SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARY

APPENDIX A

Orders and Opinion of United States Court of Appeals

FILED
United States Court of Appeals
Tenth Circuit

March 14, 2022

Christopher M. Wolpert
Clerk of Court

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

RUSSELL MARSHALL BOLES,

Petitioner - Appellant,

v.

JEFF LONG, S.C.F., et al.,

Respondents - Appellees.

No. 21-1238
(D.C. No. 1:20-CV-03204-WJM)
(D. Colo.)

ORDER

Before **HARTZ**, **BALDOCK**, and **MATHESON**, Circuit Judges.

Appellant's petition for rehearing is denied.

The petition for rehearing en banc was transmitted to all of the judges of the court who are in regular active service. As no member of the panel and no judge in regular active service on the court requested that the court be polled, that petition is also denied.

Entered for the Court

CHRISTOPHER M. WOLPERT, Clerk

FILED
United States Court of Appeals
Tenth Circuit

February 3, 2022

Christopher M. Wolpert
Clerk of Court

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

RUSSELL M. BOLES,

Petitioner - Appellant,

v.

JEFF LONG, S.C.F.; PHILLIP WEISER, Attorney General of the State of Colorado,

Respondents - Appellees.

No. 21-1238
(D.C. No. 1:20-CV-03204-WJM)
(D. Colo.)

ORDER DENYING CERTIFICATE OF APPEALABILITY*

Before **HARTZ**, **BALDOCK**, and **MATHESON**, Circuit Judges.

Russell Marshall Boles, a Colorado state prisoner appearing pro se, seeks a certificate of appealability (COA) under 28 U.S.C. § 2253(c)(1)(A) to appeal the district court's denial of his application for habeas relief under 28 U.S.C. § 2254. We deny his request for a COA and dismiss this matter.[1]

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* This order is not binding precedent except under the doctrines of law of the case, res judicata, and collateral estoppel. It may be cited, however, for its persuasive value consistent with Fed. R. App. P. 32.1 and 10th Cir. R. 32.1.

[1] Because Mr. Boles is pro se, we construe his filings liberally, but we do not act as his advocate. *Yang v. Archuleta*, 525 F.3d 925, 927 n.1 (10th Cir. 2008).

I. BACKGROUND

A. *State Court Proceedings*

Mr. Boles was charged with first-degree assault and failure to leave premises, in violation of Colorado law. The Colorado Court of Appeals (CCA) summarized the facts as follows:

> Defendant and the victim both leased separate garage spaces on the same property. Defendant also parked his RV there. On the night of the incident, the victim went to check on an AC unit attached to the garage. Without warning, defendant came up behind the victim and shot him in the leg before retreating into his RV.
>
> When law enforcement arrived, defendant refused to leave the RV, resulting in a nearly five-hour standoff with police and SWAT.

R., Vol. 1 at 95. During the standoff, Mr. Boles communicated with the police by phone and by text message.

Through a portion of his criminal proceedings, Mr. Boles was represented by a public defender and later by private counsel. For the remainder of the proceedings, including during a suppression hearing and at trial, Mr. Boles represented himself.

Mr. Boles challenged the constitutionality of his arrest without a warrant and sought to suppress evidence discovered incident to his arrest. After a hearing, the trial court held that he was not arrested until he left his RV and was taken into custody by the police, who had probable cause to make an arrest. Alternatively, the trial court held that exigent circumstances existed to justify an arrest of Mr. Boles in his RV based upon his shooting of the victim several hours earlier, his retreat to his RV with his gun after the shooting, his refusal to come out, and his communication of suicidal thoughts to the police.

At trial, Mr. Boles's theory of defense was that he shot the victim in self-defense and in defense of his property. A jury convicted him on both counts, and the trial court sentenced him to 24 years in prison.

The CCA affirmed Mr. Boles's convictions. As relevant to his application for a COA, the CCA denied relief on five claims. First, Mr. Boles argued the trial court erred by denying his motion for the appointment of alternate defense counsel based on its finding there was no conflict of interest between Mr. Boles and his appointed public defender. The CCA did not reach the merits of this claim, holding that Mr. Boles failed to provide an adequate record to permit appellate review.

Second, Mr. Boles contended the trial court erred in refusing to give several jury instructions. The CCA concluded there was no error because his requested instructions were not relevant to the charged offenses or were adequately covered in the pattern jury instructions. Mr. Boles also challenged the wording of certain pattern instructions for the first time on appeal. Applying plain error review, the CCA held these instructions accurately tracked the statutory language and correctly stated the law.

Third, Mr. Boles argued the prosecution failed to disclose exculpatory evidence, including security camera footage, text messages, and the victim's alleged false testimony. The CCA rejected this claim. It noted that the prosecution investigated and attempted to preserve the evidence. As to the security camera footage, the CCA concluded:

> Specifically, at trial both owners of the property where the security cameras were placed testified that law enforcement officers reviewed the recordings immediately following the incident. The property owners stated that the

> cameras were pointed away from the incident and that nothing was seen in the recordings. When law enforcement returned to obtain copies of the recordings following defendant's motion to preserve evidence, the recordings had been copied over in compliance with the owners' policies. Furthermore, defendant cross-examined the owners of the property.

Id. at 103. The CCA further held that Mr. Boles's contentions that the prosecutor was required to disclose deals and promises made to the victim and text messages between officers who responded to the incident were conclusory and unsupported by the record.

Fourth, Mr. Boles appealed the trial court's denial of his suppression motion and further argued that the statute underlying his conviction for failure to leave premises was unconstitutional under the Fourth Amendment. The CCA rejected these claims, expressly holding that the statute is not unconstitutional.[2]

Finally, having determined that no errors occurred, the CCA rejected Mr. Boles's assertion of cumulative error.

Following the CCA's affirmance, the Colorado Supreme Court denied review.

B. *Federal District Court Proceedings*

Mr. Boles next filed this action challenging his convictions under § 2254, asserting five claims. The district court applied the standards for habeas relief in § 2254(d), which provides:

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

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[2] The CCA did not discuss the trial court's denial of Mr. Boles's suppression motion. But we presume that it decided that claim on the merits, and Mr. Boles does not contend otherwise. *See Johnson v. Williams*, 568 U.S. 289, 301 (2013) ("When a state court rejects a federal claim without expressly addressing that claim, a federal habeas court must presume that the federal claim was adjudicated on the merits—but that presumption can in some limited circumstances be rebutted.").

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

28 U.S.C. § 2254(d)(1)-(2). The court also presumed that the state courts' factual findings were correct and placed the burden on Mr. Boles to rebut that presumption by clear and convincing evidence. *See id.* § 2254(e)(1). And it considered whether any of Mr. Boles's claims were procedurally defaulted in state court and whether he had overcome the default. *See Jackson v. Shanks*, 143 F.3d 1313, 1317 (10th Cir. 1998) (holding federal courts "do not review issues that have been defaulted in state court on an independent and adequate state procedural ground, unless the default is excused through a showing of cause and actual prejudice or a fundamental miscarriage of justice").

In Claim 1, Mr. Boles alleged a violation of his Sixth Amendment right to counsel. Noting the CCA's rejection of this claim because Mr. Boles had not provided an adequate record, the district court found that he had failed to rebut the presumption that the CCA's factual determination regarding the record was correct. It therefore held that Claim 1 was procedurally defaulted in the CCA. The district court then held that the CCA had applied an independent and adequate state procedural rule in rejecting Mr. Boles's claim and that he failed to demonstrate cause and prejudice or a fundamental miscarriage of justice to overcome the procedural default. It therefore denied relief on Claim 1.[3]

[3] The district court further held, alternatively, that Claim 1 failed on the merits.

In Claim 2, Mr. Boles argued that certain jury instructions violated his right to due process because they prevented the jury from considering relevant evidence and relieved the prosecution of its burden of proving every element of the charged offenses beyond a reasonable doubt. *See Waddington v. Sarausad*, 555 U.S. 179, 190-91 (2009) (stating that to show a due process violation a defendant must show "that the jury applied the instruction in a way that relieved the State of its burden of proving every element of the crime beyond a reasonable doubt"). The CCA had rejected Mr. Boles's jury-instruction claim on the merits, and the district court denied habeas relief because Mr. Boles failed to make the required showing under § 2254(d).

The district court held he had not demonstrated that the CCA's decision was based on an unreasonable determination of the facts in light of the evidence presented. *See* § 2254(d)(2). More specifically, it found that Mr. Boles had failed to overcome the presumption that the CCA correctly determined he had challenged certain jury instructions for the first time on appeal. *See* § 2254(e)(1). The district court also held that Mr. Boles did not identify a Supreme Court decision that would compel a result different from the CCA's adjudication of his jury-instruction claim. *See* § 2254(d)(1). In particular, *Estelle v. McGuire*, 502 U.S. 62, 72 (1991), did not compel a different result because the CCA recognized it must consider the jury instructions as a whole. Moreover, the district court held that Mr. Boles's speculation that the jury may have misapplied the instructions was insufficient to demonstrate a constitutional violation. *See Waddington*, 555 U.S. at 191 ("[I]t is not enough that there is some slight *possibility* that the jury misapplied the instruction." (internal quotation marks omitted)). Thus, the court held that

Mr. Boles had failed to demonstrate a reasonable likelihood that the jury applied any instructions in a way that relieved the prosecution of its burden of proving every element beyond a reasonable doubt. *See id.* at 190-91. It therefore denied relief on Claim 2.

In Claim 3, Mr. Boles contended that the prosecution withheld exculpatory evidence, specifically security camera footage that was not recovered, text messages that were not preserved, and the victim's alleged false testimony. The district court again denied habeas relief because he did not make the required showing under § 2254(d). It found that Mr. Boles had not presented clear and convincing evidence to overcome the presumption that the CCA correctly determined there was no security camera footage of the incident. *See* § 2254(e)(1). The court also held that "he concede[d] there was testimony about the text message conversation and he certainly was aware of the content of the text messages he sent, and he fail[ed] to identify any perjured testimony." R., Vol. 1 at 283. It ultimately determined that Mr. Boles did not demonstrate that the CCA's decision was based on an unreasonable determination of the facts, *see* § 2254(d)(2), or that its adjudication was contrary to or an unreasonable application of *Brady v. Maryland*, 373 U.S. 83 (1963), *see* § 2254(d)(1).[4] Accordingly, the district court denied relief on Claim 3.

[4] The district court acknowledged Mr. Boles's contention "that the trial court improperly limited the evidence he could introduce and his cross-examination of the victim, which allegedly prevented him from presenting his theory of defense." R., Vol. 1 at 283. But it held these arguments—asserting that Mr. Boles was prevented from disclosing evidence to the jury—failed to support his claim under *Brady* that the prosecution did not disclose exculpatory evidence to the defense.

In Claim 4, Mr. Boles contended that his Fourth Amendment rights were violated when he was arrested without a warrant and that the trial court should have suppressed the evidence obtained as a result of his illegal seizure. He specifically challenged the trial court's determination that he was not arrested before he exited his RV following the nearly five-hour standoff. The district court held this claim was barred by *Stone v. Powell*, 428 U.S. 465 (1976), because Mr. Boles failed to show he did not have a full and fair opportunity to litigate his Fourth Amendment claim in the state court proceedings. The court noted that "Mr. Boles raised the Fourth Amendment claim in a motion to suppress, the trial court held a hearing on the motion to suppress, and he raised a claim on appeal challenging the warrantless arrest." R., Vol. 1 at 285.

The court further held that Mr. Boles did not demonstrate that the state courts failed to make a colorable application of the correct Fourth Amendment standards. It concluded that Mr. Boles's argument amounted instead to a substantive disagreement with the state courts' resolution of Claim 4, which was insufficient to overcome the bar to review in *Stone*. *See Matthews v. Workman*, 577 F.3d 1175, 1194 (10th Cir. 2009) (noting question was not whether the state "misapplied Fourth Amendment doctrine" but "whether [the applicant] had a full and fair opportunity to present his Fourth Amendment claims in state court"). The district court therefore denied relief on Claim 4.

Finally, on Claim 5, the district court rejected Mr. Boles's cumulative-error argument because it did not find two or more constitutional errors warranting that analysis, and Mr. Boles failed to demonstrate that the CCA's rejection of that claim was contrary to or an unreasonable application of clearly established federal law.

The district court thus held that Mr. Boles was not entitled to relief on any of his claims and dismissed his habeas application under § 2254 with prejudice. The court also denied a COA.

II. DISCUSSION

A. *COA Standard*

Mr. Boles must obtain a COA for this court to review the district court's denial of his § 2254 application. *See* 28 U.S.C. § 2253(c)(1)(A). To receive a COA, the petitioner must make "a substantial showing of the denial of a constitutional right," *id.* § 2253(c)(2), and must show "that reasonable jurists could debate whether . . . the petition should have been resolved in a different manner or that the issues presented were adequate to deserve encouragement to proceed further," *Slack v. McDaniel*, 529 U.S. 473, 484 (2000) (internal quotation marks omitted). More specifically, where the district court denied his claims on the merits, Mr. Boles "must demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong." *Slack*, 529 U.S. at 484. But where the district court denied a claim on procedural grounds without reaching the underlying constitutional claim, Mr. Boles must demonstrate "that jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right *and* . . . whether the district court was correct in its procedural ruling." *Id.* (emphasis added).

B. *Analysis of COA Application*

Mr. Boles is not entitled to a COA because reasonable jurists would not debate whether the district court correctly decided the issues he seeks to appeal.

1. **Claims Denied on Procedural Grounds**

The district court denied relief on Claims 1 and 4 on procedural grounds without reaching the merits. Mr. Boles seeks a COA to appeal these rulings.

a. *Claim 1 – Denial of Alternate Defense Counsel*

Mr. Boles argued in Claim 1, as he did in his direct appeal to the CCA, that the trial court erred by denying his motion for the appointment of alternate defense counsel based on its finding there was no conflict of interest between Mr. Boles and his appointed public defender.[5] The district court held that Claim 1 was procedurally defaulted in the CCA and Mr. Boles did not overcome the default. *See Jackson*, 143 F.3d at 1317.

Mr. Boles argues that Claim 1 cannot be procedurally defaulted, but the cases he cites are inapposite.[6] He also contends that the district court erred by presuming the correctness of the CCA's factual finding that the record on appeal was inadequate.

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[5] In his COA Application, Mr. Boles also makes assertions regarding the trial court's bias and interference. In the district court, the State read similar assertions in Mr. Boles's habeas application as support for his claim that he was denied his right to counsel, not as a separate claim. *See* R., Vol. 1 at 38 n.3 (noting such a separate claim would be procedurally defaulted because Mr. Boles did not raise it in his direct appeal). Mr. Boles did not contest the State's characterization of Claim 1 in the district court, and the district court ruled only on his denial-of-counsel claim. We understand and consider Claim 1 consistent with the district court's construction.

[6] Mr. Boles cites several Tenth Circuit cases holding that the failure to bring an ineffective-assistance-of-counsel claim on direct appeal does not result in a procedural bar. *See, e.g.*, *United States v. Galloway*, 56 F.3d 1239, 1241 (10th Cir. 1995). But the district court held that the right-to-counsel claim he asserted in Claim 1 was procedurally defaulted not because Mr. Boles failed to raise it in his direct appeal but because the CCA applied a procedural rule in declining to decide the merits of that claim.

But that presumption is codified in § 2254(e)(1).[7] Finally, Mr. Boles asserts, contrary to the CCA's finding, that he did supply an adequate record on appeal, and he maintains that the CCA did not read the entire record. As the district court found, however, this contention fails to show there is clear and convincing evidence to overcome the statutory presumption in § 2254(e)(1).[8] We deny a COA on Claim 1 because the district court's procedural ruling on this claim is not debatable by reasonable jurists.

b. *Claim 4 – Denial of Motion to Suppress Evidence Based on Illegal Arrest*

In Claim 4, Mr. Boles challenged the trial court's denial of his motion to suppress evidence seized as a result of his warrantless arrest. The district held that its consideration of the merits of this claim was barred by *Stone v. Powell*, in which the Supreme Court held "that where the State has provided an opportunity for full and fair litigation of a Fourth Amendment claim, the Constitution does not require that a state prisoner be granted federal habeas corpus relief on the ground that evidence obtained in an unconstitutional search or seizure was introduced at his trial," 428 U.S. at 481-82.

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[7] The case Mr. Boles cites addressed an entirely different presumption. *See Ylst v. Nunnemaker*, 501 U.S. 797, 803 (1991) ("[W]here . . . the last reasoned opinion on the claim [by a state court] explicitly imposes a procedural default, we will presume that a later decision rejecting the claim did not silently disregard that bar and consider the merits."). In Mr. Boles's case, the *Ylst* presumption supports the district court's application of procedural default as to Claim 1 because the CCA imposed a procedural default and the Colorado Supreme Court denied review without comment.

[8] Mr. Boles's remaining contentions regarding Claim 1 merit little discussion. To the extent he addresses the requirements for an "independent" procedural rule, he fails to develop an argument why the rule applied by the CCA does not meet that standard. And his arguments challenging the substance of the trial court's no-conflict-of-interest ruling and asserting the trial court's alleged bias and interference do not address the district court's procedural-bar holding or show that holding is debatable.

As he did in the district court, Mr. Boles contests the state courts' substantive rulings on this claim, rather than the district court's bases for applying the *Stone* bar. *See Matthews*, 577 F.3d at 1194. And the cases he cites do not demonstrate that the state courts failed to recognize and make at least a colorable application of correct Fourth Amendment constitutional standards. *See Gamble v. Oklahoma*, 583 F.2d 1161, 1165 (10th Cir. 1978). We deny a COA because Mr. Boles fails to show that reasonable jurists would debate the district court's application of the *Stone* bar as to Claim 4.

2. **Claims Denied on the Merits**

The district court denied Claims 2, 3, and 5 on the merits. Mr. Boles seeks a COA to appeal those rulings.

a. *Claim 2 – Due Process Claim Regarding Jury Instructions*

In Claim 2, Mr. Boles asserted that certain jury instructions violated his right to due process because they relieved the prosecution of its burden of proving every element of the charged offenses beyond a reasonable doubt. *See Waddington*, 555 U.S. at 190-91. The CCA had rejected the relevant portion of his jury-instruction claim because the pattern instructions he challenged accurately tracked the statutory language and correctly stated the law. The district court held that Mr. Boles failed to demonstrate that the CCA's adjudication of this claim was either contrary to or an unreasonable application of clearly established Supreme Court law, or was based on an unreasonable determination of the facts. *See* § 2254(d). In particular, aside from speculation, Mr. Boles failed to demonstrate a reasonable likelihood that the jury applied any instruction in a way that

relieved the prosecution of its burden of proving every element beyond a reasonable doubt.

Mr. Boles argues that some of the pattern jury instructions did not correctly set forth state law. But the CCA held otherwise, and "it is not the province of a federal habeas court to reexamine state-court determinations on state-law questions," *Waddington*, 555 U.S. at 832 n.5 (internal quotation marks omitted).[9] Although Mr. Boles cites numerous cases, he fails to show that the CCA's adjudication of this claim is contrary to or unreasonably applied any Supreme Court decision. A few examples illustrate this point.

Mr. Boles relies on *Darden v. Wainwright*, 477 U.S. 168 (1986), in which the Supreme Court rejected a habeas claim asserting that the prosecutor's closing argument rendered a conviction fundamentally unfair, *see id.* at 178-79, 181. But he does not explain how the CCA's adjudication of his jury-instruction claim is contrary to or an unreasonable application of this holding in *Darden*. Citing *Francis v. Franklin*, 471 U.S. 307 (1985), Mr. Boles argues that due process prohibits the state from using evidentiary presumptions in a jury charge that relieve the state of the burden of persuasion beyond a

[9] We note that, contrary to Mr. Boles's assertions, the jury instruction on the elements of first-degree assault required a finding of specific intent. *See* R., Vol. 2 (Court File) at 430 (listing elements of first-degree assault as including "intent . . . to cause serious bodily injury to another person"). And the self-defense instruction did indicate who had the burden of proof. *See id.* at 434 (stating that the prosecution bore "the burden to prove, beyond a reasonable doubt, that the defendant's conduct was not legally authorized by [that] defense").

reasonable doubt, *see id.* at 313. But he fails to point to such an evidentiary presumption in the jury instructions given at his trial.

Mr. Boles also cites several Supreme Court cases for the proposition that the wording of the reasonable-doubt instruction given at his trial violated due process. But none of these cases held that an instruction the same as or even similar to the Colorado pattern reasonable-doubt instruction violated due process. And it was Mr. Boles's burden to show that the CCA's application of governing federal law was "not only erroneous, but objectively unreasonable." *Waddington*, 555 U.S. at 190 (internal quotation marks omitted).[10]

We deny a COA because Mr. Boles fails to show that reasonable jurists would find the district court's application of § 2254(d) as to Claim 2 debatable or wrong.

b. *Claim 3 – Brady Violation*

In Claim 3, Mr. Boles contended that the prosecution failed to disclose exculpatory evidence consisting of security camera footage, text messages, and the victim's allegedly false testimony. Under *Brady*, "the suppression by the prosecution of evidence favorable to an accused . . . violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." 373 U.S. at 87. The knowing use of perjured testimony can also be categorized as a *Brady* violation. *See Douglas v. Workman*, 560 F.3d 1156, 1172

[10] Mr. Boles also contends the district court's decision rests on "misplaced harmless error analysis," COA Appl. at 16, but the district court's ruling on Claim 2 was not based upon a harmless-error analysis.

(10th Cir. 2009). The CCA rejected Mr. Boles's *Brady* claim on the merits. The district court denied relief on Claim 3, noting the lack of material security camera footage, the trial testimony about the text message conversation between Mr. Boles and the police, and Mr. Boles's failure to identify any perjured testimony. It held that Mr. Boles failed to demonstrate that the CCA's adjudication of this claim was either contrary to or an unreasonable application of clearly established federal law, or was based on an unreasonable determination of the facts. *See* § 2254(d).

Mr. Boles continues to challenge the CCA's determination there was no security camera footage of the incident, but his contentions about other video cameras do not amount to clear and convincing evidence overcoming the presumption that the CCA's factual finding was correct. *See* § 2254(e)(1). Mr. Boles's assertion that the missing texts "would have co[rr]oborated or disputed" the prosecution's version of the text exchange, COA Appl. at 22, does not show that any material evidence was withheld. And he still does not identify any perjured testimony. We deny a COA because Mr. Boles fails to show that reasonable jurists would find the district court's application of § 2254(d) as to Claim 3 debatable or wrong.

c. *Claim 5 – Cumulative Error*

Mr. Boles asserted cumulative error in Claim 5. The CCA rejected this claim because it found no errors occurred. The district court denied relief because it did not find two or more constitutional errors and Mr. Boles failed to demonstrate that the CCA's rejection of Claim 5 was contrary to or an unreasonable application of clearly established

federal law. We deny a COA because Mr. Boles fails to show that reasonable jurists would debate the district court's ruling on Claim 5.[11]

III. CONCLUSION

Mr. Boles has failed to show that reasonable jurists would find the district court's assessment of his § 2254 application debatable or wrong. We therefore deny his application for a COA and dismiss this matter.

Entered for the Court

Scott M. Matheson, Jr.
Circuit Judge

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[11] Mr. Boles also seeks review of the district court's denial of his motion for expanded access to online legal research in the prison library. He mailed this motion on March 8, 2021, shortly before the State responded to his habeas application on March 16. The State opposed Mr. Boles's motion, asserting that the time allotted for use of the prison library was reasonable but stating it would not oppose a request by Mr. Boles for an extension of time to file his reply. The district court denied Mr. Boles's motion and denied reconsideration, but on April 21 it granted his subsequent motion for an extension of time, giving him until May 21, 2021, to file his reply. Mr. Boles mailed his reply on April 21, apparently before receiving the court's order granting his requested extension. He did not thereafter seek leave to supplement his reply within the additional time allowed by the district court.

On these facts, Mr. Boles is not entitled to a COA on this issue because reasonable jurists would not debate the district court's procedural rulings in denying Mr. Boles's motion for expanded access to online legal research while granting his requested extension of time. Further, even if a COA were not required, *see Harbison v. Bell*, 556 U.S. 180, 183 (2009), the foregoing discussion shows no error occurred.

SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARY

APPENDIX B

Orders and Opinions of the United States District Court

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
Honorable William J. Martínez

Civil Action No. 20-cv-3204-WJM

RUSSELL M. BOLES,

Applicant,

v.

JEFF LONG, S.C.F., and
PHILLIP WEISER, Attorney General of the State of Colorado,

Respondents.

ORDER ON APPLICATION FOR WRIT OF HABEAS CORPUS

Applicant, Russell M. Boles, is a prisoner in the custody of the Colorado Department of Corrections. Mr. Boles has filed *pro se* an Application for a Writ of Habeas Corpus Pursuant to 28 U.S.C. § 2254 (ECF No. 1) (the "Application") challenging the validity of his conviction and sentence in Jefferson County District Court case number 2015CR2447. Respondents have filed an Answer (ECF No. 24) and Mr. Boles has filed a Reply (ECF No. 31).

After reviewing the record, including the Application, the Answer, the Reply, and the state court record, the Court concludes Mr. Boles is not entitled to relief.

I. FACTUAL AND PROCEDURAL BACKGROUND

The Colorado Court of Appeals on direct appeal summarized the background of Mr. Boles' case as follows:

> Defendant and the victim both leased separate garage spaces on the same property. Defendant also parked his RV there. On the night of the incident, the victim went to

> check on an AC unit attached to the garage. Without warning, defendant came up behind the victim and shot him in the leg before retreating into his RV.
>
> When law enforcement arrived, defendant refused to leave the RV, resulting in a nearly five-hour standoff with police and SWAT.
>
> The prosecution charged defendant with first degree assault and failure to leave premises under section 18-9-119, C.R.S. 2018.
>
> At trial, defendant represented himself and chose not to testify after the trial court advised him that if he chose to testify, the prosecution could cross-examine him on prior felony convictions.
>
> Defendant's theory of defense was that he shot the victim in self-defense and in defense of his property. In attempting to prove his theory, defendant sought to introduce evidence of the victim's prior misdemeanor convictions. He also requested that security camera recordings in the area be preserved. No such recordings were available at trial.

(ECF No. 9-3 at pp.2-3.) Mr. Boles was convicted as charged and sentenced to twenty-four years in prison. The judgment of conviction was affirmed on appeal. (*See id.*) On November 4, 2019, the Colorado Court of Appeals denied Mr. Boles' petition for writ of certiorari. (*See* ECF No. 9-4.)

Mr. Boles asserts five claims in the Application. He contends in claim one that his Sixth Amendment right to counsel was violated because the trial court forced him to represent himself and then interfered with his ability to do so. Claim two is a due process claim in which Mr. Boles challenges certain jury instructions. Mr. Boles contends in claim three that the prosecution failed to disclose exculpatory evidence in violation of *Brady v. Maryland*, 373 U.S. 83 (1963). He contends in claim four that his

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Fourth Amendment rights were violated when he was arrested without a warrant. Finally, claim five is a cumulative error claim. Additional facts pertinent to each claim are set forth below.

II. STANDARDS OF REVIEW

The Court must construe the Application and other papers filed by Mr. Boles liberally because he is not represented by an attorney. *See Haines v. Kerner*, 404 U.S. 519, 520-21 (1972); *Hall v. Bellmon*, 935 F.2d 1106, 1110 (10th Cir. 1991). However, the Court should not be an advocate for a *pro se* litigant. *See* Hall, 935 F.2d at 1110.

Title 28 U.S.C. § 2254(d) provides that a writ of habeas corpus may not be issued with respect to any claim that was adjudicated on the merits in state court unless the state court adjudication:

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

28 U.S.C. § 2254(d). Mr. Boles bears the burden of proof under § 2254(d). *See Cullen v. Pinholster*, 563 U.S. 170, 181 (2011).

The Court's inquiry is straightforward "when the last state court to decide a prisoner's federal claim explains its decision on the merits in a reasoned opinion." *Wilson v. Sellers*, 138 S. Ct. 1188, 1192 (2018). "In that case, a federal habeas court simply reviews the specific reasons given by the state court and defers to those reasons if they are reasonable." *Id.* When the last state court decision on the merits "does not

come accompanied with those reasons, . . . the federal court should 'look through' the unexplained decision to the last related state-court decision that does provide a relevant rationale [and] presume that the unexplained decision adopted the same reasoning." *Id.* The presumption may be rebutted "by showing that the unexplained affirmance relied or most likely did rely on different grounds than the lower state court's decision, such as alternative grounds for affirmance that were briefed or argued to the state supreme court or obvious in the record it reviewed." *Id.*

The threshold question the Court must answer under § 2254(d)(1) is whether Mr. Boles seeks to apply a rule of law that was clearly established by the Supreme Court at the time the state court adjudicated the claim on its merits. *Greene v. Fisher*, 565 U.S. 34, 38 (2011). Clearly established federal law "refers 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, 412 (2000). Furthermore,

> clearly established law consists of Supreme Court holdings in cases where the facts are at least closely-related or similar to the case *sub judice*. Although the legal rule at issue need not have had its genesis in the closely-related or similar factual context, the Supreme Court must have expressly extended the legal rule to that context.

House v. Hatch, 527 F.3d 1010, 1016 (10th Cir. 2008). If there is no clearly established federal law, that is the end of the Court's inquiry pursuant to § 2254(d)(1). *See id.* at 1018.

If a clearly established rule of federal law is implicated, the Court must determine whether the state court's decision was contrary to or an unreasonable application of that

clearly established rule of federal law. *See Williams*, 529 U.S. at 404-05.

> A state-court decision is contrary to clearly established federal law if: (a) "the state court applies a rule that contradicts the governing law set forth in Supreme Court cases"; or (b) "the state court confronts a set of facts that are materially indistinguishable from a decision of the Supreme Court and nevertheless arrives at a result different from [that] precedent." *Maynard* [*v. Boone*], 468 F.3d [665,] 669 [(10th Cir. 2006)] (internal quotation marks and brackets omitted) (quoting *Williams*, 529 U.S. at 405, 120 S. Ct. 1495). "The word 'contrary' is commonly understood to mean 'diametrically different,' 'opposite in character or nature,' or 'mutually opposed.'" *Williams*, 529 U.S. at 405, 120 S. Ct. 1495 (citation omitted).
>
> A state court decision involves an unreasonable application of clearly established federal law when it identifies the correct governing legal rule from Supreme Court cases, but unreasonably applies it to the facts. *Id.* at 407-08, 120 S. Ct. 1495.

House, 527 F.3d at 1018.

The Court's inquiry pursuant to the "unreasonable application" clause is an objective inquiry. *See Williams*, 529 U.S. at 409-10. "[A] federal habeas court may not issue the writ simply because that court 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.* at 411. A decision is objectively unreasonable "only if all fairminded jurists would agree that the state court got it wrong." *Stouffer v. Trammel*, 738 F.3d 1205, 1221 (10th Cir. 2013) (internal quotation marks omitted). Furthermore,

> [E]valuating whether a rule application was unreasonable requires considering the rule's specificity. The more general the rule, the more leeway courts have in reaching outcomes

> in case-by-case determinations. [I]t is not an unreasonable application of clearly established Federal law for a state court to decline to apply a specific legal rule that has not been squarely established by [the Supreme] Court.

Harrington v. Richter, 562 U.S. 86, 101 (2011) (internal quotation marks and citation omitted, brackets in original). In conducting this analysis, the Court "must determine what arguments or theories supported or . . . could have supported[] the state court's decision" and then "ask whether it is possible fairminded jurists could disagree that those arguments or theories are inconsistent with the holding in a prior decision of [the Supreme] Court." *Id.* at 102. In addition, "review under § 2254(d)(1) is limited to the record that was before the state court that adjudicated the claim on the merits." *Cullen*, 563 U.S. at 181.

Under this standard, "only the most serious misapplications of Supreme Court precedent will be a basis for relief under § 2254." *Maynard*, 468 F.3d at 671; *see also Richter*, 562 U.S. at 102 (stating "that even a strong case for relief does not mean the state court's contrary conclusion was unreasonable").

> As a condition for obtaining habeas corpus from a federal court, a state prisoner must show that the state court's ruling on the claim being presented in federal court was so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement.

Richter, 562 U.S. at 103.

Section 2254(d)(2) allows the Court to grant a writ of habeas corpus only if the relevant state court decision was based on an unreasonable determination of the facts in light of the evidence presented to the state court. Pursuant to § 2254(e)(1), the Court

presumes the state court's factual determinations are correct and Mr. Boles bears the burden of rebutting the presumption by clear and convincing evidence. The presumption of correctness applies to factual findings of the trial court as well as state appellate courts. *See Al-Yousif v. Trani*, 779 F.3d 1173, 1181 (10th Cir. 2015). The presumption of correctness also applies to implicit factual findings. *See Ellis v. Raemisch*, 872 F.3d 1064, 1071 n.2 (10th Cir. 2017).

Finally, the Court's analysis is not complete even if Mr. Boles demonstrates the state court decision is contrary to or an unreasonable application of clearly established federal law or was based on an unreasonable determination of the facts in light of the evidence presented. *See Harmon v. Sharp*, 936 F.3d 1044, 1056 (10th Cir. 2019), *cert. denied*, 141 S. Ct. 294 (2020). If the requisite showing under § 2254(d) is made, the Court must consider the merits of the constitutional claim *de novo*. *See id.* at 1056-57.

If a claim was not adjudicated on the merits in state court, and if the claim also is not procedurally barred, the Court must review the claim *de novo* and the deferential standards of § 2254(d) do not apply. *See id.* at 1057. However, even if a claim is not adjudicated on the merits in state court, the Court still must presume the state court's factual findings pertinent to the claim are correct under § 2254(e). *See id.*

III. MERITS OF APPLICANT'S CLAIMS

A. Claim One

Mr. Boles contends in claim one that his Sixth Amendment right to counsel was violated because the trial court forced him to represent himself and then interfered with his ability to do so. Mr. Boles alleges he was forced to represent himself because the

trial court determined there was no conflict of interest with his public defender and refused to appoint a new public defender or alternate defense counsel even though his relationship with his public defender was "contemptuous" and they could not get along with each other. Mr. Boles specifically alleges his public defender refused to request video evidence, investigate the scene, interview witnesses, share discovery, or allow him to participate in his defense. Mr. Boles also alleges that, after he opted to represent himself, the trial court interfered with his ability to do so by: excluding "antecedent intrinsic evidence" that provided context and explained his actions on the night in question in support of his self-defense theory; refusing to grant a continuance or do anything about jail conditions that deprived him of food, adequate medical care, and legal materials; forcing him to take medication that left him in a "mental fog"; constructively blocking him from participating in selecting jury instructions; and refusing to approve sufficient funds for his investigator.

Mr. Boles raised a Sixth Amendment claim on direct appeal. The Colorado Court of Appeals rejected the claim because Mr. Boles failed to provide an adequate record. The state court explained as follows:

> Defendant next argues that the trial court erred by finding that there was no conflict of interest with the public defender requiring appointment of alternate defense counsel, and, as a result, he was erroneously denied counsel.
>
> The defendant bears the burden of providing the reviewing court with an adequate record that sets forth his or her appellate claims' factual underpinnings. *See People v. Rodriguez*, 914 P.2d 230, 260 (Colo. 1996).

> Here, however, defendant has not provided a complete trial record to permit our review of the trial court's determination that no conflict of interest existed. Absent an adequate record, we presume the trial court's findings and conclusions are correct and will not disturb them on review. *Till v. People*, 196 Colo. 126, 127, 581 P.2d 299, 299 (1978).

(ECF No. 9-3 at pp.14-15 (footnote omitted).)

Respondents argue claim one is defaulted because Mr. Boles failed to comply with an independent and adequate state procedural rule requiring him to provide an adequate record on appeal. Mr. Boles counters that he requested and ordered all relevant transcripts. However, the Court presumes the state court's factual finding regarding the completeness of the trial record is correct and Mr. Boles fails to rebut that presumption with clear and convincing evidence otherwise. *See* 28 U.S.C. § 2254(e)(1). Therefore, the Court agrees with Respondents that claim one is procedurally defaulted.

Federal courts "do not review issues that have been defaulted in state court on an independent and adequate state procedural ground, unless the default is excused through a showing of cause and actual prejudice or a fundamental miscarriage of justice." *Jackson v. Shanks*, 143 F.3d 1313, 1317 (10th Cir. 1998). "A state procedural ground is independent if it relies on state law, rather than federal law, as the basis for the decision." *English v. Cody*, 146 F.3d 1257, 1259 (10th Cir. 1998). A state procedural ground is adequate if it "was firmly established and regularly followed." *Beard v. Kindler*, 558 U.S. 53, 60 (2009) (internal quotation marks omitted).

Mr. Boles bears the burden of demonstrating the rule identified by the Colorado Court of Appeals is not an independent and adequate state procedural rule. *See*

Fairchild v. Workman, 579 F.3d 1134, 1143 (10th Cir. 2009). He fails to do so. It is clear that the rule relies on Colorado state law. The rule also is firmly established and regularly followed by Colorado's appellate courts. *See People v. Ullery,* 984 P.2d 586, 591 (Colo. 1999); *People v. Wells,* 776 P.2d 386, 390 (Colo. 1989); *People v. Velarde*, 616 P.2d 104, 105 (Colo. 1980); *Till v. People*, 581 P.2d 299, 300 (Colo. 1978); *People v. Duran*, 382 P.3d 1237, 1239 (Colo. App. 2015); *In re Marriage of Rivera*, 91 P.3d 464, 466 (Colo. App. 2004). Therefore, the Sixth Amendment claim is procedurally defaulted and cannot be considered unless Mr. Boles demonstrates either cause and prejudice or a fundamental miscarriage of justice. *See Jackson*, 143 F.3d at 1317. Mr. Boles' *pro se* status does not exempt him from the requirement of demonstrating either cause and prejudice or a fundamental miscarriage of justice to overcome the procedural default. *See Lepiscopo v. Tansy*, 38 F.3d 1128, 1130 (10th Cir. 1994).

To demonstrate cause for his procedural default, Mr. Boles must show that some objective factor external to the defense impeded his ability to comply with the state's procedural rule. *See Murray v. Carrier*, 477 U.S. 478, 488 (1986). "Objective factors that constitute cause include interference by officials that makes compliance with the State's procedural rule impracticable, and a showing that the factual or legal basis for a claim was not reasonably available to [applicant]." *McCleskey v. Zant*, 499 U.S. 467, 493-94 (1991) (internal quotation marks omitted). If Mr. Boles can demonstrate cause, he also must show "actual prejudice as a result of the alleged violation of federal law." *Coleman v. Thompson*, 501 U.S. 722, 750 (1991).

Mr. Boles contends he can overcome the procedural default of claim one

because the trial court interfered with his ability to provide an adequate record. According to Mr. Boles:

> When I notified the trial court of my appeal, Judge Tighe sent me a letter saying I should limit the amount of record I requested to what was essential because the clerk-reporter that worked through 99% of my hearings and trial had abruptly quit, moved to another state, and was not interested in doing my transcripts. The letter said a reporter from another division was solicited to make my transcripts in her spare time. So if I requested very much, it would take a very long time to get them. As it was it took three 90 day extensions of time to get just what I requested. This semi-suppression of information could be considered a contributing factor to default.
>
> Another contributing factor was the Appeals Court itself. If they had read the record I provided the[y] would not have made the ruling they did. Part of it was in a hearing for an Alternate Defense Counsel I had requested. The part about Judge Tighe's interference is laced throughout the record. The[y] did not read it. They simply recapitulated the State Attorney's view. So you have cause and prejudice.

(ECF No. 11 at p.6.)

Mr. Boles' allegation that the trial judge advised him to limit the record on appeal to only what was essential does not demonstrate interference by a state official that made compliance with the procedural rule impracticable. Mr. Boles does not demonstrate or even allege that he was directed not to request the transcripts necessary to permit review of his Sixth Amendment claim or that he was prevented from requesting and providing those transcripts. He alleges only that the trial judge suggested he limit his request to the essential transcripts and Mr. Boles failed to do so. His concern over the time required to prepare the record also does not demonstrate

compliance with the procedural rule was impracticable. Finally, Mr. Boles' assertion that the Sixth Amendment violation should have been apparent to the state appellate court based on the record he provided also does not demonstrate cause for the procedural default.

Mr. Boles also fails to demonstrate the existence of a fundamental miscarriage of justice. A fundamental miscarriage of justice occurs when "a constitutional violation has probably resulted in the conviction of one who is actually innocent." *Murray*, 477 U.S. at 496. A credible claim of actual innocence requires Mr. Boles "to support his allegations of constitutional error with new reliable evidence--whether it be exculpatory scientific evidence, trustworthy eyewitness accounts, or critical physical evidence--that was not presented at trial." *Schlup v. Delo*, 513 U.S. 298, 324 (1995). Mr. Boles then "must establish that, in light of new evidence, 'it is more likely than not that no reasonable juror would have found petitioner guilty beyond a reasonable doubt.'" *House v. Bell*, 547 U.S. 518, 536-37 (2006) (quoting *Schlup*, 513 U.S. at 327)). "The *Schlup* standard is demanding and permits review only in the extraordinary case." *Id.* at 538 (internal quotation marks omitted). Mr. Boles does not present any new evidence to support an actual innocence argument.

For these reasons, the Court concludes claim one is procedurally barred.

Claim one also fails on the merits. The Sixth Amendment to the United States Constitution provides that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence." The right to counsel includes not only the right to retain counsel, but also the right of an indigent defendant

to have counsel appointed for him at state expense. *Gideon v. Wainwright*, 372 U.S. 335 (1963). With respect to the issue of substitute counsel, a criminal defendant has a constitutional right to representation by counsel that is free from conflicts of interest. *See Cuyler v. Sullivan*, 446 U.S. 335, 348 (1980).

The Supreme Court has recognized at least the possibility of a conflict of interest between a criminal defendant and his or her attorney in various circumstances. *See, e.g.*, *Mickens v. Taylor*, 535 U.S. 162, 164-65 (2002) (recognizing a "potential conflict of interest" when appointed counsel previously represented the murder victim in a separate case); *Wood v. Georgia*, 450 U.S. 261, 270-72 (1981) (suggesting strong "possibility of a conflict of interest " when defendants were represented by a lawyer hired by their employer); *Cuyler*, 446 U.S. at 348 ("Since a possible conflict inheres in almost every instance of multiple representation, a defendant who objects to multiple representation must have the opportunity to show that potential conflicts impermissibly imperil his right to a fair trial.") However, there is no Sixth Amendment right to substitute counsel in the absence of an actual conflict of interest. *See Plumlee v. Masto*, 512 F.3d 1204, 1211 (9th Cir. 2008) ("Plumlee has cited no Supreme Court case – and we are not aware of any – that stands for the proposition that the Sixth Amendment is violated when a defendant is represented by a lawyer free of actual conflicts of interest, but with whom the defendant refuses to cooperate because of dislike or distrust.").

Mr. Boles fails to demonstrate an actual conflict of interest with his public defender that required appointment of substitute counsel. The Supreme Court has made it clear that the Sixth Amendment does not guarantee "a 'meaningful relationship'

between an accused and his counsel." *Morris v. Slappy*, 461 U.S. 1, 14 (1983). Mr. Boles' specific allegations that his public defender refused to request video evidence, investigate the scene, interview witnesses, share discovery, or allow him to participate in his defense demonstrate only that he disagreed with his public defender about defense strategy. But a disagreement with counsel about defense strategy does not require substitution of counsel. *See United States v. Lott*, 310 F.3d 1231, 1249 (10th Cir. 2002).

To the extent Mr. Boles also is challenging the voluntariness of his waiver of counsel by arguing he was effectively compelled to proceed *pro se*, he again fails to demonstrate he is entitled to relief. A defendant in a criminal proceeding has a constitutional right to waive his right to counsel and to represent himself. *Faretta v. California*, 422 U.S. 806, 819-20 (1975). A waiver may take the form of an express statement relinquishing the right to counsel or, under certain circumstances, a waiver can be implied from the facts of the case. *See North Carolina v. Butler*, 441 U.S. 369 (1979). In order to be effective, a waiver of counsel must be knowing, voluntary, and intelligent. *See Iowa v. Tovar*, 541 U.S. 77, 88 (2004).

Whether a waiver is knowing, voluntary, and intelligent "depends in each case upon the particular facts and circumstances surrounding that case, including the background, experience, and conduct of the accused." *Edwards v. Arizona*, 451 U.S. 477, 482 (1981) (internal quotation marks omitted). In the context of a criminal proceeding that goes to trial, warnings regarding the pitfalls of proceeding without counsel must be rigorously conveyed. *See Patterson v. Illinois*, 487 U.S. 285, 299

(1988). Mr. Boles bears the burden of proving that he did not competently and intelligently waive his right to the assistance of counsel. *See Tovar*, 541 U.S. at 92.

The Court's review of the state court record demonstrates Mr. Boles made a knowing, voluntary, and intelligent waiver of his right to counsel. He requested to proceed *pro se* after the trial court determined there was no conflict with the public defender, he was questioned extensively about his desire to proceed *pro se*, he was thoroughly warned about the potential pitfalls of proceeding without counsel, and the trial court determined his waiver was knowing, voluntary, and intelligent. The issue of proceeding *pro se* arose again after private counsel hired by Mr. Boles moved to withdraw and he again waived his right to be represented by counsel. Therefore, any claim that Mr. Boles may be asserting challenging his waiver of counsel lacks merit.

Finally, Mr. Boles fails to demonstrate he is entitled to relief with respect to his vague and conclusory allegations that the trial court interfered with his ability to represent himself. For example, Mr. Boles fails to allege specific facts regarding the conditions of his pretrial confinement and how those conditions actually prejudiced his ability to prepare a defense. Similarly, although Mr. Boles alleges the trial court would not approve sufficient funds for his investigator, he does not allege what additional funds would have accomplished, referring instead only to "evidence he might have discovered." (ECF No. 31 at p.28.) Mr. Boles' allegations about evidentiary rulings also do not demonstrate unconstitutional interference with his ability to represent himself.

For these reasons, the Court finds that Mr. Boles is not entitled to relief with respect to claim one.

B. Claim Two

Claim two is a due process claim in which Mr. Boles challenges certain jury instructions. He specifically references the instructions on reasonable doubt, specific intent, and self-defense, although he does not explain clearly in the Application why he believes the instructions were defective. In his Reply Mr. Boles argues the jury instructions prevented the jury from considering relevant evidence and relieved the prosecution from their burden of proving every element of the crimes charged beyond a reasonable doubt. According to Mr. Boles: there was no specific intent instruction in instructions 13 and 14, which allowed the jury to convict on a lesser degree of proof than required by law; instruction 16 left out part of the defense theory (that Mr. Boles caught the victim in an act of criminal tampering); instruction 17 "seems to have something missing in light of everything else, like burden of proof; who bears it?" (ECF No. 31 at p.12); the trial court would not allow an affirmative defense instruction for the failure to leave premises charge; the instruction on self-defense left out that actual danger is not required and that "apparent necessity" justifies self-defense; and instruction 4, the pattern instruction on reasonable doubt, was too weak because "[t]he jury needs to reach a subjective state of near certitude of guilt, or there is reasonable doubt" (ECF No. 31 at p.13).

The Due Process Clause of the Fourteenth Amendment requires the prosecution to prove every element of a charged offense beyond a reasonable doubt. *In re Winship*, 397 U.S. 358, 364 (1970). Thus, a constitutional challenge to jury instructions requires a habeas petitioner to show a reasonable likelihood that the jury applied the instructions in

a way that relieved the state of its burden of proving every element of the crime beyond a reasonable doubt. *See Waddington v. Sarausad*, 555 U.S. 179, 190-91 (2009); *see also Victor v. Nebraska*, 511 U.S. 1, 6 (1994) (the pertinent constitutional question "is whether there is a reasonable likelihood that the jury understood the instructions to allow conviction based on proof insufficient to meet the *Winship* standard."). "[I]t is not enough that there is some 'slight possibility' that the jury misapplied the instruction." *Waddington*, 555 U.S. at 191 (quoting *Weeks v. Angelone*, 528 U.S. 225, 236 (2000)). Furthermore, a challenged instruction may not be considered in artificial isolation; rather, it must be considered in the context of the instructions as a whole and the trial record. *See Estelle v. McGuire*, 502 U.S. 62, 72 (1991).

The Colorado Court of Appeals rejected Mr. Boles' claim regarding the jury instructions and explained its reasoning as follows:

> Next, we disagree with defendant that he is entitled to a new trial based on errors in the trial court's jury instructions.
>
> We review jury instructions de novo to determine whether the instructions as a whole accurately informed the jury of the governing law. *People v. Reeves*, 252 P.3d 1137, 1139 (Colo. App. 2010).
>
> "The trial court has broad discretion to formulate jury instructions as long as they are correct statements of the law." *People v. Oram*, 217 P.3d 883, 893 (Colo. App. 2009), *aff'd*, 255 P.3d 1032 (Colo. 2011).
>
> Where a defendant's instructional argument is unpreserved, we review for plain error. *People v. Miller*, 113 P.3d 743, 750-51 (Colo. 2005) (holding that the defendant must demonstrate not only that the jury instruction affected a substantial right, but also that the record reveals a

reasonable possibility that the error contributed to his conviction).

For the following reasons, we conclude that the trial court properly declined to give these requested jury instructions:

> 1. "Defendant as Victim or Incidental Actor." Defendant was not charged with an offense that would have held him criminally liable for the conduct of another. *See* COLJI-Crim. H:06 cmt.3 (2015). Therefore, this instruction was not appropriate.
>
> 2. "No Duty to Retreat." The pattern instruction given to the jury included the language that "[t]he defendant was legally authorized to use physical force upon another person without first retreating if" particular conditions were met. Because the jury was already instructed on "no duty to retreat," defendant was not entitled to an additional instruction.
>
> 3. "Criminal Tampering." Defendant was not charged with criminal tampering, and criminal tampering was not an element of any charged offense. *See People v. Silva*, 987 P.2d 909, 913 (Colo. App. 1999) ("[T]he court should not instruct on an abstract principle of law unrelated to issues in controversy."). Accordingly, the court declined to instruct on this offense.

For the first time on appeal, defendant also alleges the following instructional errors:

> • Jury Instruction 1 improperly ruled out jury nullification.
>
> • Jury Instruction 4 incorrectly defined reasonable doubt.
>
> • Jury Instruction 8 improperly emphasized defendant's decision not to testify.

> • Jury Instruction 12 improperly condoned hearsay.
>
> • Jury Instructions 13 and 14 (listing the elements for first degree assault and the lesser included offense of second degree assault) implied a "lesser degree of intent than that statute requires."
>
> • The language of Jury Instructions 15, 16, and 17 was incorrect.
>
> Defendant did not challenge these instructions at trial. *See Miller*, 113 P.3d at 748, 751 (holding that if a defendant does not object to an instruction given to a jury, it is reviewed for plain error). Because they are pattern jury instructions that accurately track the statutory language and correctly state the law, we will not reverse. *See Reeves*, 252 P.3d at 1141.

(ECF No. 9-3 at pp.11-14.)

Mr. Boles is not entitled to relief on claim two under the "contrary to" clause of § 2254(d)(1) because he does not identify any materially indistinguishable Supreme Court decision that would compel a different result. *See House*, 527 F.3d at 1018. Mr. Boles does cite *Estelle* for the proposition that the jury instructions must be considered in the context of the trial as a whole, but *Estelle* does not compel a different result because the Colorado Court of Appeals recognized that it must consider the jury instructions "as a whole." (ECF No. 9-3 at p.11.)

Next, Mr. Boles fails to demonstrate the state court's decision is based on an unreasonable determination of the facts in light of the evidence presented under § 2254(d)(2). He apparently takes issue with the Colorado Court of Appeals' factual

determination that certain instructions were challenged for the first time on appeal, but he fails to present clear and convincing evidence to overcome the presumption that the state court's factual determination is correct. *See* 28 U.S.C. § 2254(e)(1). In any event, the Colorado Court of Appeals considered the challenges raised for the first time on appeal for plain error and Mr. Boles does not demonstrate or argue that a different standard of review would have led to a different result.

Finally, Mr. Boles fails to demonstrate the state court's rejection of claim two "was so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement." *Richter*, 562 U.S. at 103. He apparently contends the state court improperly considered the instructions in isolation and accepted them solely because they were pattern instructions, but he offers only speculation that the jury may have misapplied the instructions. Such speculation, without more, is not enough to demonstrate a constitutional violation. *See Weeks*, 528 U.S. at 236. As a result, Mr. Boles fails to demonstrate a reasonable likelihood that the jury applied any instructions in a way that relieved the prosecution of its burden of proving every element beyond a reasonable doubt. *See Waddington*, 555 U.S. at 190-91; *Victor*, 511 U.S. at 6.

For these reasons, Mr. Boles is not entitled to relief with respect to claim two.

C. Claim Three

Mr. Boles contends in claim three that the prosecution failed to disclose exculpatory evidence. He primarily contends in support of this claim that Lakewood police officers negligently failed to obtain video footage from a security camera that was

directly above the location of the shooting that would have verified his version of events. Mr. Boles also alleges in claim three that text messages he sent to a police officer during a conversation while he was in his recreational vehicle after shooting the victim were not preserved, but he concedes that there was testimony about his side of the conversation during cross-examination and in response to a jury question. Finally, Mr. Boles contends in claim three that the prosecution likely "contrived a conviction through preten[s]e and testimony known to be perjured to cover up the alleged victim's illegal enterprise and the deal made to not prosecute him in exchange for his testimony against me." (ECF No. 1 at pp.15-16.)

The Colorado Court of Appeals rejected this claim for the following reasons:

> We further reject defendant's contention that the prosecution failed to comply with its discovery obligations under Crim. P. 16 and *Brady v. Maryland*, 373 U.S. 83 (1963), when it failed to disclose alleged exculpatory evidence, including false testimony of the victim, text messages, and security camera footage from a nearby building.
>
> As an initial matter, we note that this issue was unpreserved at trial. Although the trial court granted defendant's pretrial discovery motion to preserve evidence, defendant did not ask the trial court to make a ruling as to whether the prosecution failed to comply with that motion. Therefore, we review for plain error. *Hagos v. People*, 2012 CO 63, ¶ 14 (holding that we reverse under plain error only if the error is so obvious and substantial as to undermine the fundamental fairness of the trial so as to cast doubt on the reliability of the judgment of conviction).
>
> After review of the record, we discern no error in the court's failure to inquire as to whether the prosecution complied with its discovery order.

> Moreover, even assuming error occurred, it would not have been so obvious to the court as to constitute plain error, because the prosecution investigated and attempted to preserve the evidence. Specifically, at trial both owners of the property where the security cameras were placed testified that law enforcement officers reviewed the recordings immediately following the incident. The property owners stated that the cameras were pointed away from the incident and that nothing was seen in the recordings. When law enforcement returned to obtain copies of the recordings following defendant's motion to preserve evidence, the recordings had been copied over in compliance with the owners' policies. Furthermore, defendant cross-examined the owners of the property.
>
> Further, defendant's contentions that the prosecution was required to disclose deals and promises made to the victim as well as text messages between the officers responding to the incident are conclusory and unsupported by the record. *People v. Simpson*, 93 P.3d 551, 555 (Colo. App. 2003) ("We decline to consider a bald legal proposition presented without argument or development . . . .").
>
> Accordingly, we discern no error, let alone plain error, in the trial court's failure to sua sponte conclude that the prosecution committed discovery violations or failed to comply with the court's discovery order.

(ECF No. 9-3 at pp.9-11.)

Suppression "of evidence favorable to an accused . . . violates due process where the evidence is material either to guilt or to punishment." *Brady*, 373 U.S. at 87. "There are three components of a true *Brady* violation: The evidence at issue must be favorable to the accused, either because it is exculpatory, or because it is impeaching; that evidence must have been suppressed by the State, either willfully or inadvertently; and prejudice must have ensued." *Strickler v. Greene*, 527 U.S. 263, 281-82 (1999). The *Brady* rule encompasses evidence "known only to police investigators and not to

the prosecutor." *Kyles v. Whitley*, 514 U.S. 419, 438 (1995). "Prejudice satisfying the third element exists 'when the suppressed evidence is material for *Brady* purposes.'" *Douglas v. Workman*, 560 F.3d 1156, 1173 (10th Cir. 2009) (per curiam) (quoting *Banks v. Dretke*, 540 U.S. 668, 691 (2004)). Generally, evidence is material "if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." *Kyles*, 514 U.S. at 433 (quotation marks omitted). A reasonable probability of a different result exists "when the government's evidentiary suppression undermines confidence in the outcome of the trial." *Id.* at 434 (quotation marks omitted). The Court must evaluate whether undisclosed evidence is material in the context of the entire record. *See United States v. Agurs*, 427 U.S. 97, 112 (1976). The burden is on Mr. Boles to demonstrate the existence of a *Brady* violation by a preponderance of the evidence. *See United States v. Garcia*, 793 F.3d 1194, 1205 (10th Cir. 2015).

Claim three consists of three distinct elements: the video camera footage, the text messages, and the victim's allegedly perjured testimony. With respect to the video camera footage that allegedly was not recovered and the text messages that allegedly were not preserved, those elements of claim three properly are considered under *California v. Trombetta*, 467 U.S. 479 (1984), and *Arizona v. Youngblood*, 488 U.S. 51 (1988). In *Trombetta*, the Supreme Court noted that, "[w]hatever duty the Constitution imposes on the States to preserve evidence, that duty must be limited to evidence that might be expected to play a significant role in the suspect's defense." *Trombetta*, 467 U.S. at 488. Thus, a due process violation occurs when the state fails to preserve or

destroys evidence that has "an exculpatory value that was apparent before the evidence was destroyed" and was "of such a nature that the defendant would be unable to obtain comparable evidence by other reasonably available means." *Id.* at 489. In *Youngblood*, the Supreme Court clarified that the Due Process Clause does not "impos[e] on the police an undifferentiated and absolute duty to retain and preserve all material that might be of conceivable evidentiary significance in a particular prosecution." *Youngblood*, 488 U.S. at 58. Instead, if the evidence is only potentially useful, i.e., "evidentiary material of which no more can be said than that it could have been subjected to tests, the results of which might have exonerated the defendant," there is no due process violation unless the defendant proves the state acted in bad faith in destroying or failing to preserve the evidence. *Id.* at 57-58. The Supreme Court specifically noted that "the police do not have a constitutional duty to perform any particular tests" and "the Due Process Clause is [not] violated when the police fail to use a particular investigatory tool." *Id.* at 59. With respect to the victim's allegedly perjured testimony, the knowing use of perjured testimony violates due process and can be categorized as a *Brady* violation. *See Douglas*, 560 F.3d at 1172-74 & n.13; *see also Giglio v. United States*, 405 U.S. 150, 153 (1972) ("[D]eliberate deception of a court and jurors by the presentation of known false evidence is incompatible with rudimentary demands of justice." (internal quotation marks omitted)).

Mr. Boles is not entitled to relief on claim two under the "contrary to" clause of § 2254(d)(1) because he does not identify any materially indistinguishable Supreme Court decision that would compel a different result. *See House*, 527 F.3d at 1018.

Next, Mr. Boles fails to demonstrate the state court's decision is based on an unreasonable determination of the facts in light of the evidence presented under § 2254(d)(2). He does allege with respect to the video camera footage that the state court referenced the wrong cameras, but he fails to present clear and convincing evidence to overcome the presumption that the state court's factual determination is correct. *See* 28 U.S.C. § 2254(e)(1). Thus, the Court must presume there was no video camera footage of the incident.

Finally, Mr. Boles fails to demonstrate the state court's rejection of the alleged *Brady* violations in claim three "was so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement." *Richter*, 562 U.S. at 103. Mr. Boles argues strenuously that the trial court improperly limited the evidence he could introduce and his cross-examination of the victim, which allegedly prevented him from presenting his theory of defense, but there is a difference between the argument that he was prevented from disclosing evidence to the jury and a claim under *Brady* that the prosecution failed to disclose exculpatory evidence to the defense. With regard to the asserted *Brady* violation, Mr. Boles fails to demonstrate there was any material video camera footage, he concedes there was testimony about the text message conversation and he certainly was aware of the content of the text messages he sent, and he fails to identify any perjured testimony. Thus, Mr. Boles does not demonstrate the state court unreasonably determined there was no *Brady* violation.

For these reasons, Mr. Boles is not entitled to relief with respect to claim three.

D. Claim Four

Mr. Boles contends in claim four that his Fourth Amendment rights were violated when he was arrested without a warrant and he specifically takes issue with the trial court's determination that he was not arrested until he exited his recreational vehicle following the five-hour standoff. According to Mr. Boles, he was arrested when the police surrounded the recreational vehicle and ordered him to come out and the trial judge ruled otherwise because he "was motivated by a desire to rescue a lady prosecutor that was lo[]sing the battle on the issue." (ECF No. 1 at p.16.)

Respondents argue that claim four must be dismissed pursuant to *Stone v. Powell*, 428 U.S. 465 (1976). Under *Stone*, "where the State has provided an opportunity for full and fair litigation of a Fourth Amendment claim, a state prisoner may not be granted federal habeas corpus relief on the ground that evidence obtained in an unconstitutional search or seizure was introduced at his trial." *Id.* at 494 (footnotes omitted); *see also Miranda v. Cooper*, 967 F.2d 392, 401 (10th Cir. 1992). A full and fair opportunity to litigate a Fourth Amendment claim in state court includes the procedural opportunity to litigate the claim as well as a full and fair evidentiary hearing. *See Miranda*, 967 F.2d at 401. A full and fair opportunity to litigate also "contemplates recognition and at least colorable application of the correct Fourth Amendment constitutional standards." *Gamble v. Oklahoma*, 583 F.2d 1161, 1165 (10th Cir. 1978). It is Mr. Boles' burden to demonstrate he was denied a full and fair opportunity to litigate his Fourth Amendment claim in state court. *See Young v. Conway*, 715 F.3d 79, 92 (2d Cir. 2013) (Raggi, Circuit J., dissenting from denial of reh'g en banc); *Peoples v.*

Campbell, 377 F.3d 1208, 1224 (11th Cir. 2004); *Sanna v. Dipaolo*, 265 F.3d 1, 8 (1st Cir. 2001); *Woolery v. Arave*, 8 F.3d 1325, 1328 (9th Cir. 1993); *Davis v. Blackburn*, 803 F.2d 1371, 1372 (5th Cir. 1986) (per curiam); *Doleman v. Muncy*, 579 F.2d 1258, 1266 (4th Cir. 1978).

Mr. Boles fails to demonstrate he did not have a full and fair opportunity to litigate his Fourth Amendment claim in the state court proceedings. The record before the Court demonstrates Mr. Boles had a procedural opportunity to litigate his Fourth Amendment claim in state court and that he took advantage of that opportunity. In particular, Mr. Boles raised the Fourth Amendment claim in a motion to suppress, the trial court held a hearing on the motion to suppress, and he raised a claim on appeal challenging the warrantless arrest. Mr. Boles also fails to demonstrate the state courts did not make colorable application of the correct Fourth Amendment standards. Therefore, consideration of claim four is barred by *Stone*. *See Smallwood v. Gibson*, 191 F.3d 1257, 1265 (10th Cir. 1999) (*Stone* bar applied when the state courts "thoughtfully considered the facts underlying [the] Fourth Amendment claim and rejected the claim on its merits, applying the appropriate Supreme Court precedent").

Ultimately, Mr. Boles' real argument with respect to claim four is a substantive disagreement with the resolution of the Fourth Amendment claim by the state court. However, disagreement with a state court's resolution of a Fourth Amendment claim is not enough to overcome the bar in *Stone*. *See Matthews v. Workman*, 577 F.3d 1175, 1194 (10th Cir. 2009) (rejecting petitioner's argument that the state court misapplied Fourth Amendment doctrine in reaching wrong conclusions about probable cause

because that was not the proper question under *Stone*); *see also Pickens v. Workman*, 373 F. App'x 847, 850 (10th Cir. 2010) (stating that "[t]he opportunity for full and fair litigation is not defeated merely because a participant might prefer a different outcome"). Thus, Mr. Boles is not entitled to relief with respect to claim four.

E. Claim Five

Finally, claim five is a cumulative error claim. Mr. Boles describes the cumulative error claim in his Reply as follows:

> Cumulative error is not just errors that would not have much of an impact standing alone. But, as mentioned in *Estelle v. McGuire*, 502 U.S. 62 (1991)[,] and *Esquibel v. Rice*, 13 F.3d 1430 (10th Cir. 1994), the Court needs to consider the jury instructions and the whole court record. Looking at everything from warrantless arrest, no bail, bail so high it is no bail, negligent police investigations missing important exculpatory evidence, a bad public defender, no counsel, deal with alleged victim by [the] prosecutor, overly restrictive and errant court rulings, inadequate jury instructions with prohibited mandatory presumption and lack of critical "specific intent" element, both failure to disclose and suppression of exculpatory evidence, and not allowing me to present a complete defense[.] They did not even have sufficient evidence to convict on every element had every element been presented. Should there be any doubt, much less grave doubt? There has been a fundamental miscarriage of justice. A complete miscarriage of justice.

(ECF No. 31 at p.31.) The Colorado Court of Appeals rejected Mr. Boles' cumulative error claim on direct appeal "because we have determined that no errors occurred." (ECF No. 9-3 at p.15.)

Respondents argue claim five is not a cognizable habeas corpus claim because there is no clearly established federal law to apply to a claim of cumulative error. In

support of this argument Respondents cite the Tenth Circuit's decision in *Hooks v. Workman*, 689 F.3d 1148, 1195 n.24 (10th Cir. 2012), which recognized a circuit spit on the issue but declined to definitively decide the issue. More recently, the Tenth Circuit addressed the merits of a cumulative error claim in a habeas corpus action, noting that "[w]e have held that when a habeas petitioner raises a cumulative error argument under due process principles the argument is reviewable because Supreme Court authority clearly establishes the right to a fair trial and due process." *Bush v. Carpenter*, 926 F.3d 644, 686 (10th Cir. 2019) (internal quotation marks omitted). At the same time, the panel in *Bush* questioned whether a cumulative error claim is cognizable.

> Although we are bound by Tenth Circuit precedent on this issue, we note, in passing, that the Supreme Court has never recognized the concept of cumulative error. And, because there is no "clearly established Federal law" on this issue, we question whether a state appellate court's rejection of a cumulative error argument can justify federal habeas relief under the standards outlined in § 2254(d).

Id. at n.16.

Even assuming cumulative error analysis is clearly established federal law to be applied in reviewing an application for a writ of habeas corpus, "the only otherwise harmless errors that can be aggregated [in the federal habeas context] are federal constitutional errors, and such errors will suffice to permit relief under cumulative error doctrine only when the constitutional errors committed in the state court trial so fatally infected the trial that they violated the trial's fundamental fairness." *Littlejohn v. Trammell*, 704 F.3d 817,-868 (10th Cir. 2013) (internal quotation marks omitted).

The Court has not found two or more constitutional errors at Mr. Boles' trial that would warrant a cumulative-error analysis. Mr. Boles' conclusory references to a plethora of alleged legal errors does not change that fact. Furthermore, Mr. Boles fails to demonstrate the state court's rejection of the cumulative error claim, which was premised on a determination that no errors occurred, was contrary to or an unreasonable application of clearly established federal law. As a result, he is not entitled to relief with respect to claim five.

IV. CONCLUSION

For the reasons discussed in this order, Mr. Boles is not entitled to relief on any of his claims. Accordingly, it is

ORDERED that the Application for a Writ of Habeas Corpus Pursuant to 28 U.S.C. § 2254 (ECF No. 1) is denied and this case is dismissed with prejudice. It is further

ORDERED that there is no basis on which to issue a certificate of appealability pursuant to 28 U.S.C. § 2253(c).

Dated this 4th day of June, 2021.

BY THE COURT:

William J. Martínez
United States District Judge

SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARY

APPENDIX C

Opinion of Colorado Court of Appeals with orders

16CA2064 Peo v Boles 05-02-2019

COLORADO COURT OF APPEALS

DATE FILED: May 2, 2019
CASE NUMBER: 2016CA2064

Court of Appeals No. 16CA2064
Jefferson County District Court No. 15CR2447
Honorable Laura A. Tighe, Judge

The People of the State of Colorado,

Plaintiff-Appellee,

v.

Russell M. Boles,

Defendant-Appellant.

JUDGMENT AFFIRMED

Division III
Opinion by JUDGE ROMÁN
Webb and Freyre, JJ., concur

NOT PUBLISHED PURSUANT TO C.A.R. 35(e)
Announced May 2, 2019

Philip J. Weiser, Attorney General, Melissa D. Allen, Senior Assistant Attorney General, Colleen Wort, Assistant Attorney General Fellow, Denver, Colorado, for Plaintiff-Appellee

Russell M. Boles, Pro Se

¶ 1 Defendant, Russell M. Boles, appeals the judgement of conviction entered after a jury found him guilty of first degree assault and failure to leave premises. We affirm.

I. Background

¶ 2 Defendant and the victim both leased separate garage spaces on the same property. Defendant also parked his RV there. On the night of the incident, the victim went to check on an AC unit attached to the garage. Without warning, defendant came up behind the victim and shot him in the leg before retreating into his RV.

¶ 3 When law enforcement arrived, defendant refused to leave the RV, resulting in a nearly five-hour standoff with police and SWAT.

¶ 4 The prosecution charged defendant with first degree assault and failure to leave premises under section 18-9-119, C.R.S. 2018.

¶ 5 At trial, defendant represented himself and chose not to testify after the trial court advised him that if he chose to testify, the prosecution could cross-examine him on prior felony convictions.

¶ 6 Defendant's theory of defense was that he shot the victim in self-defense and in defense of his property. In attempting to prove his theory, defendant sought to introduce evidence of the victim's

prior misdemeanor convictions. He also requested that security camera recordings in the area be preserved. No such recordings were available at trial.

¶ 7 The jury convicted defendant as charged. This appeal followed.

II. Discussion

¶ 8 Defendant asserts error in (A) the admissibility of his prior felony conviction; (B) the constitutionality of section 18-9-119(2); (C) the exclusion of the victim's prior misdemeanor conviction under CRE 404(b); (D) the prosecution's failure to disclose alleged exculpatory evidence; (E) the jury instructions; (F) the trial court's denial of defendant's motion for alternate defense counsel; and (G) the effect of multiple errors leading to cumulative error. We consider and reject each of these arguments in turn.

A. Admissibility of Prior Felony Conviction

¶ 9 Defendant asserts that his waiver of his constitutional right to testify was induced by the trial court's advisement that his prior conviction would be used against him. Because the trial court gave a proper *Curtis* advisement, we are not persuaded.

¶ 10 The validity of a defendant's waiver of his right to testify is a question of law that we review de novo. *People v. Harding*, 104 P.3d 881, 885 (Colo. 2005), *overruled by Moore v. People*, 2014 CO 8. Where the trial court, applying the correct standards, makes the findings necessary to establish effective waiver, and there is evidence to support these findings, they will not be disturbed on review. *People v. Gray*, 920 P.2d 787, 790 (Colo. 1996); *People v. Curtis*, 681 P.2d 504, 515 (Colo. 1984). To be effective, a waiver of the right to testify must provide assurance that the defendant understood the constitutional right to testify and the consequences of not testifying. *Gray*, 920 P.2d at 791.

¶ 11 Here, the following colloquy took place:

> THE COURT: Mr. Boles, if you have a prior felony, the Prosecution will be entitled to ask you about it, and thereby disclose a prior felony to the jury. Do you understand?
>
> DEFENDANT: I do.
>
> THE COURT: If a felony conviction is disclosed to the jury, the jury will be instructed to consider it only as it bears on your credibility. Do you understand?
>
> DEFENDANT: I do.

B. Constitutionality of Section 18-9-119(2)

¶ 12 Later, defendant informed the court that he would not be testifying, and the court issued another *Curtis* advisement, informing defendant of his rights and asking multiple questions about the voluntariness of his waiver. We conclude the trial court's *Curtis* advisement was proper and, based on defendant's affirmances on the record, we conclude he knowingly waived his right to testify. *See id.*

¶ 13 Defendant next contends that section 18-9-119(2) is unconstitutional because it allows law enforcement officers to circumvent the warrant requirement before an in-home arrest. We disagree.

¶ 14 We review the constitutionality of statutes de novo. *People v. Lente*, 2017 CO 74, ¶ 10. We presume that statutes are constitutional, and the challenger has the burden to prove a statute unconstitutional. *Id.*

¶ 15 Under section 18-9-119(2), it is an offense to refuse law enforcement entry or refuse to leave premises "upon being requested to do so by a peace officer who has probable cause to believe a crime is occurring and that such person constitutes a danger to himself or others."

¶ 16 Generally, law enforcement authorities must have a warrant to conduct a search. *People v. Aarness*, 150 P.3d 1271, 1277 (Colo. 2006). But, the warrant requirement is waived where the officers have probable cause or there are exigent circumstances. *Id.* Exigent circumstances include a colorable claim of an emergency threatening the life or safety of another. *People v. Kluhsman*, 980 P.2d 529, 534 (Colo. 1999).

¶ 17 On its face, section 18-9-119(2) enumerates the constitutional requirements for warrantless entry. Not only does it require law enforcement to have probable cause that a crime is in progress, it also requires exigent circumstances that the person refusing entry and refusing to leave is a danger to himself or others.

The conduct that is proscribed by this offense falls well within the established exigent circumstances exception to the warrant requirement of both the Federal and Colorado Constitutions. *See Klushman*, 980 P.2d at 534. And, there was a colorable claim of an emergency threatening life or safety here, where defendant told law enforcement officers that he had the gun used to shoot the victim and repeatedly threatened to kill himself if the officers entered. Accordingly, defendant has failed to establish that section 18-9-119

incorrect determination of fact

is unconstitutional, either on its face or as applied. *See Lente*, 406 P.3d at 831.

C. Exclusion of Victim's Prior Conviction Under CRE 404(b)

¶ 18 Next, defendant argues that the court erred in excluding evidence of the victim's prior misdemeanor convictions under CRE 404(b).[1] We perceive no error.

¶ 19 We review a trial court's decision to admit evidence for an abuse of discretion and will only overturn it "if the decision was arbitrary, unreasonable, or unfair." *People v. James*, 117 P.3d 91, 94 (Colo. App. 2004).

¶ 20 Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. CRE 404(b); *see People v. Spoto*, 795 P.2d 1314, 1318 (Colo. 1990); *People v. Trujillo*, 2014 COA 72, ¶ 73.

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[1] Although defendant also asserts that he should have been able to admit evidence concerning the victim's marijuana business, the court did not make an evidentiary ruling on that issue. Since the prosecutor opened the door to this evidence and defendant cross-examined the victim on it, we do not review this part of defendant's argument on appeal. *People in Interest of O.C.*, 2013 CO 56, ¶ 9 ("If a controversy no longer exists or if the relief granted by the Court would not have a practical effect upon an existing controversy, the issue before the Court is moot and typically unreviewable.").

¶ 21 Defendant argues that the victim's prior misdemeanor convictions are part of the res gestae or immediate context of the incident. According to defendant, because the victim had harassed someone in the past, it was more likely that he harassed defendant prior to or during the incident in this case. However, proving that the victim acted in conformity with previously charged conduct is precisely the manner in which Rule 404(b) evidence cannot be used. *See Spoto*, 795 P.2d at 1318 (holding that "evidence of other crimes, wrongs or acts is inadmissible if the logical relevance of the proffered evidence depends upon an inference that a person who has engaged in such misconduct has a bad character and the further inference that the defendant therefore engaged in the wrongful conduct at issue.").[2]

¶ 22 Despite defendant's argument to the contrary, there is also no evidence in the record that the victim was the initial aggressor.

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[2] And, although defendant argues CRE 404's exceptions for motive, bias, prejudice, or interest of a witness apply, he does not articulate how evidence of the victim's prior convictions fall under those exceptions. Accordingly, we need not address these arguments.

Thus, defendant's reliance on *People v. Jones*, 675 P.2d 9 (Colo. 1984), is misplaced.

¶ 23 For these reasons, the trial court properly excluded evidence of the victim's prior misdemeanor convictions.

D. Prosecution's Failure to Disclose Alleged Exculpatory Evidence

¶ 24 We further reject defendant's contention that the prosecution failed to comply with its discovery obligations under Crim. P. 16 and *Brady v. Maryland*, 373 U.S. 83 (1963), when it failed to disclose alleged exculpatory evidence, including false testimony of the victim, text messages, and security camera footage from a nearby building.

¶ 25 As an initial matter, we note that his issue was unpreserved at trial. Although the trial court granted defendant's pretrial discovery motion to preserve evidence, defendant did not ask the trial court to make a ruling as to whether the prosecution failed to comply with that motion. Therefore, we review for plain error. *Hagos v. People*, 2012 CO 63, ¶ 14 (holding that we reverse under plain error only if the error is so obvious and substantial as to undermine the

fundamental fairness of the trial so as to cast doubt on the reliability of the judgment of conviction).

¶ 26 After review of the record, we discern no error in the court's failure to inquire as to whether the prosecution complied with its discovery order.

¶ 27 Moreover, even assuming error occurred, it would not have been so obvious to the court as to constitute plain error, because the prosecution investigated and attempted to preserve the evidence. Specifically, at trial both owners of the property where the security cameras were placed testified that law enforcement officers reviewed the recordings immediately following the incident. The property owners stated that the cameras were pointed away from the incident and that nothing was seen in the recordings. When law enforcement returned to obtain copies of the recordings following defendant's motion to preserve evidence, the recordings had been copied over in compliance with the owners' policies. Furthermore, defendant cross-examined the owners of the property.

¶ 28 Further, defendant's contentions that the prosecution was required to disclose deals and promises made to the victim as well as text messages between officers responding to the incident are

conclusory and unsupported by the record. *People v. Simpson*, 93 P.3d 551, 555 (Colo. App. 2003) ("We decline to consider a bald legal proposition presented without argument or development . . . .").

¶ 29 Accordingly, we discern no error, let alone plain error, in the trial court's failure to sua sponte conclude that the prosecution committed discovery violations or failed to comply with the court's discovery order.

E. Jury Instructions

¶ 30 Next, we disagree with defendant that he is entitled to a new trial based on errors in the trial court's jury instructions.

¶ 31 We review jury instructions de novo to determine whether the instructions as a whole accurately informed the jury of the governing law. *People v. Reeves*, 252 P.3d 1137, 1139 (Colo. App. 2010).

¶ 32 "The trial court has broad discretion to formulate jury instructions as long as they are correct statements of the law." *People v. Oram*, 217 P.3d 883, 893 (Colo. App. 2009), *aff'd*, 255 P.3d 1032 (Colo. 2011).

¶ 33 Where a defendant's instructional argument is unpreserved, we review for plain error. *People v. Miller*, 113 P.3d 743, 750-51 (Colo. 2005) (holding that the defendant must demonstrate not only that the jury instruction affected a substantial right, but also that the record reveals a reasonable possibility that the error contributed to his conviction).

¶ 34 For the following reasons, we conclude that the trial court properly declined to give these requested jury instructions:

1. "Defendant as Victim or Incidental Actor." Defendant was not charged with an offense that would have held him criminally liable for the conduct of another. *See* COLJI-Crim. H:06 cmt.3 (2015). Therefore, this instruction was not appropriate.
2. "No Duty to Retreat." The pattern instruction given to the jury included the language that "[t]he defendant was legally authorized to use physical force upon another person without first retreating if" particular conditions were met. Because the jury was already instructed on "no duty to retreat," defendant was not entitled to an additional instruction.

3. "Criminal Tampering." Defendant was not charged with criminal tampering, and criminal tampering was not an element of any charged offense. *See People v. Silva*, 987 P.2d 909, 913 (Colo. App. 1999) ("[T]he court should not instruct on an abstract principle of law unrelated to issues in controversy."). Accordingly, the court declined to instruct on this offense.

¶ 35 For the first time on appeal, defendant also alleges the following instructional errors:

- Jury Instruction 1 improperly ruled out jury nullification.
- Jury Instruction 4 incorrectly defined reasonable doubt.
- Jury Instruction 8 improperly emphasized defendant's decision not to testify.
- Jury Instruction 12 improperly condoned hearsay.
- Jury Instructions 13 and 14 (listing the elements for first degree assault and the lesser included offense of second degree assault) implied a "lesser degree of intent than that statute requires."
- The language of Jury Instructions 15, 16, and 17 was incorrect.

¶ 36 Defendant did not challenge these instructions at trial. *See Miller*, 113 P.3d at 748, 751 (holding that if a defendant does not object to an instruction given to a jury, it is reviewed for plain error). Because they are pattern jury instructions that accurately track the statutory language and correctly state the law, we will not reverse. *See Reeves*, 252 P.3d at 1141.

F. Denial of Defendant's Motion for Alternate Defense Counsel

¶ 37 Defendant next argues that the trial court erred by finding that there was no conflict of interest with the public defender requiring appointment of alternate defense counsel, and, as a result, he was erroneously denied counsel.[3]

¶ 38 The defendant bears the burden of providing the reviewing court with an adequate record that sets forth his or her appellate claims' factual underpinnings. *See People v. Rodriguez*, 914 P.2d 230, 260 (Colo. 1996).

¶ 39 Here, however, defendant has not provided a complete trial record to permit our review of the trial court's determination that no

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[3] Defendant waived his right to counsel under *People v. Arguello*, 772 P.2d 87, 92 (Colo. 1989), and does not appear to challenge this waiver on appeal.

conflict of interest existed. Absent an adequate record, we presume the trial court's findings and conclusions are correct and will not disturb them on review. *Till v. People*, 196 Colo. 126, 127, 581 P.2d 299, 299 (1978).

G. Cumulative Error

¶ 40 Finally, because we have determined that no errors occurred, the doctrine of cumulative error does not apply. *People v. Whitman*, 205 P.3d 371, 387 (Colo. App. 2007) (holding that the doctrine of cumulative error requires that numerous errors be committed, not merely alleged).

III. Conclusion

¶ 41 The judgment is affirmed.

JUDGE WEBB and JUDGE FREYRE concur.

Court of Appeals

STATE OF COLORADO
2 East 14th Avenue
Denver, CO 80203
(720) 625-5150

PAULINE BROCK
CLERK OF THE COURT

NOTICE CONCERNING ISSUANCE OF THE MANDATE

Pursuant to C.A.R. 41(b), the mandate of the Court of Appeals may issue forty-three days after entry of the judgment. In worker's compensation and unemployment insurance cases, the mandate of the Court of Appeals may issue thirty-one days after entry of the judgment. Pursuant to C.A.R. 3.4(m), the mandate of the Court of Appeals may issue twenty-nine days after the entry of the judgment in appeals from proceedings in dependency or neglect.

Filing of a Petition for Rehearing, within the time permitted by C.A.R. 40, will stay the mandate until the court has ruled on the petition. Filing a Petition for Writ of Certiorari with the Supreme Court, within the time permitted by C.A.R. 52(b), will also stay the mandate until the Supreme Court has ruled on the Petition.

BY THE COURT: Steven L. Bernard
Chief Judge

DATED: December 27, 2018

Notice to self-represented parties: *The Colorado Bar Association provides free volunteer attorneys in a small number of appellate cases. If you are representing yourself and meet the CBA low income qualifications, you may apply to the CBA to see if your case may be chosen for a free lawyer. Self-represented parties who are interested should visit the Appellate Pro Bono Program page at http://www.cobar.org/Portals/COBAR/repository/probono/CBAAppProBonoProg_PublicInfoApp.pdf*

Colorado Supreme Court 2 East 14th Avenue Denver, CO 80203	DATE FILED: November 4, 2019 CASE NUMBER: 2019SC535
Certiorari to Court of Appeals, 2016CA2064 District Court, Jefferson County, 2015CR2447	
Petitioner: Russell Boles, **v.** **Respondent:** The People of the State of Colorado.	Supreme Court Case No: 2019SC535
ORDER OF COURT	

Upon consideration of the Petition for Writ of Certiorari to the Colorado Court of Appeals and after review of the record, briefs, and the judgment of said Court of Appeals,

IT IS ORDERED that said Petition for Writ of Certiorari shall be, and the same hereby is, DENIED.

BY THE COURT, EN BANC, NOVEMBER 4, 2019.

Colorado Court of Appeals 2 East 14th Avenue Denver, CO 80203	DATE FILED: November 6, 2019
Jefferson County 2015CR2447	
Plaintiff-Appellee: The People of the State of Colorado, **v.** **Defendant-Appellant:** Russell Boles.	Court of Appeals Case Number: 2016CA2064
MANDATE	

This proceeding was presented to this Court on the record on appeal. In accordance with its announced opinion, the Court of Appeals hereby ORDERS:

JUDGMENT AFFIRMED

POLLY BROCK
CLERK OF THE COURT OF APPEALS

DATE: NOVEMBER 6, 2019

SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARY

APPENDIX D

Order of State Trial Court of Colorado

11-9-16

JEFFERSON COUNTY DISTRICT COURT DIVISION 7 Court Address: 100 Jefferson County Parkway Golden, CO 80401	
PEOPLE OF THE STATE OF COLORADO, **v.** **RUSSELL BOLES,** Defendant.	**Case Number: 15CR2447** **Division 7** **Courtroom 4A**

ORDER RE: MOTION FOR MISTRIAL

THIS MATTER comes before the Court on Defendant's Motion for Mistrial for the trial held from October 3-6, 2016. The Court, having reviewed the motion, the response, documentation, and applicable law, dispenses with oral argument. The motion is hereby **DENIED**.

At trial, Defendant rejected the Court's offer of counsel at public expense and exercised his constitutional right to defend himself without counsel. On October 6, 2016, the jury returned a verdict finding Defendant guilty of Count II, Assault with Deadly Weapon, Colo. Rev. Stat. § 18-3-202(1)(a), and Count IV, Failure to Leave Premises with a Weapon, Colo. Rev. Stat. § 18-9-119(2),(4). Prior to the entry of verdict, Defendant did not make any motions for mistrial.

Pursuant to People v. Jamerson, a mistrial is only procedurally correct prior to the entry of verdict by a jury. 580 P.2d 805, 807 (Colo. 1978). "But once a verdict has been

CERTIFICATE OF MAILING

I hereby certify that on the 9th day of November 2016 I emailed a true and accurate copy of the foregoing document to the following:

Jefferson County District Attorney
Deputy District Attorney
500 Jefferson County Parkway
Golden, Colorado 80401

I hereby certify that on the 9th day of November 2016 I mailed, postage prepaid through the U.S. Mail, a true and accurate copy of the foregoing document to the following:

Russell M. Boles #P01094271
P.O. Box 16700
Golden, CO 80402

Clerk
Division 7

RID:D0302015CR002447-000154

District Court, Jefferson County, State of Colorado
Case#:D0302015CR002447 Div/Room: 7
JUDGMENT OF CONVICTION, SENTENCE Original

The People of the State of Colorado vs. BOLES, RUSSELL
DOB 3/09/1952

AKA: BOLES, RUSSELL MARSHAL

The Defendant was sentenced on: 11/16/2016 DATE FILED: November 16, 2016
People represented by...: KENDALL, ADAM D.
Defendant represented by: PRO SE
UPON DEFENDANT'S CONVICTION this date of: 10/06/2016
The defendant was found guilty after trial of:
Count # 2 Charge: ASSAULT 1-SBI W/ DEADLY WEAPON
C.R.S # 18-3-202(1)(a) Class: F3
Date of offense(s): 8/23/2015 to 8/23/2015 Date of finding(s):10/06/2016
Count # 4 Charge: FAILURE TO LEAVE PREMISES-W/WEAPON
C.R.S # 18-9-119(2),(4) Class: M1
Date of offense(s): 8/23/2015 to 8/24/2015 Date of finding(s):10/06/2016

IT IS THE JUDGMENT/SENTENCE OF THIS COURT that the defendant be sentenced to THE CUSTODY OF THE EXECUTIVE DIRECTOR OF THE DEPARTMENT OF CORRECTIONS

Department of Corrections	24.00 YEARS	COUNT	2
Credit for Time Served	451.00 DAYS	COUNT	2
5 YEAR PERIOD OF PAROLE. COUNTS 2 AND 4 CONCURRENT			/AJJ
Jail	18.00 MONTHS	COUNT	4

Plus a mandatory period of parole as required by statute.
Months on parole 0060

Assessed	Balance
$ 481.50	$ 481.50

THEREFORE, IT IS ORDERED the Sheriff of JEFFERSON COUNTY shall convey the DEFENDANT to the following department TO BE RECEIVED AND KEPT ACCORDING TO LAW COLORADO STATE DEPARTMENT OF CORRECTIONS DIAGNOSTIC CENTER

ADDITIONAL REQUIREMENTS

The restraining order pursuant to C.R.S. 18-1-1001 shall remain in effect until final disposition of the action, or in the case of an appeal, until disposition of the appeal.

JUDGMENT OF CONVICTION IS NOW ENTERED, IT IS FURTHER ORDERED OR RECOMMENDED:

DATE 11/16/16 NPT _____ JUDGE/MAGISTRATE _____
LAURA ANN TIGHE

CERTIFICATE OF SHERIFF

I CERTIFY THAT I EXECUTED THIS ORDER AS DIRECTED
DATE _____ SHERIFF _____
BY DEPUTY _____

DISTRICT COURT, JEFFERSON COUNTY, COLORADO Court Address: 100 Jefferson County Parkway, Golden, CO, 80401-6002	DATE FILED: December 22, 2016
The People of the State of Colorado v. RUSSELL BOLES	⚠ COURT USE ONLY ⚠
	Case Number: 2015CR2447 Division: 7 Courtroom:

Order re: Motion for Reconsideration of Motion for for New Trial, Together with Excusable Neglect

THIS MATTER comes before the Court on Defendant's Motion for Reconsideration of Motion for for New Trial, Together with Excusable Neglect

The Court has reviewed the motions, documentation, and applicable law and hereby dispenses with oral argument. The Motion is for New Trial is DENIED.

Issue Date: 12/22/2016

LAURA ANN TIGHE
District Court Judge

SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARY

APPEDIX E

U.S. Supreme Court's grant of Extension of time to file for a writ of certiorary

Supreme Court of the United States
Office of the Clerk
Washington, DC 20543-0001

Scott S. Harris
Clerk of the Court
(202) 479-3011

April 27, 2022

Mr. Russell Marshall Boles
Prisoner ID #90379
Sterling Correctional Facility
PO Box 6000
Sterling, CO 80751

Re: Russell M. Boles
v. Jeff Long, Warden
Application No. 21A651

Dear Mr. Boles:

The application for an extension of time within which to file a petition for a writ of certiorari in the above-entitled case has been presented to Justice Gorsuch, who on April 27, 2022, extended the time to and including August 12, 2022.

This letter has been sent to those designated on the attached notification list.

Sincerely,

Scott S. Harris, Clerk

by

Susan Frimpong
Case Analyst

Supreme Court of the United States
Office of the Clerk
Washington, DC 20543-0001

Scott S. Harris
Clerk of the Court
(202) 479-3011

NOTIFICATION LIST

Mr. Russell Marshall Boles
Prisoner ID #90379
Sterling Correctional Facility
PO Box 6000
Sterling, CO 80751

Clerk
United States Court of Appeals for the Tenth Circuit
Byron White Courthouse
1823 Stout Street
Denver, CO 80257

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT
OFFICE OF THE CLERK

Byron White United States Courthouse
1823 Stout Street
Denver, Colorado 80257
(303) 844-3157

Christopher M. Wolpert
Clerk of Court

Jane K. Castro
Chief Deputy Clerk

June 3, 2022

Russell Marshall Boles
#1094271
Sterling Correctional Facility
P.O. Box 6000
Sterling, CO 80751

Re: No. 21-1238, Boles v. Long, et al.

Dear Mr. Boles,

The court has received your motion titled "motion and brief to proceed on appeal without COA." However, as you know, the court dismissed your appeal on February 3, 2022 and denied your petition for rehearing on March 14, 2022. Your appeal is now closed. Accordingly, the court can take no action on your motion.

Please be advised that the court may not respond to future correspondence unless and until you have an appeal pending.

Sincerely,

Christopher M. Wolpert
Clerk of Court