

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 16-50565

DAVID MARK ISAACSON,

Petitioner - Appellant

v.

LORIE DAVIS, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL
JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION,

Respondent - Appellee

Appeal from the United States District Court for the
Western District of Texas, San Antonio

ON MOTION FOR RECONSIDERATION AND REHEARING EN BANC

Before JOLLY, SMITH, and HAYNES, Circuit Judges.

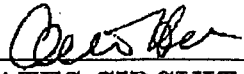
PER CURIAM:

- (X) The Motion for Reconsideration is DENIED and no member of this panel nor judge in regular active service on the court having requested that the court be polled on Rehearing En Banc, (FED R. APP. P. and 5TH CIR. R. 35) the Petition for Rehearing En Banc is also DENIED.
- () The Motion for Reconsideration is DENIED and the court having been polled at the request of one of the members of the court and a majority of the judges who are in regular active service and not disqualified not having voted in favor, (FED R. APP. P. and 5TH CIR. R. 35) the Petition

for Rehearing En Banc is also DENIED.

- () A member of the court in active service having requested a poll on the reconsideration of this cause en banc, and a majority of the judges in active service and not disqualified not having voted in favor, Rehearing En Banc is DENIED.

ENTERED FOR THE COURT: 9-28-2017


UNITED STATES CIRCUIT JUDGE

Reid 10/3/17

FILED**IN THE UNITED STATES COURT OF
FOR THE FIFTH CIRCUIT**

AUG - 8 2017

CLERK, U.S. DISTRICT COURT
WESTERN DISTRICT OF TEXAS
BY  DEPT

No. 16-50565
USDC No. 5:15-CV-651

-XRV
A True Copy

Certified order issued Aug 03, 2017

DAVID MARK ISAACSON,


Clerk, U.S. Court of Appeals, Fifth Circuit

Petitioner-Appellant

v.

LORIE DAVIS, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL
JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION,

Respondent-Appellee

Appeal from the United States District Court for the
Western District of Texas, San Antonio

ORDER:

A jury found David Mark Isaacson, Texas prisoner # 1691396, guilty of two counts of aggravated assault on a peace officer. The trial court sentenced Isaacson to 15 years of imprisonment. He now requests a certificate of appealability (COA) from this court following the district court's denial of his 28 U.S.C. § 2254 application and denial of a COA.

Isaacson argues that (1) he received ineffective assistance of counsel from his trial attorney based on a failure to communicate plea offers; (2) the trial court abused its discretion by overruling defense counsel's objections to the state's closing arguments; (3) the trial court abused its discretion by overruling defense counsel's objections to the prosecutor's leading questions;

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(4) his appellate counsel rendered ineffective assistance because he never spoke to Isaacson and overlooked issues with the trial representation; (5) trial counsel rendered ineffective assistance by "failing to execute a sound argument" based on the evidence; (6) trial counsel rendered ineffective assistance by failing to object to the omission of a lesser included offense in the jury instructions; (7) trial counsel's mistakes constituted cumulative error; (8) the trial court abused its discretion by denying defense counsel's requested jury instructions on threat of force, mistake of fact, and self-defense; (9) the trial court abused its discretion by illegally enhancing the sentence based on a prior conviction; (10) the district court abused its discretion by holding that Isaacson's "sleep automatism/inertia" defense was procedurally barred as unexhausted; (11) both the federal and state courts violated Isaacson's due process rights by failing to order evidentiary hearings; (12) the district court abused its discretion by holding that the "castle doctrine" defense was procedurally barred; and (13) the district court's denial of Isaacson's motion for a stay violated his due process rights. Isaacson also requests leave to proceed IFP on appeal.

A COA is required to appeal the final order in a habeas case. *Miller-El v. Cockrell*, 537 U.S. 322, 335-36 (2003). To obtain a COA, Isaacson must make "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2); see *Miller-El*, 537 U.S. at 334, *Slack v. McDaniel*, 529 U.S. 470, 483-84 (2000). A COA should issue only if the petitioner "demonstrat[es] that jurists of reason could disagree with the district court's resolution of his constitutional claims or that jurists could conclude the issues presented are adequate to deserve encouragement to proceed further." *Miller-El*, 537 U.S. at 327; see *Slack*, 529 U.S. at 483-84. S.Ct. 123 - 1029

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Isaacson has not made the requisite showing. *See Miller-El*, 537 U.S. at 327. Accordingly, his motion for a COA is DENIED, and his motion to proceed IFP is DENIED as moot.

Signed: 8-3-2017

_____/s/ Catharina Haynes_____
CATHARINA HAYNES
UNITED STATES CIRCUIT JUDGE

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS 25
SAN ANTONIO DIVISION 20

**DAVID MARK ISAACSON,
TDCJ No. 01691396,**

Petitioner,

v.

**WILLIAM STEPHENS, Director,
Texas Department of Criminal Justice,
Correctional Institutions Division,**

Respondent.

CIVIL NO. SA-15-CA-651-XR (HJB)

FINAL JUDGMENT

This federal habeas corpus action, filed pursuant to 28 U.S.C. § 2254, came for consideration before the Court. In an Order issued contemporaneously with this Judgment, this Court has rendered a final decision on all issues pending in this cause.

Accordingly, it is ORDERED, ADJUDGED, and DECREED that:

1. Petitioner’s petition for federal habeas corpus relief, filed August 5, 2015 (ECF no. 1), as supplemented by Petitioner’s Reply Brief, filed February 19, 2016 (ECF no. 32), is **DENIED**.
2. Petitioner is **DENIED** a Certificate of Appealability on all his claims.

It is so ORDERED.

SIGNED this 27th day of April, 2016.



XAVIER RODRIGUEZ
UNITED STATES DISTRICT JUDGE

Isaacson and Donna Johnson had shared a house near Canyon Lake for almost a year before the incident at issue here. On the day of the incident, Johnson moved her belongings from Isaacson's house to an apartment in San Antonio. Isaacson and Johnson met at a nearby "icehouse" at around 6:30 p.m., then Isaacson went home. Isaacson was asleep when Johnson later arrived at the home around 9:30 p.m. with two men. The three companions entered the house and their conversation awakened Isaacson, who did not appreciate having unknown guests. When Isaacson exhibited a handgun while requesting that they depart, the two men left in short order. Johnson testified that Isaacson then aimed the handgun at her for several seconds, lowered the weapon, and returned to his room.

About fifteen minutes later (though Isaacson testified that he believed he had been asleep for about an hour), Comal County sheriff's deputies came to Isaacson's house. Johnson testified that, when she answered the door, the deputies told her they were responding to a report of domestic violence. She acceded to their request that she step out onto the porch and answer questions. Isaacson then opened the door, naked, holding a handgun. The officers testified that Isaacson pointed the gun at each of them and at Johnson for up to a combined 30 seconds, that they each told Isaacson six to eight times to drop his handgun, and that Isaacson then turned around, went back in the house, and closed the door. Johnson contradicted the officers' testimony, stating that she never saw Isaacson pointing his handgun at the officers, that she heard the officers say something to Isaacson but did not hear them repeatedly tell him to drop his weapon, and that Isaacson closed the door after only seven or eight seconds.

Isaacson testified that, before opening the door, he believed that the men on the porch were the men he had ejected from his house earlier, returning to retaliate. He opened the door because he believed that they otherwise would forcibly enter his home or that they might damage his property or car. He admitted he was holding a handgun when he opened the door, but denied pointing it at the officers or Johnson. He agreed that when ordered to drop the gun he instead turned around and closed the door. Isaacson denied pointing a gun at anyone on the evening in question.

Isaacson v. State, 03-10-00866-CR, 2013 WL 1955799, *1 (Tex. App. – May 10, 2013, pet. ref'd).²

² The verbatim transcription of the testimony given during both phases of the June 14–16, 2010 jury trial and December 14, 2010 punishment hearing (henceforth "S.F. Trial") appears herein at ECF no. 15-5 through ECF no. 15-15.

unknown & uninvited by owner
irrelevant

order

contradiction w/ 3rd witness?

trespassers
illegal drug use

for fear of accidental discharge

On June 16, 2010, the jury found Petitioner guilty of both counts against him and also found that he had used a deadly weapon during the commission of his offense.³ On December 14, 2010, the state trial court sentenced Petitioner to serve concurrent fifteen-year terms of incarceration.⁴

Petitioner appealed.⁵ In an unpublished opinion, the Texas Third Court of Appeals affirmed the conviction and sentence. *Isaacson v. State*, 03-10-00866-CR, 2013 WL 1955799 (Tex. App. — May 10, 2013, *pet. ref'd*). The Texas Court of Criminal Appeals refused his petition for

³ Trial Transcript, ECF no. 16-4, at pp. 76-79; S.F. Trial, Volume 4 of 6, at pp. 74-75 (ECF no. 15-13, at pp. 16-17).

⁴ S.F. Trial, Volume 5 of 6, at pp. 38 (ECF no. 15-15, at p. 15).

⁵ Petitioner filed his appellant's brief on June 30, 2011 (ECF no. 15-2) and argued therein that (1) the trial court erred in failing to submit defendant's requested jury instruction on self-defense, (2) the trial court erred in failing to submit the defendant's requested jury instruction on justifiable use of force when faced with threats of force, (3) the trial court erred in failing to submit defendant's requested jury instruction on mistake of fact, (4) the trial court's failure to submit any of the defendant's requested defensive jury instructions violated due process and due course of law principles, (5) the trial court's failure to submit any of the defendant's requested defensive jury instructions violated defendant's right to trial by jury, and (6) the trial court erred in overruling defendant's objections to the admission of testimony concerning an extraneous offense (i.e., Donna Johnson's testimony that Petitioner pointed his gun at her on the evening in question) without requiring the state to furnish notice required by Rule 404(b) of the Texas Rules of Evidence.

discretionary review on December 11, 2013 (PD-1462-13).⁶ Petitioner did not thereafter seek further review of his conviction from the United States Supreme Court via a petition for writ of certiorari. 8

On September 23, 2014, Petitioner filed his application for state habeas corpus relief.⁷ On May 5, 2015, the state habeas trial court issued its findings of fact and conclusions of law, in which it (1) found Petitioner's claims of an un-communicated plea offer were not credible, (2) found credible the affidavit of Petitioner's trial counsel, in which said counsel averred that he

⁶ Petitioner's petition for discretionary review (ECF no. 16-13) presented only four grounds for review: (1) whether a jury may reasonably conclude that a defendant has communicated a threat of imminent bodily injury to someone merely by approaching that person to confront him, and standing in front of him or her with gun in hand for five or six seconds, (2) whether a defendant can be said to have committed the offense of assault (by threat) by going to the door of his residence with the intention of confronting the visitors with gun in hand, opening the door in such a manner that the gun could be seen, and standing there five or six seconds, (3) whether a defendant has sufficiently admitted the offense of assault on a public servant when he admits that he went to the front door to confront his visitors (who unbeknownst to him happened to be sheriff's deputies), opened the door with a gun in his hand, and stood there for five or six seconds, and (4) is a defendant entitled to a jury instruction on mistake of fact if, when he opens the door, he points his gun at the visitors, thinking certain persons are at his door, and then finds out after he opens the door that other persons (sheriff's deputies) are at his door? Thus, 8) 1AAC Petitioner's PDR did not raise any of the same grounds for relief presented in his first, third, fourth, fifth, and sixth points of error on direct appeal.

⁷ Petitioner's pro se application for state habeas corpus relief and memorandum in support appear at ECF no. 16-26, at pp. 1-88. As grounds for relief, Petitioner argued (1) his trial counsel rendered ineffective assistance by (a) failing to raise the affirmative defenses of confession and avoidance, self-defense, and mistake of fact, (b) failing to request a lesser-included offense jury instruction on assault, (c) failing to communicate a pre-trial plea offer from the prosecution of a ten-year sentence, and (d) the cumulative errors of trial counsel prejudiced Petitioner, (2) Petitioner's appellate counsel rendered ineffective assistance by failing to raise the foregoing complaints about the performance of trial counsel as points of error on direct appeal, (3) the trial court erred in admitting evidence of an extraneous offense for which the prosecution had failed to furnish proper notice as required by state evidentiary rules, (4) the state trial court erred in failing to give the requested jury instructions on self-defense, mistake of fact, and threat by force, (5) the trial court abused its discretion in (a) overruling defendant's objection to the prosecution's definition of reasonable doubt and (b) failing to require the prosecution to explain all the elements of the charges during the initial portion of the prosecution's closing argument at the guilt-innocence phase of trial, and (6) the trial court improperly enhanced Petitioner's sentence.

communicated all plea offers to Petitioner, (3) found Petitioner refused the plea offer of ten years and refused to consider a plea of guilty or nolo contendere to any possible offer from the state - even when the state appeared open to a plea bargain which avoided jail time, (4) found Petitioner rejected his trial counsel's advice and insisted on proceeding to trial, (5) concluded Petitioner's assertion of ineffective assistance in connection with the allegedly un-communicated plea offer failed to satisfy either prong of the *Strickland* analysis, and (6) recommended denial of Petitioner's state habeas corpus application.⁸ On June 17, 2015, the Texas Court of Criminal Appeals denied Petitioner's state habeas corpus application without written order based on the trial court's findings made without a hearing. *Ex parte David Mark Isaacson*, WR-81,373-02 (Tex. Crim. App. June 17, 2015).

9
which was
ordered 1/14/15
by CCA

II. Proceedings in this Court

Petitioner filed his federal habeas corpus petition in this Court on August 5, 2015 (ECF no. 1),⁹ arguing as ground for relief that (1) his trial counsel rendered ineffective assistance by failing to communicate a plea offer of ten years allegedly extended by the prosecution on September 3, 2009, (2) the trial court abused its discretion when it overruled trial counsel's objections to the prosecution's jury arguments which incorrectly explained "reasonable doubt" and failed to advise the jury regarding the elements of the offense charged, (3) the trial court erred when it permitted testimony over Petitioner's counsel's objections and in contravention of a grant of a motion in limine regarding an extraneous offense (i.e., Donna Johnson's "surprise" testimony the Petitioner pointed

⁸ ECF no. 16-24, at pp. 6-13. The affidavit of Petitioner's trial counsel, attorney Paul Goeke, to which the state habeas trial court referred repeatedly in its findings of fact and conclusions of law, appears at ECF no. 16-24, at pp. 14-16.

my rebuttal
is not referred
to at all!

⁹ Petitioner's federal habeas corpus petition was dated July 27, 2015. Since Petitioner's federal habeas corpus petition was timely filed when received by this Court, it is unnecessary to address the application of the prison mailbox rule to the federal habeas corpus petition.

a gun at her on the evening of the offense), (4) his appellate counsel rendered ineffective assistance by failing to meet with or speak to Petitioner and failing to present a number of points of error on direct appeal (specifically Petitioner's complaints of ineffective assistance by his trial counsel), (5) his trial counsel rendered ineffective assistance by failing to raise an affirmative defense at trial (such as mistake of fact, self-defense, or justifiable use of force), (6) his trial counsel rendered ineffective assistance by failing to request a jury instruction on the lesser-included offense of assault, (7) his trial counsel's deficient performance cumulatively deprived Petitioner of effective assistance of counsel, (8) the trial court erred in denying Petitioner's counsel's requests for jury instructions on self-defense, mistake of fact, and threat by force, (9) the trial court erred in enhancing Petitioner's sentence based upon a conviction from Michigan that was not final under Michigan or Texas law, (10) the trial court in denying Petitioner's requested jury instructions on the defenses of sleep inertia and automatism, (11) the state habeas court improperly denied Petitioner an evidentiary hearing on his claims for state habeas relief, and (12) his trial counsel rendered ineffective assistance by failing to request a jury instruction on the defenses of "stand your ground" and "castle doctrine."

✱ On November 19, 2015 (ECF no. 21), Respondent filed his answer, arguing therein that (1) Petitioner's tenth and ^{twelfth} ~~eleventh~~ claims listed above were unexhausted and, therefore, procedurally defaulted, (2) Petitioner's eleventh ground listed above did not furnish a basis for federal habeas corpus relief, (3) the state trial court correctly instructed Petitioner's jury on the elements of Petitioner's offense, (4) the Constitution does not require juries be instructed on the definition of reasonable doubt, (5) evidentiary rulings do not furnish a basis for federal habeas corpus relief absent a showing the ruling rendered the entire trial fundamentally unfair, (6) the state appellate courts expressly found Petitioner was not entitled to jury instructions on the state law defenses of mistake

of fact, self-defense, or justifiable use of force, (7) Petitioner was not entitled under applicable state law to a jury instruction on the lesser-included offense of assault, (8) Petitioner's sentence was properly enhanced under state law, (9) the state habeas court found as a matter of fact that Petitioner's trial counsel communicated all plea offers extended by the prosecution to Petitioner, (10) complaints about misapplication of state law do not furnish a basis for federal habeas relief, and (11) Petitioner's complaints about the performance of his trial counsel were raised and rejected on the merits during Petitioner's state habeas corpus proceeding. 12

On February 19, 2016 (ECF no. 32), Petitioner filed his reply brief in which, in part, he (1) acknowledged he was not entitled to a jury instruction on self-defense under applicable state law, (2) argued it would be a fundamental miscarriage of justice for this Court to refuse to address the merits of his complaint about the trial court's refusal to instruct the jury on the affirmative defenses of self-defense, justifiable use of force, and mistake of fact, (3) argued his trial counsel rendered ineffective assistance by failing to call and impeach "Chris," "Dave," and "Lisa Green," none of whom testified at his trial, and (4) he is actually innocent of the offenses for which he was convicted. 13

III. AEDPA Standard of Review

Because Petitioner filed his federal habeas corpus action after the effective date of the AEDPA, this Court's review of Petitioner's claims for federal habeas corpus relief is governed by the AEDPA. *Penry v. Johnson*, 532 U.S. 782, 792 (2001). Under the AEDPA standard of review, this Court cannot grant Petitioner federal habeas corpus relief in connection with any claim that was adjudicated on the merits in state court proceedings, unless the adjudication of that claim either: (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 14

a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the state court proceeding. *Brown v. Payton*, 544 U.S. 133, 141 (2005); *Williams v. Taylor*, 529 U.S. 362, 404-05 (2000); 28 U.S.C. § 2254(d).

The Supreme Court has concluded the “contrary to” and “unreasonable application” clauses of 28 U.S.C. Section 2254(d) (1) have independent meanings. *Bell v. Cone*, 535 U.S. 685, 694 (2002). Under the “contrary to” clause, a federal habeas court may grant relief if (1) the state court arrives at a conclusion opposite to that reached by the Supreme Court on a question of law or (2) the state court decides a case differently than the Supreme Court on a set of materially indistinguishable facts. *Brown v. Payton*, 544 U.S. at 141; *Mitchell v. Esparza*, 540 U.S. 12, 15-16 (2003) (“A state court’s decision is ‘contrary to’ our clearly established law if it ‘applies a rule that contradicts the governing law set forth in our cases’ or it ‘confronts a set of facts that are materially indistinguishable from a decision of this Court and nevertheless arrives at a result different from our precedent.’”). A state court’s failure to cite governing Supreme Court authority does not, *per se*, establish the state court’s decision is “contrary to” clearly established federal law: “the state court need not even be aware of our precedents, ‘so long as neither the reasoning nor the result of the state-court decisions contradicts them.’” *Mitchell v. Esparza*, 540 U.S. at 16.

Under the “unreasonable application” clause, a federal habeas court may grant relief if the state court identifies the correct governing legal principle from the Supreme Court’s decisions but unreasonably applies that principle to the facts of the Petitioner’s case. *Brown v. Payton*, 544 U.S. at 141; *Wiggins v. Smith*, 539 U.S. 510, 520 (2003). A federal court making the “unreasonable application” inquiry should ask whether the state court’s application of clearly established federal law was “objectively unreasonable.” *McDaniel v. Brown*, 558 U.S. 120, 132-33 (2010) (“A federal

habeas court can only set aside a state-court decision as ‘an unreasonable application of...clearly established Federal law,’ § 2254(d) (1), if the state court’s application of that law is ‘objectively unreasonable.’”); *Wiggins v. Smith*, 539 U.S. at 520-21. The focus of this inquiry is on whether the state court’s application of clearly established federal law was objectively unreasonable; an “unreasonable” application is different from a merely “incorrect” one. *Schriro v. Landrigan*, 550 U.S. 465, 473 (2007) (“The question under the AEDPA is not whether a federal court believes the state court’s determination was incorrect but whether that determination was unreasonable - a substantially higher threshold.”); *Wiggins v. Smith*, 539 U.S. at 520; *Price v. Vincent*, 538 U.S. 634, 641 (2003) (“it is the habeas applicant’s burden to show that the state court applied that case to the facts of his case in an objectively unreasonable manner”).

As the Supreme Court has explained:

Under the Antiterrorism and Effective Death Penalty Act, a state prisoner seeking a writ of habeas corpus from a federal court “must show that the state court’s ruling on the claim being presented in federal court was so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement.”

Bobby v. Dixon, ___ U.S. ___, ___, 132 S. Ct. 26, 27, 181 L. Ed. 2d 328 (2011) (quoting *Harrington v. Richter*, 562 U.S. 86, 103 (2011)).

Legal principles are “clearly established” for purposes of AEDPA review when the holdings, as opposed to the dicta, of Supreme Court decisions as of the time of the relevant state-court decision establish those principles. *Yarborough v. Alvarado*, 541 U.S. 652, 660-61 (2004) (“We look for ‘the governing legal principle or principles set forth by the Supreme Court at the time the state court renders its decision.’”); *Lockyer v. Andrade*, 538 U.S. 63, 71-72 (2003). Under the AEDPA, what constitutes “clearly established federal law” is determined through review of the decisions of the

United States Supreme Court, not the precedent of the federal Circuit Courts. *See Lopez v. Smith*, ___ U.S. ___, ___, 135 S. Ct. 1, 2, 190 L. Ed. 2d 1 (2014) (holding the AEDPA prohibits the federal courts of appeals from relying on their own precedent to conclude a particular constitutional principle is “clearly established”).

The AEDPA also significantly restricts the scope of federal habeas review of state court fact findings. 28 U.S.C. §2254(d)(2) provides federal habeas relief may not be granted on any claim that was adjudicated on the merits in the state courts unless the state court’s adjudication of the claim resulted in a decision based on an unreasonable determination of the facts in light of the evidence presented in the state court proceeding. *Wood v. Allen*, 558 U.S. 290, 301 (2010) (“[A] state-court factual determination is not unreasonable merely because the federal habeas court would have reached a different conclusion in the first instance.”); *Williams v. Taylor*, 529 U.S. at 410 (“[A]n *unreasonable* application of federal law is different from an *incorrect* application of federal law.”). Even if reasonable minds reviewing the record might disagree about the factual finding in question (or the implicit credibility determination underlying the factual finding), on habeas review, this does not suffice to supersede the trial court’s factual determination. *Wood v. Allen*, 558 U.S. at 301; *Rice v. Collins*, 546 U.S. 333, 341-42 (2006).

In addition, Section 2254(e)(1) provides a petitioner challenging state court factual findings must establish by clear and convincing evidence that the state court’s findings were erroneous. *Schriro v. Landrigan*, 550 U.S. at 473-74 (“AEDPA also requires federal habeas courts to presume the correctness of state courts’ factual findings unless applicants rebut this presumption with ‘clear and convincing evidence.’”); *Rice v. Collins*, 546 U.S. 333, 338-39 (2006) (“State-court factual findings, moreover, are presumed correct; the petitioner has the burden of rebutting the presumption

The record reflects Plaintiff's argument that the Texas court's factual findings are entitled to deference under the AEDPA. The record reflects Plaintiff's argument that the Texas court's factual findings are entitled to deference under the AEDPA.

by 'clear and convincing evidence.'"); *Miller-El v. Dretke*, 545 U.S. 231, 240 (2005) ("[W]e presume the Texas court's factual findings to be sound unless Miller-El rebuts the 'presumption of correctness by clear and convincing evidence.'"); 28 U.S.C. §2254(e) (1). It remains unclear at this juncture whether Section 2254(e)(1) applies in every case presenting a challenge to a state court's factual findings under Section 2254(d) (2). *See Wood v. Allen*, 558 U.S. at 300 (choosing not to resolve the issue of Section 2254(e)(1)'s possible application to all challenges to a state court's factual findings); *Rice v. Collins*, 546 U.S. at 339 (likewise refusing to resolve the Circuit split regarding the application of Section 2254(e)(1)).

However, the deference to which state-court factual findings are entitled under the AEDPA does not imply an abandonment or abdication of federal judicial review. *See Miller-El v. Dretke*, 545 U.S. at 240 (the standard is "demanding but not insatiable"); *Miller-El v. Cockrell*, 537 U.S. 322, 340 (2003) ("Even in the context of federal habeas, deference does not imply abandonment or abdication of judicial review. Deference does not by definition preclude relief.").

Finally, in this Circuit, a federal habeas court reviewing a state court's rejection on the merits of a claim for relief pursuant to the AEDPA must focus exclusively on the propriety of the ultimate decision reached by the state court and not evaluate the quality, or lack thereof, of the state court's written opinion supporting its decision. *See Maldonado v. Thaler*, 625 F.3d 229, 239 (5th Cir. 2010) (federal habeas review of a state court's adjudication involves review only of a state court's decision, not the written opinion explaining the decision), *cert. denied*, 132 S. Ct. 124 (2011); *Pondexter v. Dretke*, 346 F.3d 142, 148 (5th Cir. 2003) (holding the precise question before a federal habeas court in reviewing a state court's rejection on the merits of an ineffective assistance claim is whether the state court's ultimate conclusion was objectively reasonable), *cert. denied*, 541 U.S. 1045 (2004);

Neal v. Puckett, 286 F.3d 230, 246 (5th Cir. 2002) (*en banc*) (holding a federal court is authorized by §2254(d) to review only a state court's decision and not the written opinion explaining that decision), *cert. denied*, 537 U.S. 1104 (2003).

IV. Jury Instructions

A. The Claims

In his eighth and tenth grounds for relief, Petitioner argues the state trial court erred in (1) denying the defense's requested jury instructions on mistake of fact, threat by force, and self-defense and (2) failing to instruct the jury on the defenses of sleep automatism and sleep inertia.

B. State Court Disposition

As Respondent correctly points out, Petitioner has never presented to any state court his tenth ground for relief in his federal habeas corpus petition, i.e., Petitioner's argument that the trial court should have submitted jury instructions on sleep inertia or automatism. *Presented to state court on direct appeal!*

During the charge conference at the guilt-innocence phase of Petitioner's trial, Petitioner's trial counsel requested jury instructions on justifiable use of force, self-defense, and mistake of fact.¹⁰ The trial court denied each of those requests.¹¹ Petitioner's first five points of error on direct appeal challenged the state trial court's failure to submit defense counsel's requested jury instructions on

¹⁰ S.F. Trial, Volume 3 of 6, at pp. 167-70 (ECF no. 15-10, at pp. 17-19); S.F. Trial, Volume 4 of 6, at pp. 6-12 (ECF no. 15-11, at pp. 6-12). Petitioner's trial counsel did not specifically request jury instructions on either sleep inertia or automatism. *Id.*

¹¹ *Id.*

mistake of fact, self-defense, and justifiable use of force.¹² The Texas Third Court of Appeals rejected these arguments on the merits, concluding that: (1) Petitioner was not entitled to an instruction on self-defense because (a) that affirmative defense is available under Texas law *only* when a criminal defendant admits he engaged in the charged conduct but offers self-defense as a justification for the action and (b) Petitioner consistently denied during his trial testimony that he ever pointed his handgun at either of the sheriff's deputies; (2) Petitioner was not entitled to a jury instruction on justifiable use of force because (a) justifiable use of force is available as a defense under Texas law only when a defendant shows his use of force was justified by one of the justifications recognized in Chapter 9 of the Texas Penal Code, which include public duty, necessity, protection of persons, protection of property, law enforcement, or a special relationship, (b) the only state-law justification recognized in Chapter 9 which Petitioner claimed was self-defense, and (c) Petitioner did not admit to having pointed his handgun at the sheriff's deputies and, therefore, self-defense was unavailable to justify Petitioner's use of force; and (3) while Texas law recognizes a defense when the actor through mistake formed a reasonable belief about a matter and his mistaken belief negated the kind of culpability required for the offense, the state trial court's failure to give an instruction on mistake of fact was harmless error because the nature of Petitioner's offense and the jury instructions given encompassed the substance of the defense. *Isaacson v. State*, 2013 WL 1955799, *2-5 (pointing out the trial court instructed the jury, in part, that, to convict, the jurors

¹² Appellant's Brief, at pp. 3, 9-24 (ECF no. 15-2, at pp. 12, 19-33). While Petitioner's Appellant's Brief did include a discussion of the topics of sleep inertia and automatism, those topics were discussed in the context of Petitioner's argument that he was entitled to a jury instruction on self-defense. Appellant's Brief, at pp. 19-21 (ECF no. 15-2, at pp. 28-30). Petitioner did not argue in his Appellant's Brief that the state trial court should have given separate jury instructions on sleep inertia or automatism.

must find beyond a reasonable doubt that Petitioner knew the men on the porch were public servants and Petitioner intentionally and knowingly threatened the public servants with imminent bodily injury by pointing a handgun at them).¹³ In his petition for discretionary review, Petitioner argued he was entitled to a jury instruction on mistake of fact because he pointed his gun at his visitors in the mistaken belief his visitors (the sheriff's deputies) were someone other than the persons he believed them to be.¹⁴ The Texas Court of Criminal Appeals refused Petitioner's petition for discretionary review.

In his seventh ground for state habeas corpus relief, Petitioner argued the state trial court abused its discretion when it failed to submit defense counsel's requested jury instructions on mistake of fact, threat by force, and self-defense.¹⁵ The Texas Court of Criminal Appeals denied Petitioner's state habeas corpus application without written order based on the trial court's findings.¹⁶

C. AEDPA Review of Complaints about Absence of Affirmative Defenses

Petitioner fairly presented the state habeas court with his argument that the state trial court should have instructed Petitioner's jury on the defenses of mistake of fact, justifiable use of force,

¹³ Petitioner consistently maintained during his trial testimony that he "knew right away" when he opened the door of his residence the deputies were not the two men whom he had chased away earlier that evening. S.F. Trial, Volume 3 of 6, testimony of David Mark Isaacson, at pp. 136-38, 150, 161-62 (ECF no. 15-9, at pp. 24-26, 38; ECF no. 15-10, at pp. 11-12).

¹⁴ Petitioner's Petition for Discretionary Review, at pp. 8-9 (ECF no. 16-13, at pp. 15-16). Petitioner did not argue in his petition for discretionary review that the trial court had erred in refusing to submit his requested jury instructions on self-defense or justifiable use of force.

¹⁵ Transcript of pleadings, motions, and other documents filed in Petitioner's state habeas corpus proceeding (WR-81-373-02) (henceforth "State Habeas Transcript"), at pp. 23, 76-81 (ECF no. 16-26, at pp. 25, 78-83).

¹⁶ ECF no. 16-18.

and self-defense. As explained above, however, the Texas Third Court of Appeals rejected these arguments on the merits, concluding (1) Petitioner was not entitled under Texas law to jury instructions on self-defense or justifiable use of force and (2) any error with regard to the trial court's failure to instruct on mistake of fact was harmless in view of the jury charge, which required the prosecution to establish beyond a reasonable doubt that Petitioner knowingly and intentionally pointed his handgun at persons he knew to be public servants. *Isaacson v. State*, 2013 WL 1955799, *2-*5. Neither the state habeas trial court nor the Texas Court of Criminal Appeals offered any different legal analysis of Petitioner's arguments in the course of the state habeas corpus proceeding.

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A state court's interpretation of state law binds a federal court sitting in habeas corpus. *Bradshaw v. Richey*, 546 U.S. 74, 76 (2005); *Paredes v. Quarterman*, 574 F.3d 281, 291 (5th Cir. 2009), *cert. denied*, 562 U.S. 1203 (2011); *Wood v. Quarterman*, 503 F.3d 408, 414 (5th Cir. 2007), *cert. denied*, 552 U.S. 1314 (2008). Thus, this Court is not free to second-guess the state habeas court's determinations that Petitioner was not entitled *as a matter of state law* to jury instructions on any of the three defensive theories identified in ground eight of Petitioner's federal habeas corpus petition. The Texas Third Court of Appeals specifically concluded that Petitioner's complaints about the absence of the jury instructions in question from his guilt-innocence phase jury charge did not violate due process principles because Petitioner was not entitled to the instructions under applicable state statutes and state rules or the absence of the requested jury instructions was harmless in view of the instructions given the jury. *Isaacson v. State*, 2013 WL 1955799, *5. Having conducted a careful review of the entire record from Petitioner's trial, this Court reaches the same conclusions. Petitioner clearly was not entitled to a jury instruction on self defense; he refused to admit he pointed his handgun at either sheriff's deputy. Petitioner was not entitled to a jury instruction on justifiable

use of force; he refused to admit he actually used the alleged force and failed to present the trial court with any evidence showing he had a reasonable belief his use of force was necessary to protect himself, his property, or any other person. During his trial testimony, Petitioner admitted he knew “right away” the sheriff’s deputies were not the two men he had chased from his residence by brandishing a firearm earlier the same evening and claimed he did not see Donna Johnson on the porch with the deputies.¹⁷ Under such circumstances, there was nothing objectively unreasonable in the state habeas court’s determinations that Petitioner was not entitled to jury instructions on self-defense, mistake of fact, or justifiable use of force.

Improper jury instructions in state criminal trial do not generally form the basis for federal habeas relief. *Estelle v. McGuire*, 502 U.S. 62, 71-72 (1991); *Galvan v. Cockrell*, 293 F.3d 760, 764-65 (5th Cir. 2002). The fact that a jury instruction was incorrect under state law is not a basis for federal habeas relief. *Gilmore v. Taylor*, 508 U.S. 333, 342 (1993); *Estelle v. McGuire*, 502 U.S. at 71; *Marshall v. Lonberger*, 459 U.S. 422, 438 n.6 (1988). Rather, the question is whether the allegedly ailing instruction by itself so infected the entire trial that the resulting conviction violates due process. *Estelle v. McGuire*, 502 U.S. at 72; *Henderson v. Kibbe*, 431 U.S. 145, 154 (1977); *Cupp v. Naughten*, 414 U.S. 141, 147 (1973); *Johnson v. Puckett*, 176 F.3d 809, 824 (5th Cir. 1999) (“as a federal habeas court, our question is whether the ailing instruction by itself so infected the entire trial that the resulting conviction violates due process, not merely whether the instruction is undesirable, erroneous, or even universally condemned.”). “An omission, or an incomplete instruction, is less likely to be prejudicial than a misstatement of law.” *Henderson v. Kibbe*, 431

It does!

¹⁷ S.F. Trial, Volume 3 of 6, testimony of David Mark Isaacson, at pp. 136-38, 150, 161-62 (ECF no. 15-9, at pp. 24-26, 38; ECF no. 15-10, at pp. 11-12).

U.S. at 155. The relevant inquiry is whether the failure to give an instruction by itself so infected the entire trial that the resulting conviction violates due process. *Cupp v. Naughten*, 414 U.S. at 147; *Galvan v. Cockrell*, 293 F.3d at 764-65. A federal court may reverse a state court criminal conviction based upon erroneous jury instructions only when the instructions in question render the entire trial fundamentally unfair. *Henderson v. Kibbe*, 431 U.S. at 154; *Cupp v. Naughten*, 414 U.S. at 147; *Mayabb v. Johnson*, 168 F.3d 863, 867 (5th Cir.), *cert. denied*, 528 U.S. 969 (1999). Moreover, there is a strong presumption that errors in jury instructions are subject to harmless error analysis. *Galvan v. Cockrell*, 293 F.3d at 765 (recognizing under *Brecht v. Abrahamson*, 507 U.S. 619, 623-24 (1993), the test for harmless error in federal court is “whether the error had a substantial and injurious effect or influence in determining the jury’s verdict”). / /

The state appellate court concluded Petitioner was not entitled, as a matter of state law, to jury instructions on justifiable use of force or self defense and any error in the absence of a mistake of fact instruction was rendered harmless by the instructions themselves, which required the jury to find beyond a reasonable doubt that Petitioner intentionally and knowingly pointed his handgun at persons he *knew* to be public servants. *Isacson v. State*, 2013 WL 1955799, *4.¹⁸ Having carefully

¹⁸ The state trial court instructed Petitioner’s jury at the guilt-innocence phase of trial in pertinent part as follows:

Bearing in mind the foregoing instructions, *if you find beyond a reasonable doubt that* on or about the 16th day of November, 2008, in the County of Comal and the State of Texas, DAVID MARK ISAACSON, hereinafter styled Defendant, did then and there intentionally or knowingly threaten Tom Byford with imminent bodily injury by pointing a handgun at the said Tom Byford, and did then and there use or exhibit a deadly weapon, to-wit: a handgun, during the commission of said assault, and *the defendant did then and there know that the said Tom Byford was then and there a public servant, to-wit: a Comal County Deputy*, and that the said Tom Byford was then and there lawfully discharging an official duty, to-wit: investigating a possible criminal situation, as charged in Count 1 the indictment and so answer on

reviewed the entire record of testimony from Petitioner's trial, this Court concludes the state appellate court and state habeas court both acted in an objectively reasonable manner when they concluded any error in Petitioner's guilt-innocence phase jury charge arising from the absence of a mistake of fact instruction was harmless error. The state appellate court's ruling that Petitioner was not entitled *as a matter of state law* to jury instructions on self-defense or justifiable use or force is unassailable in this federal habeas corpus proceeding. Moreover, this Court concludes that the absence of jury instructions on self-defense, justifiable use or force, or mistake of fact from Petitioner's guilt-innocence jury charge did not render Petitioner's trial fundamentally unfair. The Texas Third Court of Appeals concluded the testimony and other evidence presented to the jury simply did not support the defenses of self-defense or justifiable use of force. With regard to mistake of fact, the state trial court instructed Petitioner's jury it was required to find beyond a reasonable doubt that Petitioner knew deputies Byford and Stanislawski were peace officers lawfully discharging their duties before the jury could convict Petitioner of aggravated assault of a public servant. The jury found Petitioner guilty beyond a reasonable doubt on both counts, thus effectively negating any contention Petitioner was mistaken about the identity of the persons on whom he took aim with his handgun on the evening in question.

The Texas Court of Criminal Appeals' rejection on the merits during the course of Petitioner's state habeas corpus proceeding of Petitioner's complaints about the trial court's failure to instruct Petitioner's jury on the defenses of mistake of fact, justifiable use of force, and self-

verdict form Number 1.

Trial Transcript, ECF no. 16-4, at p. 73.

The state trial court instructed the jury in an identical manner regarding the count of the indictment charging Petitioner with the aggravated assault of deputy Stanislawski. *Id.*, at p. 74.

IAC
precluded
this
rejection
no
question!

defense did not result in a decision that was either (1) contrary to, or involved an unreasonable application of, clearly established federal law, as determined by the Supreme Court of the United States, nor (2) based on an unreasonable determination of the facts in light of the evidence presented in the Petitioner's state trial, appellate, and habeas corpus proceedings. Petitioner's eighth ground for relief in his federal habeas corpus petition does not warrant federal habeas corpus relief.

D. De Novo Review of Complaint—Absence of Instructions on Automatism and Sleep Inertia

Insofar as Petitioner complains for the first time in any judicial forum that the trial court failed to instruct the jury on sleep inertia and automatism, the short answer is Petitioner never requested such instructions. Moreover, as Respondent correctly points out, Petitioner has never fairly presented this complaint to any state court as an independent ground for relief. ?

Procedural default occurs where (1) a state court clearly and expressly bases its dismissal of a claim on a state procedural rule, and that procedural rule provides an independent and adequate ground for the dismissal, or (2) a Petitioner fails to exhaust all available state remedies, and the state court to which he would be required to petition would now find the claims procedurally barred. *Coleman v. Thompson*, 501 U.S. 722, 735 n.1 (1991). In either instance, a Petitioner is deemed to have forfeited his federal habeas claim. *O'Sullivan v. Boerckel*, 526 U.S. 838, 848 (1999). Procedural defaults only bar federal habeas review when the state procedural rule which forms the basis for the procedural default was "firmly established and regularly followed" by the time it was applied to preclude state judicial review of the merits of a federal constitutional claim. *Ford v. Georgia*, 498 U.S. 411, 424 (1991). The Fifth Circuit has consistently held that federal habeas review on unexhausted claims presented by a convicted Texas criminal defendant is barred under

then if not properly
introduced in
House of Reps.
was 1977.
and cannot
be discussed
as properly
discussed w/o
realizing then
the cause was
EAC.

I say this was presented in its entirety to Mr. App. The Court agreed to the Court's ruling but added if it is not in the Court's presented - Chicago - I admit to the Court that IIA from App

20

Stanislawski. Petitioner did not testify that he was disoriented or confused when he opened the door and saw the deputies standing on Petitioner's porch. On the contrary, Petitioner insisted he recognized them as sheriff's deputies "right away" and was surprised to see them standing there.²⁰ Furthermore, Petitioner offered no expert testimony from a mental health professional who had examined Petitioner or who otherwise opined that Petitioner was suffering from sleep inertia or automatism at the time of the offenses in question. Under such circumstances, the failure of the state trial court to include jury instructions addressing sleep inertia or automatism in the guilt-innocence phase jury charge did not render Petitioner's trial fundamentally unfair. The question presented to Petitioner's jury was not whether Petitioner had aimed his pistol at the deputies while in a stupor or state of somnambulism. Petitioner offered no evidence showing he was sleep walking or otherwise disoriented when he opened his door and found deputies Byford and Stanislawski standing on his porch. On the contrary, Petitioner testified he recognized them as sheriff's deputies "right away." Petitioner insisted he never pointed his gun at either deputy. Thus, the critical factual question before Petitioner's jury was whether Petitioner actually aimed his handgun at the deputies, as both deputies testified, or whether, as Petitioner testified, he never pointed his gun at anyone that evening. The absence of jury instructions on sleep inertia and automatism did not render Petitioner's trial fundamentally unfair. Petitioner's unexhausted, procedurally defaulted, tenth claim in his federal petition lacks any arguable merit and does not warrant federal habeas corpus relief.

V. Evidentiary Ruling

A. The Claim

²⁰ S.F. Trial, Volume 3 of 6, testimony of David Mark Isaacson, at pp. 136-38, 150, 161-62 (ECF no. 15-9, at pp. 24-26, 38; ECF no. 15-10, at pp. 11-12.

In his third claim, Petitioner argues the state trial court erred in admitting testimony from prosecution witness Donna Johnson that he pointed his gun at her prior to the arrival of deputies Byford and Stanislawski. Petitioner argues this testimony amounted to evidence of an extraneous offense and, pursuant to Rule 404(b) of the Texas Rules of Evidence, he was entitled to formal notice from the prosecution before such testimony was presented at his trial.

B. State Court Disposition

During the guilt-innocence phase of Petitioner's trial, prosecution witness Donna Johnson testified that, after Petitioner chased two men from the home she had shared with Petitioner by brandishing a handgun, Petitioner momentarily aimed his gun at her, then dropped his hand, and went back to his bedroom.²¹ Petitioner's trial counsel requested the trial judge direct the jury to disregard this testimony but the trial court denied that request. Petitioner's trial counsel then objected that the admission of this aspect of Johnson's testimony violated a motion in limine the trial court had granted. The jury was excused. After hearing arguments from both parties, the trial court overruled Petitioner's objections.²²

Petitioner presented the same claim as his sixth point of error on direct appeal.²³ The Texas Third Court of Appeals rejected this argument on the merits, concluding the state was not required to give Petitioner notice of its intention to offer evidence of other crimes, wrongs, or acts arising in the same transaction as the charged offense. *Isaacson v. State*, 2013 WL 1955799, *5-*6 (holding

ok yes it is
3.

²¹ S.F. Trial, Volume 3 of 6, testimony of Donna Johnson, at p. 20 (ECF no. 15-6, at p. 20).

²² *Id.*, at pp. 21-25.

²³ Appellant's Brief, at pp. 25-28 (ECF no. 15-2, at pp. 34-37).

the trial court could reasonably have concluded Petitioner's alleged action of pointing a gun at Johnson was part of the same transaction and provided context for the peace officer's encounter later the same evening).²⁴ Petitioner raised the same complaint as the sixth ground for relief in his state habeas corpus application.²⁵ The Texas Court of Criminal Appeals rejected Petitioner's state habeas corpus application on the merits.²⁶

C. AEDPA Review

It is well-settled law in this Circuit that, in reviewing state evidentiary rulings in habeas corpus petitions, a federal court does not sit as super state supreme court to review error under state law. *Bridge v. Lynaugh*, 838 F.2d 770, 772 (5th Cir. 1988). It is not the province of a federal habeas court to reexamine state court determinations on state-law questions such as the admissibility of evidence under state procedural rules. *Estelle v. McGuire*, 502 U.S. 62, 67-68 (1991); *Goodrum v. Quarterman*, 547 F.3d 249, 261 (5th Cir. 2008), *cert. denied*, 556 U.S. 1130 (2009). A federal court may grant habeas relief based on an erroneous state court evidentiary ruling only if the ruling also violates a specific federal constitutional right or renders the petitioner's trial fundamentally unfair. *Brown v. Epps*, 686 f3d 281, 286 n.20 (5th Cir. 2012); *Goodrum v. Quarterman*, 547 F.3d at 261. "A state court's evidentiary rulings present cognizable habeas claims only if they run afoul of a specific constitutional right or render the petitioner's trial fundamentally unfair." *Johnson v. Puckett*, 176 F.3d 809, 820 (5th Cir. 1999); *Pemberton v. Collins*, 991 F.2d 1218, 1226 (5th Cir. 1993), *cert.*

²⁴ Petitioner did not include this same point of error in his petition for discretionary review. ECF no. 16-13.

²⁵ State Habeas Transcript, at pp. 21-22, 71-75 (ECF no. 16-26, at pp. 23-24, 73-77).

²⁶ ECF no. 16-18.

denied, 510 U.S. 1025 (1993). The challenged evidence must be a crucial, critical, or highly significant factor in the context of the entire case. *Gonzales v. Thaler*, 643 F.3d 425, 430 (5th Cir. 2011); *Jackson v. Johnson*, 194 F.3d 641, 656 (5th Cir. 1999), *cert. denied*, 529 U.S. 1027 (2000). The test to determine whether a trial error makes a trial “fundamentally unfair” is whether there is a reasonable probability that the verdict might have been different had the trial been properly conducted. *Brown v. Dretke*, 419 F.3d 365, 377 (5th Cir. 2005), *cert. denied*, 546 U.S. 1217 (2006); *Guidroz v. Lynaugh*, 852 F.2d 832, 835 (5th Cir. 1988). Due process is implicated only for rulings of such a magnitude or so egregious that they render the trial fundamentally unfair; it offers no authority to federal habeas courts to review ordinary evidentiary rulings of state trial courts. *Gonzales v. Thaler*, 643 F.3d at 430. A “fundamentally unfair” trial is one largely robbed of dignity due a rational process. *Menzies v. Proconier*, 743 F.2d 281, 288 (5th Cir. 1984).

As explained above, the state appellate court’s determination that Johnson’s testimony on this point was admissible *under applicable state law* is not subject to reexamination by this Court. *Bradshaw v. Richey*, 546 U.S. at 76; *Paredes v. Quarterman*, 574 F.3d at 291; *Wood v. Quarterman*, 503 F.3d at 414. Donna Johnson was present at Petitioner’s trial and subject to cross-examination so admission of her testimony did not violate Petitioner’s Confrontation Clause rights. Nor does Petitioner identify any other specific federal constitutional right which he claims was violated by admission of Johnson’s testimony. Thus, the question remaining before the Court is whether the admission of Johnson’s testimony about Petitioner aiming his gun at her prior to the arrival of the two deputies rendered Petitioner’s trial fundamentally unfair. *Brown v. Epps*, 686 f3d at 286 n.20; *Goodrum v. Quarterman*, 547 F.3d at 261.

clearly Johnson was coached by prosecution who never mentioned this in her statement. Or why if she was threatened - which was never proved - nor charged with - would she remain in the house & tell deputies that everything was fine!

24

makes the trial fundamentally unfair

This is pros. misconduct. leading witness, meant to excite (inflame) the jury.

Having reviewed the entire record from Petitioner's trial, this Court concludes the admission of Johnson's testimony regarding Petitioner pointing a gun at her prior to the arrival of the deputies did not render Petitioner's trial fundamentally unfair. Johnson had already testified without objection that she witnessed Petitioner brandish a handgun in a manner clearly designed to cause Johnson's two male companions to vacate Petitioner's residence with great speed. Petitioner himself testified he waved his handgun at the ceiling and directed Johnson's two male companions to vacate his residence. The critical issue before the jury was not whether Petitioner aimed his handgun at Johnson or either of her male companions (identified by her at trial only as "Chris and Dave"). Rather, the critical question for the jury was whether Petitioner aimed his handgun at the two sheriff's deputies who arrived on the scene shortly after Johnson's male companions vacated the premises at Petitioner's direction. Johnson admitted she was facing away from Petitioner when he came to the door and did not turn around until after his confrontation with the two deputies was all but over and Petitioner was closing his door.²⁷ The critical issue for the jury was the relative credibility of Petitioner vis-a-vis that of the two deputies. Under such circumstances, there is no reasonable probability the jury's verdict at the guilt-innocence phase of trial would have been any different had the state trial court excluded (or directed the jury to disregard) this aspect of Johnson's testimony. *It is because it caused the jury to conclude I was some*

crazed nut job. & if I did - why would deputies leave me
The Texas Court of Criminal Appeals' rejection on the merits of Petitioner's complaint about *totally on*
the admission of Johnson's testimony that Petitioner briefly aimed his gun at her prior to the arrival *my own*
of the deputies was neither (1) contrary to, or involved an unreasonable application of, clearly *for the*
next 18-20
hours!

²⁷ S.F. Trial, Volume 3 of 6, testimony of Donna Johnson, at pp. 32-33 (ECF no. 15-6, at pp. 32-33).

*The evid.
does not support
their story &
reinforces mine!*

established federal law, as determined by the Supreme Court of the United States, nor (2) based on an unreasonable determination of the facts in light of the evidence presented in the Petitioner's state trial, appellate, and habeas corpus proceedings. Petitioner's third ground for relief in his federal habeas corpus petition does not warrant federal habeas corpus relief.

VI. Prosecution's Voir Dire and Closing Jury Argument

A. The Claims

In his second claim for federal habeas corpus relief, Petitioner argues the state trial court erred in overruling the defense's objections to (1) the state's failure to explain all the essential elements of the charged offenses during the initial portion of the prosecution's closing jury argument at the guilt-innocence phase of trial and (2) the prosecution's definition of "reasonable doubt" made during voir dire examination.²⁸

²⁸ Petitioner's memorandum in support of his federal habeas corpus petition discusses these alleged erroneous rulings but includes no citations to the record to help this Court determine where in the record those alleged errors took place. ECF no. 1-8, at pp. 3-4. This Court's independent review of the record from Petitioner's trial court proceedings reveals, however, that prior to closing argument at the guilt-innocence phase of trial (1) Petitioner's trial counsel stated "Your Honor, I'd like to move for a full opening on the elements of the offense by the prosecution," (2) the trial court replied "That will - - that will be ordered," and (3) the prosecution then commenced its closing jury argument. S.F. Trial, Volume 4 of 6, at p. 24 (ECF no. 15-11, at p. 24). When the prosecutor completed the opening portion of his closing jury argument (1) Petitioner's trial counsel commented the prosecution had not made "a full opening on the elements of the offense as I requested," (2) Petitioner's trial counsel asked "Must I proceed without that?", and (3) the trial court responded "Defense request is denied." S.F. Trial, Volume 4 of 6, at p. 27 (ECF no. 15-11, at p. 27).

This Court's independent review of the voir dire examination reveals that, at one point, a member of the jury venire asked the prosecutor to return to the subject of the difference between "a shadow of a doubt and reasonable." S.F. Trial, Volume 2 of 6, at p. 64 (ECF no. 15-5, at p. 64). When the prosecutor responded to the venire member's question, Petitioner's trial counsel objected, stating "Your Honor, I object to - - this is really a misstatement with regard to the most important aspect of this trial, the burden of proof beyond a reasonable doubt. And the law says that proof beyond a reasonable doubt is what a reasonable doubt is to a juror under all of the

B. State Court Disposition

Petitioner presented these same complaints as his eighth ground for state habeas corpus relief.²⁹ The Texas Court of Criminal Appeals rejected this claim on the merits.³⁰

C. AEDPA Review

Improper remarks by a prosecutor “are a sufficient ground for habeas relief only if they are so prejudicial that they render the trial fundamentally unfair.” *Harris v. Cockrell*, 313 F.3d 238, 245 (5th Cir. 2002). “Such unfairness exists only if the prosecutor’s remarks evince either persistent and pronounced misconduct or ... the evidence was so insubstantial that (in probability) but for the remarks no conviction would have occurred.” *Id.* at 245 (internal quotation marks and citation omitted). “The relevant question is whether the prosecutors’ comments so infected the trial with unfairness as to make the resulting conviction a denial of due process.” *Darden v. Wainwright*, 477 U.S. 168, 181, 106 S.Ct. 2464, 91 L.Ed.2d 144 (1986) (internal quotation marks and citation omitted). A curative instruction may reduce the risk of prejudice to the defendant. *See Ward v. Dretke*, 420 F.3d 479, 499 (5th Cir. 2005).

Hughes v. Quarterman, 530 F.3d 336, 347 (5th Cir. 2008), *cert. denied*, 556 U.S. 1239 (2009).

1. Prosecution’s Voir Dire Explanation of Reasonable Doubt

Petitioner does not identify any constitutional error arising from the prosecution’s attempts during voir dire to explain the difference between “reasonable doubt” and “beyond a shadow of a doubt.” Respondent correctly points out the Supreme Court has held the Constitution requires no formalistic definition of “reasonable doubt” be employed in every criminal trial: — Except when?

facts and circumstances. So it is not that precise, narrow definition.” *Id.*, at p. 65. The state trial court then responded: “Overrule the objection. But the jury is instructed that at the end of the trial, if you’re on the jury, you will receive a charge which explains that the law - - the attorneys during voir dire have a chance to tell you what they think the law is. Overrule the objection.” *Id.*, at pp. 65-66.

²⁹ State Habeas Transcript, at pp. 24-25, 82-84 (ECF no. 16-26, at pp. 25-26, 84-86).

³⁰ ECF no. 16-18.

The beyond a reasonable doubt standard is a requirement of due process, but the Constitution neither prohibits trial courts from defining reasonable doubt nor requires them to do so as a matter of course. *Cf. Hopt v. Utah*, 120 U.S. 430, 440–441, 7 S.Ct. 614, 618–20, 30 L.Ed. 708 (1887). Indeed, so long as the court instructs the jury on the necessity that the defendant's guilt be proved beyond a reasonable doubt, see *Jackson v. Virginia*, 443 U.S. 307, 320, n. 14, 99 S.Ct. 2781, 2789, n. 14, 61 L.Ed.2d 560 (1979), the Constitution does not require that any particular form of words be used in advising the jury of the government's burden of proof.

Victor v. Nebraska, 511 U.S. 1, 5 (1994).

Petitioner identifies no error in the state trial court's guilt-innocence phase jury charge regarding the identity of any of the elements of the charges against Petitioner. Nor does Petitioner identify any error in the jury charge with regard to the burden of proof contained therein. On the contrary, Petitioner's jury charge clearly instructed the jury that the prosecution was required to prove beyond a reasonable doubt each of the elements of aggravated assault upon a peace officer, as defined by applicable Texas law.³¹ Thus, Petitioner identifies no error in the state trial court's guilt-innocence phase jury charge regarding the nature of the prosecution's burden of proof. The possibility the prosecution's efforts during voir dire to explain the difference between "reasonable doubt" and "beyond a shadow of a doubt" were less than unambiguous did not render Petitioner's trial fundamentally unfair. It is the duty of the trial court, not the parties' attorneys, to instruct the jury on the law. Juries are presumed to follow their instructions. *Zafiro v. United States*, 506 U.S. 534, 540 (1993); *United States v. Cessa*, 785 F.3d 165, 183 (5th Cir.), cert. denied, 136 S. Ct. 522 (2015). The state trial court's overruling of Petitioner's trial counsel's objection to the prosecutor's

Then why was the judge the one instructing at voir dire?

³¹ See S.F. Trial, Volume 4 of 6, at p. 20 (ECF no. 15-11, at p. 20): "The prosecution has the burden of proving the defendant guilty, and it must do so by proving each and every element of the offense charged beyond a reasonable doubt and, if it fails to do so, you must acquit the Defendant."

voir dire comment on the difference between “reasonable doubt” and “beyond a shadow of a doubt” did not render Petitioner’s trial fundamentally unfair. At best, the trial court’s ruling rose no higher than harmless error. *See Brecht v. Abrahamson*, 507 U.S. at 623-24 (the test for harmless error in federal court is “whether the error had a substantial and injurious effect or influence in determining the jury’s verdict”).

2. Opening Portion of the Prosecution’s Closing Argument

Insofar as Petitioner complains the prosecution did not specifically address each and every element of the charges against Petitioner during the opening phase of the prosecution’s closing jury argument at the guilt-innocence phase of trial, Petitioner identifies no federal constitutional right or duty which was violated thereby. Nothing in the Constitution entitles a criminal defendant to dictate what information the prosecution will include or specifically address during closing jury argument.

We analyze prosecutorial-misconduct claims in two steps. *United States v. Ebron*, 683 F.3d 105, 140 (5th Cir. 2012) (citation omitted). First, we evaluate whether the prosecutor made an improper remark. *United States v. Fields*, 483 F.3d 313, 358 (5th Cir. 2007) (citation omitted). If so, then we determine whether the defendant suffered prejudice. *Id.* (citation omitted). “The prejudice step of the inquiry sets a high bar: ‘Improper prosecutorial comments constitute reversible error only where the defendant’s right to a fair trial is substantially affected.’” *Ebron*, 683 F.3d at 140 (quoting *United States v. Holmes*, 406 F.3d 337, 355–56 (5th Cir. 2005)). Thus, a criminal conviction should not be “lightly overturned on the basis of a prosecutor’s comments standing alone.” *Id.* Rather, “the determinative question is whether the prosecutor’s remarks cast serious doubt on the correctness of the jury’s verdict.” *Id.* In deciding whether serious doubt infects the verdict, we look to three factors: “(1) the magnitude of the prejudicial effect of the prosecutor’s remarks, (2) the efficacy of any cautionary instruction by the judge, and (3) the strength of the evidence supporting the conviction.” *Id.* (quoting *United States v. Mares*, 402 F.3d 511, 515 (5th Cir. 2005)) (internal quotation marks omitted).

Trottie v. Stephens, 720 F.3d 231, 253 (5th Cir. 2013), *cert. denied*, 134 S. Ct. 1540 (2014).

Isaacson
had every right
under the
circumstances
and the evidence
supports the
castle doctrine -
allowing me the use
of deadly force in
self defense.

As explained above, the state trial court accurately instructed Petitioner's jury on the essential elements of the charges against Petitioner.³² The prosecutor then began his closing argument by reading almost verbatim from the jury charge, emphasizing the prosecution bore the burden of proof, and arguing a "presumption of innocence is not a presumption of truthfulness."³³ There was nothing improper in this portion of the prosecution's closing jury argument. *See Hughes v. Quarterman*, 530 F.3d at 347 (recognizing that, under Texas law, "[t]o be proper, jury argument must constitute either (1) a summation of the evidence, or (2) a reasonable deduction from the evidence, or (3) a response to an opponent's argument, or (4) a plea for law enforcement."). Moreover, this Court finds nothing prejudicial in this portion of the prosecution's closing jury argument. The outcome of Petitioner's trial turned on the relative credibility of the testimony of deputies Byford and Stanislawski (who each testified Petitioner pointed his gun at them) vis-a-vis that of Petitioner (who denied pointing his gun at anyone), a point which was neither obfuscated nor confused by the prosecution's opening remarks during guilt-innocence phase jury argument.

Insofar as Petitioner argues the failure of the prosecutor to more specifically address each and every element of the charges against Petitioner during the opening phase of prosecutorial closing jury argument violated some state law rule or state law procedural requirement, that argument ignores the well-settled legal principle that violations of state procedural or evidentiary rules do not, standing alone, furnish a basis for federal habeas corpus relief. Federal habeas corpus relief will not issue to correct errors of state constitutional, statutory, or procedural law, unless a federal issue is also presented. *See Estelle v. McGuire*, 502 U.S. at 67-68 (complaints regarding the admission of

³² S.F. Trial, Volume 4 of 6, at pp. 14-24 (ECF no. 15-11, at pp. 14-24).

³³ *Id.*, at pp. 25-27.

evidence under California law did not present grounds for federal habeas relief absent a showing that admission of the evidence in question violated due process); *Lewis v. Jeffers*, 497 U.S. 764, 780 (1990) (recognizing that federal habeas relief will not issue for errors of state law); *Pulley v. Harris*, 465 U.S. 37, 41 (1984) (a federal court may not issue the writ on the basis of a perceived error of state law). In the course of reviewing state criminal convictions in federal habeas corpus proceedings, a federal court does *not* sit as a super-state appellate court. *Estelle v. McGuire*, 502 U.S. at 67-68; *Lewis v. Jeffers*, 497 U.S. at 780; *Pulley v. Harris*, 465 U.S. at 41.

When a federal district court reviews a state prisoner's habeas petition pursuant to 28 U.S.C. § 2254 it must decide whether the petitioner is "in custody in violation of the Constitution or laws or treaties of the United States." The court does not review a judgment, but the lawfulness of the petitioner's custody *simpliciter*.

Coleman v. Thompson, 501 U.S. 722, 730 (1991).

The state trial court's refusal to direct the prosecution to engage in further jury argument prior to Petitioner's trial counsel giving his closing jury argument did not prejudice Petitioner and, even if erroneous under state procedural rules, did not rise above the level of harmless error.

3. Conclusions

The Texas Court of Criminal Appeals' rejection on the merits during the course of Petitioner's state habeas corpus proceeding of Petitioner's complaints about the trial court's adverse rulings on prosecutorial comments and jury argument was neither (1) contrary to, or involved an unreasonable application of, clearly established federal law, as determined by the Supreme Court of the United States, nor (2) based on an unreasonable determination of the facts in light of the evidence

Fair & impartial Trial ! Dah-

presented in the Petitioner's state trial, appellate, and habeas corpus proceedings. Petitioner's second ground for relief in his federal habeas corpus petition does not warrant federal habeas corpus relief.

VII. Improper Sentence "Enhancement"

A. The Claim

In his ninth claim for relief in his federal habeas corpus petition, Petitioner argues the state trial court improperly "enhanced" Petitioner's sentence based upon a conviction from Michigan which Petitioner argues was not a final conviction and was not a felony offense under Texas law.³⁴

B. State Court Disposition

During the punishment phase of Petitioner's trial, Petitioner pleaded "not true" to the enhancement paragraph of the indictment against him³⁵ and the state trial court admitted documentary evidence showing (1) Petitioner was convicted in May, 1999 in Howell County, Michigan of the felony offense of carrying concealed weapons and (2) Petitioner was arrested in April, 1997 for assault causing bodily injury.³⁶ Petitioner testified that (1) he had received a probated

³⁴ ECF no. 1-8, at p. 16.

OK { In point of fact, Petitioner's indictment did not include an enhancement paragraph. Trial Transcript, at pp. 7-8 (ECF no. 16-4, at pp. 7-8). The prosecution did file a motion requesting enhancement of Petitioner's sentence pursuant to § 12.42(c)(1) of the Texas Penal Code [Trial Transcript, at pp. 24-25 (ECF no. 16-4, at pp. 24-25)], which provides that a defendant convicted of a first degree felony who has previously been convicted of a felony other than a state jail felony shall be punished by imprisonment for life or for any term of not more than 99 years or less than fifteen years. Section 12.32(a) of the Texas Penal Code provides that persons convicted of a first degree felony shall be punished by imprisonment for life or any term of not more than 99 years or less than 5 years. Petitioner was convicted of aggravated assault of a peace officer, which § 22.02(b)(2)(B) of the Texas Penal Code provides is a first degree felony.

³⁵ S.F. Trial, Volume 5 of 6, at pp. 6-7 (ECF no. 15-14, at pp. 6-7).

³⁶ S.F. Trial, Volume 5 of 6, at pp. 5-19 (ECF no. 15-14, at pp. 5-19).

sentence in Michigan for carrying a concealed weapon and his probation was never revoked, (2) he never went to the penitentiary in connection with his Michigan conviction, (3) he did not choke his wife in April, 1997, (4) he had been arrested for operating a motor vehicle with a suspended license, (5) he was convicted in Michigan in April, 1997 for possession of marijuana, (6) he had been arrested in Wisconsin in 1973 for burglary, (7) he was arrested in April, 1997 in Bexar County for assault with bodily injury and his probation was revoked, (8) he had been arrested for resisting arrest, and (9) he did not point his gun at the sheriff's deputies.³⁷

Petitioner raised this argument for the first time as his ninth claim for relief in his state habeas corpus application.³⁸ The Texas Court of Criminal rejected this claim on the merits.³⁹

C. AEDPA Analysis

Respondent correctly points out that Petitioner's arguments in support of his ninth claim for federal habeas corpus relief raise only alleged errors of state law which do not furnish a basis for federal habeas corpus relief. *See Rubio v. Estelle*, 689 F.2d 533, 536 (5th Cir. 1982) (holding alleged errors in the state court's consideration of a defendant's prior convictions for purposes of calculating an enhanced sentence raised only issues of state law and did not raise federal constitutional questions). Petitioner was sentenced to serve concurrent 15-year terms of imprisonment, terms which fell within the statutory range for persons convicted of a first degree felony under Texas law. It was unnecessary for the state trial court to make any specific factual findings regarding Petitioner's

³⁷ S.F. Trial, Volume 5 of 6, testimony of David Mark Isaacson, at pp. 21-38 (ECF no. 15-14, at pp. 21-23, ECF no. 15-15, at pp. 1-15).

³⁸ State Habeas Transcript, at pp. 26, 85-86 (ECF no. 16-26, at pp. 28, 87-88).

³⁹ ECF no. 16-18.

Michigan conviction before it imposed a 15-year term of imprisonment. Under § 12.32(a), of the Texas Penal Code, the trial court was authorized to impose a term of life imprisonment (or any term of not more than 99 years) upon Petitioner. Thus, under Texas law, the state trial court could have sentenced Petitioner to serve concurrent 15-year terms of imprisonment even if it determined not to consider Petitioner's Michigan conviction when it imposed Petitioner's sentence. Insofar as Petitioner argues the state trial court improperly "enhanced" his sentence by virtue of the trial court's consideration of Petitioner's Michigan conviction, Petitioner raises, at best, only alleged errors of state law. Moreover, any complaint Petitioner might have over the manner in which the state court calculated Petitioner's concurrent 15-year sentences following the jury's rendition of guilty verdicts on a pair of first degree felonies fails to rise above the level of harmless error.

The Texas Court of Criminal Appeals' rejection on the merits in the course of Petitioner's state habeas corpus proceeding of Petitioner's ninth claim for federal habeas corpus relief was neither (1) contrary to, or involved an unreasonable application of, clearly established federal law, as determined by the Supreme Court of the United States, nor (2) based on an unreasonable determination of the facts in light of the evidence presented in the Petitioner's state trial, appellate, and habeas corpus proceedings. Petitioner's ninth ground for relief in his federal habeas corpus petition does not warrant federal habeas corpus relief.

VIII. Denial of Evidentiary Hearing in State Habeas Corpus Proceeding

A. The Claim

In his eleventh claim for federal habeas corpus relief, Petitioner complains that the state habeas trial court issued its findings of fact and conclusions of law without affording Petitioner an evidentiary hearing on his ineffective assistance claims.⁴⁰ as instructed by written order from CCA!

B. No State Court Disposition

As Respondent correctly points out, Petitioner has never fairly presented this complaint to the Texas Court of Criminal Appeals as a ground for state habeas corpus relief.

C. De Novo Review

Complaints about alleged constitutional violations occurring during the course of state habeas corpus proceedings do not give rise to a legal basis for federal habeas corpus relief. *See, e.g., Henderson v. Stephens*, 791 F.3d 567, 578 (5th Cir. 2015) (“infirmities in state habeas proceedings do not constitute grounds for federal habeas corpus relief”), *cert. filed*, Feb. 3, 2016, no. 15-7974); *Ladd v. Stevens*, 748 F.3d 637, 644 (5th Cir.) (“it is axiomatic that infirmities ‘infirmities in state habeas proceedings do not constitute grounds for federal habeas corpus relief’”), *cert. denied*, 135 S. Ct. 192 (2014). This is because an attack on the validity of a state habeas corpus proceeding does not impact the validity of the underlying state criminal conviction. *See Rudd v. Johnson*, 256 F.3d 317, 319-20 (5th Cir.) (“A long line of cases from our circuit dictates that ‘infirmities in state habeas proceedings do not constitute grounds for relief in federal court.’ That is because an attack on the state habeas proceeding is an attack on a proceeding collateral to the detention and not the detention itself.” (*citations omitted*)), *cert. denied*, 534 U.S. 1001 (2001). For the foregoing reasons, Petitioner’s complaint he was denied an evidentiary hearing during his recent state habeas corpus

⁴⁰ ECF no. 1-8, at pp. 20-21.

proceeding does not furnish a basis for federal habeas corpus relief. For the same reasons, Petitioner's complaints (ECF nos. 30 & 33) that he was not furnished with a copy of his trial counsel's affidavit or the state habeas trial court's findings of fact and conclusions of law during Petitioner's state habeas corpus proceeding do not furnish a basis for federal habeas corpus relief.

IX. Ineffective Assistance of Trial Counsel

A. The Claims

In his first, fifth, sixth, seventh, and twelfth claims in his original petition, Petitioner argues his trial counsel rendered ineffective assistance by (1) failing to communicate a plea offer of a ten-year sentence made September 3, 2009, (2) failing to raise the affirmative defenses of mistake of fact, self-defense, and justifiable use of force, (3) failing to request a lesser-included offense jury instruction on assault, (4) virtue of the cumulative effect of the deficiencies in trial counsel's performance, and (5) failing to request jury instructions on "stand your ground" and "the castle doctrine." In his reply brief, Petitioner also argues, for the first time anywhere, that his trial counsel should have called to testify and then impeached the two men identified at trial by Donna Johnson as "Chris and Dave" and another person named "Lisa Green," none of whom testified at Petitioner's trial.

B. State Court Disposition

In his first, second, fourth, and fifth grounds for relief in his state habeas corpus application, Petitioner made the arguments that his trial counsel rendered ineffective assistance by (1) failing to raise the affirmative defenses of self-defense, mistake of fact, and "confession and avoidance," (2) failing to request a lesser-included offense instruction on assault, (3) failing to communicate a plea

offer of ten years, and (4) failing to object to allegedly erroneous comments made by the prosecution.⁴¹ Petitioner also argued the cumulative effect of the foregoing deficient performance by his trial counsel constituted ineffective assistance.⁴²

The Texas Court of Criminal Appeals issued an Order remanding Petitioner's state habeas corpus application to the state trial court for factual findings addressing Petitioner's allegation his trial counsel failed to convey a plea offer. *Ex parte David Mark Isaacson*, WR-81,373-02, 2015 WL 195855 (Tex. Crim. App. Jan. 14, 2015).⁴³ The state trial court reviewed an affidavit submitted by Petitioner's trial counsel and specifically found (1) said counsel conveyed all plea offers to Petitioner but (2) Petitioner refused to accept any of the plea offers extended by the prosecution.⁴⁴

The Texas Court of Criminal Appeals rejected all of the complaints of ineffective assistance. As Respondent correctly points out, Petitioner did not "fairly present" any state appellate court with his complaint about his trial counsel's failure to request jury instructions on either "the castle doctrine" and "stand your ground." This Court likewise finds no evidence in the state court record now before this Court showing Petitioner has ever "fairly presented" any state court with his newest

⁴¹ State Habeas Transcript, at pp. 11-14, 17-20, 45-57, 61-70 (ECF no. 16-26, at pp. 13-16, 19-22, 47-59, 63-72).

⁴² State Habeas Transcript, at pp. 19-20, 68-70 (ECF no. 16-26, at pp. 21-22, 70-72).

⁴³ Contrary to Petitioner's assertions in this Court, the Texas Court of Criminal Appeals' Order did not require the state habeas trial court to conduct a live evidentiary hearing. *Ex parte David Mark Isaacson*, 2014 WL 195855, *1 (informing the trial court it was free to use any means set out in TEX. CODE CRIM. PROC. art 11.07, § 3(d)). The Order instructed the trial court to make additional factual findings and order Petitioner's trial counsel to respond to Petitioner's claim of ineffective assistance of counsel. *Id.* The Order also informed the trial court it could rely upon its personal recollection. *Id.*

⁴⁴ ECF no. 16-24, at pp. 8-9.

the court cannot rely on affidavits alone
when its facts are contested. —

Due Process

ineffective assistance complaint, i.e., his complaint about his trial counsel's failure to call and impeach Lisa Green and the two men whom Petitioner chased out of his residence by waving a gun at them prior to the arrival of deputies Stanislawski and Byford.

C. The Constitutional Standard

The Sixth Amendment entitles criminal defendants to "the effective assistance of counsel," i.e., legal representation that does not (1) fall below an objective standard of reasonableness in light of prevailing professional norms and the circumstances of the defendant's case (*Wong v. Belmontes*, 558 U.S. 15, 16-17 (2009); *Bobby v. Van Hook*, 558 U.S. 4, 7 (2009)); and (2) give rise to a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different (*Porter v. McCollum*, 558 U.S. 30, 38-40 (2009); *Wong v. Belmontes*, 558 U.S. at 19-20). The constitutional standard for determining whether a criminal defendant has been denied the effective assistance of *trial* counsel, as guaranteed by the Sixth Amendment, was announced by the Supreme Court in *Strickland v. Washington*, 466 U.S. 668, 687 (1984):

A convicted defendant's claim that counsel's assistance was so defective as to require reversal of a conviction or death sentence has two components. First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.

To satisfy the first prong of *Strickland*, i.e., establish that his counsel's performance was constitutionally deficient, a convicted defendant must show that counsel's representation "fell below an objective standard of reasonableness." *Wiggins v. Smith*, 539 U.S. 510, 521 (2003); *Williams v. Taylor*, 529 U.S. 362, 390-91 (2000). In so doing, a convicted defendant must carry the burden of

it was

proof and overcome a strong presumption that the conduct of his trial counsel falls within a wide range of reasonable professional assistance. *Strickland v. Washington*, 466 U.S. at 687-91. Courts are extremely deferential in scrutinizing the performance of counsel and make every effort to eliminate the distorting effects of hindsight. See *Wiggins v. Smith*, 539 U.S. at 523 (holding the proper analysis under the first prong of *Strickland* is an objective review of the reasonableness of counsel's performance under prevailing professional norms which includes a context-dependent consideration of the challenged conduct as seen from the perspective of said counsel at the time). "No particular set of detailed rules for counsel's conduct can satisfactorily take account of the variety of circumstances faced by defense counsel or the range of legitimate decisions regarding how best to represent a criminal defendant." *Bobby v. Van Hook*, 558 U.S. at 7; *Strickland v. Washington*, 466 U.S. at 688-89. It is strongly presumed counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. *Strickland v. Washington*, 466 U.S. at 690. To satisfy the "prejudice" prong, a convicted defendant must establish a reasonable probability that, but for the objectively unreasonable misconduct of his counsel, the result of the proceeding would have been different. *Wiggins v. Smith*, 539 U.S. at 534; *Strickland v. Washington*, 466 U.S. at 694. A reasonable probability is a probability sufficient to undermine confidence in the outcome of the proceeding. *Strickland v. Washington*, 466 U.S. at 694.

In evaluating Petitioner's complaints about the performance of his counsel under the AEDPA, i.e., those complaints which the state courts have addressed on the merits, the issue before this Court is whether the Texas Court of Criminal Appeals could reasonably have concluded Petitioner's complaints about his trial counsel's performance failed to satisfy either prong of the *Strickland* analysis. *Schaetzle v. Cockrell*, 343 F.3d 440, 444 (5th Cir. 2003), cert. denied, 540 U.S.

then why did he attempt to have the instruction of SD - C of F submitted to the jury - w/o me admitting every element of the charge?

I.E. Did point a gun - Any 1st yr law student

must admit every element of the crime to get the instruction - seasoned DoJ Coun. didn't know this? IAC

39 you cannot claim the crime never happened - then ask for the instruction - WTF.

1154 (2004). In making this determination, this Court must consider the underlying *Strickland* standard. *Id.* In those instances in which the state courts failed to adjudicate either prong of the *Strickland* test (such as those complaints the state courts summarily dismissed under the Texas writ-abuse statute or which petitioner failed to fairly present to the state courts), this Court's review of the un-adjudicated prong is *de novo*. See *Porter v. McCollum*, 558 U.S. at 39 (holding *de novo* review of the allegedly deficient performance of petitioner's trial counsel was necessary because the state courts had failed to address this prong of *Strickland* analysis); *Rompilla v. Beard*, 545 U.S. at 390 (holding *de novo* review of the prejudice prong of *Strickland* required where the state courts rested their rejection of an ineffective assistance claim on the deficient performance prong and never addressed the issue of prejudice); *Wiggins v. Smith*, 539 U.S. at 534 (holding the same).

A habeas petitioner has the burden to prove both prongs of the *Strickland* ineffective assistance standard by a preponderance of the evidence. *Rogers v. Quarterman*, 555 F.3d 483, 489 (5th Cir. 2009), *cert. denied*, 558 U.S. 839 (2009); *Blanton v. Quarterman*, 543 F.3d 230, 235 (5th Cir. 2008), *cert. denied*, 556 U.S. 1240 (2009). Under the well-settled *Strickland* standard, the Supreme Court recognizes a strong presumption that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. *Bell v. Cone*, 535 U.S. 685, 698 (2002); *Strickland v. Washington*, 466 U.S. at 690.

D. Procedural Default & De Novo Review of Unexhausted Ineffective Assistance Complaints

1. Procedural Default

Respondent correctly points out Petitioner has failed to exhaust available state remedies with regard to Petitioner's complaint that his trial counsel rendered ineffective assistance by failing to

request jury instructions on "castle doctrine" and "stand your ground." This Court also finds Petitioner wholly failed to "fairly present" the state courts with his new complaint that his trial counsel failed to call and impeach Lisa Green and the two men whom Petitioner chased out of his residence on the evening in question. Petitioner procedurally defaulted on these two unexhausted complaints of ineffective assistance. *See Beatty v. Stephens*, 759 F.3d 455, 465 (5th Cir. 2014) (Texas petitioner who failed to raise complaint of ineffective assistance by his trial counsel during his first state habeas corpus proceeding would be precluded under Article 11.071, §5 from returning to state court to litigate same claim and procedurally defaulted on claim in federal habeas corpus proceeding), *cert. denied*, 135 S. Ct. 2312 (2015); *Trottie v. Stephens*, 720 F.3d 231, 248 (5th Cir. 2013) (holding petitioner's failure to fairly present factual basis underlying an ineffective assistance complaint in his state habeas corpus action rendered same ineffective assistance complaint unexhausted and procedurally defaulted), *cert. denied*, 134 S. Ct. 1540 (2014).

Petitioner cannot satisfy either of the exceptions to the procedural default doctrine because, as explained below, even under *de novo* review, Petitioner's unexhausted ineffective assistance complaints do not satisfy the prejudice prong of the *Strickland* analysis. *See Johnson v. Cain*, 712 F.3d 227, 234 (5th Cir.) ("Where, as here, 'a prisoner fails to exhaust state remedies and the court to which the prisoner would be required to present his claims in order to meet the exhaustion requirement would now find the claims procedurally barred due to the prisoner's own procedural default,' we are barred from reviewing those claims unless the petitioner 'demonstrate[s] cause for the default and actual prejudice as a result of the alleged violation of federal law, or demonstrate[s] that failure to consider the claims will result in a fundamental miscarriage of justice.'"), *cert. denied*, 134 S. Ct. 431 (2013). Likewise, Petitioner's unexhausted ineffective assistance claims are not

Q. The Castle Doctrine is a combination of different Penal Codes. Tex Penal Code 9.31 and 9.32, and 9.41 and 9.42. These Penal Codes authorize the Castle Doctrine. - See 9.31 SE/2 - Degeuss - instruction requested & denied, Sec. 9.32 Deadly Force in Day or a Person instruction requested & denied. Dispute counsel commented these all together during trial, CRF Vol 4 p 9 9-12 §. 34

entitled to merits review from this Court under the rule announced in *Martinez v. Ryan* and *Trevino v. Thaler* because Petitioner's unexhausted ineffective assistance claims are insubstantial, i.e., they lack some merit. *See Beatty v. Stephens*, 759 F.3d at 465-66 ("To succeed in establishing cause under *Trevino* and *Martinez*, the petitioner must show: (1) that his claim of ineffective assistance of counsel at trial is 'substantial' (i.e., 'has some merit'); and (2) that his habeas counsel was ineffective for failing to present those claims in his first state habeas application.). Because no state court has addressed the Petitioner's unexhausted ineffective assistance claims, this Court's review of same is necessarily *de novo*. *Porter v. McCollum*, 558 U.S. at 39, 130 S. Ct. at 452; *Rompilla v. Beard*, 545 U.S. at 390, 125 S. Ct. at 2467; *Wiggins v. Smith*, 539 U.S. at 534, 123 S. Ct. at 2542.

2. De Novo Review of Failure to Call and Impeach Lisa Green and "Chris and Dave"

Petitioner complains his trial counsel should have called to testify, and impeached, Lisa Green and the two men Donna Johnson identified at trial only as "Chris and Dave." Complaints of uncalled witnesses are not favored, because the presentation of testimonial evidence is a matter of trial strategy and because allegations of what a witness would have testified are largely speculative. *Day v. Quarterman*, 566 F.3d 527, 538 (5th Cir. 2009); *Coble v. Quarterman*, 496 F.3d 430, 436 (5th Cir. 2007); *Miller v. Dretke*, 420 F.3d 356, 362 (5th Cir. 2005). "To prevail on an ineffective assistance claim based upon uncalled witnesses, an applicant must name the witness, demonstrate that the witness would have testified, set out the content of the witness's proposed testimony, and show that the testimony would have been favorable." *Gregory v. Thaler*, 601 F.3d 347, 352 (5th Cir.), *cert. denied*, 562 U.S. 911 (2010). A federal habeas corpus petitioner asserting a claim of ineffective assistance based on counsel's failure to call a witness (either a lay witness or an expert witness) satisfies the prejudice prong of the *Strickland* analysis only by naming the witness,

demonstrating the witness was available to testify and would have done so, setting out the content of the witness' proposed testimony, and showing the testimony would have been favorable to a particular defense. *Woodfox v. Cain*, 609 F.3d 774, 808 (5th Cir. 2010); *Day v. Quarterman*, 566 F.3d at 538. Petitioner offers no affidavits from any of these three individuals stating either (1) they were available to testify at the time of Petitioner's trial or (2) the substance of what their testimony would have been had they been called to testify at Petitioner's trial.

Petitioner alleges no specific facts showing that either Lisa Green or Chris or Dave were available to testify at the time of Petitioner's trial or that any of these persons possessed personal knowledge of any facts bearing on the critical issue at Petitioner's trial, i.e., whether Petitioner aimed his handgun at deputies Byford and Stanislawski. Insofar as Petitioner argues these three witness might have been able to help Petitioner's trial counsel impeach the trial testimony of Donna Johnson, such impeachment would not have been favorable to Petitioner. Johnson testified she did not see Petitioner point his handgun at either deputy. Petitioner offers no specific factual allegations showing any of these three witnesses (1) were available to testify (i.e., located in a place where they were subject to subpoena by Petitioner's trial counsel) as of the date of Petitioner's trial or (2) possessed any personal knowledge of the facts relevant to the charges against Petitioner. Petitioner was not charged with domestic violence or with any offense related to his admission that he brandished his handgun at Chris and Dave. Rather, the only issue before the jury at Petitioner's trial was whether Petitioner aimed his handgun at the two deputies. Petitioner's trial counsel cannot reasonably be faulted to for failing to call these witnesses absent a showing any of them possessed personal knowledge of any facts (1) relevant to the charges against Petitioner or (2) which might have impeached the trial testimony of deputies Byford or Stanislawski. Petitioner's complaint about

his trial counsel's failures to call and impeach these three persons fails to satisfy either prong of the *Strickland* analysis.

3. De Novo Review of Failure to Request Instructions

The failure of Petitioner's trial counsel to request jury instructions on "stand your ground" and "the castle doctrine" did not cause the performance of said counsel to fall below an objective level of reasonableness. Nor did these failures "prejudice" Petitioner within the meaning of the *Strickland* analysis.

Petitioner does not explain or offer any citation to legal authority explaining precisely what he means by the term "stand your ground." This Court's independent research did not disclose any Texas Court of Criminal Appeals opinion employing that term in conjunction with a recognized defense in a state criminal proceeding. Under Texas law, a person may use deadly force if he or she reasonably believes such force is immediately necessary to protect himself from the other person's use of deadly force. *Graves v. State*, 452 S.W.3d 907, 910 (Tex. App. – Texarkana 2014, *pet. ref'd.*). Petitioner apparently misunderstands the scope of the Texas Castle doctrine:

Before September 1, 2007, deadly force under Texas Penal Code Section 9.32(a) was justified only "if a reasonable person in the actor's situation would not have retreated." The Castle Doctrine was made effective on September 1, 2007. It relieves a person of the duty to retreat when he is justified in using deadly force against another if (1) he has a right to be present at the location where the deadly force is used, (2) he has not provoked the person against whom the deadly force is used, and (3) he is not engaged in criminal activity at the time that the deadly force is used. See TEX. PENAL CODE § 9.32(c).

Krajcovic v. State, 393 S.W.3d 282, 284 (Tex. Crim. App. 2013).

Petitioner engaged in unlawful activity when he aimed his handgun at deputies Byford and Stanislawski, whom he testified at trial he recognized as peace officers “right away” when he opened his door and saw them standing on his porch. The jury found beyond a reasonable doubt that Petitioner knew the deputies were peace officers performing their lawful duties when he aimed his handgun at them. Petitioner was not charged with using deadly force against the deputies - only with aggravated assault arising from pointing his gun at them. The facts of Petitioner’s case, even assuming the accuracy of Petitioner’s trial testimony, do not fall within the scope of the statutory justification for the use of *deadly* force known colloquially as the castle doctrine. Furthermore, the Texas Court of Criminal Appeals has expressly rejected a request to expand the statutory justification to encompass situations like those in which Petitioner aimed his handgun at a pair of deputies investigating a potential domestic disturbance:

Appellant argues that, even though the Penal Code “does not explicitly contain and carry forward all of the traditional common law doctrines regarding justification,” we should expand upon the Penal Code to embody a free-standing “castle doctrine” that would permit property owners to kill police officers who come on their property in response to a 911 “domestic violence-gunshots” call. This we would decline to do even if we had the authority to create a nonstatutory justification defense.

Mays v. State, 318 S.W.3d 368, 385-86 (Tex. Crim. App. 2010) (footnotes omitted), *cert. denied*, 562 U.S. 1274 (2011).

Petitioner testified consistently throughout his trial that he did not aim his handgun at either deputy or at any other person on the evening in question. Petitioner’s trial counsel could reasonably have concluded that requesting a jury instruction on “castle doctrine” would have been futile since Petitioner was not charged with using *deadly* force and Petitioner refused to admit he had aimed his weapon at the deputies. Under Texas law, Petitioner’s refusal to admit he pointed his gun at the

no it doesn't

Went deputies deprived Petitioner of a jury instruction on self-defense. *Isaacson v. State*, 2013 WL 1955799, *3 (“Isaacson did not sufficiently admit the charged conduct to warrant a self-defense instruction.”). Petitioner’s trial counsel could reasonably have concluded Petitioner was not entitled to a jury instruction on the castle doctrine. Moreover, Petitioner has failed to identify any recognized legal authority suggesting his actions on the evening in question fell within the scope of the Texas castle doctrine. Petitioner’s complaints about his trial counsel’s failure to request jury instructions on “castle doctrine” and “stand your ground” fail to satisfy either prong of the *Strickland* analysis. Petitioner’s twelfth ground for relief does not warrant federal habeas corpus relief.

E. AEDPA Review of Failure to Convey Plea Offer

In his first ground for federal habeas corpus relief, Petitioner argues his trial counsel rendered ineffective assistance by failing to communicate an offer of a ten-year sentence extended by the prosecution.⁴⁵ The state habeas trial court expressly found as a matter of fact, however, that Petitioner’s trial counsel timely advised Petitioner of all plea bargain offers made by the State.⁴⁶ This factual finding was fully supported by the affidavit of Petitioner’s trial counsel, attorney Paul Goeke,

which was presented to the state habeas trial court during Petitioner’s state habeas corpus

so if Goeke said he saw "pigs giving" the court would immediately run outside and look up? I doubt that. But the court believes him when he uses the fear, fear, pants on fire affidavit even though he has no proof, when I have proof he didn't
(see ex A & B)

⁴⁵ ECF no. 1, at p. 6; ECF no. 1-8, at pp. 1-2.

⁴⁶ State Habeas Trial Court’s Findings and Conclusions, issued May 5, 2015, Clerk’s Supplemental Record, at p. 8 (ECF no. 16-24, at p. 9).

proceeding.⁴⁷ The Texas Court of Criminal Appeals rejected Petitioner's state habeas corpus application on the merits without written order based on the trial court's factual findings.⁴⁸

Federal habeas relief may not be granted on any claim that was adjudicated on the merits in the state courts unless the state court's adjudication of the claim resulted in a decision based on an unreasonable determination of the facts in light of the evidence presented in the state court proceeding. *Wood v. Allen*, 558 U.S. at 301 ("[A] state-court factual determination is not unreasonable merely because the federal habeas court would have reached a different conclusion in the first instance."). Even if reasonable minds reviewing the record might disagree about the factual finding in question (or the implicit credibility determination underlying the factual finding), on habeas review, this does not suffice to supersede the trial court's factual determination. *Wood v. Allen*, 558 U.S. at 301; *Rice v. Collins*, 546 U.S. at 341-42.

A petitioner challenging state court factual findings must establish by clear and convincing evidence that the state court's findings were erroneous. *Schriro v. Landrigan*, 550 U.S. at 473-74 ("AEDPA also requires federal habeas courts to presume the correctness of state courts' factual findings unless applicants rebut this presumption with 'clear and convincing evidence.'"); *Rice v. Collins*, 546 U.S. at 338-39 ("State-court factual findings, moreover, are presumed correct; the petitioner has the burden of rebutting the presumption by 'clear and convincing evidence.'"); *Miller-*

⁴⁷ *Id.*, at pp. 13-15 (ECF no. 16-24, at pp. 14-16). In his affidavit, attorney Goeke avers that (1) Petitioner was advised of all offers of negotiated settlement agreement, (2) Petitioner refused any possibility of entering a plea of guilty or no contest and remained intransigent in this regard, (3) Petitioner was informed of the ten-year offer extended by the prosecution, and (4) Petitioner immediately rejected same.

⁴⁸ ECF no. 16-18.

How about
The

There was nothing unreasonable with the state habeas trial court's (and by implication the Texas Court of Criminal Appeals') reliance upon the affidavit of attorney Goeke in rejecting as factually inaccurate this claim of ineffective assistance. Attorney Goeke furnished a detailed account of the plea negotiations which took place during Petitioner's state criminal proceeding and the state habeas trial court judge had before him the transcript of Petitioner's trial testimony, in which Petitioner repeatedly insisted he had never pointed his handgun at the deputies. The state habeas trial court was free to reasonably conclude Petitioner's jury unanimously found Petitioner's sworn assertions (that he never pointed his gun at either deputy) to be factually inaccurate. Therefore, the state habeas trial court had a reasonable basis upon which to conclude Petitioner's assertion of an uncommunicated plea offer was, in the face of attorney Goeke's controverting affidavit, factually inaccurate. Petitioner has failed to furnish this Court with any evidence, much less any clear and convincing evidence, showing the state habeas court's factual finding on this subject was incorrect. *See Matamoros v. Stephens*, 783 F.3d 212, 216 (5th Cir. 2015) (recognizing the presumption of correctness afforded a state habeas court's factual findings applies absent clear and convincing evidence to the contrary); *Ward v. Stephens*, 777 F.3d 250, 268 (5th Cir.) (holding the same), *cert. denied*, 136 S. Ct. 86 (2015).

Petitioner's criticism of the state habeas court's reliance upon his trial counsel's affidavit is without arguable merit. A federal habeas court is required to defer to a state habeas court's factual findings even if those findings were based upon the affidavit of the federal habeas corpus petitioner's

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same. it is. look at the facts & present
look at USC. sec 28 & 2746

former state trial counsel. *See, e.g., Smith v. Quarterman*, 515 F.3d 392, 405 (5th Cir. 2008) (holding state habeas court's factual findings - based expressly on the affidavits of a petitioner's state habeas counsel - were entitled to deference from the federal habeas court where the federal habeas petitioner failed to overcome the factual findings with clear and convincing evidence to the contrary); *Pippin v. Dretke*, 434 F.3d 782, 791-92 (5th Cir. 2005) (holding state habeas court's factual finding rejecting an assertion about an allegedly inattentive juror - based upon a credibility determination made from the conflicting affidavits of the petitioner's brother-in-law on the one hand and controverting affidavits of the prosecuting attorneys and the petitioner's own trial counsel on the other - was entitled to deference, i.e., presumption of correctness, under § 2254(e)(1)), *cert. denied*, 549 U.S. 828 (2006). The Texas Court of Criminal Appeals acted in a wholly reasonable manner in relying upon the state habeas trial court's credibility finding and rejecting the factual premise underlying this ineffective assistance complaint.

The Texas Court of Criminal Appeals' rejection on the merits during the course of Petitioner's state habeas corpus proceeding of Petitioner's ineffective assistance complaint that his trial counsel failed to convey a ten-year plea offer was neither (1) contrary to, or involved an unreasonable application of, clearly established federal law, as determined by the Supreme Court of the United States, nor (2) based on an unreasonable determination of the facts in light of the evidence presented in the Petitioner's state habeas corpus proceeding. Petitioner's first ground for relief in his federal habeas corpus petition does not warrant federal habeas corpus relief.

It's a clear violation of "Due Process" & "Due Course" of law as guaranteed by the US Const. - VI.

F. AEDPA Review of Complaint About Failure to Raise Affirmative Defenses

In his fifth ground for federal habeas corpus relief, Petitioner argues his trial counsel rendered ineffective assistance by failing to raise the affirmative defenses of mistake of fact, self-defense and justifiable use of force.⁴⁹ The Texas Court of Criminal rejected this claim on the merits during Petitioner's state habeas corpus proceeding.⁵⁰

This Court independently concludes this complaint fails to satisfy either prong of the *Strickland* analysis. At the guilt-innocence phase of Petitioner's trial, the only four persons possessing any personal knowledge of the confrontation between Petitioner and deputies Byford and Stanislawski (i.e., Petitioner, Donna Johnson, and the two deputies) all testified fully about what they saw and heard. Petitioner's trial counsel specifically requested jury instructions on each of the three affirmative defenses identified by Petitioner in his federal habeas corpus petition's fifth claim for relief.⁵¹ The state trial court denied those requests.⁵² The state appellate court reviewed their trial testimony and concluded (1) Petitioner was not entitled to jury instructions on the affirmative defenses of self-defense or justifiable use of force and (2) the trial court's instructions effectively required the jury to find beyond a reasonable doubt that Petitioner was not mistaken regarding the identities of deputies Byford and Stanislawski before the jury could convict Petitioner, thus rendering

⁴⁹ ECF no. 1, at p. 8; ECF no. 1-8, at pp. 8-9.

⁵⁰ ECF no. 16-18. Petitioner raised the same ineffective assistance claim as his first ground for state habeas corpus relief. State Habeas Transcript, at pp. 11-12, 45-49 (ECF no. 16-26, at pp. 14-15, 47-51).

⁵¹ S.F. Trial, Volume 4 of 6, at pp. 6-12 (ECF no. 15-11, at pp. 6-12).

⁵² *Id.*

instructions on any of these three affirmative defenses (or the absence of such an instruction was harmless error) *as a matter of state law*, Petitioner's complaint that his trial counsel failed to "raise" these affirmative defenses does not satisfy the prejudice prong of the *Strickland* analysis. *Woodfox v. Cain*, 609 F.3d at 808; *Day v. Quarterman*, 566 F.3d at 538. Petitioner has not identified anything

more his trial counsel could have done which would have effectively "raised" any of the affirmative defenses in question.

yes I did - He could have mentioned the drugs Donna's Company were using. He could have mentioned Donna's position made it physically impossible to point a gun at Stanislawski (Police actions dictate no crime took place!)

The Texas Court of Criminal Appeals' rejection on the merits during the course of Petitioner's state habeas corpus proceeding of Petitioner's ineffective assistance complaint that his trial counsel failed to "raise" the affirmative defenses of self-defense, justifiable use, of force, and mistake of fact was neither (1) contrary to, or involved an unreasonable application of, clearly established federal law, as determined by the Supreme Court of the United States, nor (2) based on an unreasonable determination of the facts in light of the evidence presented in the Petitioner's state habeas corpus proceeding. Petitioner's fifth ground for relief in his federal habeas corpus petition does not warrant federal habeas corpus relief. *it's IAC.*

G. AEDPA Review of Failure to Request Lesser-Included Offenses Instruction on Assault

In his sixth ground for federal habeas corpus relief, Petitioner argues his trial counsel rendered ineffective assistance by failing to request a jury instruction on the lesser-included offense of assault.⁵³ In his affidavit responding to Petitioner's state habeas ineffective assistance claims, attorney Goeke stated there was no request for a lesser-included offense instruction on assault because (1) such an instruction was not supported by the evidence and (2) such a request would have

⁵³ ECF no. 1, at p. 8; ECF no. 1-8, at pp. 10-11.

undermined the ultimate defense argument that Petitioner's trial testimony was accurate and no assault on the deputies had taken place.⁵⁴ The Texas Court of Criminal Appeals rejected this claim on the merits.⁵⁵ This Court independently concludes this complaint fails to satisfy either prong of the *Strickland* analysis.

The only assaultive conduct with which Petitioner was charged was pointing his handgun at the deputies. Because Petitioner was charged with having pointed a deadly weapon toward the deputies, the only legally operative assaultive offense on which the trial court could have charged Petitioner's jury was aggravated assault. Under Texas law, aggravated assault is simply assault (as defined in § 22.01 of the Texas Penal Code) which either causes serious bodily injury or involves the use or exhibition of a deadly weapon. *See Shelby v. State*, 448 S.W.3d 431, 438 (Tex. Crim. App. 2014) ("The gravamen of aggravated assault, therefore, is either causing bodily injury or threatening imminent bodily injury, depending on which theory has been pleaded in the charging instrument."); TEX. PENAL CODE ANN. § 22.02(a). Under Texas law, "[a] defendant is entitled to a lesser-included offense instruction in the jury charge if (1) the requested charge is a lesser-included offense of the offense charged, and (2) there is some evidence that if the defendant is guilty, he is guilty only of the lesser offense." *Irving v. State*, 176 S.W.3d 842, 845 (Tex. Crim. App. 2005) (holding assault is not necessarily a lesser-included offense of aggravated assault where the factual theory of the case offered by the defense did not support a finding of guilt on the charge of assault); *Richards v. Quarterman*, 566 F.3d 553, 568 (5th Cir. 2009) ("Under Texas law, there is a two-step

⁵⁴ Affidavit of Paul J. Goeke, Supplemental Clerk's record, at p. 14 (ECF no. 16-24, at p.15).

⁵⁵ ECF no. 16-18.

test to determine whether a lesser included offense instruction should be given: first, the lesser included offense must be within the proof necessary to establish the offense charged; second, there must be some evidence in the record that if the defendant is guilty, he is guilty only of the lesser offense.”). Here, the evidence presented at Petitioner’s trial permitted only two reasonable inferences: either Petitioner pointed his handgun at the deputies (and thereby committed aggravated assault) or he did not. Under such circumstances, Petitioner’s trial counsel reasonably concluded a request for a jury instruction on assault would have been futile, as well as potentially harmful to the defense’s position that Petitioner had testified truthfully that he never pointed his gun at either deputy. *See Richards v. Quarterman*, 566 F.3d at 569 (holding trial counsel was not ineffective in failing to request lesser-included offense instruction on assault where defendant charged with aggravated assault admitted he struck the victim but claimed self-defense and defense counsel testified he deliberately chose not to request lesser-included offense instruction because defense sought an acquittal, not a conviction for a lesser offense). Furthermore, given the trial testimony of Petitioner and the two deputies, this Court independently concludes there is no reasonable probability that, but for the failure of Petitioner’s trial counsel to request a lesser-included offense instruction on simple assault, the outcome of either phase of Petitioner’s trial would have been any different.

The Texas Court of Criminal Appeals’ rejection on the merits during the course of Petitioner’s state habeas corpus proceeding of Petitioner’s ineffective assistance complaint that his trial counsel failed to request a lesser-included offense instruction on assault was neither (1) contrary to, or involved an unreasonable application of, clearly established federal law, as determined by the Supreme Court of the United States, nor (2) based on an unreasonable determination of the facts in

light of the evidence presented in the Petitioner's state habeas corpus proceeding. Petitioner's sixth ground for relief in his federal habeas corpus petition does not warrant federal habeas corpus relief.

H. AEDPA Review of "Cumulative" Ineffective Assistance Theory *Counsel's representation is laughable. -*

In his seventh ground for federal habeas corpus relief, Petitioner argues the cumulative effect of his trial counsel's acts and omissions of deficient performance discussed above caused the performance of said counsel to fall below an objective level of reasonableness and prejudiced Petitioner within the meaning of *Strickland*.⁵⁶ Petitioner included a somewhat similar but not identical claim as his fifth ground for relief in his state habeas corpus application.⁵⁷ The Texas Court of Criminal Appeals rejected this claim on the merits.⁵⁸ This Court independently concludes this complaint fails to satisfy either prong of the *Strickland* analysis. *Again Bullshit.*

For the reasons discussed at length above, none of Petitioner's complaints about the performance of his trial counsel satisfy the prejudice prong of the *Strickland* analysis. Furthermore, this Court has independently concluded none of Petitioner's discrete complaints about the performance of his trial counsel satisfy the deficient performance prong of the *Strickland* analysis. "[T]here is no precedent supporting the idea that a series of 'errors' that fail to meet the standard of objectively unreasonable can somehow cumulate to meet the high burden set forth in *Strickland*." *United States v. Thomas*, 724 F.3d 632, 648 (5th Cir. 2013), *cert. denied*, 134 S. Ct. 1040 (2014). "Our clear precedent indicates that ineffective assistance of counsel cannot be created from the

⁵⁶ ECF no. 1, at p. 8; ECF no. 1-8, at pp. 12-13.

⁵⁷ State Habeas Transcript, at pp. 19-20, 68-70 (ECF no. 16-26, at pp. 21-22, 70-72).

⁵⁸ ECF no. 16-18.

accumulation of acceptable decisions and actions.” *United States v. Hall*, 455 F.3d 508, 520 (5th Cir. 2006), *cert. denied*, 549 U.S. 1343 (2007). Absent a showing of deficient performance by counsel, there is nothing to cumulate. *Miller v. Johnson*, 200 F.3d 274, 286 n.6 (5th Cir.) (“Miller has not demonstrated error by trial counsel; thus, by definition, Miller has not demonstrated that cumulative error of counsel deprived him of a fair trial.”), *cert. denied*, 531 U.S. 849 (2000).

The Texas Court of Criminal Appeals’ rejection on the merits during the course of Petitioner’s state habeas corpus proceeding of Petitioner’s ineffective assistance complaint that his trial counsel’s cumulative deficient performance prejudiced Petitioner was neither (1) contrary to, or involved an unreasonable application of, clearly established federal law, as determined by the Supreme Court of the United States, nor (2) based on an unreasonable determination of the facts in light of the evidence presented in the Petitioner’s state habeas corpus proceeding. Petitioner’s seventh ground for relief in his federal habeas corpus petition does not warrant federal habeas corpus relief.

X. Ineffective Assistance of Appellate Counsel

A. The Claim

In his fourth ground for relief in his federal habeas corpus petition, Petitioner argues his state appellate counsel rendered ineffective assistance by failing to present as points of error on direct appeal Petitioner’s complaints about the performance of his trial counsel discussed above.⁵⁹

⁵⁹ ECF no. 1, at p. 7; ECF no. 1-8, at pp. 6-7.

B. State Court Disposition

Petitioner included a somewhat similar but not identical argument as his third ground for relief in his state habeas corpus application.⁶⁰ The Texas Court of Criminal Appeals rejected this claim on the merits.⁶¹

C. AEDPA Review

1. The Constitutional Standard

The same two-pronged standard for evaluating ineffective assistance claims against trial counsel announced in *Strickland* applies to complaints about the performance of counsel on appeal. *See Smith v. Robbins*, 528 U.S. 259, 285 (2000) (holding a petitioner arguing ineffective assistance by his appellate counsel must establish both (1) his appellate counsel's performance was objectively unreasonable and (2) there is a reasonable probability that, but for appellate counsel's objectively unreasonable conduct, the petitioner would have prevailed on appeal); *Dorsey v. Stephens*, 720 F.3d 309, 319 (5th Cir. 2013) ("A criminal defendant has a constitutional right to receive effective assistance of counsel on his first appeal. In a direct appeal, ineffective assistance of counsel claims are governed by the standard established by the Supreme Court in *Strickland v. Washington*." (Footnotes omitted)), *cert. denied*, 134 S. Ct. 1292 (2014); *Higgins v. Cain*, 720 F.3d 255, 261 n.8 (5th Cir.) ("The *Strickland* standard is used to evaluate claims for ineffective assistance of appellate counsel."), *cert. denied*, 134 S. Ct. 688 (2013).

⁶⁰ State Habeas Transcript, at pp. 15-16, 58-60 (ECF no. 16-26, at pp. 17-18, 60-62).

⁶¹ ECF no. 16-18.

Thus, the standard for evaluating the performance of counsel on appeal requires inquiry into (1) whether appellate counsel's performance was deficient, i.e., whether appellate counsel's conduct was objectively unreasonable under then-current legal standards, and (2) whether appellate counsel's allegedly deficient performance "prejudiced" petitioner, i.e., whether there is a reasonable probability that, but for appellate counsel's deficient performance, the outcome of petitioner's appeal would have been different. *Smith v. Robbins*, 528 U.S. at 285; *Higgins v. Cain*, 720 F.3d at 260-61. Appellate counsel who files a merits brief need not and should not raise every non-frivolous claim but, rather, may select from among them in order to maximize the likelihood of success on appeal. *Smith v. Robbins*, 528 U.S. at 288; *Jones v. Barnes*, 463 U.S. 745, 751 (1983). The process of winnowing out weaker arguments on appeal and focusing on those more likely to prevail is the hallmark of effective appellate advocacy. *Smith v. Murray*, 477 U.S. 527, 536 (1986); *Jones v. Barnes*, 463 U.S. at 751-52.

Nonetheless, appellate counsel is obligated to research relevant facts and law or to make an informed decision that certain avenues will not prove fruitful. *See Busby v. Dretke*, 359 F.3d 708, 714 (5th Cir. 2004) (a reasonable attorney has an obligation to research relevant facts and law or make an informed decision that certain avenues will not be fruitful), *cert. denied*, 541 U.S. 1987 (2004); *United States v. Reinhart*, 357 F.3d 521, 525 (5th Cir. 2004) (holding the same); *Schaetzle v. Cockrell*, 343 F.3d 440, 445 (5th Cir. 2003) (failure to raise a discrete, purely legal issue, where the precedent could not be more pellucid or applicable, denies adequate representation), *cert. denied*, 540 U.S. 1154 (2004). Likewise, solid, meritorious arguments based on directly controlling precedent should be discovered and brought to the appellate court's attention. *United States v. Reinhart*, 357 F.3d at 525; *Schaetzle v. Cockrell*, 343 F.3d at 445.

Where, as in Petitioner's case, appellate counsel presented, briefed, and argued, albeit unsuccessfully, one or more non-frivolous grounds for relief on appeal and did not seek to withdraw from representation without filing an adequate *Anders* brief, the defendant must satisfy *both* prongs of the *Strickland* test in connection with his claims of ineffective assistance by his appellate counsel. *See Roe v. Flores-Ortega*, 528 U.S. 470, 477 & 482 (2000) (holding the dual prongs of *Strickland* apply to complaints of ineffective appellate counsel and recognizing, in cases involving "attorney error," the defendant must show prejudice); *Smith v. Robbins*, 528 U.S. at 287-89 (holding petitioner who argued his appellate counsel rendered ineffective assistance by failing to file a merits brief must satisfy both prongs of *Strickland*); *Busby v. Dretke*, 359 F.3d at 714-17 (applying dual prongs of *Strickland* to a complaint about appellate counsel's failure to present a point of error on appeal).

2. Synthesis

This Court independently concludes there was nothing objectively unreasonable with the decision of Petitioner's state appellate counsel not to include claims of ineffective assistance by Petitioner's trial counsel as points of error on direct appeal. At the time of Petitioner's direct appeal, there had been no factual development of any of Petitioner's complaints about the performance of his trial counsel, either through a hearing on a motion for new trial or any other proceeding allowing evidentiary development. Ordinarily, the Texas appellate courts will not entertain complaints of ineffective assistance by trial counsel on direct appeal; instead, criminal defendants are encouraged to present such claims in state habeas corpus proceedings. *See, e.g., Lopez v. State*, 343 S.W.3d 137, 143 (Tex. Crim. App. 2011) ("This Court has repeatedly stated that claims of ineffective assistance of counsel are generally not successful on direct appeal and are more appropriately urged in a hearing on an application for a writ of habeas corpus."); *Estrada v. State*, 313 S.W.3d 274, 311 (Tex. Crim.

App. 2010) (“Under normal circumstances, the record on direct appeal will not be sufficient to show that counsel’s representation was so deficient and so lacking in tactical or strategic decisionmaking as to overcome the presumption that counsel’s conduct was reasonable and professional.”) (*quoting Bone v. State*, 77 S.W.3d 828, 833 (Tex. Crim. App. 2002)), *cert. denied*, 562 U.S. 1142 (2011). It was objectively reasonable for Petitioner’s state appellate counsel to omit claims of ineffective assistance by Petitioner’s trial counsel as points of error on direct appeal. None of those claims had been factually developed and it was highly unlikely the Texas appellate courts would have entertained such claims in the absence of factual or evidentiary development.

Furthermore, for the reasons discussed at length above, this Court concludes none of Petitioner’s complaints about the performance of his trial counsel satisfy the prejudice prong of the *Strickland* analysis. There is, therefore, no reasonable probability that but for the failure of Petitioner’s state appellate counsel to include any of the complaints of ineffective assistance by Petitioner’s trial counsel included in Petitioner’s federal habeas corpus petition and other pleadings in this Court as points of error on direct appeal, the outcome of Petitioner’s direct appeal would have been any different. The Texas Court of Criminal Appeals rejected on the merits all of the ineffective assistance claims Petitioner presented in his state habeas corpus application. There is not even a remote possibility, much less a reasonable probability, the outcome of Petitioner’s appeal would have been different had Petitioner’s appellate counsel included these same complaints as points of error on direct appeal.

3. Conclusions

The Texas Court of Criminal Appeals' rejection on the merits during the course of Petitioner's state habeas corpus proceeding of Petitioner's ineffective assistance complaint about his state appellate counsel's performance was neither (1) contrary to, or involved an unreasonable application of, clearly established federal law, as determined by the Supreme Court of the United States, nor (2) based on an unreasonable determination of the facts in light of the evidence presented in the Petitioner's state habeas corpus proceeding. Petitioner's fourth ground for relief in his federal habeas corpus petition does not warrant federal habeas corpus relief.

XI. Certificate of Appealability

The AEDPA converted the "certificate of probable cause" previously required as a prerequisite to an appeal from the denial of a petition for federal habeas corpus relief into a "Certificate of Appealability" ("CoA"). *See Hill v. Johnson*, 114 F.3d 78, 80 (5th Cir. 1997) (recognizing the "substantial showing" requirement for a CoA under the AEDPA is merely a change in nomenclature from the CPC standard); *Muniz v. Johnson*, 114 F.3d 43, 45 (5th Cir. 1997) (holding the standard for obtaining a CoA is the same as for a CPC). The CoA requirement supersedes the previous requirement for a certificate of probable cause to appeal for federal habeas corpus petitions filed after the effective date of the AEDPA. *Robison v. Johnson*, 151 F.3d 256, 259 n.2 (5th Cir. 1998), *cert. denied*, 526 U.S. 1100 (1999); *Hallmark v. Johnson*, 118 F.3d 1073, 1076 (5th Cir. 1997), *cert. denied sub nom. Monroe v. Johnson*, 523 U.S. 1041 (1998).

Under the AEDPA, before a petitioner may appeal the denial of a habeas corpus petition filed under Section 2254, the petitioner must obtain a CoA. *Miller-El v. Johnson*, 537 U.S. 322, 335-36

(2003); 28 U.S.C. §2253(c)(2). Likewise, under the AEDPA, appellate review of a habeas petition is limited to the issues on which a CoA is granted. *See Crutcher v. Cockrell*, 301 F.3d 656, 658 n.10 (5th Cir. 2002) (holding a CoA is granted on an issue-by-issue basis, thereby limiting appellate review to those issues); *Jones v. Cain*, 227 F.3d 228, 230 n.2 (5th Cir. 2000) (holding the same); *Lackey v. Johnson*, 116 F.3d 149, 151 (5th Cir. 1997) (holding the scope of appellate review of denial of a habeas petition limited to the issues on which CoA has been granted). In other words, a CoA is granted or denied on an issue-by-issue basis, thereby limiting appellate review to those issues on which CoA is granted alone. *Crutcher v. Cockrell*, 301 F.3d at 658 n.10; *Lackey v. Johnson*, 116 F.3d at 151; *Hill v. Johnson*, 114 F.3d at 80; *Muniz v. Johnson*, 114 F.3d at 45; *Murphy v. Johnson*, 110 F.3d 10, 11 n.1 (5th Cir. 1997); 28 U.S.C. §2253(c)(3). A CoA will not be granted unless the petitioner makes a substantial showing of the denial of a constitutional right. *Tennard v. Dretke*, 542 U.S. 274, 282 (2004); *Miller-El v. Johnson*, 537 U.S. at 336; *Slack v. McDaniel*, 529 U.S. 473, 483 (2000); *Barefoot v. Estelle*, 463 U.S. 880, 893 (1983).)

To make such a showing, the petitioner need not show he will prevail on the merits but, rather, must demonstrate that reasonable jurists could debate whether (or, for that matter, agree) the petition should have been resolved in a different manner or that the issues presented are adequate to deserve encouragement to proceed further. *Tennard v. Dretke*, 542 U.S. at 282; *Miller-El v. Johnson*, 537 U.S. at 336; *Slack v. McDaniel*, 529 U.S. at 484; *Barefoot v. Estelle*, 463 U.S. at 893 n.4. / This Court is required to issue or deny a CoA when it enters a final Order such as this one adverse to a federal habeas petitioner. *Rule 11(a), Rules Governing Section 2254 Cases in the United States District Courts.*

The showing necessary to obtain a CoA on a particular claim is dependent upon the manner in which the District Court disposed of the claim. “[W]here a district court has rejected the constitutional claims on the merits, the showing required to satisfy §2253(c) is straightforward: The petitioner must demonstrate that reasonable jurists would find the district court’s assessment of the constitutional claims debatable or wrong.” *Miller-El v. Johnson*, 537 U.S. at 338 (quoting *Slack v. McDaniel*, 529 U.S. at 484); *Tennard v. Dretke*, 542 U.S. at 282. In a case in which the petitioner wishes to challenge on appeal this Court’s dismissal of a claim for a reason not of constitutional dimension, such as procedural default, limitations, or lack of exhaustion, the petitioner must show jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right and whether this Court was correct in its procedural ruling. See *Slack v. McDaniel*, 529 U.S. at 484 (holding when a district court denies a habeas claim on procedural grounds, without reaching the underlying constitutional claim, a CoA may issue only when the petitioner shows that reasonable jurists would find it debatable whether (1) the claim is a valid assertion of the denial of a constitutional right and (2) the district court’s procedural ruling was correct).

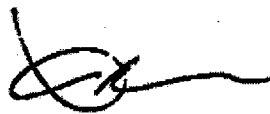
Reasonable minds could not disagree over this Court’s conclusions that (1) all of Petitioner’s assertions of ineffective assistance fail to satisfy the prejudice prong of the *Strickland* analysis, (2) all of Petitioner’s assertions of ineffective assistance fail to satisfy the deficient performance prong of the *Strickland* analysis, (3) Petitioner procedurally defaulted on his unexhausted tenth and twelfth claims for federal habeas corpus relief, (4) Petitioner’s second, third, eighth, ninth, and eleventh claims for federal habeas corpus relief fail to furnish an arguable for federal habeas corpus relief because they do not raise legitimate federal constitutional issues, and (5) Petitioner’s complaint about

allegedly erroneous constructions of state law do not raise federal constitutional claims. *Bradshaw v. Richey*, 546 U.S. at 76; *Paredes v. Quarterman*, 574 F.3d at 291; *Wood v. Quarterman*, 503 F.3d at 414. Petitioner is not entitled to a Certificate of Appealability on any of his claims herein.

Accordingly, it is hereby **ORDERED** that:

1. The referral of this cause to the Magistrate Judge is **WITHDRAWN**.
2. Petitioner's original federal habeas corpus petition, filed August 5, 2015 (ECF no. 1), as supplemented by Petitioner's Reply Brief, filed February 19, 2016 (ECF no. 32), is in all respects **DENIED**.
- ✓ 3. Petitioner is **DENIED** a Certificate of Appealability on all his claims in this § 2254 action.
- ✓ 4. Petitioner's motion to vacate conviction, filed February 29, 2016 (ECF no. 33), is in all respects **DENIED**.
- ✓ 5. Petitioner's motion to compel, filed April 18, 2016 (ECF no. 34), is **DENIED**. This Court exercises no jurisdiction over TDCJ personnel located in Cuero, DeWitt County, Texas, which is outside the geographic boundaries of this Court. 28 U.S.C. § 124(b)(5).
- ✓ 6. All other pending motions are **DISMISSED** as moot.

SIGNED this 27th day of April, 2016.



XAVIER RODRIGUEZ
UNITED STATES DISTRICT JUDGE

**Additional material
from this filing is
available in the
Clerk's Office.**