were violated by the admission of evidence of defendant's membership in a white racist prison gang

because the evidence had no relevance to the issues being decided in the proceeding.

In Dawson, the prosecution introduced evidence at a death penalty hearing that defendant was a member of the Aryan Brotherhood. An agreed stipulation proved only that an "Aryan Brotherhood prison gang originated in California in the 1960's, that it entertains white racist beliefs, and that a separate gang in the Delaware prison system calls itself the Aryan Brotherhood." Dawson, 503 U.S. at 165. This Court found that because the prosecution had failed to show any relevance for the Aryan Brotherhood evidence apart from Dawson's "abstract beliefs" the admission of the Aryan Brotherhood evidence violated Dawson's First Amendment right to freedom of association. 503 U.S. at 167. Indeed:

> "On the present record one is left with the feeling that the Aryan Brotherhood evidence was employed simply because the jury would find these beliefs morally reprehensible. Because Delaware failed to do more, we cannot find the evidence was

> properly admitted as relevant character evidence."

503 U.S. at 167.

However, in a stunning non sequitur, after correctly citing Dawson, the Illinois court then concluded that in Wysingo Turner's case "evidence that defendant carried a gun, which was introduced by defendant himself, was relevant as to why defendant had a loaded gun with him on the day in question. " People v. Turner, 2015 IL App (1st) 133649, ¶ 52.

This reasoning made absolutely no sense. As the state court itself acknowledged, Wysingo Turner challenged the cross-examination and argument on the legality of his gun possession, not the possession itself, which he had introduced in his direct testimony. Wysingo Turner's possession of the gun was relevant, because it was used in the charged fatal shooting, but whether or not Wysingo Turner was breaking the law by carrying the gun had as little bearing on Wysingo Turner's accident and self-defense defenses as the Dawson defendant's membership in a white racist prison gang had on whether the defendant should be sentenced to death. The state

court's reasoning was therefore objectively unreasonable. There was no AEDPA bar, and Seventh Circuit should have reviewed this issue de novo.

Instead, the Seventh Circuit below attempted to distinguish Dawson on the ground that Dawson involved irrelevant "character" evidence whereas this case involved "character-propensity" evidence, the relevance of which was somehow a matter of state law, and not federal constitutional law. But this is a distinction without a difference.

In Dawson it could have been argued that, as a matter of state law, the racist views of a capital defendant were fair game for comment at a capital sentencing hearing, where after, all the jury was free to consider all aspects of the defendant's makeup, good and bad, including criminal propensity. But Dawson made clear that the state law of relevance had to yield to the demands of free speech under the first amendment. Here, similarly the legality or illegality of Wysingo Turner's possession of a firearm was not a matter of state law, but was governed by a federal constitutional right.

Therefore, this court should grant the petition for writ of certiorari.

## CONCLUSION

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

Respectfully submitted,

WYSINGO TURNER

Dated: April 3, 2022

By:

/s/ Stephen L. Richards

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**APPENDIX A**

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

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No. 20-3419

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WYSINGO TURNER, PETITIONER-APPELLANT
v.
CHRISTINE BRANNON-DORTCH, RESPONDENT-APPELLEE

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Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.
No. 19-cv-0693 — Mary M. Rowland, Judge

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ARGUED MARCH 31, 2021 DECIDED JANUARY 3, 2022

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Before SYKES, Chief Judge, and FLAUM and EASTERBROOK, Circuit Judges

SYKES, Chief Judge. Wysingo Turner is serving a lengthy prison term for fatally shooting Krystal Rodney during a heated argument outside her home in Chicago. At his trial in state court, Turner claimed that the shooting was accidental. He testified that Krystal grabbed the handgun he was carrying and that it discharged in the ensuing scuffle. Seeking to cast doubt on Turner's story, the prosecutor cross-examined him about why he was carrying a loaded gun that day. Turner admitted that he frequently kept a loaded firearm in his car for protection. The prosecutor pressed him further, asking whether he knew it was illegal to have a loaded gun in his car in Chicago and whether he thought he was "entitled to just break the law." He replied that keeping a loaded gun in his car wasn't illegal—or if it was, he was unaware of that law.

The jury rejected Turner's "accidental discharge" defense and found him guilty of first-degree murder. Turner appealed, arguing that the prosecutor's cross-examination about the legality of his gun possession violated his Second Amendment right to bear arms. The appellate court

disagreed and affirmed the judgment. After exhausting state postconviction remedies, Turner sought federal habeas relief under 28 U.S.C. § 2254, reprising his Second Amendment argument. It fared no better in federal court. The district judge denied the petition but granted a certificate of appealability.

We affirm. The state court addressed Turner's claim on the merits, so federal habeas relief is unavailable unless the state court's decision was "contrary to, or involved an unreasonable application of, clearly established [f]ederal law." 28 U.S.C. § 2254(d)(1). We see no error in the state court's ruling, let alone one that meets § 2254(d)'s demanding standard.

## I. Background

The events culminating in Krystal Rodney's death began on August 10, 2010, two days before the fatal shooting. At the time, Krystal lived with her 12-year-old son Demar'J Bankston in the basement of a home on South Justine Street in Chicago. Silvia Gandy, Krystal's half-sister and a friend of

Turner's, lived upstairs with her three-year-old son Ya'Shon and her grandmother Queen Spencer. Walter Gandy, Queen's son, also lived there.

On August 10 Silvia called Turner and asked him to take Ya'Shon to get the vaccinations he needed for school. Turner agreed and drove to the Justine Street home. Silvia, Ya'Shon, and Krystal got into his car. An intense argument broke out during the drive, and Turner pulled over at a local police station to enlist help in removing them from the car.

On the morning of August 12 Turner again visited the Justine Street residence. He and Krystal talked outside the home and tempers again flared. Turner left but returned a few hours later. What happened next was hotly disputed at trial.

Twelve year old Demar'J was the only eyewitness to the shooting. He testified that Turner returned that afternoon, got out of his car, and approached the house carrying a beer bottle and asked to see Sylvia. Demar'J replied that she wasn't home. Turner then asked to see Krystal, who came outside. She and Turner argued again, and Demar'J saw

Turner pull a silver handgun from the back of his pants and shoot Krystal in the neck. Turner returned to his car and fled the scene.

Queen Spencer was home that afternoon but did not see the shooting. She testified that Turner was a frequent visitor to the home and was there on the afternoon of August 12. From inside the house, she heard him talking with Krystal outside and then heard a gunshot. She immediately went to the front porch and saw Turner walking to his car with a gun in his hand. She testified that he got into his car, lowered his head to the steering wheel and said, "Oh my god," and then drove away. Walter Gandy testified that he was at home on the morning of August 12 and heard Krystal arguing with Turner, but he was not there at the time of the shooting.

Turner recounted a starkly different version of these events. He told the jury that he kept a loaded handgun in his car for protection, and when he returned to the Gandy home on the afternoon of August 12, he put the gun in his left pocket because "thugs" often loitered in the area. He testified that as he walked down the gangway toward

the home, Krystal approached him, snatched the gun from his pocket, and aimed it at him. Turner said that he feared for his life and tussled with Krystal for control of the firearm, which accidentally discharged during the struggle. He denied pulling the trigger. The prosecutor confronted Turner about his gun possession on cross-examination.

Q: What kind of gun is that that you carry in your car?

A: It's a Magnum 45.

Q: Was it loaded?

A: Yes, it was.

. . . .

Q: And when did you load that gun?

A: Maybe about 8 years ago.

Q: 8 years ago. You haven't fired it for 8 years?

A: Never had no need to.

Q: And you say you carried it in your car for protection?

A: Yes, I do.

Q: And it's against the law to carry your gun in the car, isn't it?

[Objection overruled.]

A: No, it's not.

Q: And it's against the law to carry a loaded gun on the streets of the City of Chicago when you're driving your car, correct?

A: No.

Q: And you think that you are entitled to just break that law, correct?

A: I never known it was a law.

The lawfulness of Turner's gun possession arose again in closing argument. After noting that Turner's "accidental discharge" theory turned on his credibility, the prosecutor commented on his testimony about keeping a loaded gun in his car:

> Let's just talk about a couple of things. "I drove with a loaded gun in my car. I always drive with a loaded gun in my car." Apparently he doesn't care about the law[] because he can pick and choose the law that he does or does not want to

> follow[] because he's Wysingo Turner. …
> [T]hat's the type of guy he is.

The jury rejected Turner's defense and found him guilty of first-degree murder, and the judge imposed a sentence of 10 years in prison. The Illinois Appellate Court affirmed the judgment. *People v. Turner*, 2015 IL App. (1st) 133649-U (Ill. App. Ct. 2015) (unpublished). Among other arguments on direct appeal, Turner claimed that the prosecutor violated his Second Amendment right to bear arms by questioning him about the legality of keeping a loaded gun in his car and commenting on this testimony during closing argument. *Id.* at ¶ 48.

Turner's argument relied heavily on *Dawson v. Delaware*, 503 U.S. 159 (1992). There the Supreme Court held that introducing irrelevant evidence of the defendant's membership in a white-supremacist group during the penalty phase of his capital trial served no legitimate purpose and thus violated the defendant's associational rights under the First Amendment. *Id.* at 167–68. Turner's analogy to Dawson did not succeed. The state appellate court rejected his Second

Amendment argument, reasoning that Turner's case was different because he himself had introduced the evidence that he carried a loaded gun in his car, so the prosecutor's questions and comments were relevant and did not infringe his Second Amendment right to bear arms. *Turner*, 2015 IL App. (1st) at ¶ 52. The Illinois Supreme Court declined review.

After unsuccessful state postconviction proceedings, Turner sought federal habeas relief under § 2254, raising the same Second Amendment claim. Applying the deferential review required by § 2254(d), the district judge concluded that the state court reasonably determined that Turner's case was distinguishable from Dawson. The judge therefore denied relief but granted a certificate of appealability.

II. Discussion

Turner faces a high hurdle. Because the state court addressed his claim on the merits, a federal court may not grant habeas relief unless the state court's decision was "contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court." §

2254(d)(1). "This standard is difficult to meet." *Mays v. Hines*, 141 S. Ct. 1145, 1149 (2021) (per curiam) (quotation marks omitted). Turner concedes that the state appellate court applied the correct federal law, so his argument is really quite limited: he contends that the state court unreasonably applied Dawson in rejecting his claim that the prosecutor's questions and comments about the legality of his gun possession violated his Second Amendment right to bear arms as announced in *District of Columbia v. Heller*, 554 U.S. 570 (2008), and *McDonald v. City of Chicago*, 561 U.S. 742 (2010). To prevail on this claim, Turner must establish 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 fairminded disagreement." *Harrington v. Richter*, 562 U.S. 86, 103 (2011). He falls far short of satisfying his burden.

We begin with the observation that Turner's claim doesn't rest directly on Heller and McDonald. The Court's Second Amendment decisions are simply in the background. The claim turns entirely on

Dawson. As we've noted, there the Court held that it was constitutional error to admit irrelevant evidence of a capital-murder defendant's membership in a white-supremacist group during the penalty phase of his trial. *Dawson*, 503 U.S. at 167–68. To understanding this holding—or more importantly, the limits of this holding—some additional unpacking is necessary.

David Dawson and three other inmates escaped from a Delaware prison and went on a crime spree that included burglary, theft, and murder. *Id.* at 161. A jury convicted Dawson of murder during the guilt phase of his trial. Before the penalty phase began, in which the jury would consider whether to recommend a death sentence, the prosecution announced its intention to introduce evidence of Dawson's membership in the Aryan Brotherhood, a white supremacist group with affiliated gangs in many prisons. Among other evidence, the prosecution sought to introduce photographs of Dawson's racist tattoos—swastikas and Aryan Brotherhood symbols and names—as well as expert testimony about the origins and nature of the Aryan Brotherhood. *Id.* At 161–62.

When the defense objected, the prosecution agreed to drop its expert witness and instead read a stipulation to the jury explaining that the Aryan Brotherhood is a white supremacist gang that exists in many prisons. *Id.* at 162. The defense maintained its objection to the other Aryan Brotherhood evidence, but the trial judge permitted the prosecution to introduce photos of some of the tattoos in addition to the stipulation. Id. The jury recommended a sentence of death. The court was bound by that recommendation and imposed a death sentence. *Id* at 163.

Dawson challenged the admission of the Aryan Brotherhood evidence on appeal to the Delaware Supreme Court, but the court affirmed his conviction and sentence. The Supreme Court granted certiorari and reversed, ruling that admitting this evidence was constitutional error. Id. The Court did not, however, accept Dawson's broadest argument: he maintained that admitting evidence of constitutionally protected associations, activities, or beliefs is always unconstitutional. *Id.* at 164–65. The Court rejected this broad claim, explaining that "the Constitution does not erect a per se barrier to

the admission of evidence concerning one's beliefs and associations at sentencing simply because those beliefs and associations are protected by the First Amendment." *Id.* at 165.

Rather, the holding in *Dawson* is more limited: the Aryan Brotherhood evidence served no legitimate purpose because it was irrelevant to any issue in the penalty phase of trial. The Court observed that "the narrowness of the stipulation left the Aryan Brotherhood evidence totally without relevance to Dawson's sentencing proceeding" and "proved nothing more than Dawson's abstract beliefs." *Id.* at 165, 167. Indeed, the Court surmised that the evidence was "employed simply because the jury would find these beliefs"— and Dawson's association with others who held similar racist beliefs— to be "morally reprehensible." *Id.* at 167. The Court thus concluded that the First Amendment barred the state from introducing evidence of Dawson's associations and abstract beliefs during his sentencing proceeding when those associations and beliefs had "no bearing on the issue being tried." *Id.* at 168.

The irrelevance of the Aryan Brotherhood evidence is a key limit on Dawson's reach. The decision does not extend to the admission of relevant evidence, even if the evidence concerns constitutionally protected conduct. *Wisconsin v. Mitchell*, 508 U.S. 476, 486 (1993); *United States v. Schmidt*, 930 F.3d 858, 865 (7th Cir. 2019). So if the evidence of Turner's firearm possession was relevant, then his Dawson claim necessarily fails. And that's true even if we assume for the sake of argument that his firearm possession was constitutionally protected.

The state appellate court rejected Turner's claim on precisely this ground: "[E]vidence that [Turner] carried a gun, which was introduced by the defendant himself, was relevant as to why [he] had a loaded gun with him on the day in question." *Turner*, 2015 IL App. (1st) at ¶ 52. We see no error in this ruling, let alone an error "beyond any possibility for fairminded disagreement." *Richter,* 562 U.S. at 103.

Turner counters that even though his firearm possession was relevant, its legality was not. That may be so; the prosecutor's emphasis on Turner's character strikes us as

an invitation to draw an improper character-propensity inference. E.g., *People v. Ward*, 952 N.E.2d 601, 606 (Ill. 2011). But that's an error of state evidence law, not a federal constitutional violation. The problematic irrelevant evidence in Dawson concerned the defendant's constitutionally protected conduct—his association with a racist organization—not the legality of that conduct. Here, the prosecutor's apparent attempt to draw an impermissible character-propensity link is simply irrelevant to Turner's bid for federal habeas relief. See § 2254(a) (limiting federal habeas relief to violations of federal law).

Accordingly, we agree with the district judge that the state court reasonably applied Dawson. The § 2254 petition was properly denied.

**AFFIRMED.**

## APPENDIX B

IN THE UNITED STATES COURT OF APPEALS FOR NORTHERN DISTRICT OF ILLINOIS EASTERN DIVISION

No. 19-cv-0693

WYSINGO TURNER, PETITIONER,
v.
SHERWIN MILES,
Acting Warden, Stateville Correctional Center, DEFENDANTS(S)

[December 3. 2020]

Judge Mary M. Rowland

MEMORANDUM OPINION AND ORDER

Wysingo Turner, an Illinois prisoner, petitions for a writ of habeas corpus under 28 U.S.C. § 2254. Dkt. 1. The petition is denied, and a certificate of appealability will issue.

### I. Background

A federal habeas court presumes that state court factual findings are correct unless rebutted by clear and convincing evidence. See 28 U.S.C. § 2254(e)(1); *Jean-Paul v. Douma*, 809 F.3d 354, 360 (7th Cir. 2015) ("A state court's factual finding is unreasonable only if it ignores the clear and convincing weight of the evidence.") (internal quotation marks omitted). The Appellate Court of Illinois is the last state court to have adjudicated *Turner's* case on the merits. *People v. Turner*, 2015 IL App (1st) 133649-U (Ill. App. Aug. 27, 2015) (unpublished order) (reproduced at Dkt. 7-3). The following sets forth the facts as that court described them, as well as the procedural background of the state criminal and post-conviction proceedings.

This case involves the August 12, 2010 shooting and death of Krystal Rodney at her home in West Englewood, Chicago. *Id.* at ¶ 3.

At trial, Rodney's son, Demar'J Bankston, testified that he was twelve at the time of the shooting and living with Rodney in the basement of a relative's house. *Id.* He testified that on the morning of August 12, he saw Wysingo Turner arrive at the house in a

silver BMW. *Id.* Turner had a conversation with Rodney that Bankston did not hear and then Turner left. Id. Turner returned later that day and asked Bankston where Silvia Gandy, Rodney's half-sister, was. Id. After learning Gandy was not home, Turner then asked where he could find Rodney and Bankston told him she was in the basement. *Id.*

Turner then knocked on the basement window, Rodney came outside, and an argument between them began. Id. Bankston testified that Turner pulled a silver gun from the back of his pants and aimed it at Turner. Id. at ¶ 4. Rodney said, "I'm sorry," and then Turner shot her in the neck. *Id.* Turner shortly thereafter drove away. *Id.* A neighbor and relative present at the shooting also testified at the trial, largely consistent with Bankston's testimony. *Id.* at ¶¶ 5-6. Turner was arrested soon after the shooting. *Id.* at ¶ 8.

Turner testified in his own defense at trial. *Id.* at ¶ 11. He testified that after he first arrived at the West Englewood property on the morning of August 12, he was kicked from behind by Rodney, knocking him down. *Id.* at

13.

In response, Turner left and drove to Ogden Park. Id. He later returned to the house, where he got out of his car and took his gun. *Id.* at ¶ 14. He regularly carried a loaded gun in his car for protection and testified that he took it with him because there were often "thugs" on the property. Id. at ¶¶ 13-14. Turner testified that Rodney approached him as he walked towards the house and grabbed the gun from him, pointing it at him. *Id.* at ¶ 14. Turner grappled with her for control of the gun and, in the struggle, it fired and hit Rodney. Id. Turner denied pulling the trigger. *Id.*

On cross examination, the prosecution questioned Turner about his firearm:

"Q. And it's a revolver, correct?

A. Yes, it is.

Q. And you say you carried it in your car for protection?

A. Yes, I do.

Q. And it's against the law to carry your gun in the car, isn't it?

A. No, it's not.

[Objection overruled]

Q. And it's against the law to carry a loaded gun on the streets of the City of

Chicago when you're driving your car, correct?

A. No.

Q. And you think you are entitled to just break the law, correct?

A. I never known it was a law."

Id. at ¶ 48. The exchange was recalled at closing arguments, when the prosecution said:

> Let's just talk about a couple of things. 'I drove with a loaded gun in my car. I always drive with a loaded gun in my car.' Apparently he doesn't care about the law, because he can pick and choose the law that he does or does not want to follow.

*Id.* at ¶ 50.

The jury found Turner guilty of first-degree murder and personally discharging a firearm that proximately caused the victim's death. *Id.* at ¶ 16. He was sentenced by the trial court for 35 years for the murder and a

consecutive 25-year term for discharging the firearm. *Id.*

Turner appealed to the Appellate Court of Illinois, contending that he suffered from ineffective assistance of counsel and various trial court errors. *Id.* at ¶ 1. Among the claimed errors was that the State violated Turner's Second Amendment rights when it questioned whether he knew it was illegal to carry a gun in his car. *Id.* at ¶ 48. The Appellate Court affirmed the lower court, and the Supreme Court of Illinois denied Turner's petition for leave to appeal. *Id.* at ¶ 1; Dkt. 7-5.

In September 2016, Turner filed a postconviction petition consistent with state law. The trial court dismissed the petition and was affirmed on appeal. Dkt. 7-9. The Supreme Court of Illinois denied his petition for leave to appeal in November 2018. Dkt. 7-11. He then timely filed the instant habeas petition on February 2, 2019. Dkt. 1.

## II. Standard

Turner brings his habeas claim under 28 U.S.C. § 2254. § 2254(d) states that the writ will not be granted if it was already

adjudicated on the merits in state court.

There are only two exceptions to this rule: 1) if the state court's decision "was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States;" or 2) if the decision "was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." See *Harrington v. Richter*, 562 U.S. 86, 98 (2011) ("By its terms § 2254(d) bars relitigation of any claim 'adjudicated on the merits' in state court, subject only to the exceptions in §§ 2254(d)(1) and (2)"). Turner does not argue that the evaluation of the evidence was unreasonable, and so we focus here on the first exception.

In determining whether a state court decision was contrary to clearly established federal law, we look to "the holdings, as opposed to the dicta, of [the Supreme Court]'s decisions as of the time of the relevant state-court decision." *Williams v. Taylor*, 529 U.S. 362, 365 (2000). To be overturned, the state court's application of the law must have been "objectively unreasonable." *Id.* at 409. In making this determination we focus on

Supreme Court precedent, as "circuit precedent does not constitute clearly established Federal law." *Glebe v. Frost*, 574 U.S. 21, 24 (2014).

Importantly, finding a decision "unreasonable" is a higher standard than merely "incorrect." *Williams*, 529 U.S. at 411. This Court "may not issue the writ simply because [it] concludes in its independent judgment that the relevant state-court decision applied clearly established federal law erroneously or incorrectly. Rather, that application must also be unreasonable." *Id.*

## III. Analysis

### A. The State Court's Ruling Was Not Contrary to Clearly Established Federal Law

In this habeas petition, Turner claims one error—that his Second Amendment rights were violated during cross-examination and closing arguments by the trial

court allowing the prosecutor to argue Turner's carrying a firearm violated state law. Turner raised this issue on appeal, where the court affirmed the trial court because the "evidence that defendant carried

a gun, which was introduced by defendant himself, was relevant as to why defendant had a loaded gun with him on the day in question," distinguishing the case from the precedent Turner had cited. (Dkt. 7-3 at ¶ 11).

As discussed above, on habeas review we look to whether the state court decision was "contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States." 28 U.S.C. § 2254(d)(1). So long as the state court did not violate any "clearly established holding" of the Supreme Court, this Court cannot grant habeas relief. *Woods v. Donald*, 575 U.S. 312, 317 (2015). Turner has not cited any Supreme Court case that clearly establishes that questioning a defendant during a criminal trial about their possession of a firearm in violation of state law violates the defendant's Second Amendment rights. The Court's own review of Supreme Court precedent has not uncovered any such case. Indeed, the Supreme Court has not yet addressed a case close to this question. This is a situation in which "none of [the Supreme Court's] cases

confront the specific question presented by this case," and so, ipso facto, "the state court's decision could not be contrary to any holding" of the Supreme Court. *Woods*, 575 U.S. at 318 (citations omitted). Thus, this Court cannot grant Turner a writ of habeas corpus.

### B. Heller, McDonald, and Dawson Do Not Create a Clearly Established Federal Law

Turner argues that three Supreme Court cases, when read together, actually do create the required "clearly established Federal law." The argument proceeds in two parts. First, he argues that *District of Columbia v. Heller*, 554 U.S. 570 (2008) and *McDonald v. City of Chicago, Ill.*, 561 U.S. 742 (2010) established that Turner's firearm possession in his car was protected by the Second Amendment. Then, he argues that *Dawson v. Delaware*, 503 U.S. 159 (1992) established that questioning Turner in a criminal trial about that firearm possession infringed on his Second Amendment rights. This argument fails. Both its steps require interpretative leaps not found in the holdings of the cases. While Turner's reading of the case law is plausible, it is far from "clearly established," the standard for granting

habeas.

### 1. Supreme Court Precedent Has Not Established Heller and McDonald's Scope Outside the Home

At the time of Turner's arrest, the Illinois Aggravated Unlawful Use of a Weapon statute generally prohibited the carrying of an uncased, loaded gun in public. See 720 ILCS 5/24-1.6(a)(1), (a)(3)(A) (2010). In the 2013 case *Moore v. Madigan*, 702 F.3d 933, 934 (7th Cir. 2012), the Seventh Circuit held that the statute violated the Second Amendment. The Illinois legislature has subsequently amended the law to provide an exception for properly licensed handguns. See 720 ILCS 5/24-1.6(a)(3)(A-5) (2018). In Moore, the Seventh Circuit relied on the Supreme Court precedent of Heller and McDonald. Heller, which was the Court's "first in-depth examination of the Second Amendment," held that a District of Columbia law that prohibited keeping a handgun in one's home violated the Second Amendment. *D.C. v. Heller*, 554 U.S. 570, 635 (2008). McDonald then held that the Fourteenth Amendment incorporated the Second Amendment against the states. *McDonald v. City of Chicago, Ill.*,

561 U.S. 742, 791 (2010). Turner argues that even though his carrying a loaded gun in his car violated Illinois law, it was inappropriate for the prosecutor to describe his actions as "against the law" because the Illinois statute clearly violated the Second Amendment. Turner points to language in Heller and McDonald to argue that the opinions found an "inherent right of self-defense" that necessarily extended to keeping a loaded handgun in one's car. *Heller*, 554 U.S. at 628. Turner cites Moore to support the view that such a right has been clearly established. Moore, however, is not controlling in this case because we may only look to Supreme Court precedent to determine if a particular right has been clearly established. See *Glebe v. Frost*, 574 U.S. 21, 24 (2014). And while Heller and McDonald's language is sweeping, the actual holdings of the cases are limited to the domestic context. Looking at these decisions alone, it is unclear just how far they go in overturning state firearm regulations.

Turner suggests that even if the cases' holdings are not directly applicable, their "fundamental principles" leave only one possible conclusion. *Abdul-Kabir v.*

*Quarterman*, 550 U.S. 233, 258 (2007) (warning that "ignoring the fundamental principles" of Supreme Court precedent will result in decisions contrary to federal law). But Moore itself undermines this argument. Judge Williams dissented from the majority opinion in Moore, writing that she is "not convinced that the implication of the Heller and McDonald decisions is that the Second Amendment right to have ready-to-use firearms for potential self-defense extends beyond the home." *Moore v. Madigan*, 702 F.3d 933, 946 (7th Cir. 2012) (Williams, J., dissenting). Heller and McDonald's logic may extend to finding the Illinois statute unconstitutional, but other readings, emphasizing the historical primacy of the home as the place where the "importance of the lawful defense of self . . . is most acute," are also reasonable. *McDonald*, 561 U.S. at 767 (quoting *Heller*, 554 U.S. at 559); see *Moore*, 702 F.3d at 943-954 (setting forth this argument in detail). If a federal appellate court judge could reasonably find the Illinois statute constitutional, then, almost by definition, its unconstitutionality is not "clearly established." This is an archetypal example of a situation in which "fairminded

jurists could disagree." *Yarborough v. Alvarado*, 541 U.S. 652, 664 (2004). As such, we cannot overturn the state court's ruling on habeas review.

**2. Dawson Does Not "Clearly" Apply Outside the First Amendment Context**

Heller and McDonald are only the first step in Turner's argument. As he acknowledges in his petition, those cases "do not reach the question of whether a defendant's second amendment rights are violated not only by a criminal prosecution for possessing a gun but also by the invocation of an unconstitutional gun statute during the course of a prosecution for a different offense." Dkt. 1 at 24. To bridge that gap, *Turner* tuns to *Dawson v. Delaware*, 503 U.S. 159 (1992).

*Dawson* dealt with a defendant who had escaped from state prison, murdered a woman, and stole her car. *Id.* at 160-61. At trial, the prosecution and defense stipulated to the defendant's membership in the Aryan Brotherhood, a white racist prison gang. *Id.* at 162. The jury found the defendant guilty and he was sentenced to death. *Id.* at 163. On appeal, the Supreme Court found that the introduction of the defendant's membership

in the prison gang violated his First Amendment rights. Id. The Court reasoned that the information was not actually relevant to his guilt or sentencing, and so the evidence was exclusively to prove "Dawson's abstract beliefs." Id. at 167. This, in turn, implicated the established First Amendment principle that "the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable." *Id.* (quoting *Texas v. Johnson*, 491 U.S. 397, 414 (1989)).

*Turner* reads *Dawson* broadly. He describes its holding as being that a "defendant's rights are violated when the prosecution introduces irrelevant evidence in violation of specific right guaranteed to the defendant under United States Constitution." Dkt. 8 at 8-9. Turner's Second Amendment rights were thus violated when irrelevant evidence, that he carried his gun in violation of state law, was introduced at his trial.

*Dawson* itself, however, is much more limited in scope. In its own description of its holding, it expressly limits its application to the First Amendment. *Dawson*, 503 U.S. at 160 (holding that "the First and Fourteenth

Amendments prohibit the introduction in a capital sentencing proceeding of the fact that the defendant was a member of an organization called the Aryan Brotherhood, where the evidence has no relevance to the issues being decided in the proceeding").

What is more, it is not clear that its reasoning readily applies outside the First Amendment context. The opinion grounds itself in First Amendment jurisprudence, invoking previous precedent that had established the Amendment's particularly expansive reach. *Id.* at 168 (citing cases that limited states' ability to control bar membership or gather information on private organizations). It is perhaps unsurprising, then, that neither the Supreme Court nor the Seventh Circuit have applied Dawson's holding outside of the First Amendment.

Given the limited language and reasoning of Dawson, it is not "objectively unreasonable" for the state court to have failed to apply its reasoning to Turner's Second Amendment claim. Yet again, this is an extension of Supreme Court precedent about which "fairminded jurists could disagree." *Yarborough v. Alvarado*, 541 U.S.

652, 664 (2004). As a result, the state court did not act contrary to clearly established federal law by allowing the testimony.

### C. A Certificate of Appealability Is Warranted

When a district court enters a judgement on a habeas petition, it must also deny or grant a certificate of appealability. 28 U.S.C. § 2253(c). Such a certificate will only be issued if the applicant has made a "substantial showing of the denial of a constitutional right." Id. Or, as the Supreme Court puts it, "[w]here a district court has rejected the constitutional claims on the merits . . . [t]he petitioner must demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000). Although we have found Turner's argument unpersuasive, a reasonable jurist could disagree with our assessment of *Heller, McDonald*, and *Dawson*. So, a certificate of appealability is granted.

## IV. Conclusion

For the stated reasons, Turner's petition for a writ of habeas corpus is denied, but a certificate of appealability will issue.

Dated: December 3, 2020

E N T E R:

MARY M. ROWLAND

United States District Judge

**APPENDIX C**

IN THE SUPREME COURT OF ILLINOIS

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No. 119778

PEOPLE OF THE STATE OF ILLINOIS,
PLAINTIFF-APPELLANT

v.

WYSINGO TURNER,

DEFENDANT- APPELLEE

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[January 20, 2016]

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Disposition: Petition for leave to appeal denied.

## APPENDIX D

IN THE APPELLATE COURT OF ILLINOIS
FIRST DISTRICT, FIRST DIVISION

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No. 1–13–3649

PEOPLE OF THE STATE OF ILLINOIS,
PLAINTIFF-APPELLANT

v.

WYSINGO TURNER, DEFENDANT-
APPELLEE

---

[August 17, 2015]

ORDER

JUSTICE CONNORS delivered the judgment of the court.

Presiding Justice Delort and Justice Cunningham concurred in the judgment.

¶1 Defendant, Wysingo Turner, was convicted of first degree murder following a jury trial, and was sentenced to 60 years in the Illinois Department of Corrections. On appeal, defendant contends that he was deprived of effective assistance of counsel by counsel's failure to: (1) tender a jury instruction on

involuntary manslaughter; (2) tender a jury instruction with respect to prior inconsistent statements; (3) tender a jury instruction with respect to no duty to retreat; (4) tender a jury instruction with respect to proof of other crimes; (5) elicit from a witness an alleged threat by the victim to defendant. Defendant also contends that the trial court erred when it: (1) excluded evidence that the victim threatened to kill defendant; (2) allowed defendant to be cross-examined about whether he knew that it was illegal to carry a gun in his car; (3) refused defense counsel's tendered jury instructions defining intent and knowledge; (4) sustained an objection to a question of a certain witness; and (5) refused to ask defense counsel's tendered voir dire questions to the venire. For the following reasons, we affirm the judgment of the circuit court.

## ¶ 2 BACKGROUND

¶3 At trial, the following evidence was presented. The victim's son, Demar'J Bankston, testified that he was 12 years old in August of 2010 and that he lived with the victim in the basement of Queen Spencer's house at 7019 South Justine in Chicago. The

victim's half-sister, Silvia Gandy, lived upstairs. Demar'J testified that on the morning of August 12, 2010, defendant arrived at 7019 South Justine in his silver BMW and had a conversation with the victim outside that Demar'J did not hear. He testified that defendant returned later and defendant approached him outside with a beer bottle in his hand and asked for Silvia. Demar'J told defendant she was not home, so defendant asked for the victim. Demar'J told defendant that the victim was in the basement. Defendant then went to his car, put his beer bottle in the trunk, and knocked on the basement window. The victim came out and she and defendant argued.

¶ 4 Demar'J testified that defendant then pulled a silver gun from the back of his pants and pointed it at the victim. Demar'J heard the victim say, "I'm sorry," and then defendant shot the victim in the neck and she fell to the ground. Demar'J testified that defendant then walked to where Demar'J's cousin was standing and handed him some money. He then went to his car and drove away.

¶ 5 Raymond Washington lived at 7021 South

Justine at the time of the incident. Washington testified that he was in his living room on the afternoon in question, and saw defendant's silver BMW pull up and saw defendant get out. A few minutes later, Washington heard a gunshot and went toward his front door. He saw defendant walk back to his car with what appeared to be a weapon in his hand. Washington looked into the gangway and saw the victim on the ground with a bullet hole in her neck.

¶ 6 Queen Spencer lived at 7019 South Justine with her son, Walter Gandy, her granddaughter Silvia, and Silvia's three-year-old son Ya'Shon. Spencer testified that she knew the victim as Silvia's half-sister, and that she had seen defendant at her house a few times a week visiting Ya'Shon and taking him places. Spencer was home on the afternoon of the incident and saw defendant standing in the gangway between her house and the house next door. She testified that she heard defendant say, "What you want to do now?" and the victim answer, "Nothing. I was just playing." Queen then heard a gunshot and went to the front porch. She saw defendant walking from the gangway to his

car with a gun in his hand. Spencer testified that defendant got in his car, put his head on the steering wheel, and said, "Oh, my god," and then drove away. She called the police.

¶ 7 Chicago police officer Wade Clark testified that he responded to the scene at 7019 South Justine and went to the gangway, where he saw paramedics working on the victim. He spoke to witnesses at the scene, and then began looking for the shooter and a silver BMW.

¶ 8 Chicago police officer Richard Barber was patrolling the area when he heard the dispatch of the shooting which included a description of the shooter and the car he was driving. As Officer Barber was driving, he observed a silver BMW pull into an automotive store, about two miles from 7019 South Justine. Officer Barber saw defendant open his door to exit and a full bottle of Corona rolled out of the car. Officer Barber asked defendant his name, which defendant provided. The officer handcuffed him and placed him in the back of the squad car. Officer Barber testified that defendant asked him to loosen his handcuffs, stating that he was going to prison for a long time. Officer

Barber further testified that he looked into defendant's car through the open driver's door and observed a chrome handgun on the driver's side floor.

¶ 9 Chicago police officer Zbigniew Niewdach, a forensic investigator, testified that he processed the scene of defendant's arrest. He saw a full Corona beer bottle on the ground next to the driver's side door, a liquor bottle in the passenger seat of the silver BMW, a blue towel on the driver's seat, and the barrel of a handgun on the driver's side floor. He recovered a .44 caliber revolver from inside the car.

¶ 10 The defense called Walter Gandy, who testified that he lived with his mother, Queen Spencer, at 7019 South Justine. He knew the victim and was familiar with her voice. Gandy testified that at approximately 10 or 11 a.m. on the day in question, he heard the victim's voice speaking loudly and "violent like in an up rage." He was not present at the time of the shooting.

¶ 11 Defendant testified on his own behalf. He testified that he was 63 years old, and was a retired fireman after 25 years of employment at the Chicago Fire Department.

Defendant testified that he had hernia surgery in early August 2010, and a tooth extracted on August 8, 2010. On August 10, 2010, Silvia called and asked him to take Ya'Shon to get his shots for school. Defendant testified that he agreed even though he felt weak. He stated that he weighed approximately 150 pounds at the time.

¶ 12 Defendant testified that when he arrived to pick up Ya'Shon, Silvia, Ya'Shon, and the victim entered his car. As he drove, Silvia told defendant to drop the victim at another location, but defendant did not feel like it. He testified that the language between them became "quite heated," so he drove to a police station and told the desk sergeant his dilemma. The desk sergeant and other officers made Silvia, Ya'Shon, and the victim get out of the car.

¶ 13 Defendant testified that on August 12, 2010, he went to 7019 South Justine between 10:30 and 11 a.m. He saw Ya'Shon riding his bicycle and stopped to explain why he had made him get out of the car two days before. Defendant testified that as he was crouched down talking to Ya'Shon, the victim came out and kicked his shoulder, causing him to fall

back. Defendant then got in his car and drove to Ogden Park, where he stayed for several hours. Defendant testified that he kept a loaded gun in his car for protection.

¶ 14 He then went back to 7019 South Justine at approximately 3 p.m. Defendant testified that when he arrived back at the residence, he got out of his car and took his gun with him because sometimes there were "thugs" in the basement. He walked down the gangway, but the victim approached him as he reached the end of the gangway. She did not say anything to him, and she appeared calm. Defendant testified that the victim then "snatched the gun" from him and held it facing him. He thought his life was in danger and thought the victim was going to kill him so he struggled with her but the gun discharged during the struggle. Defendant denied pulling the trigger or shooting the victim.

¶ 15 On cross-examination, defendant admitted that although he had emergency medical training, he did not help the victim after she was shot. Defendant denied that a bottle of Corona fell from his car when he got out at the automotive store, and testified that

the bottle was a "prop."

¶16 At the jury instruction conference, defendant requested a jury instruction on self-defense, to which the State objected. The trial court granted the request to instruct the jury on self-defense. The jury found defendant guilty of first degree murder and personally discharging a firearm that proximately caused the victim's death. At the conclusion of the sentencing hearing, the trial court sentenced defendant to 35 years for first degree murder and a consecutive term of 25 years for personally discharging a firearm that proximately caused death. Defendant now appeals.

¶ 17 ANALYSIS

¶ 18 On appeal, defendant contends that he was deprived of effective assistance of counsel for various reasons discussed below. Defendant also contends that the trial court erred when it: (1) excluded evidence that the victim threatened to kill defendant; (2) allowed defendant to be cross-examined about the legality of carrying a gun in his car; (3) refused defense counsel's tendered jury instructions defining intent and knowledge; (4) sustained an objection to a question of a

certain witness; and (5) refused to ask defense counsel's tendered voir dire questions to the venire.

¶ 19 Ineffective Assistance of Counsel

¶ 20 We first address defendant's ineffective assistance of counsel claims. Defendant contends that he was deprived of effective assistance of counsel by counsel's failure to: (1) tender a jury instruction on involuntary manslaughter; (2) tender a jury instruction with respect to prior inconsistent statements; (3) tender a jury instruction with respect to no duty to retreat; (4) tender a jury instruction with respect to proof of other crimes; (5) elicit from a witness an alleged threat by the victim to defendant.

¶ 21 Every defendant has a constitutional right to effective assistance of counsel under the sixth amendment to the United States Constitution and the Constitution of Illinois. U.S. Const., amends. VI, XIV; Ill. Const. 1970, art. 1, § 8. Claims of ineffective assistance are governed by the standard set forth in Strickland v. Washington, 466 U.S. 668 (1984), and adopted by Illinois in People v. Albanese, 104 Ill. 2d 504 (1984). To prevail on a claim of ineffective assistance of counsel,

a defendant must demonstrate that counsel's performance was deficient and that the deficient performance prejudiced the defendant. Strickland, 466 U.S. at 687. More specifically, a defendant must show that counsel's performance was objectively unreasonable under prevailing professional norms and that there is a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Id. at 694. If the defendant fails to establish either prong, his ineffective assistance claim must fail. Id.

¶ 22 We turn to defendant's first ineffective assistance of counsel claim, which is that defense counsel failed to tender the jury instruction for involuntary manslaughter. A defendant commits involuntary manslaughter when he unintentionally kills another person without lawful justification by recklessly acting in a manner likely to cause death or great bodily harm. 720 ILCS 5/9-3 (West 2008).

¶ 23 Jury instructions are necessary to provide the jury with the legal principles applicable to the evidence presented so that it

may reach a correct verdict. *People v. Hopp*, 209 Ill. 2d 1, 8 (2004). It is well-settled in Illinois that counsel's choice of jury instructions is a matter of trial strategy. *People v. Sims*, 374 Ill. App. 3d 231, 267 (2007). "Such decisions enjoy a strong presumption that they reflect sound trial strategy rather than incompetence," and therefore are "generally immune from claims of ineffective assistance of counsel." *People v. Enis*, 194 Ill. 2d 361, 378 (2000). However, the failure to request a particular jury instruction may be grounds for finding ineffective assistance of counsel if the instruction was so critical to the defense that its omission "den[ied] the right of the accused to a fair trial." *People v. Pegram*, 124 Ill. 2d 166, 174 (1988); *People v. Johnson*, 385 Ill. App. 3d 585, 599 (2008).

¶ 24 The State presented evidence that defendant intentionally killed the victim by a shot to the neck. Defendant presented evidence that a struggle ensued between him and the victim and the victim shot herself during the struggle. There was no evidence presented that defendant killed the victim recklessly. In the absence of any evidence of

recklessness, defendant was not entitled to an involuntary manslaughter instruction. See *People v. Jones*, 174 Ill. 2d 126, 131-32 (1997) (a defendant is entitled to an instruction on his theory of the case only if there is some foundation for the instruction in the evidence). Accordingly, defendant was not prejudiced by defense counsel's failure to request the instruction for involuntary manslaughter, and therefore his claim of ineffective assistance of counsel fails.

¶ 25 The case of *People v. Salas*, 2011 IL App (1st) 091880, is instructive here. In Salas, two witnesses testified that they saw the defendant shoot the victim. Several other witnesses testified that they saw defendant with a gun either immediately before or immediately after the shooting of the victim. The defendant testified that he was riding his bike down an alley when he saw a Hispanic male come out of a gangway flashing gang signs toward the defendant. The defendant testified that when he was within four feet of him, the person pulled a gun from his pocket and tried to point it at the defendant. The defendant testified that they struggled and the person fired the gun without hitting

defendant. The person eventually tired during the struggle and dropped the gun. Defendant picked it up and ran to his bicycle. He testified that he did not shoot anyone. *Salas*, 2011 IL App (1st) 091880, ¶ 39. The defendant was found guilty of first degree murder.

¶ 26 The Salas defendant argued on appeal that his counsel provided ineffective assistance by failing to investigate, consider, or discuss with him whether an involuntary manslaughter instruction should have been tendered. The court found that the State presented evidence that the defendant intentionally killed the victim by a shot to the back of the head, and that the defendant presented evidence that he did not shoot and did not kill the victim. *Salas*, 2011 IL App (1st) 091880, ¶ 93. The court specifically found that there "was no evidence that [the] defendant recklessly killed [the victim]," and thus absent any evidence of recklessness, the defendant was not entitled to an instruction on involuntary manslaughter. Id.

¶ 27 The circumstances are precisely the same in the case at bar. Defendant presented evidence that a struggle ensued between he

and the victim, but that he did not pull the trigger. Accordingly, as in Salas, we find that defendant presented no evidence that defendant recklessly killed the victim, and thus he was not entitled to an instruction of involuntary manslaughter, and his claim of ineffective assistance fails on this point.

¶ 28 Defendant's next claim of ineffective assistance of counsel is that defense counsel failed to tender *Illinois Pattern Jury Instruction* (IPI) Criminal 4th No. 3.11, which provides:

"The believability of a witness may be challenged by evidence that on some former occasion he made a statement or acted in a manner that was not consistent with his testimony in this case. Evidence of this kind may be considered by you only for the limited purpose of deciding the weight to be given the testimony you heard from the witness in this courtroom."

When evidence of a witness' prior inconsistent statement is admissible to impeach his or her credibility, such evidence is not admitted as proof of the truth of the facts stated out of court, but to cast doubt on the testimony by showing his inconsistency.

*People v. Larry*, 218 Ill. App. 3d 658, 666 (1991). An instruction to that effect should be given upon request. Id. A prior inconsistent statement encompasses omissions as well as affirmative statements. *Id.*

¶ 29 Defendant contends that one of the State's witnesses, Queen Spencer, testified that just before the shooting, she heard defendant say "What do you want to do now?" and heard the victim reply, "Nothing. I was just playing." Defendant argues that Spencer admitted, however, that when interviewed by police immediately after the incident, she did not tell them about the conversation she overheard between defendant and the victim. Defendant claims that if the jury had been tendered *IPI* Criminal 4th No. 3.11, the jury would have known that it "could discount Queen Spencer's testimony, [and it] might well have concluded that [defendant's] account of the killing was accurate, and that he was acting in self defense." We disagree.

¶ 30 We reiterate that defense counsel's choice of jury instructions is considered a tactical decision, within the discretion of defense counsel. *Enis*, 194 Ill. 2d at 378. The alleged contradictory statements " 'must have

the reasonable tendency to discredit a witness' testimony on a material matter' " for reversal error to be found. *Larry*, 218 Ill. App. 3d at 666 (quoting *People v. Villa*, 93 Ill. App. 3d 196 (1981)).

¶ 31 Applying these principles to the case at bar, we conclude that the omission of which defendant complains, that Spencer failed to tell the police that she heard an exchange between defendant and the victim, was not material to the issue of defendant's guilt of first degree murder. Accordingly, we cannot say that it was ineffective assistance of counsel for defense counsel to fail to request *IPI* Criminal 4th No. 3.11.

¶ 32 Defendant's next contention regarding ineffective assistance of counsel is that defense counsel should have tendered *IPI* Criminal 4th No. 24-25.09X, which provides:

"A person who has not initially provoked the use of force against himself has no duty to attempt to escape the danger before using force against the aggressor."

¶ 33 Defendant maintains that this instruction was pertinent in this case because he returned to the scene of the crime several

hours after being "attacked" by the victim, and without knowing that defendant had no duty to attempt to escape the danger, the jury might have concluded that his return to the scene "deprived him of the right to act in self-defense." The State responds that the jury was properly instructed in this case, and we agree.

¶ 34 We again reiterate that defense counsel's choice of jury instructions is considered a tactical decision, within the discretion of defense counsel. *Enis*, 194 Ill. 2d at 378. The jury was instructed on defendant's right to self-defense. Had the jury believed that appropriate circumstances existed, it could have found defendant not guilty. See *People v. Miller*, 259 Ill. App. 3d 257, 266 (1994) (not improper to refuse instruction of no duty to retreat when jury properly instructed on defendant's theory of the case, self-defense). Accordingly, we cannot find that counsel was ineffective for failing to tender the jury instruction on no duty to retreat.

¶ 35 Defendant also claims that defense counsel failed to tender *IPI* Criminal 4th No. 3.14, which governs proof of other offenses or

conduct. Defendant contends that because the prosecutor during closing argument stated that defendant drove around with a loaded gun in his car and that he "doesn't care about the law," defense counsel should have tendered *IPI* Criminal 4th No. 3.14, which instructs the jury to consider other-crimes evidence only for the limited purpose for which it was introduced. Generally, evidence that a defendant in a criminal case has engaged in other bad acts on a different occasion is not admissible to show that the defendant has a propensity to commit crime. Ill. R. Evid. 404(b) (eff. Jan. 1, 2011); *People v. Pikes*, 2013 IL 115171, ¶ 13. The law disallows evidence of prior bad acts on this basis, not because it has no probative value, "but rather because it has too much." *People v. Manning*, 182 Ill. 2d 193, 213 (1998). However, evidence of prior bad acts may be admitted to prove any matter other than propensity that is relevant to the case, including "motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." Ill. R. Evid. 404(b) (eff. Jan. 1, 2011). Defendant contends that because evidence that he drove around with a loaded gun in his car was introduced

for more than the limited purpose of intent to kill the victim, defense counsel's failure to tender the jury instruction on other-crimes evidence was objectively unreasonable.

¶ 36 We reiterate that defense counsel's choice of jury instruction is considered a tactical decision within the discretion of defense counsel. *People v. Bobo*, 375 Ill. App. 3d 966, 977 (2007). "Neither mistakes in strategy nor the fact that another attorney with the benefit of hindsight would have handled the case differently indicates the trial lawyer was incompetent." *People v. Negron*, 297 Ill. App. 3d 519, 538 (1998). In the case at bar, defense counsel elicited testimony that defendant carried a loaded gun in his car for protection, which supported defendant's theory of self-defense. On cross-examination, the prosecution asked defendant if it was against the law to carry a loaded gun in his car, which defendant denied. Defendant expressed that he did not know it was against the law to carry a loaded gun in his car, and that he carried one because "this is Englewood." The prosecution stated in closing arguments that defendant admitted to carrying around a loaded gun

because he did not care about the law. While a limiting instruction may have been appropriate in this case, we cannot find that failing to request one amounted to ineffective assistance of counsel. Namely, we cannot say that there is a reasonable probability that, but for counsel's failure to tender a limiting instruction on proof of other crimes, the result of the proceeding would have been different. See *Strickland*, 466 U.S. at 687. Rather, the evidence against defendant was overwhelming. Several witnesses testified that defendant arrived at 7019 South Justine on the afternoon in question and approached the gangway with a gun in his hand, and shot the victim in the neck. Defendant was apprehended immediately afterward with a loaded gun in his car. Accordingly, we do not find prejudice in this case.

¶ 37 Defendant's final ineffective assistance of counsel claim is that defense counsel failed to elicit from Walter Gandy that on the morning of August 12, 2010, he overheard the victim saying in a loud voice that she was going to kick defendant's car and "beat his ass." At trial, Gandy testified that at about 10 or 11 a.m. while he was at 7019 South

Justice, he heard the victim speaking in a loud voice, "kind of violent like, in an up rage." After trial, Gandy signed an affidavit saying that he would have testified further as to what he heard on August 12 if he had been asked. Defendant contends that defense counsel should have elicited further testimony about the threat Gandy overheard the victim make about defendant, as such evidence would have established that the victim "had violent intentions towards [defendant]." The State responds that the proffered testimony was not admissible under *People v. Lynch*, 104 Ill. 2d 194 (1984).

¶ 38 Lynch provides the seminal law regarding the admissibility of character evidence in cases where self-defense has been raised. The Lynch court held that when self-defense "is properly raised, evidence of the victim's aggressive and violent character may be offered for two reasons: (1) to show that the defendant's knowledge of the victim's violent tendencies affected [his] perceptions of and reactions to the victim's behavior; and (2) to support the defendant's version of the facts where there are conflicting accounts of what happened." *People v. Nunn*, 357 Ill.

App. 3d 625, 631 (2005) (discussing Lynch).

¶ 39 Here, defendant does not specify which reason under Lynch for which he would be offering this alleged evidence of the victim's "aggressive and violent character." Id. However, since defendant did not know at the time of the offense that the victim had made these alleged threats regarding defendant, we assume defendant would be offering the evidence to support his version of the facts, namely that he was acting in self-defense. "A prior altercation or an arrest, without a conviction, can be adequate proof of violent character when supported by firsthand testimony as to the victim's behavior." *People v. Cook*, 352 Ill. App. 3d 108, 128 (2004); see also *People v. Huddleston*, 176 Ill. App. 3d 18, 28 (1988) (noting that a victim could testify that the decedent had struck her, but a police officer who had not observed the incident could not).

¶ 40 We find that the alleged testimony by Gandy would not have been adequate proof of the victim's violent and aggressive nature. Overhearing someone state that she was going to kick defendant's car and "beat his ass," is not the type of evidence that has been

contemplated by this court to show a violent and aggressive nature. See Lynch, 104 Ill. 2d at 201 (victim had three battery convictions); *People v. Simon*, 2011 IL App (1st) 091197, ¶ 69 (victim had previously shot and attacked defendant); *People v. Bedoya*, 288 Ill. App. 3d 226, 235-36 (1997) (victim had three aggravated battery convictions). Accordingly, we are unwilling to say the defense counsel's performance fell below an objective standard of reasonableness where the evidence defendant sought to introduce did not show that the victim had a violent or aggressive nature.

¶ 41 Evidence of Alleged Threat to Defendant

¶ 42 Defendant's next argument on appeal is that the trial court erred by excluding evidence that the victim threatened to kill defendant. At trial, defendant testified that during his first encounter with the victim on August 12, 2010, at about 10 a.m., defendant was on his knees speaking to Ya'Shon when the victim kicked defendant in the shoulder and said "I'm going to kill you, mother fucker." After the State objected to this statement a sidebar was held. At the sidebar, defense counsel argued that the victim's

statement was admissible as an excited utterance, and also for its effect on defendant to explain why he had his gun when he returned to the residence that afternoon. The State responded that the testimony was hearsay and that the gap between the victim's statement and the victim's killing did not warrant admission as evidence of defendant's state of mind. The trial court found that the statement was not an excited utterance and that hours had passed between the threat, defendant's departure, and defendant's return, which rendered the statement irrelevant. Defendant now argues that the testimony was not hearsay, and that even if it was, it would be admissible as an exception to show the victim's violent character and to prove that she was the aggressor. We disagree.

¶ 43 Evidentiary rulings are within the sound discretion of the trial court and will not be reversed unless the trial court has abused that discretion. *People v. Caffey*, 205 Ill. 2d 52, 89 (2001). An abuse of discretion will be found only where the trial court's ruling is arbitrary, fanciful, unreasonable, or where no reasonable person would take the view

adopted by the trial court. Id. "Hearsay evidence is an out-of-court statement offered to prove the truth of the matter asserted, and is generally inadmissible unless it falls within an exception." *People v. Lawler*, 142 Ill. 2d 548, 557 (1991). Defendant maintains, relying on *People v. Quick*, 236 Ill. App. 3d 446 (1992), that his testimony was not hearsay evidence of what the victim said, offered to prove not the truth of the matter asserted (that she was going to kill defendant) but rather to show the victim's effect on defendant's state of mind.

¶ 44 In Quick, the defendant was accused of solicitation to commit murder and raised compulsion and entrapment as defenses. The defendant attempted to show that she went through with a plan to kill her husband only because the friend who introduced her to the hitman told her that she would be killed, or her children would be killed, if she did not go through with the murder. The trial court barred her from testifying as to any statements made by the friend, finding that they were hearsay statements. The court in Quick, however, noted that an "out-of-court statement used for purposes other than

establishing the truth of the matter asserted may be admissible to show the state of mind of the recipient after hearing the statement." *Quick*, 236 Ill. App. 3d at 453. The court went on to state that if the statement is offered to prove its effect on the listener's mind or to show why the listener acted as she did, it is not hearsay. Id. The court found that the out-of-court statements made by defendant's friend were crucial to her defense, and were offered to show the defendant's state of mind after she heard them. Id.

¶ 45 In the case at bar, the testimony by defendant regarding what the victim said to him on the morning of the shooting was not crucial to his defense. Defendant raised self-defense, arguing the victim snatched his loaded gun from him in the gangway, and that he then grabbed the victim's wrist because the victim was trying to point the gun in his face, and he felt that she was trying to kill him. Defendant claimed that during the struggle, the gun discharged, but he did not pull the trigger and did not shoot the victim.

¶ 46 Self-defense exists when (1) force is threatened against a person; (2) the person

threatened is not the aggressor; (3) the danger of harm is imminent; (4) the threatened force is unlawful; (5) the person threatened actually and subjectively believed a danger existed that required the use of force applied; and (6) the beliefs of the person threatened were objectively reasonable. *People v. Jeffries*, 164 Ill. 2d 104, 127-28 (1995). Here, the alleged statement by the victim that she was going to kill defendant, which occurred several hours before the incident, would have little or no bearing on any of the six elements of self-defense. Defendant's testimony indicated that the imminent danger of harm came from the victim pointing a gun at his face. Accordingly, we do not find that it was error for the trial court to exclude this out-of-court statement allegedly made by the victim.

¶ 47 Second Amendment Right to Bear Arms

¶ 48 Defendant's next contention is that the State violated his second amendment right to bear arms when it cross-examined defendant about whether defendant knew that it was illegal to carry a gun in his car, and where the State improperly argued during closing argument that defendant had a general

criminal propensity. During direct examination, defendant testified that he kept a loaded gun in his car for protection. On cross-examination, the following colloquy occurred:

"Q. And it's a revolver, correct?

A. Yes, it is.

Q. And you say you carried it in your car for protection?

A. Yes, I do.

Q. And it's against the law to carry your gun in the car, isn't it?

A. No, it's not."

¶ 49 At this point, defense counsel's objection was overruled. Cross-examination continued:

"Q. And it's against the law to carry a loaded gun on the streets of the City of Chicago when you're driving your car, correct?

A. No.

Q. And you think that you are entitled to just break the law, correct?

A. I never known it was a law."

¶ 50 During closing arguments, the prosecution stated, "Let's just talk about a

couple of things. 'I drove with a loaded gun in my car. I always drive with a loaded gun in my car.' Apparently hedoesn't care about the law, because he can pick and choose the law that he does or does not want to follow * * *."

¶ 51 Defendant contends that he had a constitutional right to carry a loaded gun in his car for protection and that his second amendment right was violated when the State cross-examined him about his possession of a gun, and when it made comments on the legality of carrying a gun during closing arguments. The State responds that defendant's right to bear arms was never infringed upon because he was never charged with or convicted of unlawful use of a weapon. The State maintains that while defendant has a constitutional right to bear arms, this does not extend to a constitutional right not to be questioned about his right to bear arms.

¶ 52 Defendant, relying on *Dawson v. Delaware*, 503 U.S. 159 (1992), argues that his rights were infringed upon despite not being convicted of illegal possession of a gun. In *Dawson*, the Supreme Court held that it the defendant's first and fourteenth

amendment rights were violated by the admission of evidence of defendant's membership in a white racist prison gang because the evidence had no relevance to the issues being decided in the proceeding. Here, however, evidence that defendant carried a gun, which was introduced by defendant himself, was relevant as to why defendant had a loaded gun with him on the day in question. Accordingly, we cannot find a violation of defendant's second amendment right to bear arms in this case.

¶ 53 Jury Instructions on Intent and Knowledge

¶ 54 We next address defendant's argument that the trial court erred in refusing to give IPI Criminal 4th Nos. 5.01A (the definition of intent) and 5.01B (the definition of knowledge). The State maintains that the trial court's ruling was a proper exercise of its discretion.

¶ 55 Jury instructions convey the legal rules applicable to the evidence presented at trial and guide the jury's deliberations toward a proper verdict. *People v. Hudson*, 222 Ill. 2d 392, 399 (2006). It is within the trial court's discretion to determine which issues are

raised by the evidence and whether an instruction should be given. *People v. Mohr*, 228 Ill. 2d 53, 65 (2008). The proper standard of review is whether the trial court abused its discretion. Id. at 66. " 'A trial court abuses its discretion if jury instructions are not clear enough to avoid misleading the jury. ***.' " Id. (quoting *In re Timothy H.*, 301 Ill. App. 3d 1008, 1015 (1998)).

¶ 56 Defendant argues that the jury should have been instructed on the definitions of intent and knowledge because the instructions "were particularly critical here, where [defendant's] defense was that the shooting was an accident which occurred during the course of a struggle over the gun." Generally speaking, however, "a jury need not be instructed on the term knowingly because that term has a plain meaning within the jury's common knowledge." *People v. Sanders*, 368 Ill. App. 3d 533, 537 (2006). Likewise, the jury need not be instructed on the term intentionally because it has a plain meaning within the jury's common knowledge. *People v. Powell*, 159 Ill. App. 3d 1005, 1013 (1987). The trial court only has a duty to instruct the jury further "when

clarification is requested, when the original instructions are insufficient or when the jurors are manifestly confused." *Sanders*,368 Ill. App. 3d at 537.

¶ 57 Defendant does not contend that any clarification was requested by the jury, that the original instructions were insufficient, or that the jury was manifestly confused. Rather, defendant merely states, relying on *People v. Brouder*, 168 Ill. App. 3d 938, 946 (1988), that the definitions of intent and knowledge "should be given in the absence of a jury request." In *Brouder*, the jury sent several written questions to the trial court indicating that it was confused as to the meaning of "knowing resistance." The trial court twice sent back a response telling the jury it had heard all the evidence and had been given instructions, and to continue deliberations. *Brouder*, 168 Ill. App. 3d at 946. The *Brouder* court found that the jury had specifically requested assistance as to the meaning of "knowing resistance" and therefore should have been instructed on "knowingly." The court held that because the jury demonstrated confusion as to the term "knowing resistance," it was error for the trial

court to refuse defense counsel's tendered instruction of "knowingly." Id. at 948.

¶ 58 Here, there is no evidence that the jury requested a definition of either knowingly or intentionally, and there is no evidence that the jury was manifestly confused. Accordingly, we find that the trial court did not abuse its discretion in refusing defense counsel's tendered jury instructions on the definitions of intent and knowledge.

¶ 59 Objection to Witness Questioning

¶ 60 Defendant also contends that the trial court erroneously sustained the State's objection to a question posed by defense counsel to Queen Spencer. At trial, Spencer testified that she heard a conversation between defendant and the victim, but admitted that she did not tell the police about the conversation. Defense counsel suggested on cross-examination that she had not really heard such a conversation. The State objected, and the trial court sustained the objection. Defendant contends that suggesting that Spencer had not really heard the conversation she testified to was proper as it explained, modified, or discredited what she had said on direct examination.

¶ 61 It is true that on cross-examination, the cross-examiner may go beyond the scope of direct examination to impeach a witness, and that the cross-examiner may question the witness about any matter that explains, modifies, or discredits what he or she said on direct examination. *People v. Santamaria*, 165 Ill. App. 3d 381, 388 (1987). However, while leading questions are proper, the cross-examiner "should not inject unsupported insinuations into the questioning process." Id. We find that the trial court did not abuse its discretion in sustaining the State's objection to defense counsel's leading question that injected the unsupported insinuation that Spencer had not actually heard the conversation since she failed to report it to the police.

¶ 62 Voir Dire

¶ 63 Defendant's final contentions on appeal focus on the jury selection process. Defendant contends that the trial court erred by refusing to tender two questions to the venire: whether they had any bias about firearms (and about their familiarity with firearms), and any bias about a man defending himself from a woman. The trial court ruled that it

would not ask these questions, but would read the charges of first degree murder involving the discharge of a firearm and ask whether the charges would affect potential jurors' ability to render a fair and impartial verdict, and whether they or a family member had been a victim of a crime involving a weapon such as the one charged in this case.

¶ 64 The trial court is given the primary responsibility of conducting the voir dire examination, and the extent and scope of the examination rests within its discretion. *People v. Strain*, 194 Ill. 2d 467, 476 (2000). However, the trial court must exercise its discretion in a manner consistent with the purpose of voir dire. Id. As our supreme court observed in *People v. Cloutier*, 156 Ill. 2d 483, 495-96 (1993), "[t]he purpose of voir dire is to ascertain sufficient information about prospective jurors' beliefs and opinions so as to allow removal of those members of the venire whose minds are so closed by bias and prejudice that they cannot apply the law as instructed in accordance with their oath."

¶ 65 We find no abuse of discretion in the trial court's refusal to question the venire concerning their viewpoints on handguns. In

*People v. Howard*, 147 Ill. 2d 103 (1991), the defendant was charged with murder and attempted armed robbery in connection with the shooting death of the victim. The defense counsel requested that the prospective jurors be questioned about their attitudes toward guns. Because the offenses were committed with a handgun, and because of the controversial nature of handgun use, the defendant argued that a special inquiry was warranted. Our supreme court disagreed, finding that defendant's use of a handgun as his weapon in committing the crimes charged "was not a central issue at trial, much less pertinent to any of the forms of verdict." *Howard*, 147 Ill. 2d at 135. Likewise in the case at bar, defendant's use of a handgun was not pertinent to any of the forms of verdict, and was not a central issue in the case. Accordingly, we find that the trial court did not abuse its discretion in its refusal to question the venire on this issue.

¶ 66 Similarly, we find that it was not an abuse of discretion for the trial court to refuse to question the venire about bias regarding a man defending himself against a woman. Our courts have consistently refused to allow voir

dire questions concerning a defendant's theory of self-defense. *People v. Karim*, 367 Ill. App. 3d 67, 91 (2006). The rationale is that "allowing [a] defendant to question the prospective jurors regarding any pre-disposition to a self-defense claim goes to an ultimate question of fact and would serve no purpose other than to improperly attempt to preeducate and indoctrinate the jurors as to defendant's theory of the case." *People v. Skipper*, 177 Ill. App. 3d 684, 688 (1988). Defendant argues, however, that the question had less to do with self-defense than with gender bias. Defendant does not cite to any cases where the venire was properly instructed on gender bias. Rather, defendant argues that "common sense tells us that many jurors might be prejudiced against a man engaged in a struggle with a woman." We find no authority for this proposition and find that the trial court properly exercised its discretion in refusing to question the venire on this issue.

¶ 67 CONCLUSION

¶ 68 For the forgoing reasons, we affirm the judgment of the circuit court of Cook County.

¶ 69 Affirmed.