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Case No. 16-2668

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

HAYES BACALL, Petitioner-Appellant, v. CATHLEEN STODDARD, Warden, Respondent-Appellee.	ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MICHIGAN **OPINION** (Filed Nov. 29, 2017)

BEFORE: DAUGHTREY, McKEAGUE, and DONALD, Circuit Judges.

McKEAGUE, Circuit Judge. Hayes Bacall asks us to reverse the district court's refusal to issue a writ of habeas corpus under 28 U.S.C. § 2254. Bacall was convicted in a Michigan court of first-degree, premeditated murder. Although the prosecutor committed a serious error during his rebuttal argument, we are constrained by the standards imposed by the Supreme Court and the Antiterrorism and Effective Death Penalty Act ("AEDPA"). We **AFFIRM** the judgment of the district court.

I

Bacall treated his nephew, Saif Jameel, like his own son. He loved Jameel so much that he loaned him $400,000 after taking out multiple equity loans against his residence and business.

These loans were secured by nothing except for Bacall's trust and sense of family obligation. Unfortunately for both Bacall and Jameel, this feeling was not mutual.

A

Initially, Jameel paid the monthly interest the banks were charging Bacall on the home-equity loans. Jameel paid nothing on the principal, and in time, stopped making the interest payments too. Eventually, Bacall discovered that Jameel's creditors had multiplied, and that he owed close to $1 million to various individuals. Bacall repeatedly pleaded with Jameel to start making payments, out of respect for his promise and the impact the debt was having on Bacall's family. Jameel essentially told his uncle that he would be lucky to get anything.

Welching on his debts was not Jameel's only flaw. Jameel was known to draw his concealed firearms on anyone who made him too angry. Bacall testified that Jameel once used a shotgun to chase off a group of people who tried to cash a check that did not belong to them. He also once stuck his pistol in the face of a valet who told him he couldn't park in the drive-in loop of a

funeral venue, saying, "[D]o you know who you're talking to[?]" The valet fled in terror.

After frequent cajoling, Jameel wrote his uncle a $2,000 check. However, in what must have been a cruel joke, the check was postdated by about thirty days. Bacall, angry, took the pistol he used for protection in his cash-checking [sic] business and went to visit Jameel at his BP gas station in Troy, Michigan. On his way to the station, he called Jameel about ten times. Jameel did not answer.

When Bacall arrived, there were two people at the gas station. One of them (Slieman Bashi) was a longtime friend of both Bacall and Jameel. Another witness (Danielle Iverson) watched Bacall go into the back office where Jameel worked. Eventually, both witnesses heard gunshots. Bacall exited the office, shook Bashi's hand, went outside, and called 911. When the officer arrived, he observed that Bacall "had an eerie calmness to him." He asked Bacall what had happened, and Bacall said, "I shot my nephew, he owes me $400,000." The officer arrested Bacall, secured the empty gun, and placed him in the police cruiser.

Bacall's English was not the best, and the officer struggled to discern whether Bacall understood his *Miranda* rights. At one point, the officer asked, "Okay you know your rights, right?" Bacall responded with a blunt, "Yes I'm right." After the officer tried to clarify what he meant by saying, "Constitutional rights?", Bacall again responded by saying, "Yes everything's right." Bacall later testified that "[t]here are a lot of

phrases that, you know, I don't understand," and that he had completely misunderstood what the officer was asking. After doing his best to Mirandize Bacall, the officer drove him to the police station. During the drive, Bacall received a phone call from Jameel's brother (Samir). The entire conversation was not translated to English, but from the parts that were, it is clear that Bacall confessed to killing Jameel and (at one point) insulted Samir and Jameel's sister.[1]

B

The State of Michigan charged Bacall with first-degree, premeditated murder. While he was in jail awaiting trial, Bacall made at least seven phone calls where he claimed that he shot Jameel in self-defense. He continued to insist upon this defense at trial, and testified on his own behalf. On direct examination, he said that he was afraid of Jameel because of Jameel's reputation, and that when he arrived at the gas station, Jameel got angry and threatened to "put it in your ass." Bacall testified that this anger, combined with the small size of Jameel's office and the fact that Jameel kept weapons in the room, caused him to feel afraid: "I knew I was going to die. I was, I felt in danger. Because he had pulled a gun on, on tons of people[] with no reason.

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[1] The insult apparently does not translate well into English, but runs something like: "I just fucked his sister up."

So how about, how about a person whom, whom he owes $400,000 – what do you think he will do to him[?]" After seeing Jameel reach for his cabinet, Bacall fired.

Although the gas station had video surveillance, there was no camera in Jameel's office. Iverson did not see the shooting, and Bashi gave inconsistent testimony about what happened. Ballistics and forensic evidence were equally inconclusive. Samir – Jameel's brother – testified that Bacall had frequently threatened to kill Jameel for defaulting on his debt by "empty[ing] the gun" into Jameel. But Samir admitted on cross-examination that he never reported any of these threats to the police, and his motive to lie is obvious.

During closing arguments, the prosecutor and the defense attorney focused on Bacall's mental state at the time of the shooting. In rebuttal, the prosecutor told the jury:

> In English, the defendant says he killed his nephew for $400,000. That's the first thing out of his mouth when the officer asked him what happened. . . . Defendant never says self-defense to the police officer and the officer gives him three separate chances. . . . [A]fter the *Miranda* rights, the officer asks him again about shooting a nephew. He says – well, he hasn't given me anything in about a year. He never says self-defense or even anything like self-defense. And on the witness stand, defense counsel asked the defendant – well, why did you tell the officer, you know, you shot him

> because of $400,000 – and the defendant slips up, he says – because that was the main reason at the time. So practice though he may, the truth shines through. *Now, at trial is the first time the defendant says self-defense.*

This was false, and the prosecutor knew it. The record shows that the prosecutor was well-aware of the seven calls from jail where Bacall claimed self-defense. In obedience to the judge's instructions, defense counsel raised his objection to this statement after the jury had retired to deliberate. The trial judge overruled the objection and refused to give a curative instruction or to grant a mistrial.

During deliberations, the jury sent a note to the judge. The note read: "Can the jury decide on a verdict of a lesser cause when they are unanimous, even though some may feel a stronger verdict is what they believe?" The judge, after another objection from the defense,[2] instructed the jurors that they should decide the case on whatever charge they could agree upon, that they could go back and forth between first-degree murder and voluntary manslaughter, that they should all keep their minds open to persuasion, but that none of them should give up their beliefs just for the sake of agreement. The jury also requested to see the gun used in the killing, and the judge – nervous about sending a gun back to the jury room – permitted the jury to examine the weapon in the jury box for a few minutes. Although the jurors talked amongst themselves, their

[2] Bacall's counsel claimed that this was a decision on a lesser charge, triggering the Constitution's double-jeopardy protections.

statements were not recorded, and nothing of note was said in the courtroom during this time.

The jury deliberated for two afternoons and a morning. After the foreperson told the court that "this was not an easy decision and we . . . thought about it," the jury found Bacall guilty of first-degree murder.

The Michigan Court of Appeals affirmed Bacall's conviction. *People v. Bacall*, No. 306269, 2013 WL 951084 (Mich. Ct. App., March 5, 2013). On appeal, Bacall raised three issues relevant for our purposes: (1) that the jury's note to the judge triggered double-jeopardy protections because it indicated that the jury was unanimous on a lesser charge; (2) that the jury's brief, public deliberation was plain, reversible error; and (3) that the prosecutor made several improper statements[3] during argument that deprived him of a fair trial. *Id.* at *1-5.

The court of appeals rejected all three claims. On the first claim, the court found that the jury had not made a decision because it had asked a question instead of actually returning the verdict form. On the second, the court found that although the jury should not have been permitted to discuss the gun in public, Bacall had not objected to the public deliberation and had not shown any prejudice under *United States v. Olano*, 507 U.S. 725 (1993). On the third claim, the

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[3] In addition to the "first time" remark, the prosecutor also referred to Bacall as a "loan shark" and mentioned inadmissible evidence that Bacall had lied on his concealed-carry-permit application.

court found that most of the prosecutor's statements were proper. However, it reprimanded the government for lying about the jail phone calls, finding that this was "highly inappropriate" and stating that the trial judge should have given a curative instruction to the jury. Nevertheless, the court affirmed the conviction because the "overwhelming evidence" against Bacall resulted in a fundamentally fair trial. *Bacall*, at *3-5. The Michigan Supreme Court denied review. 843 N.W.2d 147 (Mich. 2013) (mem.).

C

Bacall then filed this § 2254 petition in federal court. The district court denied the petition, holding that Bacall's claims were either meritless or barred by the AEDPA standard of review. However, it granted a certificate of appealability on the three claims identified above. Bacall timely appealed.

Because this is a habeas case challenging a state-court conviction, we apply the rules prescribed in 28 U.S.C. § 2254. When a state court has decided a federal issue on the merits, we may issue the writ only if the state court's decision "was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States," or if it "was based on an unreasonable determination of the facts." 28 U.S.C. § 2254(d). We presume that a state court decides all claims presented to it. *Harrington v. Richter*, 562 U.S. 86, 99 (2011); *Johnson v. Williams*, 568 U.S. 289, 298-99 (2013).

Bacall contends that his conviction resulted from an "unreasonable application" of federal law. A state court's resolution of a federal issue is unreasonable under this standard only if it "was so lacking in justification that [it committed] an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement." *Harrington*, 562 U.S. at 103. In other words, the mistake cannot simply be error, or even clear error – instead, it must be "objectively unreasonable." *White v. Woodall*, 134 S. Ct. 1697, 1702 (2014). Moreover, when answering this question, we may only look to the specific holdings of the U.S. Supreme Court. *Id.* In a recent prosecutorial-misconduct case, the Court chastised us for applying our own interpretations of its cases to habeas petitions. *Parker v. Matthews*, 567 U.S. 37, 48-49 (2012).[4]

II

The district court's thorough analysis of this case leaves little for us to say on most of the issues. We agree completely with Judge Michelson's evaluation of Bacall's Confrontation-Clause, double-jeopardy, and public-deliberation arguments, and we adopt her opinion as our own in those respects. We only add one

[4] All of the Sixth Circuit cases Bacall cites in favor of granting the writ predate the Court's directives in *Harrington, Parker*, and *White*. *See Slagle v. Bagley*, 457 F.3d 501 (6th Cir. 2006); *Washington v. Hofbauer*, 228 F.3d 689 (6th Cir. 2000); *Boyle v. Million*, 201 F.3d 711 (6th Cir. 2000). They are therefore of doubtful value to us.

observation to the district court's opinion on the public-deliberation issue.

We recently clarified that plain-error review can be an adjudication on the merits under AEDPA. *Stewart v. Trierweiler*, 867 F.3d 633, 638 (6th Cir. 2017). Thus, even though the district court assumed that AEDPA deference applied in light of our conflicting precedent, this assumption is unnecessary, because the Michigan court's plain-error review "conduct[ed] [a] reasoned elaboration of [the] issue under federal law." *Fleming v. Metrish*, 556 F.3d 520, 531 (6th Cir. 2009); *Bacall*, at *5-6 (discussing *Olano*, 507 U.S. at 738). Thus, AEDPA deference forecloses Bacall's public-deliberation claim; neither *Olano* nor any other Supreme Court case establish that brief public deliberation by a jury is structural error. 28 U.S.C. § 2254(d)(1); *Olano*, 507 U.S. at 738.

III

As the district court recognized, the prosecutorial-misconduct claim is more difficult. The Michigan Court of Appeals held that any prejudice arising out of the concealed-carry-permit issue was cured by the trial court's instruction that arguments are not evidence (the "concealed-carry comment"). *Bacall*, at *3. The court did, however, hold that the prosecutor committed misconduct by asserting that Bacall had not raised a self-defense claim before trial (the "first-time comment"). *Id.* at *4. Nevertheless, the court refused to

reverse Bacall's conviction, ultimately concluding that he was not deprived of a fair trial. *Id.* at *5.

A

The district court correctly identified *Darden v. Wainwright*, 477 U.S. 168 (1986), as the governing law. Under *Darden*, a prosecutor's inappropriate comment during argument must be evaluated in context, and does not justify relief solely because it is "improper," "undesirable," or even "deserves the condemnation it has received from every court to review it." *Darden*, 477 U.S. at 179-81. Instead, such statements will only violate the constitutional right to a fair trial if they "so infected the trial with unfairness as to make the resulting conviction a denial of due process." *Id.* at 181.

The generality of this standard only adds to the deference accorded to state courts under AEDPA. *Parker*, 567 U.S. at 48; *Stewart*, 867 F.3d at 638-39. Thus, our only task is to project the facts of this case against the facts in the Court's prosecutorial-misconduct jurisprudence to determine whether the Michigan Court of Appeals applied *Darden* unreasonably. *See id.* We will not (and cannot) stitch together principles from multiple related cases in order to grant relief, even if we might do so on direct review. *See White*, 134 S. Ct. at 1705-07. In addition to *Darden*, we have identified three relevant cases. *See Donnelly v. DeChristoforo*, 416 U.S. 637 (1974); *Miller v. Pate*, 386 U.S. 1 (1967); *Berger v. United States*, 295 U.S. 78 (1935). None of these decisions support granting the writ here.

B

Darden provides a starting point. In *Darden*, the prosecutor referred to the defendant as an "animal" and said that "[h]e shouldn't be out of his cell unless he has a leash on him and a prison guard at the other end of that leash." *Darden*, 477 U.S. at 180 n.12. The prosecutor also expressed his personal wish that he could "see him sitting here with no face, blown away by a shotgun." *Id.* The Court, after finding that these (and other) comments "undoubtedly were improper," nevertheless held that "they did not deprive petitioner of a fair trial." *Id.* at 180-81.

The Court pointed to six factors that influenced its decision. First, it noted that "[t]he prosecutors' argument did not manipulate or misstate the evidence, nor did it implicate other specific rights of the accused such as the right to counsel or the right to remain silent." *Id.* at 181-82. Second, "[m]uch of the objectionable content was invited by or was responsive to the opening summation of the defense." *Id.* at 182. This fact did not excuse the comments but merely served to place them in the same context in which the jury heard them. *Id.* Third, the Court observed that the trial judge expressly instructed the jury that "the arguments of counsel were not evidence." *Id.* Fourth, it noted that "[t]he weight of the evidence against petitioner was heavy," and reasoned that a strong case makes it less likely that the jury was influenced by error. *Id.* Fifth, the defense counsel intentionally withheld his objection, knowing from his long experience with the prosecutor that he would dig his own grave "if you allowed

him to go on." *Id.* at 182-83 n.14. Finally, the procedural context of the trial allowed the defense to refute the statements and place them "in a light that was more likely to engender strong disapproval than result in inflamed passions against petitioner." *Id.* at 182.

Darden provides only imperfect guidance. There, the chief issue was the identity of the defendant as the killer, not his motive or intent. *See* 477 U.S. at 172-74. In *Darden*, police recovered a firearm about forty feet from a car matching the description of the vehicle leaving the scene of the murders. *Id.* The car was the defendant's, and ballistics evidence removed all doubt that the gun was used to kill the victims. *Id.* at 173-74. In this context, the prosecutor's statements – referring to the defendant as an "animal" and lamenting that his face was not "blown away" – could not have added much to the heap of proof. *Id.* at 180 n.12, 182.

This case is more complicated. The chief dispute here was over Bacall's mental state, not his identity as the killer. In fact, it appears that the only significant issue at trial was whether Bacall acted in self-defense or whether he premeditated the killing. Further, the evidence presented here was far more equivocal than the evidence in *Darden*. It is clear that the jury struggled deeply with the first-degree murder count. This struggle was understandable, considering that the only eyewitness to the killing contradicted himself, that Bacall had difficulty comprehending police questions about his motives, that the video recordings were inconclusive, and that Bacall had a good reason to be afraid of the victim. This was not an open-and-shut

case for the defense either: Bacall brought a gun to the scene of the crime, and a witness did testify that Bacall had previously expressed a desire to shoot the victim (although these threats were never reported). Bacall also had several opportunities to explain to the police that he acted in self-defense, but instead blurted out, "I shot my nephew, he owes me $400,000" and insulted the deceased's sister.

Thus, in some sense, this case is worse than *Darden*. The prosecutor's false statement that "at trial is the first time the defendant says self-defense" went to the heart of the case. *Bacall*, at *3. It was a direct, factual claim that the defendant had fabricated his defense at the last minute. The law recognizes the strong probative force of this sort of an accusation. *See* Fed. R. Evid. 801(d)(1)(B) (exempting from the hearsay rule statements "consistent with the declarant's testimony . . . offered to rebut an express or implied charge that the declarant recently fabricated [that testimony]. . . ."). But the Court did not grant relief in *Darden*. Further, none of the Court's post-*Darden* cases have granted relief on these grounds. Thus, for some guidance, we examine two of *Darden*'s ancestors that did grant relief.

The first case is *Miller v. Pate*, 386 U.S. 1 (1967). In *Miller*, the defendant had been convicted of brutally raping and murdering an eight-year-old girl. *Id.* at 2. The prosecutor's chief exhibit was a pair of men's underwear covered by large, reddish-brown stains. *Id.* at 3. The state court refused to let the defendant examine the underwear or have it tested. *Id.* at 2. Throughout the case, the government repeatedly asserted –

through witnesses and argument – that the underwear was covered in the victim's blood. *Id.* at 2-5. This was a bald-faced lie. *Id.* at 5-7. The government knew that the underwear was actually covered in red *paint*, and not a drop of blood. *Id.* On these facts, the Court vacated the conviction because "[t]he prosecution deliberately misrepresented the truth." *Id.* at 6. The underwear was a "vital" link between the defendant and the crime, and its "gruesomely emotional impact upon the jury was incalculable." *Id.* at 4-5. The truth, in contrast, made the evidence "virtually valueless." *Id.* at 6.

Bacall also cites *United States v. Berger*, 295 U.S. 78 (1935) to support his position. In *Berger*, the Court excoriated a U.S. Attorney for repeated and persistent misconduct, including misrepresenting facts to the jury. *Id.* at 84-85. The Court also ascribed importance to the fact that "the case against Berger was not strong . . . [he] was convicted only of conspiracy and not of any substantive offense . . . upon the [sole] testimony of . . . an accomplice with a long criminal record." *Id.* at 88-89. On these facts, the Court found that a new trial was necessary because the misconduct was so "pronounced and persistent, with a probable cumulative effect upon the jury which cannot be disregarded as inconsequential." *Id.* at 89.

Here, Bacall contends that the prosecutor's first-time comment was a per se violation of due process. Appellant's Br. at 23 ("In this setting, and under any reasonable view of the trial record . . . this single remark . . . could not reasonably be construed as

anything other than an affront to petitioner's Due Process rights."). His indignation is not unfounded. As the Michigan Court of Appeals noted, this was not "merely fair comment on the evidence." *Bacall*, at *4. Instead, "[t]he prosecutor . . . made the broader and clearly false affirmative assertion that defendant had never asserted self-defense at any time prior to trial." *Id.* The prosecutor's resurrection of the excluded concealed-carry-permit issue was also inappropriate. We disagree with the district court that this only had a slight impact on Bacall's credibility. Failing to disclose a conviction for the unlawful discharge of a firearm on a concealed-weapon-permit application could seriously damage a jury's willingness to believe the permit holder's claim of self-defense.

If this were direct review, we might find that a new trial was necessary. The Michigan Court of Appeals' decision to label the evidence against Bacall as "overwhelming" also seems inordinately generous. But unfortunately for Bacall, we are bound by the facts of cases decided by the Supreme Court – and those facts do not mandate a new trial here. *Miller* did not vacate the defendant's conviction solely on one or two isolated fibs offered by the prosecution. The lies in *Miller* were repeated and egregious, in the sense that the truth, once revealed, rendered the prosecution's case virtually impotent. *Miller*, 386 U.S. at 3-7. In contrast, had the prosecutor refrained from improper argument here, he still had a fair case, albeit a close one. Similarly, the misconduct in *Berger* was so persistently wrong in the face of weak evidence that the need for a

new trial was obvious. *Berger*, 295 U.S. at 89. But like in *Miller*, it was this persistence, not just the weakness in the government's case, that demanded a new trial. *See Donnelly*, 416 U.S. at 646 ("The 'consistent and repeated misrepresentation' of a dramatic exhibit in evidence may profoundly impress a jury and may have a significant impact on the jury's deliberations. Isolated passages of a prosecutor's argument . . . do not reach the same proportions."). This same persistence was simply not present at Bacall's trial.

We do not mean to suggest that the prosecutor's misstatements were inconsequential or appropriate – they weren't. But we cannot say that they "so infected the trial with unfairness as to make the resulting conviction a denial of due process." *Darden*, 477 U.S. at 181.

C

Finally, we address the remaining facts that Bacall raises in his defense. The trial court ordered Bacall's attorney not to object during the argument and to raise his objections afterward in a motion for a mistrial (which he did). In this motion, Bacall asked the trial court to give a curative instruction regarding the prosecutor's misstatements, but the court refused. Since the problematic statements were made in the prosecutor's rebuttal, the defense had no opportunity to correct them before the jury. The misstatements therefore went into the jury room, unconfronted and uncorrected.

Disturbing as the situation is, we cannot grant habeas relief on this basis. None of the Court's precedent addresses this precise issue, or even the broader issue of when an unresponded-to statement can unconstitutionally nudge the jury toward conviction in a close case. And as the Court has made abundantly clear, we may not extend or interpret its precedents to award habeas relief, even when we might do so on direct review. We cannot say that the Court's precedent unambiguously forbids a conviction under these circumstances. The Michigan Court of Appeals therefore did not unreasonably affirm Bacall's conviction.

IV

The AEDPA standard of review can appear harsh in some cases, including this one. But we cannot rewrite the rules Congress and the Supreme Court have prescribed for us, and those rules dictate the outcome today. The judgment of the district court is **AFFIRMED**.

MARTHA CRAIG DAUGHTREY, Circuit Judge, concurring. I concur in Judge McKeague's well-crafted opinion that – in light of the present state of the law – affirms the district court's denial of Hayes Bacall's application for a writ of habeas corpus. I write separately, however, to emphasize the perversion of habeas corpus principles that has resulted from the enactment of the Antiterrorism and Effective Death Penalty Act of 1996

(AEDPA), Pub. L. No. 104-132, 110 Stat. 1214 (1996), and the Supreme Court interpretations of that statutory scheme.

The extent to which the once-Great Writ has been subverted is underscored by Judge McKeague's recognition that the prosecutor in Bacall's state court trial knowingly and intentionally lied during closing argument in a case with questionable evidence of guilt and in which "the jury struggled deeply with the first-degree murder count." Nor was the prosecution's unethical act of minimal import. Indeed, as Judge McKeague noted, "If this were direct review, we might find that a new trial was necessary."

That we would order a cure for a constitutional violation on direct review but sit powerless to offer relief to Bacall in this collateral proceeding demonstrates just how far Congress and the judiciary have gone since 1996 to eviscerate protections once deemed by the drafters of the Constitution to be essential to "the growth of fundamental rights of personal liberty." *Fay v. Noia*, 372 U.S. 391, 401 (1963). Our Supreme Court once proclaimed that "the writ of habeas corpus is the precious safeguard of personal liberty and there is no higher duty than to maintain it unimpaired," *Bowen v. Johnston*, 306 U.S. 19, 26 (1939), and that a state court "cannot have the last say when it, though on fair consideration and what procedurally may be deemed fairness, may have misconceived a federal constitutional right." *Brown v. Allen*, 344 U.S. 443, 508 (1953) (opinion of Frankfurter, J.). Yet today, even in light of a clear federal constitutional violation that might well have

condemned the petitioner to life in prison, we are forced to allow the egregious error by the prosecution to go unpunished.

In *Fay*, Justice Brennan proclaimed that "government must always be accountable to the judiciary for a man's imprisonment: if the imprisonment cannot be shown to conform with the fundamental requirements of law, the individual is entitled to his immediate release." *Fay*, 372 U.S. at 402. Sadly, after the enactment of AEDPA and the Supreme Court's interpretation of that statute, Justice Brennan's words no longer ring true. Rather than sit silently in complicity with the congressional and judicial renunciation of the ideals upon which this country was founded, I concur in today's decision only because of our duty to rule in accordance with the Supreme Court's interpretation of the law of the land.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

HAYES BACALL, Petitioner, v. CATHLEEN STODDARD, *Warden,* Respondent.	Case No. 2:14-cv-13442 Honorable Laurie J. Michelson

OPINION AND ORDER DENYING PETITION FOR HABEAS CORPUS [1]

This case primarily concerns a prosecutor's inaccurate statement during closing argument and how much it prejudiced the defendant. In 2010, Petitioner Hayes Bacall shot and killed his nephew, Saif Jameel. Bacall's defense at trial was self-defense. The only eyewitness to the shooting (other than Bacall) testified that the shooting was not in self-defense. But the witness also admitted that he did not see the first shots fired. The arresting officer testified that when he asked "what happened," Bacall said, "I shot my nephew, he owes me $400,000." But Bacall's English is poor and Bacall claimed he did not have an opportunity to clarify that the shooting was in self-defense. Bacall testified that he drew his gun when he met Jameel in the office of Jameel's gas station. But he also said that he knew Jameel had previously drawn guns on people in the past, that he knew there were guns in the office,

and that Jameel attempted to take his gun. During closing argument, the prosecutor asserted that trial was the "first time" that Bacall had claimed self-defense. In fact, Bacall had made the claim numerous times in jail-house telephone calls while awaiting trial – a fact of which the prosecutor was apparently aware.

A Michigan jury convicted Bacall of first-degree, premeditated murder. His conviction was affirmed on appeal in state court.

Bacall now seeks a writ of habeas corpus from this Court. (R. 1.) His strongest claim is that the prosecutor's false statement about when he first claimed self-defense violated his rights under the Constitution and unduly influenced the jury's verdict.

While the issue is not free from doubt, the Court finds that the prosecutor's statement did not violate the Confrontation Clause of the Sixth Amendment and that the Michigan Court of Appeals reasonably found that the statement did not deprive Bacall of the fair trial guaranteed by the Fourteenth Amendment. For this and the reasons provided below, the Court will deny the writ.

I.

A.

1.

Hayes Bacall had a close relationship with his nephew, Saif Jameel. After Bacall came to the United States from Iraq, the two lived together (with others)

in Bacall's father's home. (R. 6, PID 1568-69.) Bacall thought of Jameel as a "son" or "younger brother." (R. 6, PID 1580.)

Bacall began lending Jameel considerable sums of money in 2006. Jameel owned a BP gas station and asked Bacall for $50,000 to remediate a lot across from the station so that a Starbucks could be built there. (R. 6, PID 1575, 1579.) Bacall eventually lent Jameel over $350,000 for the Starbucks project, money Bacall obtained by taking out lines of credit against his home or his cash-checking [sic] business. (R. 6, PID 1582, 1586.) By 2009, Jameel had not paid back any of the $350,000 principal, instead paying only the interest that Bacall owed to the banks that extended the lines of credit. *(See* R. 6, PID 1583, 1650.)

In September 2009, Jameel stopped making even the interest payments. (R. 6, PID 1590-91.) And in March 2010, Jameel asked Bacall for more money: "[Jameel] started claiming that he has a lot of loans out . . . he's getting behind, and if I don't give him any more money to complete his loan applications, uh, I'm going to be in trouble because I think I will not collect anything." (R. 6, PID 1592.) Jameel had not only borrowed money from Bacall, but had close to $1,000,000 in debts. (R. 6, PID 1434.)

According to one of Jameel's brothers, Samir Bacall, between January and July 2010, Bacall had mentioned hurting Jameel on about 15 occasions. (R. 6, PID 1104-05.) Samir recalled that the two would be talking business and then Bacall would "just jump to

something and say your brother is giving me hard time, uh, I swear to you, you know, he will tell me, [we'd] always talk in Arabic or, you know, Chaldean, but the most time we talk in Arabic. He said believe me, trust me, I'm telling you I would, I'll sneak up on your brother and I'll kill him." (R. 6, PID 1106.) Samir also recounted a conversation with Bacall shortly before Jameel's death this way: "[Bacall said,] I'll empty the gun in [Jameel] and that's it, I don't care about life. He playing with my money, that's it, I'll kill him and I'll, I'll go to jail. And I used to tell [my uncle] do you want to to go to jail for the rest of your life. He said I can't take it no more, your brother is playing too much games with me." (R. 6, PID 1109.) Although Samir reported these threats to Jameel, Samir never reported them to the police. (R. 6, PID 1123, 1151.)

Sometime around June 2010, Bacall had a conversation with Jameel. According to Bacall, "[I told] him that you have not paid me my, the interest for 10 months . . . [and] nothing on the 400,000. This is my hard work, my wife's, my kids' hard work, my life. You played games with me, you were slipping, getting those monies from me. I started begging him, asking him to, say I plea with you in any way you want, uh, just give me, uh, you know, my interest. He said, uh, he said do you want it, you want your interest, who is going to give you your money to start with." (R. 6, PID 1604-05.)

In early June 2010, Bacall asked Jameel for money on the principal. (R. 6, PID 1606.) Jameel gave Bacall a $2,000 check – but postdated it until the end of June. (R. 6, PID 1606, 1651.) During the remainder of the

month, Bacall constantly pleaded with Jameel "to make the check good." (R. 6, PID 1609.) In Bacall's words, "I kept on calling him almost on a daily basis to please make the check good, and he, uh, he started saying that please don't bother me, give me couple more days, uh, and I, you know, the phone calls keep going on asking him to please make the check good and he keeps saying don't bother." (R. 6, PID 1607.) Jameel made fun of Bacall "like in a Chaldean way, we say like I have my chin under his hand, uh, and he's, he has all my money so, uh, an then there's an expression like in Chaldean, like my hand under the rock, so . . . he was in control." (R. 6, PID 1610.)

An employee who worked at Jameel's gas station recounted a call between Bacall and Jameel a few days before the July 2, 2010 shooting as follows:

> Q. Were you close enough [to the phone] where you could hear the defendant, Hayes Bacall, yelling?
>
> A. Yelling.
>
> Q. Was he yelling at Saif [Jameel]?
>
> A. Yes.
>
> Q. When Saif would speak back to his uncle, was Saif yelling back at his uncle?
>
> A. Not at all.

(R. 6, PID 1531.)

About this same time, however, another gas-station employee stated that he saw Bacall and Jameel at the station laughing and joking. (R. 6, PID 1760-61.)

2

On July 2, 2010, Bacall left his business in Detroit, Michigan (telling an associate he would see him the next day) and went to see Jameel at his gas station in Troy, Michigan. Bacall carried a gun. He had a permit for the weapon, obtained it because of the high-crime location and dangerous nature of his check-cashing business, and would carry it with him when he needed to make deposits or "bring cash." (*See* R. 6, PID 1572-74.) Bacall went to see Jameel because Jameel was going to give him cash toward the $2,000 check. (R. 6, PID 1640.) Bacall recalled, "my feelings were I'm going to go talk to [Jameel] nice, uh, trying to convince him because I put myself in jeopardy and I'm trying to do, you know, do something." (R. 6, PID 1614.) On his way to Troy, Bacall called Jameel "about 10 times," but Jameel did not answer. (R. 6, PID 1680.)

A video recovered from the BP station and shown to the jury depicts what happened before and after Bacall's meeting with Jameel, but shows little of the during. The video shows Bacall entering the gas station and heading to a small back office. Danielle Iverson, who was working the cash register, testified that Bacall "looked mad" as he headed toward the office. (R. 6, PID 1065.) The video shows Bacall knocking on the back-office door (while looking back toward the front

register), the door opening, and Bacall entering. Only part of the small office is shown through the doorway. Slieman Bashi, who had known both Bacall and Jameel for a long time (R. 6, PID 999), is shown sitting close to the door in front of a desk. Jameel, who is almost entirely out of the camera's view, is sitting behind the desk. Bacall is shown saying something to Bashi (Bacall says he shook Bashi's hand (R. 6, PID 1615)) and then Bacall closes the door. No activity is seen or heard on the video for about 16 seconds, at which point several gun shots are heard. The back-office door then opens slightly, only for about a second, with the video capturing a sliver of Jameel's body over the desk. Jameel's body is bouncing from the force of continued gunfire (presumably to Jameel's backside). Bacall is then shown opening the door to the office, with Jameel face down on the desk. Bacall exits the office followed by Bashi. Although it was disputed at trial whether Bacall or Bashi first told Iverson to call 911, the video does show Bacall telling her to call the police. The video then shows Bacall exiting the station, returning briefly while Iverson is on the phone with the police, and then going back out in front of the station and pacing back and forth. It appears that, at that point, Bacall called 911 from his cell phone. (R. 6, PID 1620.)

Bashi and Bacall provided the jury with different accounts of what occurred in the back office.

Bashi admitted he was at the office that day because Jameel was supposed to pay him some money that he owed him. (R. 6, PID 1010-11.) Bashi told the jury that when he saw Bacall, Bacall appeared "upset."

(R. 6, PID 1003.) He recalled that Bacall's attitude was "[y]elling somewhat, money, arguing." (R. 6, PID 1003.) When asked about Jameel's response, Bashi stated, "[Jameel] told him, uh, don't yell, why yelling." (R. 6, PID 1003.) Then, said Bashi, "[Jameel] was trying to get up, I think, he was like, uh, but [Bacall] didn't give him a chance. He started shooting." (R. 6, PID 1004.) But on cross examination, Bashi admitted that he had previously testified that Jameel had "got up" (*see* R. 6, PID 1025), which is consistent with a blood-splatter expert's testimony that Jameel was standing for at least one shot (*see* R. 6, PID 1361-62). The inconsistency in Bashi's testimony might be attributable to the fact that, as Bacall and Jameel were arguing, Bashi got up to leave and turned away from them. (R. 6, PID 1045-46.) Although it was established at trial that Jameel kept three guns in the back office – a rifle locked up against a wall, a semi-automatic on a safe under a second desk in the office, and a gun on top of a cabinet under some papers (R. 6, PID 1220-22) – Bashi testified that he saw no guns in the office and that Jameel never attempted to grab a gun. (R. 6, PID 1005.)

Bacall recalled the events inside the office much differently. According to Bacall, after shaking Bashi's hand, "Jameel jumped out of his, he got up from his seat, and he said, uh, who brought you here, like you, who brought you here." (R. 6, PID 1616.) Bacall told the jury: "like [Jameel's] eyes opened up, uh, cha-, cha-, uh, his face started changing, uh – right from, you know, by looking at him, I got very scared just like something, I felt something in my body." (R. 6, PID 1617.) Bacall

continued, "I got very scared. I put my hand on my gun. I tried to, uh, leave, there was no, no room for the door to get out. If I opened the door, I would either go towards [Bashi] or go towards him. . . . I pulled my gun, put it down, I wanted to make sure that I would be able to leave because I didn't want him to get to me first. Because, because I'm aware that he has a lot of weapons in the office and I had seen it. . . . I sta[r]ted telling myself what, why did I put myself in that situation, why did I come." (R. 6, PID 1617.) Bacall testified that at that point, "[Jameel] responded by saying – you are, you're pulling your weapon on me, I'll, I'll put it in your ass. He was trying to jump on me to pull it out of my gun, out of my hand. . . . If you are a man, go – shoot – if you're a man, shoot. That's when I started shooting." (R. 6, PID 1618.) When asked why he shot Jameel, Bacall testified, "I knew I was going to die. I was, I felt in danger. Because he had pulled a gun on, on tons of peoples with no reason. So how about, how about a person whom, whom he owes $400,000 – what do you think he will do to him." (R. 6, PID 1620.) Bacall stated that when he was shooting, Jameel was "trying to go to his cabinet. And, and that's when I start, kept on shooting." (R. 6, PID 1620.)

At trial, Bacall expanded on his assertion that he was aware that Jameel had previously pulled guns on people. Bacall described being at his father's funeral and the valet telling Jameel that he could not park where he had stopped. (R. 6, PID 1596.) According to Bacall, "[Jameel] responded by saying – do you know who you're talking to. You want to stop me from

parking here. Then he pulled the gun and put it in [the valet's] face." (R. 6, PID 1596.) Bacall also described a situation at his cash-checking [sic] business where Jameel exhibited similar behavior. A group of three came in and presented Bacall with a check not written out to them. (R. 6, PID 1599.) Jameel came out of the office (Jameel had just sold the business to Bacall) and told them to take their check and go. (R. 6, PID 1599.) Argument ensued, with Jameel eventually pulling a shotgun, showing the gun he had strapped to his side, and the one that he had "in his foot." (R. 6, PID 1600.)

Other witnesses testified about Jameel's possession of firearms. Jameel's wife admitted that she had told police that Jameel was always "strapped" (i.e., armed) and was always ready. (R. 6, PID 1445-46.) She also admitted to having told police that Jameel was under a lot of stress around the time of the shooting. (R. 6, PID 1434-35.) Iverson, who was working the BP register on July 2, testified that it was fairly common knowledge that Jameel kept a gun at the station and that he sometimes carried one. (R. 6, PID 1080-81.) Another BP station employee (the one who overheard Bacall yelling on the phone) similarly testified that he knew Jameel carried a gun and that he had guns in the BP station office. (R. 6, PID 1545.)

3.

Not long after the shooting, police arrived on scene. Officer Gregory Stopczynski, the first responder, saw Bacall pacing outside the BP station: "He was

cooperative and I kind of took it – he was kind of like he had a eerie calmness to him." (R. 6, PID 863.) Stopczynski secured Bacall's gun. According to Stopczynski, "I asked him, what happened. . . . He said, I shot my nephew, he owes me $400,000." (R. 6, PID 855.) Bacall was eventually placed in the back of Stopczynski's police cruiser.

In the cruiser, Stopczynski, who was unsure whether Bacall had said that his nephew owed him $400,000 or the other way around, sought clarification. A recording from Stopczynski's cruiser captured the exchange:

> STOPCZYNSKI: You, you owe your nephew four hundred?
>
> BACALL: You owe me four hundred, [pause], thousand dollars.
>
> STOPCZYNSKI: He owes you?
>
> BACALL: Yes.
>
> STOPCZYNSKI: Okay.
>
> BACALL: Yes.
>
> STOPCZYNSKI: So that's why you shot him.
>
> BACALL: Yes, I, I, I –
>
> STOPCZYNSKI: – Okay you know your rights, right?
>
> BACALL: Yes I'm right.
>
> STOPCZYNSKI: Constitutional rights?

> BACALL: Yes everything's right. . . .
>
> [Stopczynski reads *Miranda* rights in a questioning manner with Bacall saying "yes, yes"]
>
> STOPCZYNSKI: Why did you shoot your nephew?
>
> BACALL: Because he give me hard time, almost a year [or all those years] he don't give me nothing. I, I, –
>
> STOPCZYNSKI: How many times you shoot?
>
> BACALL: I shoot him six times.

(Police Car Video, File 184052 at 18:43:21 to 18:43:55.)

At trial, Bacall explained the foregoing exchange. (R. 6, PID 1623.) When asked if he recalled Stopczynski asking, "So that's why you shot him," Bacall told the jury: "There are a lot of phrases that, you know, I don't understand, uh, I think when, when he said all right, I thought he was, if I'm okay, if I'm like, uh, have a seatbelt or, you know, personally okay. That's how I understood it. Or, or I think, uh, he, he asked – that's how I understood it that what you did is all right and I think I was answering him – all right, all right." (R. 6, PID 1624.) Bacall also stated, when he answered, "Yes, I, I, I –," "I wanted to tell him, you know, what happened or how it happened but he like left, left or stopped or, you know, something happened that I did not finish what I was saying." (R. 6, PID 1624-25.) At trial, Stopczynski conceded that he interrupted Bacall to read him his *Miranda* rights. (R. 6, PID 881; *see also id.* PID 884.)

While in the back of the cruiser, Bacall, who still had his cell phone, received a call from Samir. Although their conversation was not in English, portions of the translation were read to the jury. Bacall said to Samir: "Hello, I killed – I killed your brother. I fucked his sister; I killed him." (R. 6, PID 860.) Samir testified that Bacall said, "I killed your brother . . . I just fucked his sister up" – this last part being an insult in Arabic or Chaldean. (R. 6, PID 1112.) At trial, Bacall explained the remark he had made to Samir, "when I said it is like, uh, I, I took [Jameel] first instead of him taking me – and like I had him for a first before he had me for dinner." (R. 6, PID 1627.) Bacall said that Samir immediately hung up: "I wanted to – I continued talking to Samir. He did not give me a chance, he hang up. He, he just, he just heard what he wanted to hear again and he did not hear the, the rest, and he hang up." (*Id.*)

4.

Bacall was detained pending trial. He made a number of calls while in jail. Although the transcripts of these calls were not introduced to the jury, attorney argument following trial makes plain that in seven of these calls, Bacall claimed that he killed Jameel out of self-defense. (R. 6, PID 1924, 1927.) The trial record also reflects that the prosecutor was aware of the content of these calls. (R. 6, PID 1168-69.)

B.

1.

Bacall's theory of the case was self-defense. During closing argument, Bacall's counsel stressed to the jury that Bacall thought of Jameel as a son and loved him to the extent that he put his own future on the line in lending Jameel money (R. 6, PID 1848-50); that Samir's testimony about Bacall's threats of harming Jameel were not credible given that Samir never went to the police (R. 6, PID 1850); that Jameel had threatened people with guns in the past (R. 6, PID 1865-66); that Bacall knew this (R. 6, PID 1867); that Jameel was stressed at the time of the shooting (R. 6, PID 1866); that Bashi was not credible for a number of reasons (R. 6, PID 1858-59); that Bacall only needed to have an honest and reasonable belief that Jameel was turning for a gun when he fired (R. 6, PID 1867-68, 1874); that Jameel's bullet wounds are consistent with Jameel turning toward a gun (R. 6, PID 1874); that Bacall did not flee the crime scene (R. 6, PID 1877); that Bacall's statements to Stopczynski were attributable to poor English and Stopczynski's interruptions (R. 6, PID 1879); and that the prosecution needed to prove – beyond a reasonable doubt – that Bacall did not act in self-defense (R. 6, PID 1840, 1843).

In rebuttal, the prosecutor addressed several aspects of Bacall's closing argument, including Bacall's claim of self-defense. In particular, the prosecutor told the jury,

In English, the defendant says he killed his nephew for $400,000. That's the first thing out of his mouth when the officer asked him what happened. . . . Defendant never says self-defense to the police officer and the officer gives him three separate chances. . . . [A]fter the *Miranda* rights, the officer asks him again about shooting a nephew. He says – well, he hasn't given me anything in about a year. He never says self-defense or even anything like self-defense. And on the witness stand, defense counsel asked the defendant – well, why did you tell the officer, you know, you shot him because of $400,000 – and the defendant slips up, he says – because that was the main reason at that time. So practice though he may, the truth shines through.

Now, at trial is the first time the defendant says self-defense. The eyewitnesses tell you it's no self-defense. The victim never even touched the defendant. . . .

The location of the gunshot wounds on the body of Mr. Jameel, that also shows that this is not self-defense. These are execution shots. . . .

You know in your hearts what this defendant did was not self-defense. He could have gotten out of that office. He never tried to leave until after his gun was empty and after the victim was murdered. Any one of these shots, except for a couple, would have been immediately incapacitating. Does he walk out? No. He just

> keeps firing. That shows you it's not self-defense. This is about the defendant's rage, okay.

(R. 6, PID 1897-99 (emphasis added).)

The jury deliberated for two afternoons and a morning. At one point, the jury sent a note to the judge stating, "Can the jury decide on a verdict of a lesser cause when they are unanimous, even though some may feel a stronger verdict is what they believe?" (R. 6, PID 2043, *see also id.* PID 1952-54.) And, in announcing the verdict, this exchange took place:

> THE COURT: And I'm going to ask if you are the foreperson to please stand and read the verdict.
>
> THE FOREPERSON: Might I say this was not an easy decision and we . . . thought about it.
>
> THE COURT: No, I can tell.
>
> THE FOREPERSON: Very much so.

(R. 6, PID 1956.)

In the end, the jury convicted Bacall of first-degree premeditated murder. (*Id.*)

2.

Bacall appealed. He raised four claims of error in the Michigan Court of Appeals: (1) that the trial court violated his right against double jeopardy by directing the jury to continue deliberations after the jury was

unanimous on a lesser charge; (2) that the prosecutor made several remarks during closing argument – including, "Now, at trial is the first time the defendant says self-defense" – that deprived him of both a constitutionally fair trial and his Sixth Amendment right to confrontation; (3) that the jury was impermissibly allowed to deliberate outside the jury room; and (4) that the trial judge erroneously failed to instruct the jury on the theory of imperfect self-defense. (R. 6, PID 1995.)

The Michigan Court of Appeals affirmed Bacall's conviction. *People v. Bacall*, No. 306269, 2013 WL 951084 (Mich. Ct. App. Mar. 5, 2013) (per curiam). Regarding the prosecutor's statement that trial was the "first time" that Bacall had claimed self-defense, the state appellate court found the remark "highly inappropriate." *Id.* at *4. The Michigan Court of Appeals explained, "the prosecution concedes that it possessed several recordings of phone conversations in which defendant claimed self-defense. Therefore, the prosecutor's statement that defendant 'never said self-defense' before trial was clearly false." *Id.* at *4. Nonetheless, the Court of Appeals found that statement did not deprive Bacall of a fair trial: "Given the overwhelming evidence which includes the testimony of an eyewitness to the shooting, defendant's statements to the police and a videotape of some of the events themselves, we conclude that the prosecutor's improper statement did not deny defendant a fair trial and so we do not reverse defendant's conviction." *Id.* at *5. The state

appellate court further found that none of Bacall's other claims of trial error warranted reversal.

Bacall sought leave to appeal from the Michigan Supreme Court, but the state high court was not persuaded that the questions Bacall presented warranted its review. *People v. Bacall*, 843 N.W.2d 147 (Mich. 2013).

3.

Bacall now seeks a writ of habeas corpus from this Court. (R. 1.) Although he has abandoned his claim for an imperfect-self-defense instruction, Bacall raises the other three claims that he asserted in the Michigan Court of Appeals.

II.

The standard of review this Court applies to each of Bacall's claims depends on whether the claim was "adjudicated on the merits in state court[.]" 28 U.S.C. § 2554(d); *see also Johnson v. Williams*, ___ U.S. ___, 133 S. Ct. 1088, 1097, 185 L.Ed. 2d 105 (2013). If the Michigan Court of Appeals already decided the claim "on the merits," the Antiterrorism and Effective Death Penalty Act of 1996 requires this Court to grant the state appellate court's decision deference. In particular, AEDPA prohibits this Court from granting habeas corpus relief with respect to any claim that the Michigan Court of Appeals "adjudicated on the merits" unless the 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). But "[w]hen a state court does not address a claim on the merits, . . . 'AEDPA deference' does not apply and [this Court] will review the claim *de novo*." *Bies v. Sheldon*, 775 F.3d 386, 395 (6th Cir. 2014).

III.

A.

Bacall claims that three remarks made by the prosecutor during closing argument deprived him of the fair trial guaranteed by the Due Process Clause: (1) that "trial [was] the first time" Bacall said self-defense, (2) that Bacall's "actions [were] no different than that of a loan shark," and (3) insinuation that Bacall lied on his gun-permit application. (R. 1, PID 16-21.) Bacall further asserts that if none of the three comments alone deprived him of a fair trial, together they did. (R. 1, PID 21.)

The Court begins with Bacall's claim that the prosecutor's assertion that he first claimed self-defense at trial violated the Due Process Clause.

This claim was adjudicated "on the merits" by the Michigan Court of Appeals. As noted, the state appellate court found that although "highly

inappropriate," the prosecutor's statement "did not deny defendant a fair trial" given the other evidence of guilt. *Bacall*, 2013 WL 951084, at *4-*5. As such, the above-referenced AEDPA deference applies. *See* 28 U.S.C. § 2254(d).

"The 'clearly established Federal law' relevant here is [the Supreme Court's] decision in *Darden v. Wainwright*, 477 U.S. 168, 106 S.Ct. 2464, 91 L.Ed.2d 144 (1986), which explained that a prosecutor's improper comments will be held to violate the Constitution only if they 'so infected the trial with unfairness as to make the resulting conviction a denial of due process.'" *Parker v. Matthews*, ___ U.S. ___, 132 S. Ct. 2148, 2153 (2012); *see also Gillard v. Mitchell*, 445 F.3d 883, 897 (6th Cir. 2006) ("Even if the prosecution's conduct was improper or even 'universally condemned,' [*Darden*, 477 U.S. at 181], this court can only reverse if the statements were so flagrant as to render the entire trial fundamentally unfair.").

In assessing whether the Michigan Court of Appeals unreasonably applied the *Darden* standard, the Court compares the inculpatory and exculpatory evidence: the closer the case, the more likely the prosecutor's remark "infected the trial with unfairness." *See Darden*, 477 U.S. at 182 ("The weight of the evidence against petitioner was heavy[,] . . . [which] reduced the likelihood that the jury's decision was influenced by argument.").

In terms of the evidence supporting Bacall's defense, Bashi's account of what happened was not

beyond reproach. He did not see the first shots fired and testified inconsistently about whether Jameel stood up during his confrontation with Bacall. Bashi also stated that he did not know whether Jameel owned or carried guns (R. 6, PID 1051, 1056) – a questionable claim given that Bashi had worked at the gas station at one point and Jameel was his "very closest friend." (R. 6, PID 1080-81, 1009.) And there was support for Bacall's account of what occurred: he called Jameel 10 times to let him know he was on his way, he knew Jameel had guns in the office, he knew Jameel had threatened people using guns in the past, the only way Jameel could repay him is if he was alive, and Jameel was under stress at the time of the shooting. As for Bacall's threats leading up to July 2, 2010, the jury heard that Samir failed to go to the police, suggesting that Bacall's statements were merely hyperbole. As for Bacall's failure to mention self-defense to Officer Stopczynski, it is plain that Bacall has difficulties with English and that Stopczynski interrupted Bacall on several occasions.

On the other hand, as the Michigan Court of Appeals found, the case against Bacall was strong. The shooting was consistent with Bacall's alleged threats prior to July 2, 2010. And even discounting these threats as hyperbole, the record makes plain that Bacall was very upset about not being repaid. Bacall himself stated that he told Jameel, "This is my hard work, my wife's, my kids' hard work, my life. You played games with me, you were slipping, getting those monies from me." (R. 6, PID 1604.) Bacall "started

begging [Jameel]": "I plea with you in any way you want, uh, just give me, uh, you know, my interest." (*Id.*) And Bacall's actions were consistent with his words: in June 2010, Bacall repeatedly called Jameel to collect $2,000 even though this was but a tiny fraction of what Jameel owed. Bacall's desperation to get something from Jameel lends credibility to Iverson's claim that Bacall was angry when he arrived at the station and to Bashi's claim that Bacall was upset and yelling in the back office. And while Bacall may have often carried his gun due to the nature of his cash-checking business, there was no testimony that Bacall planned to transport cash or checks on his way to see Jameel. Bacall fired 12 shots. This occurred within 16 seconds of his entering the office. Further, despite Bacall's poor English and Stopczynski's interruptions, the squad-car recording makes plain that there were opportunities for Bacall to tell the officer that Jameel had tried to attack him. One was when Stopczynski finished reading Bacall his *Miranda* rights and asked, "Why did you shoot your nephew?" Instead of referencing anything self-defense related, Bacall stated, "[b]ecause he give me hard time, almost a year [or all those years] he don't give me nothing. I, I, –." Further, while in the patrol car, Bacall spoke to Jameel's brother – in Chaldean or Arabic – and, instead of directly saying that he killed Jameel before Jameel could kill him, he made an insult involving Jameel's sister.

Apart from the strength of the parties' cases, other factors pertaining to whether the prosecutor's "first time" comment deprived Bacall of a fair trial are

mixed. In Bacall's favor is that the prosecution's comment called into question Bacall's only defense at trial. Add to that the fact that the jury struggled with its decision. On the other hand, the jury was specifically instructed that the attorneys' arguments were not evidence. At the outset of trial, the judge told the jury, "After all of the evidence has been presented, the prosecutor and the defendant's lawyer will make their closing arguments. Like the opening statements, these are not evidence." (R. 6, PID 806.) And, after the prosecutor's closing remarks, the trial court again reminded the jurors that "[t]he lawyers' statements and arguments are not evidence." (R. 6, PID 1905.) These instructions reduced the risk of prejudice from the prosecutor's misstatement of fact. *See United States v. Olano*, 507 U.S. 725, 740 (1993) ("[We] presum[e] that jurors, conscious of the gravity of their task, attend closely the particular language of the trial court's instructions in a criminal case and strive to understand, make sense of, and follow the instructions given them." (internal quotation marks omitted)).

In sum, given the considerable evidence suggesting that Bacall did not act in self-defense and the trial-court's instruction about closing argument, the Court cannot say that the Michigan Court of Appeals' finding that the prosecutor's "first time" remark did not deprive Bacall of a fair trial was contrary to *Darden* or involved an unreasonable application of the standard set out in that case. And a review of the trial transcripts reveals no unreasonable factual determinations. As such, Bacall's Due Process Clause claim based

on the prosecutor's "first time" remark does not clear § 2254(d)'s bar to habeas corpus relief.

That almost suffices to resolve all of Bacall's arguments under the Due Process Clause. "Almost," because, as noted, Bacall asserts that two other remarks by the prosecutor, when combined with the "first time" remark, deprived him of a fair trial. During closing argument, the prosecutor stated:

> [PROSECUTOR]: Defense counsel says, oh, the defendant is a good guy for loaning his nephew the money. He's not doing this out of the goodness of his heart. He's charging interest from day one. *These actions are no different than that of a loan shark.* If you think about it –
>
> [BACALL'S COUNSEL]: Your Honor –
>
> [PROSECUTOR]: – he's asking for interest –
>
> [BACALL'S COUNSEL]: I'm going to object to that. There's no evidence that this interest was anything other than what –
>
> THE COURT: Overruled. This is argument.
>
> (At 12:20 p.m., court recording video stopped & restarted)
>
> [PROSECUTOR]: This defendant who used to be Hazim Dekho moves to Michigan. *He changes his name to Hayes Bacall. The defendant then applies for a Michigan concealed pistol license but the defendant fails to tell anyone that he had the unlawful discharge of –*

> [BACALL'S COUNSEL]: Objection –
>
> [PROSECUTOR]: – *a firearm* –
>
> [BACALL'S COUNSEL]: – there's no –
>
> [PROSECUTOR]: – *conviction* –
>
> [BACALL'S COUNSEL]: – testimony –
>
> [PROSECUTOR]: – *previously.*
>
> [BACALL'S COUNSEL]: – about this. . . .
>
> THE COURT: Overruled during closing argument. It's argument.

(R. 6, PID 1894-95 (emphases added).)

The Michigan Court of Appeals addressed – separately – both remarks. It found that the "loan shark" reference was proper because, earlier in the trial, "defense counsel [had] asked [Samir] Bacall whether defendant had charged the decedent a 20 percent interest rate like a 'loan shark.'" *Bacall*, 2013 WL 951084, at *3. As for the prosecutor's reference to Bacall's failure to disclose his unlawful discharge conviction on his application for a gun permit, the Michigan Court of Appeals implied that the reference was improper given the trial court's ruling that the issue was collateral. *Id.* But, thought the appellate court, "[a]ny prejudice resulting from the prosecutor's remarks was cured" by the trial court's instruction "that the prosecution's statements and arguments are not evidence." *Id.*

The Michigan Court of Appeals' separate treatment of each of the prosecutor's remarks raises the

question of whether AEDPA deference applies to Bacall's assertion that the three remarks – in combination – rendered the trial fundamentally unfair. Where a state appellate court affirms a conviction and explicitly addresses some of the defendant's claims of error but not others, a federal habeas corpus court is to presume that the unaddressed claims were implicitly rejected "on the merits." *See Johnson v. Williams*, ___ U.S. ___, 133 S. Ct. 1088, 1094, 185 L. Ed. 2d 105 (2013). To be sure, this presumption is rebuttable when, for example, the state court's opinion and associated briefing suggests that the state court overlooked the defendant's claim. *See id.* at 1096. But the presumption remains when there is good reason to think that the state court did not feel the need to explain its rejection of a particular claim. *See id.* at 1095-96.

This is that case. For one, Bacall's cumulative prejudice argument was cursorily argued in his briefing to the Michigan Court of Appeals, essentially making the point in a single sentence. (*See* R. 6, PID 2031.) So the state appellate court could have thought it too underdeveloped to require discussion. *See Johnson*, 133 S. Ct. at 1095 ("Federal courts of appeals refuse to take cognizance of arguments that are made in passing without proper development. State appellate courts are entitled to follow the same practice." (citations omitted)). Further, a complete reading of the Michigan Court of Appeals' opinion suggests that the court implicitly rejected the cumulative prejudice claim. As noted, the state appellate court concluded that the "highly inappropriate" "first time" remark did not

deprive Bacall of a fair trial due to "overwhelming" evidence of guilt. *Bacall*, 2013 WL 951084, at *5. It would seem to follow that the state court implicitly found that the other two remarks – one which the court thought not improper and one which the court thought that any prejudice had been "cured" – would not, when combined with the "first time" remark, overcome the "overwhelming" evidence of guilt. So this Court will apply AEDPA deference to that implicit finding and ask whether it was contrary to, or an unreasonable application of, Supreme Court precedent.

It was not. The Court does not condone the prosecutor calling Bacall a "loan shark." Nor does the Court believe that the prosecutor should have referenced Bacall's omission on his gun application given the trial court's ruling that the omission was irrelevant. (*See* R. 6, PID 1662-63.) But the "loan shark" reference had little bearing on the central issue of self-defense. And while the gun-permit application went to Bacall's credibility, it did so only slightly. Further, the sting of the two statements was lessened by the objections, the trial court's response that the comments were mere attorney argument, and the court's instruction that argument was not evidence. The two remarks thus did not significantly alter the fair-trial calculus.

In short, the Michigan Court of Appeals reasonably concluded that the prosecutor's remarks during closing argument did not deprive Bacall of the fair trial promised by the Due Process Clause. As such, Bacall is not entitled to a writ of habeas corpus on this claim. *See* 28 U.S.C. § 2254(d).

B.

Bacall alternatively argues that the prosecutor's "first time" remark violated the Confrontation Clause of the Sixth Amendment.

Before turning to the merits of this claim, a threshold question again arises: does this Court adjudicate the claim in the first instance or does it defer to an implicit finding by the Michigan Court of Appeals? The answer is not obvious.

A review of the Michigan Court of Appeals' opinion suggests that this Court should decide the Confrontation Clause claim *de novo*. This is because the opinion – despite addressing all of Bacall's other claims in detail – does not mention the Confrontation Clause or the possibility that the prosecutor's statement of fact was testimony. *See generally People v. Bacall*, No. 306269, 2013 WL 951084 (Mich. Ct. App. Mar. 5, 2013). And the fair-trial analysis performed by the state appellate court does not comport with the harmless-error analysis that would apply if the court simply had presumed a Confrontation Clause violation. *See Chapman v. California*, 386 U.S. 18, 24 (1967). And this Court does not believe that the idea that a prosecutor's statement of fact could implicate the Confrontation Clause is so farfetched that the notion did not warrant any discussion. All of this suggests that the Michigan Court of Appeals overlooked Bacall's Confrontation Clause claim and that this Court should evaluate the claim *de novo*. *See Johnson*, 133 S. Ct. at 1097 (providing that "[i]f a federal claim is rejected as a result of sheer inadvertence"

it has not been "adjudicated on the merits" within the meaning of § 2554(d)).

But Bacall's briefing in the Michigan Court of Appeals suggests that AEDPA deference should apply. A review of that briefing reveals that Bacall intertwined his Confrontation Clause claim with his Due Process Clause claim. (*See* R. 6, PID 2020-26.) And it appears that the primary argument was that the prosecutor's "first time" remark violated the Due Process Clause. As such, this may be a situation, as with Bacall's cumulative error argument, where the Michigan Court of Appeals rejected the claim as inadequately developed and did not feel compelled to say that in its opinion. *See Johnson*, 133 S. Ct. at 1094 ("[I]t is not the uniform practice of busy state courts to discuss separately every single claim to which a defendant makes even a passing reference").

In the end, the Court need not decide whether AEDPA deference applies. Assuming in Bacall's favor that this Court should assess his Confrontation Clause claim *de novo*, the claim does not justify a writ of habeas corpus.

To start, Bacall cites no case holding that, by making a misstatement of fact during closing argument, a prosecutor both becomes a witness and offers a testimonial statement for Confrontation Clause purposes.

And the Court's research has not uncovered any decision so holding. There are cases holding that when a prosecutor recounts what a non-testifying witness said, and the defendant lacks the opportunity to cross

examine that witness, the prosecutor's conduct violates the Confrontation Clause. *See Douglas v. State of Alabama*, 380 U.S. 415 (1965) (finding Confrontation Clause violation where prosecutor, through questioning, introduced a witness's out-of-court statements inculpating the defendant and the witness could not be cross examined because he had asserted Fifth Amendment privilege); *United States v. Molina-Guevara*, 96 F.3d 698, 703 (3d Cir. 1996) (finding Confrontation Clause violation where, during closing argument, prosecutor implied to jury that a non-testifying agent would have corroborated testifying agent's testimony about defendant's confession); *Hutchins v. Wainwright*, 715 F.2d 512, 515-16 (11th Cir. 1983) (finding Confrontation Clause violation where, during closing argument, prosecutor essentially informed the jury that there was an eyewitness to the crime who identified defendant but who had not testified).

But this case does not involve the situation where the prosecutor recounted what a non-testifying witness said. This case instead involves an erroneous statement of fact made directly by a prosecutor during closing argument. This type of statement is not at the core of what the Confrontation Clause covers. *See United States v. Ellis*, 460 F.3d 920, 923 (7th Cir. 2006) ("The prototypical case of testimonial evidence is that created by the civil-law tradition of a judicial officer examining a witness in private and then later reporting the results in court." (citing *Crawford v. Washington*, 541 U.S. 36, 42-43 (2004))). And it is arguably not even at the Clause's periphery given that, as was the

case here, juries are instructed that a prosecutor's closing remarks are argument – not evidence.

United States v. Webster, 400 F. App'x 666 (3d Cir. 2010), supports this view. There, probation officers found guns in an apartment that the defendant shared with his father. *Id.* at 667. The defendant was tried on felon-in-possession charges and, during closing, the prosecutor stated,

> So you didn't hear that [either the defendant's father or sister] when they first came back, sa[y], hey, there are guns in there that are mine. You didn't hear that evidence. There's no evidence on that point. . . .
>
> Nowhere in the course of the couch search, when [the probation officers] tell the parents, the family to stand up, when the family is standing there, when they are flipping the cushions, did you hear evidence that somebody said, hey, wait a minute. You're going to find a gun. I've got a gun.

Id. at 669. The defendant claimed that the prosecutor's remark about his father's silence violated the Confrontation Clause because his father had asserted the Fifth Amendment and thus could not be cross examined. *Id.* The Third Circuit disagreed: "The Confrontation Clause bars the admission of out-of-court testimonial statements by witnesses who are unavailable for cross examination at trial. No testimonial statements by [the defendant's] father were admitted, and the District Court specifically instructed the jurors that lawyers' statements are not evidence." *Id.* at 670; *see also*

United States v. Crowe, 614 F. App'x 303, 306-07 (6th Cir. 2015) (finding that statement by co-defendant's counsel during closing argument was not "testimonial" and thus did not implicate the Confrontation Clause); *United States v. Taylor*, 509 F.3d 839, 850 (7th Cir. 2007) (finding that improper remark or mischaracterization of the evidence by counsel during closing argument does not implicate the Confrontation Clause because "[a]s every jury is instructed, lawyers' statements are not evidence").

Because Bacall has not cited any authority supporting his assertion that a prosecutor's statement of fact during closing arguments implicates that Confrontation Clause, and because there is good reason to think that the Confrontation Clause does not extend to such a statement, the Court declines to grant Bacall a writ of habeas corpus on his Sixth Amendment claim. *See Garner v. Mitchell*, 557 F.3d 257, 261 (6th Cir. 2009) ("[I]n a habeas proceeding[,] the petitioner has the burden of establishing his right to federal habeas relief" (internal quotation marks omitted)).

C.

Bacall also claims that he is entitled to a writ of habeas corpus because the trial court's instruction to the jury to continue deliberations placed him in double jeopardy contrary to the Double Jeopardy Clause of the Fifth Amendment. During deliberations, the jury sent a note to the judge that said: "Can the jury decide on a verdict of a lesser cause when they are unanimous,

even though some may feel a stronger verdict is what they believe?" (R. 6, PID 2043, *see also id.* PID 1952-54.) In response, the trial judge gave the jury a modified *Allen* instruction, which included the following direction:

> If you believe the defendant is not guilty of first degree premeditated murder or if you cannot agree about that crime, you should consider the less serious crime of second degree murder or voluntary manslaughter. You decide how long to spend on first degree premeditated murder before discussing second degree murder or voluntary manslaughter. You can go back to first degree premeditated murder after discussing second degree murder or voluntary manslaughter if you want to. . . .
>
> I don't mean to suggest you haven't already done this but – when you continue your deliberations, do not hesitate to rethink your own views and change your opinion if you decide it was wrong. However, none of you should give up your honest beliefs about the weight or effect of the evidence only because of what your fellow jurors think or only for the sake of reaching agreement.

(R. 6, PID 1953-54.) Bacall claims that by "ignor[ing] the fact that the jury had a verdict," the trial court violated the Constitution's prohibition on double jeopardy. (R. 1, PID 27.)

The Michigan Court of Appeals rejected this claim. It explained:

> Based on the jury's note, which stated that some jurors felt that a stronger verdict was appropriate, but did not indicate it was deadlocked on first degree murder, and the fact that the jury did not mark the second degree murder box on the verdict form, we conclude that the trial court correctly determined that the jury had not reached a unanimous verdict. Thus, the jury did not acquit defendant on his first-degree murder charge. Therefore, defendant's right against double jeopardy was not violated. Furthermore, because the jury was undecided, the trial court's instruction was appropriate.

Bacall, 2013 WL 951084, at *2 (citation ommitted).

This explanation by the Michigan Court of Appeals shows that it decided "the merits" of Bacall's double jeopardy claim; as such, this Court does not address the claim *de novo.* Instead it applies AEDPA deference. And because the Michigan Court of Appeals made factual determinations in rejecting Bacall's double jeopardy claim ("the jury had not reached a unanimous verdict" and had not "acquit[ed] defendant on his first-degree murder charge"), the question for this Court is whether Bacall has shown these factual determinations were "unreasonable . . . in light of the evidence presented in the State court proceeding," 28 U.S.C. § 2254(d)(2).

Bacall has not. Although the jury's note indicates that all members of the jury had agreed that Bacall was guilty of at least second-degree murder or

manslaughter, the note also plainly indicates that some members of the jury thought Bacall was guilty of first-degree murder. And it is not obvious that the jury completed deliberations on first-degree murder. As that question of fact is debatable, the Court cannot say that the Michigan Court of Appeals' resolution of it was unreasonable. Bacall has thus not cleared § 2254(d), and the Court cannot grant him habeas relief on his double jeopardy claim.

D.

Bacall next claims that he is entitled to a writ of habeas corpus because the jury was allowed to deliberate outside of the privacy of the jury room. During its deliberations, the jury requested to see a firearm (presumably the one that Bacall used to shoot Jameel). As the trial court's policy was not to allow guns in the jury room, the judge permitted the jurors to examine the gun in the courtroom. After the jury came into the courtroom, the following occurred:

> [COUNSEL FROM THE PROSECUTOR'S OFFICE:] Ladies and gentlemen (inaudible words) –
>
> UNIDENTIFIED JUROR: (Inaudible words) – (Pause in courtroom)
>
> THE COURT: I don't, I prefer that we not sit here and try to listen to them – if you don't mind. These are jury deliberations and they should be –
>
> UNIDENTIFIED JUROR: Your Honor –

> THE COURT: – among them. Yes.
>
> UNIDENTIFIED JUROR: Can we get up and –
>
> THE COURT: Yes, yes. Feel free to go over there. Just pretend like we're not here.

(R. 6, PID 1941-42.) Bacall asserts that there were a number of people in the courtroom, including the prosecutor and possibly Bacall's family members, whose body language or mere presence could have influenced the jury. (R. 1, PID 37.)

Although the Michigan Court of Appeals rejected this claim, it did so by exercising "plain error" review. *Bacall*, 2013 WL 951084, at *5. And published precedent from our Court of Appeals is in disagreement as to whether a state court's plain-error review amounts to adjudication "on the merits" warranting AEDPA deference. *Compare Fleming v. Metrish*, 556 F.3d 520, 532 (6th Cir. 2009) (finding that a claim reviewed by a state court for "plain error" can be considered "adjudicated on the merits" under § 2254), *with Frazier v. Jenkins*, 770 F.3d 485, 497 n.6 (6th Cir. 2014) ("We have repeatedly held that plain-error review is not equivalent to adjudication on the merits, which would trigger AEDPA deference."); *see also Frazier*, 770 F.3d at 506 (Sutton, J., dissenting) ("We have been down this road before, and [*Fleming*] tells us how to navigate it. It makes clear as day that a state court's plain-error review of an issue may receive AEDPA deference when the state court addresses the merits of the federal claim."); *Trimble v. Bobby*, 804 F.3d 767, 777 (6th Cir.

2015) (noting disagreement among *Fleming* and *Frazier* but declining to "enter th[e] debate" where claim failed under either AEDPA deference or *de novo* review). Because Bacall's claim fails under even *de novo* review, the Court assumes without deciding that the Michigan Court of Appeals did not adjudicate the claim "on the merits."

Bacall has identified no actual prejudice from the jury's apparently brief, public deliberation. Instead he merely speculates that the presence or body language of the prosecutor or others in the courtroom could have influenced the jury. (*See* R. 1, PID 37.) This possibility of harm is enough, Bacall suggests, because the jury's public deliberation amounted to structural error (*see* R. 1, PID 34) – " 'a very limited class of errors' that trigger automatic reversal because they undermine the fairness of a criminal proceeding as a whole," *United States v. Davila*, ___ U.S. ___, ___, 133 S. Ct. 2139, 2149, 186 L. Ed. 2d 139 (2013).

The Court believes that *United States v. Olano*, 507 U.S. 725 (1993), forecloses Bacall's claim of structural error. There, two alternate jurors were allowed to be present in the jury room during deliberations under the instruction that they were not allowed to participate. *Id.* at 729. As Bacall claims here, there was the possibility that the alternates could have influenced the jury through body language or by "chilling" deliberation. *Id.* at 739. In finding that the presence of the alternates did not affect the defendants' "substantial rights" as that phrase is used in Federal Rule of Criminal Procedure 52(b), the Supreme Court reasoned:

> Although the presence of alternate jurors does contravene the cardinal principle that the deliberations of the jury shall remain private and secret, the primary if not exclusive purpose of jury privacy and secrecy is to protect the jury's deliberations from improper influence. If no harm resulted from this intrusion of an alternate juror into the jury room, reversal would be pointless. We generally have analyzed outside intrusions upon the jury for prejudicial impact.

Olano, 507 U.S. at 737-38 (internal citations, alterations, and quotation marks omitted). The Court provided that while there may be cases were prejudice from intrusion upon deliberations could be presumed, at bottom the question was, "Did the intrusion affect the jury's deliberations and thereby its verdict?" *Id.* at 739. In labeling this as the "ultimate inquiry," the Court noted that in two cases involving considerable juror influence – including one where the bailiff had told the jury, "Oh that wicked fellow he is guilty" – it still inquired into prejudice from the influence. *Id.* at 739 (citing *Parker v. Gladden*, 385 U.S. 363 (1967); *Remmer v. United States*, 347 U.S. 227 (1954)). *Olano* thus cuts strongly against Bacall's claim that a jury's deliberation outside the jury room amounts to structural error. *See also United States v. Jadlowe*, 628 F.3d 1, 15, 20 (1st Cir. 2010) (finding that judge's instruction permitting jury to discuss the case during trial was not structural error even though the error had "framework" implications).

It is true that *Olano* was not addressing an alleged constitutional violation but instead the "affecting substantial rights" standard under Rule 52(b). But *Olano* itself indicates that it is not a material distinction: "Of course, the issue here is whether the alternates' presence sufficed to establish remedial authority under Rule 52(b), not whether it violated the Sixth Amendment or Due Process Clause, but we see no reason to depart from the normal interpretation of the phrase 'affecting substantial rights.'" *Id.* at 739.

As the jury's in-courtroom deliberation was not structural error, it must either be the case that this Court can presume prejudice from the jury's courtroom deliberations or that Bacall can demonstrate it. The latter has already been addressed: Bacall has no proof of prejudice. As for the former, this is not the appropriate case to presume prejudice: the jury came into the courtroom to view a piece of evidence, any deliberations in the courtroom were brief and in the presence of the judge. Under these circumstances, there is no reason to think that their verdict was adversely affected by spectators.

IV.

For the foregoing reasons, the Court DENIES Bacall's petition for a writ of habeas corpus. But the Court believes that rational jurists could debate this Court's resolution of Bacall's Confrontation Clause and Due Process Clause claims based on the prosecution's remarks during closing argument. And the Court

believes that rationale [sic] jurists could debate this Court's conclusion that the jury's in-courtroom deliberation was not structural error. Accordingly, the Court GRANTS Bacall a certificate of appealability on these three issues. The Court otherwise DENIES Bacall a certificate of appealability.

SO ORDERED.

s/Laurie J. Michelson
LAURIE J. MICHELSON
U.S. DISTRICT JUDGE

Dated: November 4, 2016

[Certificate Of Service Omitted]

Order

Michigan Supreme Court
Lansing, Michigan

September 30, 2013

Robert P. Young, Jr.,
Chief Justice

147010

Michael F. Cavanagh
Stephen J. Markman
Mary Beth Kelly
Brian K. Zahra
Bridget M. McCormack
David F. Viviano,
Justices

THE PEOPLE OF THE STATE OF MICHIGAN
Plaintiff-Appellee,

v.

HAYES BACALL,
Defendant-Appellant. /

SC: 147010
COA: 306269
Oakland CC:
2010-233054-FC

On order of the Court, the application for leave to appeal the March 5, 2013 judgment of the Court of Appeals is considered, and it is DENIED, because we are not persuaded that the questions presented should be reviewed by this Court.

STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee, v HAYES BACALL, Defendant-Appellant.	UNPUBLISHED March 5, 2013 No. 306269 Oakland Circuit Court LC No. 2010-233054-FC

Before: SHAPIRO, P.J., and SERVITTO and RONAYNE KRAUSE, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions of first-degree murder, MCL 750.316, and possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b, arising out of the killing of defendant's nephew, Saif Jameel. Defendant was sentenced to life in prison for his first-degree murder conviction and to two years' imprisonment for his felony-firearm conviction. We affirm.

On July 2, 2010, police received a call about gunshots being fired at a BP gas station owned by the victim. The responding officer found defendant pacing outside, talking on his cell phone, carrying a holstered gun. The officer asked what had happened, and defendant replied that he killed his nephew because the nephew owed him $400,000. Other evidence demonstrating that defendant killed the victim, including

eyewitness testimony, was admitted at trial. At trial the defense contended that defendant killed Jameel in self-defense.

Defendant argues that his right against double jeopardy was violated when the jury sent out a note during deliberations which indicated that it was unanimous on a lesser offense. A challenge regarding double jeopardy presents a question of constitutional law that we review de novo. *People v Smith*, 478 Mich 292, 298; 733 NW2d 351 (2007). We also review claims of instructional error de novo. *People v Kowalski*, 489 Mich 488, 501; 803 NW2d 200 (2011). The Double Jeopardy Clause affords individuals protection against a second prosecution for the same offense after acquittal. *Smith*, 478 Mich at 299.

During deliberations, the jury sent a note to the trial court which stated as follows:

> [C]an the jury decide on a verdict of a lesser cause when they are unanimous even though some may feel a stronger verdict is what they believe[?]

Based on the jury's note, the trial court did not believe the jury had reached a unanimous verdict. The trial court concluded that the jury was not in agreement and that was why it sent out a note rather than a verdict. The trial court ruled that it was appropriate for the jury to be instructed that it may go back to square one and consider first-degree murder, after discussing second-degree murder or voluntary manslaughter,

because it was undecided. The trial court ruled that this instruction was not directing the verdict.

The trial court repeated a jury instruction and gave the jury a revised *Allen*[1] instruction which did not include the first paragraph of the instruction because the court acknowledged that the jury was not deadlocked. The trial court instructed the jury as follows:

> I know you've got all the jury instructions but I'm going to repeat one of them and then I'm going to give you a new one. Okay.
>
> When you – this is what I told you and you already have this – when you go to the jury room, you should first choose a foreperson. The foreperson should see to it your discussions are carried on in a businesslike way and that everyone has a fair chance to be heard. During your deliberations, please turn off your cell phones or other communications equipment until we recess.
>
> A verdict in a criminal case must be unanimous. In order to return a verdict, it is necessary that each of you agree on that verdict. In the jury room, you will discuss the case among yourselves but, ultimately, each of you will have to make up your own mind. Any verdict must represent the individual considered judgment of each juror. It's your duty as jurors to talk to each other and make every reasonable effort to reach agreement. Express your

---

[1] *Allen v United States*, 164 US 492; 17 S Ct 154; 41 L Ed 528 (1896).

opinions and the reasons for them but keep an open mind as you listen to your fellow jurors. Rethink your opinions and do not hesitate to change your mind if you decide you were wrong. Try your best to work out your differences. However, although you should try to reach agreement, none of you should give up your honest opinion about the case just because other jurors disagree with you or just for the sake of reaching a verdict. In the end, your vote must be your own and you must vote honestly and in good conscience.

* * *

Remember it is your duty to consult with your fellow jurors and try to reach agreement, if you can do so without violating your own judgment. To return a verdict, you must all agree, and the verdict must represent the judgment of each of you. As you deliberate, you should carefully and seriously consider the views of your fellow jurors. Talk things over in a spirit of fairness and frankness. Naturally, there will be differences of opinion. You should each not only express your opinion but also give the facts and the reasons on which you base it. By reasoning the matter out, jurors can often reach agreement.

I don't mean to suggest you haven't already done this but – when you continue your deliberations, do not hesitate to rethink your own views and change your opinion if you decide it was wrong.

Based on the jury's note, which stated that some jurors felt that a stronger verdict *was appropriate*, but did not indicate it was deadlocked on first degree murder, and the fact that the jury did not mark the second degree murder box on the verdict form, we conclude that the trial court correctly determined that the jury had not reached a unanimous verdict. Thus, the jury did not acquit defendant on his first-degree murder charge. Therefore, defendant's right against double jeopardy was not violated. See *Smith*, 478 Mich at 299. Furthermore, because the jury was undecided, the trial court's instruction was appropriate.

Defendant next argues that the prosecution committed misconduct regarding several statements made during its closing argument. This Court reviews preserved issues regarding prosecutorial misconduct de novo to determine if the defendant was denied a fair and impartial trial. *People v Mann*, 288 Mich App 114, 119; 792 NW2d 53 (2010).

"Given that a prosecutor's role and responsibility is to seek justice and not merely convict, the test for prosecutorial misconduct is whether a defendant was denied a fair and impartial trial." *People v Dobek*, 274 Mich App 58, 63; 732 NW2d 546 (2007). "[A] prosecutor may not argue facts not in evidence or mischaracterize the evidence presented." *People v Watson*, 245 Mich App 572, 588; 629 NW2d 411 (2001). However, the prosecution is free to argue the evidence and all reasonable inferences arising from it as they relate to the prosecution's theory of the case. *Dobek*, 274 Mich App at 66. Also, "[a] prosecutor may fairly respond to an

issue raised by the defendant." *People v Brown*, 279 Mich App 116, 135; 755 NW2d 664 (2008).

During closing argument, the prosecution made the following arguments:

> Defense counsel says, oh, the defendant is a good guy for loaning his nephew the money. He's not doing this out of the goodness of his heart. He's charging interest from day one. These actions are no different than that of a loan shark.
>
> * * *
>
> This defendant who used to be Hazim Dekho moves to Michigan. He changes his name to Hayes Bacall. The defendant then applies for a Michigan concealed pistol license but the defendant fails to tell anyone that he had the unlawful discharge of . . . a firearm . . . conviction.
>
> * * *
>
> In English, the defendant says he killed his nephew for $400,000. That's the first thing out of his mouth when the officer asked him what happened. In Arabic, the defendant is consistent with that theme. He says I killed, he killed the victim and he's also insulting the victim by talking about he F'd his sister and things like that along the way. Defendant never says self-defense to the police officer and the officer gives him three separate chances. He talks about what happened, what happened, you know, what happened initially – I shot my nephew, owes me $400,000. Who

> owes who the money, clears that up, and then he says – is that why you shot him, because of the $400,000 – and the defendant says yes. Then later, after the Miranda rights, the officer asks him again about shooting a nephew. He says – well, he hasn't given me anything in about a year. He never says self-defense or even anything like self-defense. And on the witness stand, defense counsel asked the defendant – well, why did you tell the officer, you know, you shot him because of $400,000 – and the defendant slips up, he says – because that was the main reason at that time. So practice though he may, the truth shines through.
>
> Now, at trial is the first time the defendant says self-defense.

During the cross-examination of the decedent's brother, Samir Bacall, defense counsel asked Bacall whether defendant had charged the decedent a 20 percent interest rate like a "loan shark." In response to defendant's line of questioning, the prosecution was permitted to argue that defendant's actions were like that of a loan shark because defendant initially brought up the issue. *Brown*, 279 Mich App at 135. Furthermore, the prosecution's argument was appropriate because it related to its theory of the evidence, which is that defendant loaned the decedent a large sum of money and when the decedent did not pay defendant back, defendant murdered the decedent. *Dobek*, 274 Mich App at 66.

Defendant admitted under cross-examination that he had pled guilty to the unlawful discharge of a

firearm in Arizona in 2002. However, the Court determined that any link between the Arizona conviction and defendant's application for a Michigan CCW permit was a collateral issue, and sustained defendant's objections to the line of questioning before the prosecutor could establish a connection. Nevertheless, the prosecutor reintroduced the alleged connection in his closing statement. While defendant objected to the prosecution's comments regarding defendant's alleged misrepresentation on his application for a Michigan CCW, defendant did not request a curative instruction, which is the appropriate response to an improper remark by the prosecution. *Mann*, 288 Mich App at 121-122. Also, the trial court provided the jury with the instruction that the prosecution's statements and arguments are not evidence. Any prejudice resulting from the prosecutor's remarks was cured by the jury instructions. *People v Abraham*, 256 Mich App 265, 279; 662 NW2d 836 (2003) ("Jurors are presumed to follow their instructions, and instructions are presumed to cure most errors."). Therefore, defendant was not denied a fair and impartial trial.

There was record evidence that defendant did not tell the police that he shot and killed the decedent in self-defense. When defendant was approached at the scene regarding this incident Troy police officer Gregory Stopczynski asked defendant what happened. Defendant responded, "I shot my nephew, he owes me $400,000." Defendant was then arrested. While defendant was in the backseat of Stopczynski's patrol car his conversation with Stopczynski was recorded.

Stopczynski asked defendant, "[S]o that's why you shot him?" Defendant responded, "yes, I – I – I – I." Also, while defendant was in the patrol car, defendant made an unauthorized phone call and said over the phone in Arabic, "Hello, I killed – I killed your brother. I f..... his sister; I killed him." Stopczynski also asked defendant how many times he shot the decedent. Defendant answered, "I shoot (sic) him six, seven times." Therefore, the prosecution was permitted to argue its theory of this evidence, which was that defendant's failure to assert self-defense to the police supports the conclusion that he did not act in self-defense. *Dobek*, 274 Mich App at 66.

However, the prosecution concedes that it possessed several recordings of phone conversations in which defendant claimed self-defense. Therefore, the prosecutor's statement that defendant "never said self-defense" before trial was clearly false. The use of a false statement to buttress the prosecution's case on the key issue was highly inappropriate. Prosecutors play a special and unique role in our system of justice. "It is the duty of the public prosecutor to see that the person charged with crime receives a fair trial, so far as it is in his power to afford him one, and . . . methods to procure conviction must be such as accord with the fair and impartial administration of justice . . . *People v Dane*, 59 Mich 550, 552; 26 NW 781 (1886). "Deliberate false statements by those privileged to represent the [government] harm the trial process and the integrity of our prosecutorial system. We do not lightly tolerate a prosecutor asserting as a fact to the jury something

known to be untrue or, at the very least, that the prosecution had very strong reason to doubt. *United States v Blueford*, 312 F3d 962, 968 (CA 9, 2002).

After conclusion of the arguments and the reading of the instructions, defense counsel moved for a mistrial or a curative instruction. The prosecutor took the position that since the tapes of the phone conversations in which defendant claimed self-defense had not been played for the jury, there was nothing false about the statement that defendant had never asserted self-defense prior to trial and that the assertion was merely fair comment on the evidence. We disagree with this characterization of the prosecutor's statement. The prosecutor did not point out the lack of any admitted evidence of a claim of self-defense, but made the broader and clearly false affirmative assertion that defendant had never asserted self-defense at any time prior to trial. The prosecutor's statement did constitute misconduct and the trial court should have provided a curative instruction when it was requested even though the jury had already retired to deliberate.

Having concluded that there was prosecutorial misconduct, we must determine whether the prosecutor's improper assertion denied defendant a fair trial. *People v Blackmon*, 280 Mich App 253, 267; 761 NW2d 172 (2008). Given the overwhelming evidence which includes the testimony of an eyewitness to the shooting, defendant's statements to the police and a videotape of some of the events themselves, we conclude that the prosecutor's improper statement did not deny

defendant a fair trial and so we do not reverse defendant's conviction.

Defendant next argues that the trial court committed error when it allowed the jurors to deliberate in the courtroom in the presence of others. This Court reviews unpreserved constitutional error for plain error that affected the defendant's substantial rights. *People v Carines*, 460 Mich 750, 764-766; 597 NW2d 130 (1999).

The Supreme Court of the United States recognizes the cardinal principle that "deliberations of the jury shall remain private and secret." *United States v Olano*, 507 US 725, 737; 113 S Ct 1770; 123 L Ed 2d 508 (1993) (quotation marks and citations omitted). "[T]he primary if not exclusive purpose of jury privacy and secrecy is to protect the jury's deliberations from improper influence." *Id.* at 737-738.

During deliberations, the jury requested to see a gun that had been admitted into evidence during the trial. The judge brought the jurors into the courtroom in order for them to view the gun because it was the court's policy for safety reasons that no weapons enter the jury room. The record indicates that the gun was inspected to make sure it was safe, it was then examined by counsel for each party, and that the prosecutor then handed the gun to the jurors. The trial court indicated that it preferred that the people present in the courtroom not sit and try to listen to the jurors while they were viewing the gun because the jurors were in the middle of deliberations. The jury then requested to

go to a specific area in the courtroom to look at the gun and the trial court permitted this and told the jurors to "[j]ust pretend like we're not here." The record suggests that the jurors not only viewed the weapon, but spoke among themselves for about three minutes in the courtroom while doing so, although none of the conversation was recorded. Immediately after the jurors finished viewing the gun, they returned to the jury room to continue deliberations.

The record indicates that the purpose of the jurors being in the courtroom was specifically to safely view the gun in evidence. There is nothing improper about such a procedure. However, the court should clearly have instructed the jurors to remain silent during the viewing and to refrain from any deliberations or conversation until they returned to the jury room. When exhibits are published to the jury during trial, the jurors may not discuss those exhibits in the courtroom. This is as true, if not more so, once deliberations have begun. Allowing the jurors to speak to each other in the courtroom during the viewing was error. However, because there is no evidence or even reasonable inference that the verdict was prejudiced by this incident, we do not find that the error was reversible.

> [D]ue process does not require a new trial every time a juror has been placed in a potentially compromising situation. Were that the rule, few trials would be constitutionally acceptable . . . [I]t is virtually impossible to shield jurors from every contact or influence that might theoretically affect their vote. Due

> process means a jury capable and willing to decide the case solely on the evidence before it, and a trial judge ever watchful to prevent prejudicial occurrences and to determine the effect of such occurrences when they happen. [*Olano*. at 738 (quotation marks and citation omitted).]

Lastly, defendant argues that judge's refusal to give a jury instruction on imperfect self-defense denied him the right to present a defense. However, "[u]nder Michigan law, the doctrine of imperfect self-defense does not exist as a freestanding defense that mitigates a murder to manslaughter because it was not recognized as such under the common law at the time the Legislature codified the crimes of murder and manslaughter." *People v Reese*, 491 Mich 127, 150; 815 NW2d 85 (2012). The Michigan Supreme Court elaborated on its rejection of the doctrine of imperfect self-defense as follows:

> Although we reject the doctrine of imperfect self-defense, many circumstances that involve what the Court of Appeals labeled "imperfect self-defense" can nevertheless provide grounds for a fact-finder to conclude that the prosecution has not proved the malice element that distinguishes murder from manslaughter. However, we emphasize that the operative analysis for the fact-finder is not whether the circumstances involving "imperfect self-defense" exist. Rather, the operative analysis is whether the prosecution has proved the element of malice beyond a reasonable doubt. This focus rightly turns on the

> *actual elements* of murder and manslaughter, rather than any label of "imperfect self-defense" as a judicially created shorthand that risks becoming unmoored from the actual element distinguishing the two crimes. [*Id.* at 150-151 (quotation marks and citations omitted).]

The trial court's decision not to give an imperfect self-defense instruction was therefore proper.

Affirmed.

/s/ Douglas B. Shapiro
/s/ Deborah A. Servitto
/s/ Amy Ronayne Krause

STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR
THE COUNTY OF OAKLAND

PEOPLE OF THE
STATE OF MICHIGAN,

v

File 10-233054-FC

HAYES BACALL,

Defendant. /

JURY TRIAL

BEFORE THE HONORABLE RAE LEE CHABOT,
CIRCUIT COURT JUDGE

Pontiac, Michigan – Thursday, August 18, 2011

APPEARANCES:

For the People: MR. KENNETH E. FRAZEE, III (P-51903)
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* * *

[5] MR. KRIGER: Your Honor, while we're waiting, I have, uh, something I would like to put on the record that I meant to do yesterday but we didn't get around to it.

THE COURT: Okay.

MR. KRIGER: During closing argument, uh, Mr. Frazee made the statement that Mr. Bacall had lied on his CCW application and I file – , I, I think I, I believe I objected at the time and the court sort of indicated that the court wanted me to wait until the closing argument was done until all the objections were put on the record.

My recollection was when he got into that area, the court sustained it because the application wasn't in evidence and I would request, since the jury is coming out, that they should disregard that statement, uh –

THE COURT: That they should disregard what statement?

MR. KRIGER: The statement that Mr. Frazee made that he had lied on his CCW application. It wasn't in evidence. There's no evidence of it. But he said that in closing argument is my recollection.

THE COURT: I, didn't we address this on the record already?

MR. KRIGER: I don't think we did that objection.

THE COURT: Yes, we did.

MR. SABBOTA: Well, I think – that objection was not addressed, Judge. It –

[6] THE COURT: After closing arguments, we went on the record.

MR. SABBOTA: He didn't make that a –

MR. KRIGER: Yeah, I –

MR. SABBOTA: – specific –

MR. KRIGER: – gave you one dealing with –

THE COURT: Tell me how this argument is different from the other one cause I'm missing that.

MR. SABBOTA: Okay.

MR. KRIGER: Okay.

MR. SABBOTA: The argument – Mr. Frazee made the statement that self-defense was never claimed –

MR. KRIGER: Well –

THE COURT: Until trial?

MR. KRIGER: Right.

MR. SABBOTA: Correct.

MR. KRIGER: And we argued that the, the, that the, the –

THE COURT: That's the same argument.

MR. KRIGER: No. The argument was that there were tapes made of jailhouse conversations between twel – , between 5 and 36 hours after where he did claim self-defense and, again about 10 days later. That was the objection.

This was a, a statement in closing where he said that Mr. Bacall had lied on his CCW application. I believe I [7] objected when that statement was made that you had sustained the objection about any questioning but I didn't move for a mistrial or a cautionary instruction at, based on that statement. I didn't address that statement, I don't believe, afterward.

THE COURT: The fact that Mr. Frazee said he lied?

MR. KRIGER: Right, on the CCW –

THE COURT: And –

MR. KRIGER: – application.

THE COURT: – and you're sure that's an exact quote?

MR. KRIGER: Yeah, I think it –

THE COURT: That's what you think?

MR. KRIGER: Close to it –

THE COURT: Okay.

MR. KRIGER: – yes.

THE COURT: All right. Would you –

MR. GOETZ: Your Honor, I, not having had the benefit of hearing what Mr. Frazee said, the only thing I can expect is, is to have the court review the, the taped portion that, where he did make whatever statement which was, so that the court has an accurate view of exactly what it was that he said.

THE COURT: Is there anything else you want to put on the record?

MR. KRIGER: Not that I –

THE COURT: With respect –

MR. KRIGER: – can recall –

[8] THE COURT: – to this – okay.

MR. KRIGER: I just would like either a mistrial on it or a cautionary instruction, that's all.

THE COURT: Okay.

MR. KRIGER: Thank you.

THE COURT: Uh, as I said before, uh, and Mr. Frazee said this at the time we argued this very, very similar issue last time was that – here's what Mr. Frazee said – I was making a comment on the evidence that was admitted in the trial. And I said I think it was a fair commentary of the evidence that was admitted at the trial. The tapes, the jailhouse tapes that you were talking about from the defendant's phone conversations with other people were not admitted at trial. They were not –

MR. KRIGER: That's correct.

THE COURT: – not evidence in the trial, although all of you knew about it, it didn't come in. So Mr. Frazee didn't address it as evidence. Now, I don't know what else he was thinking. That's just what he said, but, uh, I think what he said is fair commentary on the evidence that was admitted.

So I'm going to deny your motion.

* * *

STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR
THE COUNTY OF OAKLAND

PEOPLE OF THE
STATE OF MICHIGAN,

v.

File 10-233054-FC

HAYES BACALL,

Defendant. /

JURY TRIAL

BEFORE THE HONORABLE RAE LEE CHABOT,
CIRCUIT COURT JUDGE

Pontiac, Michigan – Monday, August 15, 2011

APPEARANCES:

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* * *

[127] MOTION FOR MISTRIAL

MR. KRIGER: Yes, I, I stopped interrupting because I thought the court kind of told me you didn't want me to interrupt but he's –

THE COURT: Hold on. What?

UNIDENTIFIED SPEAKER: Are you sure that you're on the record? I don't know if Lena stopped it or not.

THE COURT: Please, please make sure.

(Pause in courtroom)

THE COURT: Are we still on?

THE CLERK: Yes.

THE COURT: So we can proceed?

THE CLERK: Yes.

THE COURT: Okay. Go ahead.

MR. KRIGER: We are on the record. Okay.

THE CLERK: Yes.

MR. KRIGER: Your Honor, at one point he said, Mr. Frazee said in closing argument and this is, I didn't want to interrupt you again because I, that you, I mentioned I thought the court said this is closing argument, at the end you can give your objections, but –

THE COURT: I did say that.

MR. KRIGER: Right, okay.

[128] He said this is the first time at trial he tells of self-defense. I think, one, that violates his right to remain silent but, more importantly, your Honor, it's simply untrue, and Mr. Frazee knows that it's untrue and I think it's prosecutorial misconduct and I'm going to ask for a mistrial.

He knows that there were several taped conversations from the jail that he chose not to put into evidence where he told time and time again that he acted in self-defense and for him to represent and to this jury that he had never said it before is a lie and I find it really offensive and, uh, I am moving for a mistrial.

Alternatively, the court can say, correct the statement and say he made a statement that's simply not true and he had made that statement, he had made that claim before.

So I would take either a mistrial or an act – , an actual correction, but the statement is just untrue.

He also said that there was testimony that Mr. Bacall said I will empty the gun into him. There was never –

MR. SABBOTA: Ask for the transcript.

MR. KRIGER: – that was never such testimony and where that statement came from was, again, from one of the jailhouse transcripts that he did not introduce into evidence and I think that merits a mistrial.

So I, but I am really, really upset, your Honor, about the statement it's the first time at trial he mentions this [129] cause it's not true and Mr. Frazee knows it's not true.

THE COURT: Okay.

MR. FRAZEE: We're only allowed to base our arguments based upon the evidence presented in court and that's – and reasonable inferences therefrom – so our statements were based upon the evidence in this case. There was nothing improper about the argument and it was made in rebuttal to the defense claims, uh, during their closing argument.

What I was referring to was based upon the evidence, how he didn't tell the police, uh, he didn't tell, uh, you know, the victim's brother, et cetera. He never said – during booking, he was surrounded by police officers, he never mentioned it.

So there's nothing inappropriate about our argument. It was a fair comment only on the evidence and that's what you asked the jury to consider in your closing, in your statements. So I respectfully disagree with the defense counsel.

And, you know, I won't take issue with all the things I disagree with Mr. Kriger and what he said or, or things that I feel perhaps he didn't represent fairly. My comments are based only on the evidence at trial and that is what we're, our argument was based upon. There was nothing inappropriate whatsoever.

MR. KRIGER: A prosecutor may not state a fact in closing argument that he knows is not true. And that statement [130] was not true – that it was the first time he ever mentioned. He said it several times in several taped conversations. And you can make fair comments on the evidence but what you can't do is misrepresent when you know that – for example, I couldn't say if a gun was suppressed, they never found a gun. It would be completely unethical for me to say they never introduced a gun here. That would be unethical because I knew there was a gun. This is no different and he has no right to make a statement to a jury as an officer of the court, a prosecutor who the jury, the courts have – (inaudible words) – knowing that he made that statement in the past.

So either I think the court could correct it or should declare a mistrial.

MR. FRAZEE: I think a mistrial is not warranted. I don't think the defense counsel is correct and I don't think any comment to the jury should be made either. Their decision should be based upon the evidence. Argument is just that, it's argument. You've already instructed upon that to base their verdict on the evidence.

(Mr. Kriger conferences with Mr. Sabbota)

THE COURT: Okay, uh, you know, this is a, the kind of circumstance – I mean I took notes – I actually took quite a few notes throughout the course of this but I honestly can't tell you when self-defense was first mentioned in the chronology of what occurred. I

think that what Mr. Frazee stated was a [131] fair perception of the facts and testimony. Further, I instruct the jury that the arguments of the lawyers are not evidence, uh, so I'm going to deny the defense motion.

MR. KRIGER: I, that's fine, your Honor, I do understand, but I would like just the record to reflect that we were provided with, I think it was several, seven conversations that were taped from the Troy lockup, six of them from the Troy lockup, one from the Oakland County Jail, and in each and every one of those he said he killed Mr. Jameel because he felt that it was, he was going to be killed. And Mr. Frazee provided those transcripts to us and he knows that it was said and that's my position. Thank you.

THE COURT: Thank you.

* * *