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APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 17-3196

[Filed September 28, 2017]

MATTHEW WARMUS,

Petitioner-Appellant,

v.

CHRISTOPHER LAROSE, Warden,

Respondent-Appellee.

ORDER

Matthew Warmus, an Ohio prisoner proceeding through counsel, appeals a district court judgment dismissing his petition for a writ of habeas corpus filed pursuant to 28 U.S.C. § 2254. He has applied for a certificate of appealability ("COA") and/or moves to remand. *See* Fed. R. App. P. 22(b).

In 2010, a jury convicted Warmus of murder with a firearm specification, rejecting his claim that he had shot a parking lot attendant in self-defense. The trial court imposed an aggregate prison term of 18 years to life and a $20,000 fine. The Ohio Court of Appeals affirmed Warmus's conviction, but remanded the action to the trial court to modify the fine. *State v. Warmus*, 967 N.E.2d 1223, 1244 (Ohio Ct. App. 2011), *perm. app. denied*, 961 N.E.2d 1137 (Ohio 2012) (table). On remand, the trial court waived the fine.

In 2013, the trial court denied Warmus's petition for post-conviction relief. The Ohio Court of Appeals affirmed the trial court's decision, and the Ohio Supreme Court denied leave to appeal.

In his § 2254 petition, Warmus asserted that: (1) the trial court erred by permitting police and lay witnesses to offer opinions on whether his use of deadly force was reasonable and whether he could have retreated safely without it; (2) an expert in audio and video technology invaded the province of the jury by testifying outside of his area of expertise and interpreting a garbled recording of a 911 call; (3) the prosecutor committed misconduct; (4) neither the trial court nor defense counsel advised Warmus of his Fifth Amendment right not to testify; (5) Ohio Revised Code § 2901.05(A) unconstitutionally places the burden of proof on defendants to demonstrate self-defense; (6) the trial court erred by failing to sua sponte conduct a hearing pursuant to *Remmer v. United States*, 347 U.S. 227 (1954), to determine whether a juror became biased after the trial judge gave the juror a ride to court; (7) the trial court improperly restricted Warmus's right to confront the witnesses against him and conduct cross-examination; (8) confusing and inadequate jury instructions deprived Warmus of his right to due process; (9) trial counsel rendered ineffective assistance by (a) failing to present evidence that Warmus previously had been the victim of a violent attack, (b) failing to anticipate that the trial court would not admit Warmus's self-designed computer program of the crime scene, (c) failing to obtain a computer expert, (d) failing to request a *Remmer* hearing, (e) making comments that opened the door to police testimony that they would not have used deadly force, and (f) failing to object to jury instructions that shifted the burden of proving self-defense; and (10) cumulative errors deprived him of due process. The state filed an answer, arguing that the claims lacked merit and/or were procedurally defaulted.

A magistrate judge recommended that the § 2254 petition be denied. The magistrate judge reasoned that the first, second, third, fifth, and seventh claims lacked merit; the fourth, sixth, and eighth claims were procedurally defaulted; and the tenth claim was not cognizable in federal habeas proceedings. The ninth claim was deemed to be procedurally defaulted only as to Warmus's allegations that trial counsel rendered ineffective assistance by failing to present evidence that Warmus previously had been the victim of a violent attack, anticipate that the trial court would not admit the computer program, and obtain a computer expert. The magistrate judge concluded that the ninth claim lacked merit as to Warmus's allegations that trial counsel rendered ineffective assistance by failing to request a *Remmer* hearing, by making comments that opened the door to police testimony that they would not have used deadly force, and by failing to object to jury instructions that shifted the burden of proving self-defense. At the end of the report, the magistrate judge advised the parties that a failure to file objections would waive their right to appeal his recommendations.

Warmus filed objections, largely reiterating his prior arguments as to most claims and expressly abandoning his eighth and tenth claims. As to his ninth claim, Warmus reasserted only his allegations that trial counsel rendered ineffective assistance by failing to present evidence that Warmus previously had been the victim of a violent attack, by failing to request a *Remmer* hearing, and by opening the door to police testimony on the use of deadly force.

Upon consideration of the magistrate judge's report and recommendation and Warmus's objections, the district court dismissed the petition for the reasons that follow. The first and second claims, which raised evidentiary issues, did not state cognizable claims for habeas relief, and there was no substantive objection to the magistrate judge's recommendation as to these claims. As to the third claim (prosecutorial misconduct), Warmus likewise did not object to the magistrate judge's recommendations as to most of the allegations of prosecutorial misconduct, and Warmus's objection to the remaining allegation was too general to preserve review. The district court agreed with the magistrate judge that the fourth and sixth claims (failure to advise on the right not to testify and failure to hold a *Remmer* hearing) were procedurally defaulted and that the fifth claim (unconstitutionality of § 2901.05(A)) lacked merit.

As to the seventh claim (restriction on the right of cross-examination), the district court reasoned that Warmus had not "identif[ied] an actual error of fact or law" in the magistrate judge's analysis and thus had "not stated an objection to the decision." The court did not address the merits of the claim.

The district court disagreed with the magistrate judge that the ninth claim had been procedurally defaulted in state court as to Warmus's allegations that trial counsel rendered ineffective assistance by failing to present evidence that Warmus previously had been the victim of a violent attack and to anticipate that the trial court would not admit the computer program. Nonetheless, the district court adopted the magistrate judge's report as written with respect to the computer-related claims because Warmus did not discuss his computer-related claims in his objections. The court then concluded that trial counsel did not render deficient performance by failing to present evidence regarding the prior attack on Warmus. The evidence was of "dubious relevance and admissibility" and counsel's decision not to use it was entitled to deference.

The district court adopted the magistrate judge's report as to Warmus's allegations in the ninth claim that trial counsel rendered ineffective assistance by failing to request a *Remmer* hearing and by opening the door to police testimony on the use of deadly force. Warmus's passing references to these allegations in his objections did not identify any legal defect or fault in the magistrate judge's analysis and thus did not qualify as objections. The district court declined to issue a COA.

In his COA application, Warmus reasserts his first, second, fifth, sixth, and seventh claims in full. As to his ninth claim, Warmus reasserts only his allegations that trial counsel rendered ineffective assistance by failing to present evidence that Warmus previously had been the victim of a violent attack, by failing to request a *Remmer* hearing, and by opening the door to police testimony on the use of deadly force.

An individual seeking a COA is required to make a substantial showing of the denial of a federal constitutional right. *See* 28 U.S.C. § 2253(c)(2). A petitioner must "show[] that reasonable jurists could debate whether (or, for that matter, agree that) the petition should have been resolved in a different manner or that the issues presented were 'adequate to deserve encouragement to proceed further.'" *Slack v. McDaniel*, 529 U.S. 473, 484 (2000) (quoting *Barefoot v. Estelle*, 463 U.S. 880, 893 n.4 (1983)). Where a valid procedural bar is present and reasonable jurists would not debate that the district court properly applied the bar, a claim should not be allowed to proceed further. *Id.*

The district court's resolution of the claims is not debatable amongst jurists of reason. Warmus's first two claims raise evidentiary issues under state law, while vaguely asserting a violation of due process rights. A petitioner's failure to file specific objections to a magistrate judge's report and recommendation generally waives appellate review. *See Thomas v. Arn*, 474 U.S. 140, 142 (1985). Because the district court exercised its discretion to consider the issues, this court may as well. *See Keeling v. Warden, Lebanon Corr. Inst.*, 673 F.3d 452, 458 (6th Cir. 2012). However, no COA will issue as to these claims. Claims regarding state evidentiary law are generally non-cognizable on habeas review, and Warmus did not make a substantial showing that the admission of evidence was fundamentally unfair. *See Estelle v. McGuire*, 502 U.S. 62, 67-68 (1991); *Moreland v. Bradshaw*, 699 F.3d 908, 923 (6th Cir. 2012). Furthermore, Warmus's general allegations of the denial of the right to due process in his state appellate brief did not fairly present claims of constitutional violations. *See Pudelski v. Wilson*, 576 F.3d 595, 606 (6th Cir. 2009).

In the fifth claim, Warmus relied on *District of Columbia v. Heller*, 554 U.S. 570 (2008), to argue that Ohio Revised Code § 2901.05(A) unconstitutionally places the burden of proof on defendants to demonstrate self-defense. The claim does not deserve further consideration. Warmus acknowledges in his COA application that the Supreme Court upheld the Ohio law in *Martin v. Ohio*, 480 U.S. 228, 236 (1987). Furthermore, *Heller* concerned the right to possess firearms in the home and did not address the burden of proof regarding self-defense. Warmus fails to cite cases extending *Heller* to this situation.

In his sixth claim, Warmus argued that the trial court erred by failing to conduct a *Remmer* hearing sua sponte to determine whether a juror became biased after the trial judge gave the juror a ride to court. The claim will not be allowed to proceed further because a valid procedural bar is present and the district court properly applied it. The Ohio Court of Appeals reviewed the claim for plain error due to the lack of a contemporaneous objection, and this court has upheld the contemporaneous objection rule as an adequate and independent state ground for dismissing a claim. *See Goodwin v. Johnson*, 632 F.3d 301, 315 (6th Cir. 2011). Moreover, Warmus failed to demonstrate cause and prejudice to excuse his default. *See id.*

As previously noted, the magistrate judge rejected the seventh claim (restriction on the right of cross-examination) on the merits, but the district court did not review the claim because Warmus did not file adequate objections to the magistrate judge's report. In his COA application, Warmus essentially contests the district court's conclusion by reasserting the seventh claim, but he does not provide any reason as to why his objections should have been deemed to be adequate. Thus, he has waived further consideration of this claim. *See Thomas*, 474 U.S. at 142; *Keeling*, 673 F.3d at 458.

No COA will issue as to the ninth claim. In the first part of the claim, Warmus asserted that trial counsel rendered ineffective assistance by failing to introduce the incident report of the prior attack against Warmus, which led him to procure a gun, take classes, and obtain a concealed-carry license. Jurists of reason would agree with the district court's determination that trial counsel did not render deficient performance and Warmus did not suffer prejudice. *See Strickland v. Washington*, 466 U.S. 668, 687 (1984). The incident report had, at most, limited relevance to Warmus's alleged act of self-defense, and Warmus has failed to make a substantial showing that he can overcome the presumption that trial counsel's decision not to use the report could be considered sound trial strategy. *See id.* at 689. Additionally, Warmus has not made a substantial showing that he suffered prejudice in light of the overwhelming evidence against him, which included, inter alia, the testimony of several eyewitnesses. *See id.* at 696.

By reasserting his allegations in the ninth claim that trial counsel rendered ineffective assistance by failing to request a *Remmer* hearing and by opening the door to police testimony on the use of deadly force, Warmus essentially challenges the district court's conclusion that he did not file adequate objections as to these allegations. But, once again, he does not provide any reason as to why his objections should have been deemed to be adequate. Thus, he has waived further consideration of these parts of the claim. *See Thomas*, 474 U.S. at 142; *Keeling*, 673 F.3d at 458.

As a final matter, Warmus does not reassert his third, fourth, eighth and tenth claims in his COA application. He also does not reassert the parts of his ninth claim regarding the computer program, the computer expert, and the jury instructions on self-defense. Thus, he has abandoned these claims, and no COA will issue. *See Elzy v. United States*, 205 F.3d 882, 886 (6th Cir. 2000).

Accordingly, the court **DENIES** the COA application and motion to remand.

ENTERED BY ORDER OF THE COURT

s/______________________________
Deborah S. Hunt, Clerk

APPENDIX B

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

CASE NO.: 1:14 CV 1925

JUDGE JOHN ADAMS

[Filed January 30, 2017]

MATTHEW WARMUS,)
)
Petitioner,)
)
v.)
)
CHRISTOPHER LAROSE, Warden,)
)
Respondent.)
)

MEMORANDUM OPINION

This action is before the Court upon objections filed by Petitioner, Matthew Warmus, asserting error in the Magistrate Judge's Report and Recommendation ("the R&R"). (Doc. #20.) The Court ADOPTS the R&R as to grounds 1; 2; 3; 4; 5; 6; 7; 8; and 10. (Doc. # 19.) The Court further ADOPTS the recommendation that ground 9 be dismissed, but does so on the merits rather than due to any procedural default. (Doc. #19.) Accordingly, the Petition is DENIED AND DISMISSED in its entirety.

I. FACTUAL AND PROCEDURAL HISTORY

The Report adequately states the factual background and procedural history of this matter. Petitioner makes no objection to, and has identified no error in, the Magistrate's Factual and Procedural Background. The Court will accept the factual and procedural history reflected in the Report as written.

II. STANDARD OF REVIEW

Motions made pursuant to 28 U.S.C. § 2254 are governed by the standard of review set forth in the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"). AEDPA prescribes a narrow *habeas corpus* remedy only where a State court adjudication has resulted in (1) "a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law," or (2) a "decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d). AEDPA further limits "clearly established Federal law" to those principles "determined by the Supreme Court of the United States." 28 U.S.C. § 2254 (d)(1). For the purposes of *habeas* review after AEDPA, "clearly established Federal law" refers to the express holdings of the United States Supreme Court "as opposed to the dicta" of that Court's decisions "of the time of the relevant state-court decision." *Williams v. Taylor*, 529 U.S. 362, 365, 120 S.Ct. 1495 (2000).

When evaluating a § 2254 petition this Court notes that AEDPA and decisional law applying its restrictions have clearly stated that a district court may not "apply its own views of what the law should be" but must issue a writ only where "clearly established federal law" has been applied *unreasonably,* not merely erroneously or incorrectly. *Bailey v. Mitchell*, 271 F.3d 652, 656 (emphasis added). The Supreme Court reiterates:

> If this standard is difficult to meet, that is because it was meant to be. As amended by AEDPA, § 2254 (d) stops short of imposing a complete bar on federal-court relitigation of claims already rejected in state proceedings. It preserves authority to issue the writ in cases where there is no possibility fairminded jurists could disagree that the state court's decision conflicts with [the United States Supreme Court's] precedents. It goes no further. Section 2254(d) reflects the view that habeas corpus is a 'guard against extreme malfunctions in the state criminal justice systems,' not a substitute for ordinary error correction through appeal.

Harrington v. Richter, 562 U.S. 86, 102, 131 S.Ct. 770 (2011) (Citations omitted). The Sixth Circuit explains:

> A state court decision is 'contrary to' clearly established Federal law 'if the state court arrives at a conclusion opposite to that reached by [the U.S. Supreme Court] on a question of law,' or 'if the state court confronts facts that are materially indistinguishable from a relevant [U.S.] Supreme Court precedent' and arrives at a different result. A state court decision is an 'unreasonable application of' clearly established Federal law 'if the state court correctly identifies the correct governing legal rule from [U.S. Supreme Court's] cases but unreasonably

> applies it to the facts of the particular state prisoner's case. An 'unreasonable application' can also occur where 'the state court either unreasonably extends a legal principle from [the U.S. Supreme Court's] precedent to a new context where it should not apply or unreasonably refuses to extend that principle to a new context where it should apply.

Ruimveld v. Birkett, 404 F.3d 1006, 1010 (6th Cir. 2005), internal citations, to *Williams v. Taylor*, 529 U.S. 405–407, omitted. A petition for relief under 28 U.S.C. § 2254 is subject to the statute of limitations set forth in 28 U.S.C. § 2244 (d), which requires:

> A 1-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the jurisdiction of a State court. The limitation period shall run from the latest of—
> (A) the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review;

28 U.S.C. § 2244; *Allen v. Yukins*, 366 F.3d 396, 399 (6th Cir. 2004).

Where, as here, a party files written objections to the report and recommendation issued by the magistrate judge, this Court "shall make" a *de novo* "determination of those portions of the record or specified proposed findings or recommendations to which objection is made." 28 U.S.C. §636 (b)(1). Only those portions of a report and recommendation to which the parties have made an objection are subject to review; absent an objection, this Court may adopt the magistrate's report without review. 28 U.S.C. § 636(b)(1)(C); *Thomas v. Arn*, 474 U.S. 140, 145, 106 S.Ct. 466 (1985). With regard to those portions of the Report and Recommendation under review, this Court "may accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate judge." 28 U.S.C. §636 (b)(1).

The Magistrate Judge Act (28 U.S.C. § 636 *et seq.*) "does not allow parties to raise at the district court stage new arguments or issues that were not presented to the magistrate." *Murr v. United States*, 200 F.3d 895, 907 n. 1 (6th Cir.2000); *see also Clark v. U.S.*, 764 F.3d 653 (6th Cir. 2014) and *Enyart v. Coleman*, 29 F.Supp.3d 1059 (N.D. Ohio 2014), among others. Thus, this Court's review is predicated on a proper objection to the Magistrate's evaluation of the issues presented to the Magistrate. Fed. R. Civ. Pro. 72 (b)(3) ("The district judge must determine de novo any part of the magistrate judge's disposition that has been properly objected to.") It is incumbent upon the party seeking relief to file objections "which shall specifically identify the portions of the proposed findings, recommendations, or report to which objection is made and the basis for such objections." Fed. R. Civ. Pro. 72 (b)(3). "An 'objection' that does nothing more than state a disagreement with a magistrate's suggested resolution or simply summarizes what has been presented before, is not an 'objection' as that term is used in this context." *Aldrich v. Bock*, 327 F.Supp.2d 743, 747 (E.D.Mich. 2004) citing *U.S. v. Walters*, 638 F.2d. 947, 949-50 (6th Cir. 1981).

III. LAW AND ANALYSIS

Petitioner originally raised ten grounds for review, however, his objections are directed to eight of the ten grounds; thus this Court adopts, without objection, the portions of the Report and Recommendation that address Petitioner's Eighth and Tenth Claims. Petitioner's remaining objections will be addressed, to the extent necessary, as they were evaluated in the R&R.

(A) Procedural Default

Under 28 U.S.C. § 2254, a petitioner may seek a writ of *habeas corpus* only after having fairly presented all constitutional claims to all appropriate state courts, including the highest state court, thereby exhausting his state court remedies before seeking federal relief. 28 U.S.C. § 2254 (b), (c). However, if a petitioner's claim either (1) was not fairly raised before a state court when state court remedies were available; or (2) was not presented in compliance with a state procedural rule, and failure to comply with the rule prevents the state court from reaching the merits of the claim, the claim is procedurally defaulted, and may not be considered by a federal court. A petitioner may overcome such a procedural bar only by demonstrating both cause for the failure to comply and prejudice that would result from the application of the bar. "Demonstrating cause requires showing that an 'objective factor external to the defense impeded counsel's efforts to comply' with the state procedural rule." *Franklin v. Anderson*, 434 F.3d 754, 764 (6th Cir. 2006). The United States Supreme Court has long held that an ineffective assistance of counsel claim, absent an identifiable external factor, will not support an exception to a procedural bar. *Murray v. Carrier*, 477 U.S. 478, 488 (1986). That Court has further noted, "without attempting an exhaustive catalog of such objective impediments" that a "showing that the factual or legal basis for a claim was not reasonably available to counsel, or that 'some interference by officials,' made compliance impracticable, would constitute cause under this standard." *Id.* at 488, internal citations to *Reed v. Ross,* 468 U.S. 1, 16 (1984) and *Brown v. Allen*, 344 U.S. 443, 486 (1953) omitted.

If a petitioner can demonstrate an external cause, the petitioner must then demonstrate actual prejudice resulting from the alleged error. *United States v. Frady*, 456 U.S. 452, 170 (1982). "Demonstrating prejudice requires showing that the trial was infected with constitutional error." *Franklin v. Anderson*, 434 F.3d 412, 417 (6th Cir. 2006). This presents a significant burden: a petitioner must not "merely" identify an instruction, decision, or occurrence that is "undesirable, erroneous, or even universally condemned" the petitioner must demonstrate that error identified operated to so infect the entire trial that the "resulting conviction violates due process." *Frady*, *supra*, at 169, quoting *Henderson v. Kibbe*, 431 U.S. 145 (1977).

Magistrate Knepp recommends dismissing Petitioner's Fourth; Sixth; and Ninth grounds for relief as procedurally defaulted. This Court will address each ground:

(i) Ground Four: Self Incrimination

Petitioner contends that the "trial court erred by not ensuring Warmus [Petitioner] understood his right against self-incrimination as established by the Fifth Amendment to the United States Constitution." (Petition, ¶ 63, Doc. #1-1, p. 25.) The State argued, and the Magistrate found, that this claim was barred by the doctrine of *res judicata* when it was not raised in Petitioner's direct appeal. Petitioner contends that his claim should survive this bar because it is "based primarily on credible evidence outside the record," namely, his affidavit, which Petitioner contends he could not use in a direct appeal. *Hartman v. Bagley*, 492 F.3d 347, 358 (6th Cir. 2007). Petitioner further contends that his affidavit is the best evidence because "[n]othing in the record reflects that the court or counsel ever discussed his right not to testify with him" and that he believed he was "compelled" to testify as he was asserting "self-defense." (Petition, ¶ 65.)

Petitioner does not provide a legal basis for his assertion that the trial court should have inquired into his decision to testify to verify that it was voluntary; instead he refers exclusively to long settled case law requiring a court inquire into the voluntariness of the decision to enter a guilty plea. (Petition, ¶¶ 68 & 69.) Petitioner further neglects to address the Ohio Supreme Court decision, *State v. Bey*, 85 Ohio St.3d 487, 709 N.E.2d 484 (1999), cited by the Cuyahoga County Common Pleas Court when rejecting his post-conviction petition. In *Bey* the Ohio Supreme Court rejected an appellant's claim that the trial court should have conducted a *sua sponte* inquiry to determine whether he "knowingly and intelligently waived his right to testify at trial." *Id* at 499. The *Bey* Court reasoned that such an inquiry is generally "thought to be unnecessary" but may actually be "harmful" because it "interferes with the attorney-client relationship" and "places the judge between the lawyer and his client and can produce confusion as well as delay." *Id.* internal citations omitted. The *Bey* Court noted that such questioning could "evoke a dramatic change in a previously carefully considered trial strategy" by suggesting the judge's "evaluation of the wisdom of the defendant's decision." *Id.* According to the Court, such interference by a trial judge is inappropriate, because "[w]hether the defendant is to testify is an important tactical decision as well as a matter of constitutional right." *Id.* The *Bey* Court concluded "[w]e agree and hold that a trial court is not *required* to conduct an inquiry with the defendant concerning the decision whether to testify in his defense." *Id.* (emphasis in the original).

In addition to ignoring applicable Ohio Supreme Court Precedent, Petitioner never addresses the fact that the record is not silent concerning his Fifth Amendment right. As both the Magistrate and the Cuyahoga County Common Pleas Court found, the record indicates that Petitioner stipulated prior to trial that he would testify, waiving his Fifth Amendment privilege, with the stated reasons being his intention to avoid any issue of burden shifting and his desire to inquire about self-defense during voir dire. (Report and Recommendation, 11; *State v. Warmus*, Cuyahoga County Common Pleas Case No. 536383 (May 9, 2013), 21, both citing Tr. 194-195; 197; 198.) This record reflects exactly the type of tactical decision the Ohio Supreme Court was anticipating when it held that a trial court should not insert itself in the decisions of individual defendants to exercise the right to testify. This record further indicates that Petitioner does not have a genuine legal or factual basis for his Fifth

Amendment claim. Petitioner's objections to the R&R do not address the substantive defects in his Fifth Amendment claim, but instead focus on the Magistrate's conclusion that his affidavit was not credible. Petitioner erroneously states that the Magistrate concluded his Fifth Amendment claim was procedurally barred due to the self-serving affidavit. The actual substance of the R&R reflects the Magistrate's conclusion that the self-serving affidavit was not necessary to state his Fifth Amendment claim, as the record itself clearly indicates that the trial court did not question Petitioner directly concerning his decision to testify, and that the issue, regardless of its actual merit, therefore would have been properly raised in his direct appeal. The Magistrate further found that the Ohio courts reviewing the claim had identified and applied *res judicata* as a genuine procedural bar, thus precluding federal review of the issue. Petitioner demonstrates no error in the conclusions reached in the R&R, accordingly it is adopted as written as to Ground Four.

(ii) Ground Six: *Remmer* Hearing

The Magistrate recommends a finding that Petitioner's claim that the trial court was required to hold a hearing on a juror's potential bias resulting from having been given a ride to court by the judge presiding over the matter is procedurally barred by Petitioner's failure to request a hearing when informed the ride had occurred. The Ohio Eighth District Court of Appeals paraphrased the events, as reflected in the trial court record:

> The judge explained on the record that while driving to the courthouse he received a

> telephone call informing him that an alternate juror was unable to find transportation to the courthouse. Knowing that the defense was presenting expert witnesses with a very tight window of availability and that one juror was about to give birth to a child, the judge decided to meet the juror and give him a ride to the courthouse. The judge said that he dropped the juror off in front of the Justice Center before proceeding to park his car. . . . The court assured the parties 'at no time did I have any conversation with this juror about any aspect of this case. We didn't mention the trial, no Matthew Warmus or any other witnesses or anything with this case at all.' The court told the parties that 'I will permit you all to think about it and motion it if you wish' and further told them that he would 'permit you to depose the juror at the conclusion of litigation if you wish.' Neither party objected nor did Warmus depose the juror at the end of trial.

State v. Warmus, Ohio Eighth District Court of Appeals, pp. 24-25 (the Ohio Supreme Court declined to hear the appeal of this decision). According to the record, this alternate juror was later seated, along with another, when two original jurors were dismissed for differing medical reasons.

The Ohio Appellate court considered these facts in the context of *Remmer v. United States*, 347 U.S. 227, 74 S.Ct. 450 (1954) and concluded that, to satisfy Ohio's long established contemporaneous objection requirement, it was incumbent upon Petitioner to request a hearing when the opportunity arose. *State v.*

Childs, 14 Ohio St.2d 56, 236 N.E.2d 545 (1968), paragraph three of the syllabus. In Ohio, "[i]t is a general rule that an appellate court will not consider any error which counsel for a party complaining of the trial court's judgment could have called but did not call to the trial court's attention at a time when such error could have been avoided or corrected by the trial court. (Paragraph one of the syllabus of *State v. Glaros*, 170 Ohio St. 471, 116 N.E.2d 379, approved and followed). Where, as here, there is no contemporaneous objection, the complaining party has waived all but a plain error review on appeal. *State v. Lang*, 126 Ohio St.3d 512, 528, 954 N.E.2d. 596 (2011) (defense counsel failed to object at trial, and waived all but plain error review, citing *Childs*, *supra*). "An alleged error is plain error only if the error is 'obvious' . . . and 'but for the error, the outcome of the trial clearly would have been otherwise' . . . [n]otice of plain error 'is to be taken with utmost caution, under exceptional circumstances and only to prevent a manfest miscarriage of justice.' (*Id.* at 528, internal citations omitted.) The Ohio Eighth District court concluded there was no obvious error in this matter and declined to find plain error.

The Eighth District noted that the Ohio Fifth District Court of Appeals had reached the same conclusion – that absent an objection, a trial court's decision not to hold a *Remmer* hearing is subject to plain error review – in *State v. Lewers*, Ohio Fifth District Court of Appeals, Stark County, Case No. 2009 CA 289, 2010-Ohio-5336 (November 1, 2010) (appeal not allowed by the Ohio Supreme Court in *State v. Lewers*, 128 Ohio St.3d 1414 (2011)). In *Lewers*, the Ohio Fifth District rejected a challenge to a Stark County trial court's decision to continue trial without inquiring into potential bias of the remaining jurors after dismissing a juror for cause during trial. The Stark County Court dismissed the juror after he privately informed the judge that he could no longer be impartial in the matter due to an experience in his private life that caused him to so strongly identify with the victim that he believed he could have been killed the same way. Thus, in this matter, as in *Lewers*, the Ohio Eighth District Court of Appeals asserted Ohio's contemporaneous objection rule as a bar to a *Remmer* claim and the Ohio Supreme Court declined to accept an appeal of the decision. The Sixth Circuit Court of Appeals holds that the contemporaneous objection rule is an adequate and independent state ground for dismissing a claim. *Scott v. Mitchell*, 209 F.3d 854, 866 (6th Cir. 2000), *Keith v. Mitchell*, 455 F.3d 662, 673 (6th Cir. 2006), *inter alia*.

Petitioner makes no attempt to demonstrate the cause and prejudice necessary to overcome this procedural bar to review. Petitioner's objections to the R&R focus solely on what he perceives as a factual error in referring to the juror given a ride as an "alternate juror" (which accurately describes the juror at the time the ride was given) and his unsupported assertion that a *Remmer* hearing was "mandated." Petitioner has not identified a defect in the Magistrate's recommendation or an exception that would allow further federal review of his claim. Accordingly, his objections are overruled; this Court adopts the conclusion reached in the R&R as to Ground Six as written.

(iii) Ground Nine: Ineffective Assistance of Counsel

Petitioner contends he received ineffective assistance of trial counsel due to three types of alleged omissions or failures. Two of the three alleged issues were raised for the first time in Petitioner's motion for post-conviction relief: (1) counsel was ineffective in not realizing the trial court could exclude a computer program Petitioner intended to use to address bullet trajectory and failing to obtain an expert to demonstrate the reliability of the computer program; and (2) counsel failed to use evidence that petitioner was the victim of a prior violent attack. The Ohio Eighth District Court of Appeals declined to address Petitioner's ineffective assistance of counsel claims on these issues because he could have raised them in his direct appeal and did not do so. The Magistrate recommends a finding that both claims are procedurally defaulted. In his objections Petitioner does not address his computer program related claims. Accordingly, in the absence of an objection demonstrating that the computer program related allegations of ineffective assistance of counsel are not procedurally defaulted, this Court adopts the R&R as written with regard to the program related ineffective assistance claim.

(a) Post-conviction relief and material outside the record.

Although the Magistrate recommends a finding that Petitioner's claims concerning a 2007 police report are similarly procedurally barred, it appears from the material submitted by Petitioner that this allegation does rely on material outside the trial court record. The

Sixth Circuit Court of Appeals has found that Ohio law recognizes two variants of res judicata in the context of a petition to vacate under O.R.C. § 2953.23: (1) a petitioner could have, but did not, present the claim for review in a direct appeal, and (2) the claim was brought, and fully litigated, on direct appeal. *Durr v. Mitchell*, 487 F.3d 423, 434 (6th Cir. 2007) (citing *Lundgren v. Mitchell*, 440 F.3d 754, 765 ftn.2 (6th Cir. 2006)). In the context of ineffective assistance of counsel allegations, the Ohio Supreme Court recognizes two limited exceptions to the general res judicata bar on such claims in a petition for post-conviction relief. First, the Ohio Supreme Court has found, where a defendant is represented by the same counsel both at trial and on appeal, ineffectiveness is properly raised in a petition for post-conviction relief, and is not subject to the res judicata bar, whether or not the claim is alleged to rely on evidence outside the record. *State v. Cole*, 2 Ohio St.3d 112, 443 N.E.2d 169, 171 & ftn.1 (Ohio 1982). The first exception does not apply to Petitioner who had new counsel for his appeal and post-conviction proceedings. (Petition for Writ of Habeas Corpus, Doc. #1-1, p. 13.) Second, claims of ineffective assistance of trial counsel that cannot "fairly be determined" without "resort to evidence dehors the record" are properly brought in a post-conviction petition. *State v. Cole*, *supra, syllabus*, 171. The submission of such evidence may be sufficient to lift the res judicata bar, but only when the petition otherwise meets applicable requirements. *Id.* For the purposes of reviewing a federal habeas petition, the Sixth Circuit only recognizes State res judicata as a basis for federal procedural default where a claim could have been, but was not, raised in the original appeal as of right. *Durr v. Mitchell*, *supra*, 434.

It appears from this record that the incident report that is the origin of the ineffective assistance of counsel claim first raised in Petitioner's application for post-conviction relief was not placed in the trial court record and the claim therefore could not have been raised in the original appeal. As such, under *Cole, supra*, it appears the claim was properly raised in the post-conviction proceeding. It is unclear why the Eighth District Court of Appeals combined this ineffectiveness claim with those correctly raised in Petitioner's original appeal and asserted res judicata as the basis of dismissal for all claims. Thus, although an Ohio court's use of the "doctrine of res judicata to preclude a merits determination of a claim raised in post-conviction proceedings" is generally "an adequate and independent state ground barring federal habeas review," the otherwise applicable bar, contrary to the Magistrate's recommendation, does not appear to apply to petitioner's claims concerning the incident report. *Durr v. Mitchell*, *supra* at 432, citing *Coleman v. Mitchell*, 268 F.3d 417, 429 (6th Cir. 2001) and *Seymour v. Walker*, 224 F.3d 542, 555 (6th Cir. 2000); *Cole, supra*. This Court will consider the portion of Petitioner's ineffective assistance of counsel claim properly raised in his Application for Post-Conviction Relief on the merits, because it appears that the res judicata bar does not apply.

To sustain a request for *habeas* relief it is not enough that Petitioner demonstrate an error of applicable State law – Petitioner must identify "a decision that was contrary to or involved an unreasonable application of clearly established Federal law" or "a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceedings." 28 U.S.C. § 2254 (d). The federal Sixth Circuit Court of Appeals specifies the situations that meet these stringent standards: (1) "if a state court arrives at a conclusion opposite to that reached by the U.S. Supreme Court on a question of law" or (2) "if a state court confronts facts that are materially indistinguishable from a relevant U.S. Supreme Court precedent and arrives at a different result." *Ruimveld*, *supra* 404 F.3d at 1010. Petitioner's arguments in support of his contention that counsel should be found under the Sixth Amendment to the United States Constitution to have rendered ineffective assistance of counsel are devoid of any reference to clearly established federal law supporting his claim.

To establish the elements of an ineffective assistance of counsel claim, petitioner must satisfy the requirements set forth by the United States Supreme Court in *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052 (1984). The *Strickland* Court found the "benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result." *Id.* at 686. To meet this benchmark, Petitioner must satisfy a two part test:

> 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.

Id. at 687. Any court evaluating such a claim must consider "whether counsel's assistance was reasonable considering all the circumstances." *Id.* at 688. Judicial scrutiny, however, "must be highly deferential" because "[i]t is all too tempting for a defendant to second guess counsel's assistance after conviction or adverse sentence, and it is all too easy for a court, examining counsel's defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable." *Id.* at 689. The Court continues to explain:

> Because of the difficulties inherent in making the evaluation, a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action 'might be considered sound trial strategy.' . . . Thus, a court deciding an actual ineffectiveness claim must judge the reasonableness of counsel's challenged conduct on the facts of the particular case, viewed as of the time of counsel's conduct. . . The court must then determine whether, in light of all the circumstances, the identified acts or omissions were outside the wide range of professionally competent assistance. . . At the same time, the court should recognize that counsel is strongly presumed to have rendered adequate assistance

> and made all significant decisions in the exercise of reasonable professional judgment . . . An error by counsel, even if professionally unreasonable, does not warrant setting aside the judgment of a criminal proceeding if the error had no effect on the judgment. The purpose of the Sixth Amendment guarantee of counsel is to ensure that a defendant has the assistance necessary to justify reliance on the outcome of the proceeding. . . It is not enough for the defendant to show that the errors had some conceivable effect on the outcome of the proceeding. Virtually every act or omission of counsel would meet that test, and not every error that conceivably could have influenced the outcome undermines the reliability of the result of the proceeding.

Id. 689–693. Petitioner falls far short of the mark.

The error or omission identified by Petitioner is trial counsel's decision not to attempt to introduce a 2007 incident report that suggests Petitioner, approximately three years prior to shooting David J. Williams, may have been assaulted by two juveniles and an eighteen-year-old after an "incident on the roadway." (Petitioner's Application for Post-Conviction Relief, ¶ 40, Doc. #8-2, p.16; Incident Report, Doc. #8-2, p. 63-68.) Petitioner contends that this report was relevant to his state of mind when he decided to shoot Mr. Williams over a disagreement about the cost of parking and would have bolstered the credibility of his theory of self-defense. Petitioner presents arguments that could have been made to the trial court in support of admitting the report; such arguments in no way demonstrate that the absence of the report made the result of his trial unreliable.

The material offered by Petitioner is not relevant to the elements of the charged offense. Without delving too deeply into an interpretation of State law that the narrow *habeas* remedy prescribed by 28 U.S.C. § 2254 is designed to avoid, Petitioner's argument for the relevance of a three-year-old incident report relies on Ohio Supreme Court cases acknowledging scientific acceptance of battered woman syndrome, defining the home as an area where there is no duty to retreat, and explaining that a jury may be charged to consider expert testimony concerning battered woman syndrome when evaluating the state-of-mind element of Ohio's self-defense test. *State v. Koss*, 49 Ohio St.3d 213 (1990); *State v. Thomas*, 77 Ohio St.3d 323 (1997). Setting aside the obvious lack of clearly established federal law in Petitioner's argument, none of the material Petitioner presents suggests that the trial court would have found an unrelated, then three-year-old, incident report concerning an altercation connected with "an incident on the roadway" was relevant and admissible for the purposes Petitioner advances. (Doc. #8-2, *supra*, p. 63-68.) Petitioner's ineffective assistance of counsel claim rests unsteadily on numerous assumptions: he assumes the report is relevant; he assumes the report is admissible for his stated purpose; and he assumes the report would be viewed by the jury in a manner favorable to him. This Court's review of the record suggests that evidence that Petitioner began habitually carrying a loaded gun in his trunk after his involvement in an apparent road-rage incident and, as a result, had easy access to the gun he then used to kill the parking lot attendant he first physically assaulted, at best, cuts both ways. The dubious relevance and admissibility of the report highlight the fact that counsel's election not to use the report is exactly the type of "tactical decision" that *Strickland* dictates must be given "wide latitude" to preserve trial counsel's independence and ability to present a case. *Strickland*, *supra*, at 689. Nothing presented by Petitioner suggests that the clearly established Federal law, expressed by the Supreme Court of the United States, necessary to demonstrate a basis for *habeas* relief under 28 U.S.C. § 2254 would in any way support this claim of ineffective assistance of counsel. Accordingly, the Court adopts the Magistrate's recommendation that this portion of Petitioner's ineffective assistance of counsel claim be dismissed. However, this dismissal is due to the claim's failure on the merits, rather than a procedural bar.

(b) Conduct of counsel during trial.

Petitioner's third, remaining, group of ineffective assistance of counsel claims address counsel's decisions during trial. Petitioner identifies trial counsel's decision not to request a *Remmer* hearing and the extent to which counsel's statements in his opening permitted later testimony that a law enforcement officer would not have used lethal force in self-defense in Petitioner's situation as further examples of ineffective assistance. Petitioner's objections passingly reference the arguments he previously raised, but identify no legal defect or other fault in the Magistrate's analysis and recommendation on these issues. "An 'objection' that does nothing more than state a disagreement with a magistrate's suggested resolution, or simply summarizes what has been presented before, is not an 'objection' as that term is used in this context." *Aldrich v. Bock,* 327 F. Supp. 2d 743, 747 (E.D. Mich. 2004); *see also* Fed. R. Civ. P. 72(b)(3). Such "general objections" are a duplication of time and effort and a waste of judicial resources, as they do not serve the purposes of Federal Rule of Civil Procedure 72(b). *Cvijetinovic v. Eberlin*, 617 F.Supp.2d 620, 632 (N.D. Ohio 2008), rev'd on other grounds, 617 F.3d 833 (6th Cir. 2010). Accordingly, the R&R is adopted as written on these issues. Thus, Petitioner's ineffective assistance of counsel ground is dismissed in its entirety.

(B) Merits Evaluation

(i) Grounds One and Two: The trial court admitted improper opinion evidence as to self-defense and interpretation of audio recordings presented to the jury.

Petitioner contends that the trial court improperly permitted both law enforcement and lay eyewitnesses to opine on the "reasonableness" of his use of deadly force and his ability to retreat safely without using force. Petitioner further objects to the fact that the jury heard differing opinions as to statements made by Petitioner during a 911 tape from prosecution and defense witnesses. With regard to both issues, the R&R finds the reasoning of the Ohio Eighth District Court of Appeals to be sound. According to the Eighth District, the testimony of lay eyewitnesses who actually observed the shooting was permitted under Ohio Evid. R. 701, which allows opinion testimony that is "(1) rationally based on the perception of the witness and (2) helpful to a clear understanding of the witness' testimony or the determination of a fact in issue." With regard to the opinions elicited from law enforcement, the reviewing court found that the officer testified specifically to whether, in his opinion, a police officer could use deadly force under similar circumstances. Petitioner himself made the possible response of an officer to similar circumstances an issue by asserting that he responded to the alleged threat "just as a police officer would have responded." (Doc. 8-1, Ex. 10.) Both evaluations were made by applying Ohio law as to Ohio evidentiary rules.

Although Petitioner cites generally to due process principles, both the arguments presented in his Traverse, and his "Objections" to the R&R (which are substantively a restatement of his Traverse), are devoid of the necessary violation of "clearly established Federal law" or "unreasonable determination of the facts in light of the evidence presented" necessary to sustain *habeas* relief under AEDPA. 28 U.S.C. § 2254(d). "Clearly established Federal law" in this context refers to the express holdings of the United States Supreme Court "as opposed to the dicta;" this Court is constrained to issue a writ only where such law has been "applied *unreasonably,* not merely erroneously or incorrectly." *Williams v. Taylor*, *supra* at 365; *Bailey v. Mitchell*, *supra* at 656 (emphasis added). Petitioner has made no such showing. The materials offered in support of his First and Second Grounds omit any reference to an unreasonable application of federal law or similar determination of facts in light of the evidence presented.

Much as Petitioner has ignored the requirements of AEDPA in choosing and framing his arguments, he has similarly ignored Fed. R. Civ. Pro. 72 (b)(3), which requires him to "specifically identify the portions of the proposed findings, recommendations, or report to which objection is made and the basis for such objections," in making his objections. In lieu of specifically identifying an error of fact or law in the proposed findings and recommendations, Petitioner has elected to recycle the arguments made in his Petition and Traverse. As such his "objections" which do "nothing more than state a disagreement with a magistrate's suggested resolution or simply [summarize] what has been presented before" are not objections "as that term is used in this context." *Aldrich v. Bock*, *supra* at 747 citing *U.S. v. Walters*, *supra* at 949-50. Thus, in the absence of a cognizable claim for relief in *habeas*\and without a substantive objection to the R&R Petitioner's First and Second Grounds for relief are overruled in their entirety. The R&R is adopted as written as to Petitioner's First and Second grounds.

(ii) Ground Three: Prosecutorial Misconduct

Petitioner identifies six acts of the prosecutor alleged to be misconduct in his Petition. Although it appeared that four of the six arguments may have been procedurally defaulted, the Magistrate, in an abundance of caution, declined to recommend a default finding because the Ohio Eight District Court of Appeals did not clearly state why it passed on the issues. The R&R addresses all six of Petitioner's misconduct arguments on the merits, and finds that none of the remarks made by the prosecutor were so egregious as to render Petitioner's trial fundamentally unfair. Petitioner's objections do not address the recommendation in the R&R as to five of the six instances of alleged misconduct. Thus, in the absence of an objection, this Court will adopt the R&R as written as to the five alleged instances Petitioner does not address in his Objections.

With regard to the remaining allegation, Petitioner renews his contention that the prosecutor engaged in misconduct when suggesting that Petitioner was illegally transporting his loaded firearm before he used it to shoot Mr. Williams, but fails to identify a legal or factual error in the Magistrate's conclusion that any actual error did not render the trial fundamentally unfair. Petitioner's "objection" on this ground is a simple disagreement with the Magistrate's conclusion devoid of independent legal or factual basis. As such, the objection offers no meaningful ground on which to reject the Magistrate's conclusion. *Aldrich v. Bock*, 327 F.Supp.2d 743, 747 (E.D.Mich. 2004) citing *U.S. v. Walters*, 638 F.2d. 947, 949-50 (6th Cir. 1981). In the absence of a properly framed objection, the Magistrate's recommendation as to Petitioner's prosecutorial misconduct arguments is adopted in its entirety. The arguments are without merit and overruled as such.

(iii) Ground Five: The burden of proof for self-defense in Ohio is Unconstitutional.

The Magistrate found that Petitioner's argument that O.R.C. § 2901.05, which places the burden of proof for self-defense on the individual asserting the defense, violates the Second and Fifth Amendments to the United States Constitution has no basis in clearly established Federal Law and recommends that

Petitioner's Fifth Ground be overruled on the Merits. 28 U.S.C. § 2254 (d)(1). Petitioner's "objection" to the Magistrate's recommendation merely restates the arguments presented in the Petition and the Transverse, verbatim. Petitioner's recycled argument is based on a mistaken interpretation of *District of Columbia v. Heller*, 554 U.S. 570, 128 S.Ct. 2783 (2008) that has no application to this matter. As the Magistrate indicated, the United States Supreme Court upheld Ohio's self-defense burden in *Martin v. Ohio*, 480 U.S. 228, 107 S.Ct. 1098 (1987), nothing in *Heller*, which addresses the limits of a municipality's ability to regulate the right to bear arms, alters the earlier finding. In the absence of any error of fact or law reflected in the Magistrate's R&R, the recommendation as to Petitioner's Fifth Ground is adopted in its entirety; Petitioner's Fifth Ground for relief is without merit and is overruled as such.

(iv) Ground Seven: The trial court improperly restricted cross examination.

Petitioner argues that he should have been allowed to re-introduce material addressed during the suppression hearing through cross examination of law enforcement witnesses at trial. At trial the court informed defense counsel that his question, as phrased, impermissibly mischaracterized prior testimony and gave counsel the opportunity to rephrase. Ultimately defense counsel was not permitted to introduce facts not in evidence concerning a second gun at the scene. On appeal the Ohio Eighth District Court of Appeals found the trial court's decision to restrict questioning to those facts in evidence was not an abuse of discretion and was properly calculated to avoid confusing the jury by "interjecting facts not in the record." (Doc. 8-1, Ex. 10.) The Eighth District characterized additional questioning by defense counsel of a second witness as "misleading and arguably intended to confuse the jury on issues that were not relevant." *Id.* The reviewing court concluded in both instances that Petitioner could show no prejudice resulting from the trial court's decision to restrict questioning to relevant issues within the scope of facts actually reflected in the record. The R&R echoes the state appellate court's conclusion, emphasizing the fact that during trial no witness testified that the victim had a gun out and thus there was no fact in the record that supported an assumption that the victim had a gun out, as well as the court's conclusion that defense counsel's questioning in both instances was designed to confuse the jury as to the relevant issues in evidence.

Petitioner identifies no defect of law or fact in the R&R, but instead reproduces verbatim the arguments presented in his Traverse. Thus, once again, in the absence of a properly framed objection identifying an actual error of fact or law, Petitioner has not stated an objection to the decision as contemplated by Fed. R. Civ. Pro. 72 (b)(3). "An 'objection' that does nothing more than state a disagreement with a magistrate's suggested resolution or simply summarizes what has been presented before, is not an 'objection' as that term is used in this context." *Aldrich v. Bock*, 327 F.Supp.2d 743, 747 (E.D.Mich. 2004) citing *U.S. v. Walters*, 638 F.2d. 947, 949-50 (6th Cir. 1981). Accordingly, Petitioner's objections as to ground seven are overruled, the R&R is adopted as written with regard to this ground.

IV. CONCLUSION

Petitioner's objections are OVERRULED. The R&R is adopted as written on grounds 1; 2; 3; 4; 5; 6; 7; 8; and 10; the recommendation of dismissal is further adopted as to ground 9. The petition is hereby DENIED AND DISMISSED in its entirety. The Court certifies, pursuant to 28 U.S.C. § 1915(a)(3), that an appeal from this decision could not be taken in good faith. There is no basis on which to issue a certificate of appealability. Fed. R. App. P. 22(b); 28 U.S.C. § 2253(c).

IT IS SO ORDERED.

/s/ John R. Adams
U.S. DISTRICT COURT JUDGE
NORTHERN DISTRICT OF OHIO

Dated: January 27, 2017.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

CASE NO.: 1:14 CV 1925

JUDGE JOHN ADAMS

[Filed January 30, 2017]

MATTHEW WARMUS,	)
	)
Petitioner,	)
	)
v.	)
	)
CHRISTOPHER LAROSE, Warden,	)
	)
Respondent.	)
	)

JUDGMENT ENTRY

For the reasons set forth in the Memorandum Opinion and Order filed contemporaneously with this Judgment Entry, IT IS HEREBY ORDERED, ADJUDGED and DECREED that Mathew Warmus's Petition for a Writ of Habeas Corpus is DISMISSED. Pursuant to 28 U.S.C § 1915(a)(3), the Court certifies that Petitioner may not take an appeal from the Court's decision in good faith, and that there is no basis upon which to issue a certificate of appealability. 28 U.S.C. § 2253(c); Fed. R. App. P. 22(b).

IT IS SO ORDERED.

/s/ John R. Adams
U.S. DISTRICT COURT JUDGE
NORTHERN DISTRICT OF OHIO

Dated: January 27, 2017

APPENDIX C

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

CASE NO.: 4:14 CV 1925

Judge John R. Adams
Magistrate Judge James R. Knepp II

[Filed August 10, 2015]

MATTHEW WARMUS,	)
Petitioner,	)
v.	)
CHRISTOPHER LAROSE, Warden	)
Respondent.	)

REPORT AND RECOMMENDATION

INTRODUCTION

This is an action initiated by Petitioner Matthew Warmus, a prisoner in state custody, seeking a writ of habeas corpus under 28 U.S.C. § 2254 ("Petition") (Doc. 1). Respondent Warden Christopher LaRose filed a Return of Writ (Doc. 8), and Petitioner moved to expand the record under Rule 5 of the Rules Governing Section 2254 (Doc. 13), which the Court granted (Doc. 14). Respondent filed a Supplement to the Return of

Writ (Doc. 15) and Petitioner filed a Traverse[1] (Doc. 18). The district court has jurisdiction over the Petition under § 2254(a). This matter has been referred to the undersigned for a Report and Recommendation pursuant to Local Rule 72.2(b)(2). (Non-document entry dated September 4, 2014). For the reasons discussed below, the undersigned recommends the Petition be denied and dismissed.

FACTUAL BACKGROUND

For purposes of habeas corpus review of state court decisions, findings of fact made by a state court are presumed correct and can only be contravened if the habeas petitioner shows, by clear and convincing evidence, that the state court's factual findings were erroneous. § 2254(e)(1); *Moore v. Mitchell*, 708 F.3d 760, 775 (6th Cir. 2013); *Mitzel v. Tate*, 267 F.3d 524, 530 (6th Cir. 2001). This presumption of correctness applies to factual findings made by a state court of appeals based on the state trial court record. *Mitzel*, 267 F.3d at 530. Ohio's Eighth District Court of Appeals set forth the following findings of fact:

> The state showed that Warmus and his female companion for the evening entered a downtown Cleveland parking lot that advertised $10 parking. Warmus parked in a space next to the lot entrance, but the victim-attendant, David Williams, told him that he had parked in a $20 parking space. Believing he was being cheated,

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1. Petitioner used "traverse" to identify what is currently referred to as a "reply". *See* Advisory Committee Notes (1976) to Rule 5 of Rules Governing Section 2254.

Warmus began to argue with Williams. The argument escalated, and Warmus pushed Williams. Williams pushed back, and the two men grappled until Williams put Warmus in a headlock and punched him three times. During this struggle, the attendant told Warmus's companion to "calm your boy down." The companion told Williams that they would leave, so he released Warmus and went to assist other drivers who had entered the lot. Warmus went to the trunk of his car and retrieved a handgun. He pointed the gun at Williams and told him to get on the ground. Williams began reaching for his own gun when Warmus fired three shots from a range of no more than three feet: one shot struck Williams in the back of the head; the other two struck him in the abdomen.

Warmus claimed to have acted in self-defense. He said that Williams's headlock caused him to lose his breath. Once released from the hold, he said that he struggled to regain his breath and heard Williams tell him to leave. Warmus replied that he was going to call the police and the owner of the parking lot to complain. At that point, Williams said, "[N]o you're not," and pulled out a gun. Warmus said he walked to his car, opened the trunk, and grabbed his gun. Warmus pointed the gun at Williams and told him to drop his gun, but Williams refused. Warmus then "shot until [Williams's] gun wasn't in his hand anymore." He placed his gun back in the trunk of the car and called the police to report the shooting.

> Eyewitnesses disputed Warmus's version of events. Although all of the eyewitnesses saw Warmus shoot Williams, none of them saw Williams holding a gun, much less pointing one at Warmus (one witness saw Williams reaching for his gun as Warmus shot him). When the police arrived, Warmus said that he knew Williams from a similar interaction a month earlier when he tried to park in the same spot and was charged an additional fee, saying, "I know him. We argued over this in the past." As Warmus sat in a police cruiser following his arrest, he told an officer that after Williams released him from the headlock, he went back to selling parking spaces. And at no point in speaking with the officer, or at any other point in the investigation, did Warmus say that he acted in self-defense. The police also found it unusual that a number of witnesses approached them after the fact to report the shooting. One of them appeared to embody the views of these witnesses by saying that she did so because she "felt that if nobody was witness for [Williams], because he was wrongly shot, I thought I should stand up for him."

State v. Warmus, 967 N.E.2d 1223 (2011); (Doc. 8-1, Ex. 10).

PROCEDURAL BACKGROUND

Petitioner was indicted by the January 2010 Term of the Cuyahoga County, Ohio Grand Jury on one count of Aggravated Murder in violation of Ohio Revised Code § 2903.01 (A), with a firearm and forfeiture specification. (Doc. 8-1, Ex. 1). Petitioner pled not guilty to the charges in the indictment. (Doc. 8-1, Ex. 2). Prior to trial, Petitioner filed a motion to suppress statements made by him after his 911 call on April 9, 2010. (Doc. 8-1, Ex. 3). The court held a hearing on the motion to suppress and denied the motion. (Doc. 8-1, Ex. 4). A jury trial commenced, and Petitioner was found guilty of the lesser included offense of Murder with a three-year firearm specification. (Doc. 8-1, Ex. 5). On October 28, 2010, Petitioner was sentenced to an aggregate term of eighteen years to life in prison. (Doc. 8-1, Ex. 5).

Direct Appeal

On November 16, 2010, Petitioner, through counsel, filed a timely notice of Appeal to the Eighth District Court of Appeals. (Doc. 8-1, Ex. 6). Petitioner raised the following assignments of error:

1. The trial court denied the appellant due process of law and a fair trial by allowing repeated instances of improper opinion testimony to be considered by the jury.

2. The trial court erred by allowing a state expert to invade the province of the jury by testifying outside his expertise to an ultimate issue before the jury.

3. Repeated acts of prosecutorial misconduct throughout the trial deprived the appellant of a fair trial.

4. Ohio's requirement that a defendant bear the burden of proof when raising the defense of self-defense is unconstitutional. Therefore, the trial court erred in instructing the jury

that the appellant bore the burden of proof to establish self-defense.

5. The trial court erred by failing to conduct a hearing pursuant to *Remmer v. United States* (1954), 347 U.S. 227 after providing a juror a ride to the courthouse during the trial.

6. The trial's allowance of prejudicially irrelevant evidence deprived the appellant of a fair trial.

7. The trial court erred by unfairly restricting the appellant's ability to cross-examine numerous states witnesses.

8. Confusing and inaccurate jury instructions deprived the appellant of his due process right to a fair trial.

9. Defense counsel's failure to preserve meritorious issues deprived the appellant his right to effective assistance of counsel.

10. Cumulative errors deprived the appellant of his due process right to a fair trial.

11. The trial court erroneously ordered the appellant to pay a fine of $20,000.00 as the maximum fine for a conviction of murder, R.C. §2903.02, is $15,000.00.

(Doc. 8-1, Ex. 7). The state filed a response (Doc. 8-1, Ex. 8) and Petitioner filed a reply (Doc. 8-1, Ex. 9). On November 10, 2011, the Court of Appeals affirmed Petitioner's conviction and sentence but remanded the imposition of an improper fine amount. (Doc. 8-1, Ex. 10).

Petitioner, through counsel, timely appealed this decision to the Ohio Supreme Court on December 13, 2011. (Doc. 8, at 4; Doc. 8-1, Ex. 11) raising the following propositions of law:

1.. Where a defendant asserts self-defense, a witness may not provide his or her opinion on whether the defendant should have retreated without action as self-defense encompasses a subjective evaluation of the defendant's acts rather than objective standard.

2. A witness may not provide testimony in an area which will not assist the jury to understand the issues at hand. Because a juror does not need assistance in listening, an audio expert may testify as to the technique used to enhance a tape, but may not testify as to the content of that tape.

3. Repeated instances of the prosecution misstating evidence, misrepresenting the law, accusing the defendant of uncharged offenses, and generally encouraging the jury to base its verdict on emotion rather than the evidence individually and cumulatively acted to deprive the defendant of his right to a fair trial.

4. Ohio's requirement that a defendant bears the burden of proof when raising the defense of self-defense is barred by both the federal and Ohio constitutions.

5. The trial court has an affirmative duty to conduct a hearing into the possible prejudice which may have resulted from any improper

contact between the court and a juror. Because the state bears the burden of proving no prejudice resulted from the contact, the failure to conduct a hearing must result in a new trial.

6. A trial court may not restrict defense cross examination of state witnesses to attack improper testimony on the state of the law of self-defense.

7. Where a defendant asserts self-defense, an instruction requiring both the state and the defense to prove the elements of self-defense is confusing and ambiguous. Where the totality of the instructions fail to clearly convey the state of the law, a reversal of the conviction is required.

8. The failure to object to a meritorious issue or issues constitutes ineffective assistance of counsel where the failure to do so resulted in the jury hearing unfairly prejudicial evidence which rendered the verdict unreliable.

9. A combination of errors may result in the requirement of a new trial even where the errors standing alone may not require reversal of the conviction.

(Doc. 8-1, Ex. 12). The State waived response. (Doc. 8-1, Ex. 13). On February 22, 2012, the Ohio Supreme Court declined jurisdiction to hear the case and dismissed the appeal as not involving any substantial constitutional question. (Doc. 8-1, Ex. 14). Petitioner, through counsel, timely filed an application for a writ of certiorari to the United State Supreme Court, which was denied on October 1, 2012. (Doc. 8-1, Ex. 15).

Re-Sentencing

Pursuant to the Court of Appeal's remand, Petitioner was resentenced to an aggregate term of eighteen years to life and found to be indigent; all fines and restitution were waived. (Doc. 8-1, Ex. 16). Petitioner did not appeal this decision.

Post-Conviction Relief

On July 15, 2011, while the direct appeal was still pending, Petitioner filed a petition to vacate or set aside his sentence pursuant to R.C. § 2953.21, and presented the following claims for relief:

1. The testimony of Thomas Ciula, a forensic video analyst with the Cuyahoga County Coroner's Office did not meet the *Daubert* criteria.

2. Petitioner was denied due process of law and a fair trial by improper argument by the prosecutor and the failure to provide Ciula's report within 21 days of trial.

3. Petitioner's Fifth Amendment right against self-incrimination was violated.

4. Petitioner received ineffective assistance of counsel

(Doc. 8-1, Ex. 17). On May 9, 2013, the Cuyahoga County Common Pleas Court denied Petitioner's petition for post-conviction relief. (Ex. 20).

Petitioner, through counsel, timely filed an appeal to the Eighth District Court of Appeals on June 3, 2013. (Doc. 8-1, Ex. 22). Petitioner raised the following assignments of error:

1. The trial court denied the appellant due process of law and a fair trial by allowing a state expert witness to testify that he listened to an unintelligible recording of the petitioner and interpreted those words to constitute a possible confession by the petitioner.

2. The prosecutor committed misconduct and the trial court erred by introducing and arguing that the petitioner transported an illegal weapon in his vehicle.

3. The trial court erred by not ensuring Warmus understood his right against self-incrimination as established by the fifth amendment to the United States Constitution.

4. The petitioner was deprived of his rights to effective assistance of counsel and to due process of law as guaranteed by the Fifth, Sixth and Fourteenth amendment to the United States Constitution and Article I §10 and §16 of the Ohio Constitution.

5. The trial court erred by failing to hold an evidentiary hearing as the affidavits provided in a petitioner's motion to vacate filed pursuant to R.C. §2953.21 establish a meritorious issue.

6. Cumulative errors deprived the appellant of his due process right to a fair trial.

(Doc. 8-1, Ex. 23). The State filed a brief in response (Doc. 8-1, Ex. 24) and Petitioner filed a reply (Doc. 8-1, Ex. 24). The Eighth District affirmed the Common Pleas Court's decision that the claims were barred by *res judicata*. (Doc. 8-1, Ex. 26).

Petitioner, through counsel, filed a timely notice of appeal to the Ohio Supreme Court on April 15, 2014. (Doc. 8-1, Ex. 26). He raised the following propositions of law:

1. If a state expert witness testifies about a subject that has not been accepted in the scientific community, the defendant may properly impeach that testimony pursuant to R.C. §2953.21 with the affidavit of an expert that exposes the fallacy of the state expert testimony.

2. The prosecutor may not suggest to the jury that the defendant committed an uncharged offense through questioning of the defendant, particularly when the law establishes that the alleged transgression was, in fact, legal.

3. Before a defendant testifies on his own behalf, it is incumbent on the trial court to ensure that the defendant has been advised of his Fifth Amendment protections against self-incrimination.

4. In a case of self-defense, defense counsel must present available credible evidence establishing the subjective belief as to why

the defendant believed that his life was endangered.

5. Where the affidavits provided in a petitioner's motion to vacate filed pursuant to R.C. §2953.21 establish a meritorious issue, the trial court may not dismiss the petition without an evidentiary hearing.

6. A combination of errors may result in the requirement of a new trial even where the errors standing alone may not require reversal of the conviction.

(Doc. 8-1, Ex. 28). The State filed a memorandum in response (Doc. 8-1, Ex. 29) and on July 9, 2014, the Ohio Supreme Court declined to accept jurisdiction of the appeal. (Doc. 8-1, Ex. 30).

FEDERAL HABEAS CORPUS

On August 29, 2014, Petitioner, through counsel, filed the instant Petition raising the following grounds for relief:

GROUND ONE: SUBJECTIVE OPINION EVIDENCE, INADMISSIBLE AS TO SELF-DEFENSE CLAIM.

GROUND TWO: "LISTENING EXPERT" INVADED PROVIDENCE OF JURY.

GROUND THREE: PROSECUTORIAL MISCONDUCT.

GROUND FOUR: FAILURE TO ADVISE OF RIGHT AGAINST SELF-INCRIMINATION.

GROUND FIVE: OHIO'S BURDEN OF SELF-DEFENSE LAW IS A VIOLATION OF STATE AND FEDERAL LAW.

GROUND SIX: FAILURE TO CONDUCT *REMMER* HEARING.

GROUND SEVEN: IMPROPER RESTRICTION OF DEFENSE CROSS EXAMINATION.

GROUND EIGHT: CONFUSING JURY INSTRUCTION DEPRIVES DUE PROCESS.

GROUND NINE: FAILURE TO PRESERVE MERITORIOUS ISSUES IS INEFFECTIVE ASSISTANCE OF COUNSEL.

GROUND TEN: CUMULATIVE ERRORS DENIED DUE PROCESS.

(Doc. 1).

JURISDICTIONAL ISSUES

Procedural Default

Before a Petitioner may seek a writ of habeas corpus in federal court pursuant to 28 U.S.C. §2254, he must exhaust his state court remedies by fairly presenting all of his constitutional claims to the highest state court and to all appropriate state courts prior to that. §2254(b),(c); *Picard v. Connor*, 404 U.S. 270, 275-76 (1971); *Pillette v. Foltz*, 824 F.2d 494, 497 (6th Cir. 1987). This requirement is satisfied when it is clear the claims are procedurally barred under state law. *Gray v. Netherland*, 518 U.S. 152, 161-62 (1996).

When a habeas petitioner fails to present a claim to the state court either due to: (1) his failure to fairly raise that claim before the state courts while state remedies are still available; or (2) noncompliance with a state procedural rule which prevents the state courts from reaching the merits of the petitioner's claim, that claim is procedurally defaulted and may not be considered by the federal court on review. *Wainwright v. Sykes,* 433 U.S. 72, 80, 84-87 (1977); *Engle v. Isaac*, 456 U.S. 107 (1982); *Seymour v. Walker*, 224 F.2d 542, 550 (6th Cir. 2000).

The second procedural bar – noncompliance with a state procedural rule, applies in this case. As such, federal habeas courts look to the four part test established in *Maupin v. Smith*:

1) whether the petitioner failed to comply with an applicable state procedural rule;

(2) whether the state courts actually enforced the state procedural sanction;

(3) whether the procedural bar is an "adequate and independent" state ground on which the state can foreclose federal review;

(4) if the above are met, whether the petitioner has demonstrated "cause" and "prejudice".

Williams v. Coyle, 260 F.3d 684, 693 (6th Cir. 2001) (citing *Maupin v. Smith*, 785 F.2d 135, 138 (6th Cir. 1986) (internal citations omitted)).

If, because of procedural default, a habeas corpus petitioner can no longer present one or more of his federal claims to the state courts, he has waived those claims for purposes of federal habeas review. Unless, however, a petitioner can show both cause for the failure to comply with the state procedural rule and prejudice resulting from the alleged constitutional violation. *See Wong v. Money*, 142 F.3d 313, 319 (6th Cir. 1998). Demonstrating "cause" requires a petitioner to "show that 'some objective factor external to the defense' prevented the petitioner's compliance with a state procedural rule." *Bonilla v. Hurley*, 370 F.3d 494, 498 (6th Cir. 2004) (quoting *Murray v. Carrier*, 477 U.S. 478, 488 (1986)). Demonstrating prejudice requires a petitioner to show "not merely that the errors at his trial created a *possibility* of prejudice, but that they worked to his *actual* and substantial disadvantage, infecting his entire trial with error of constitutional dimensions." *U.S. v. Frady*, 456 U.S. 152, 170 (1982).

In extreme cases, when cause and prejudice cannot be shown, a federal habeas court may hear a defaulted constitutional claim if the petitioner shows his conviction is the result of a fundamental miscarriage of justice, i.e., that he is "actually innocent." *Coleman v. Thompson*, 501 U.S. 722, 750 (1991). In this regard, a petitioner must show that it is more likely than not that no reasonable juror would have found him guilty beyond a reasonable doubt in light of new evidence. *Schlup v. Delo*, 513 U.S. 298 (1995).

Ground Four

In Ground Four, Petitioner asserts that his Fifth Amendment rights were violated because neither the trial court nor his trial counsel advised him of his right not to testify. (Doc. 1). Petitioner raised this claim in his motion for post-conviction relief and in his subsequent appeals stemming from that motion. (Doc. 8-1, Exs. 20, 23, 28). Respondent argues the Eighth District's decision that Petitioner's claim is barred by the doctrine of *res judicata* because he failed to raise it on direct appeal, constitutes the actual enforcement of a state procedural rule under *Maupin* barring Petitioner's claim. (Doc. 8, at 14-16).

The Sixth Circuit has generally held that Ohio's application of its *res judicata* rule constitutes an adequate and independent state ground that forecloses federal habeas review. *Monzo v. Edwards*, 281 F.3d 568, 577 (6th Cir. 2002). However, the Sixth Circuit has held that such a claim is not procedurally barred when the claim could not have been raised on direct appeal because it is, "based primarily on credible evidence outside the record". *Hartman v. Bagley*, 492 F. 3d 347, 358 (6th Cir. 2007).

Petitioner argues because Ground Four is based primarily on his own affidavit, which is outside the record, it has not been procedurally defaulted. (Doc. 18, at 35-37). However, Petitioner's claim that he was not advised of his right not to testify is not based primarily on his own affidavit. Evidence on the record, namely the lack of a record of the court advising him of this right, was available to him. In fact, there was some discussion of Petitioner waiving this trial right on the record, namely his counsel advising the court that he was waiving this right in order to raise the issue of self-defense at trial. (Doc. 9, Ex. 31, Trial Tr. Vol. 2, 194-98).

Moreover, it is difficult to refer to Petitioner's own affidavit as "credible evidence". It is far too convenient for him to be advised by his attorney of his right not to testify and then subsequently claim he was not on appeal. Absent additional evidence sustaining his claim, it is difficult to say Petitioner's own affidavit is credible.

Thus, Petitioner failed to comply with a procedural rule, namely a requirement that he raise his claim that he was not advised of his right not to testify on direct appeal; the court enforced the rule; the rule constituted an adequate and independent state ground for the decision; and Petitioner has not shown cause and prejudice for his failure to raise the claim. *Maupin*, 785 F.2d at 138. Therefore, the Court should dismiss Petitioner's Fourth Ground for relief as procedurally defaulted.

Ground Six

In his Sixth Ground for relief, Petitioner argues the trial court erred in failing to hold a *Remmer* hearing to determine whether he had been prejudiced by the trial judge giving a juror a ride to court that morning. (Doc. 18, at 45).

On direct appeal, the Eighth District reviewed this decision for plain error only because Petitioner had not objected to it at trial, even after the trial judge had offered the parties the opportunity to object and to depose the juror. (Doc. 8-1, Ex. 10). In doing so, the appellate court was enforcing Ohio's contemporaneous objection rule, which requires that parties preserve errors for appeal by calling them to the attention of the trial court at a time when the error could have been corrected. *State v. Glaros*, 170 Ohio St. 471 (1960), paragraph one of the syllabus.

The contemporaneous objection rule is an adequate and independent state ground for dismissing a claim. *Wogenstahl v. Mitchell*, 668 F.3d 307, 335 (6th Cir. 2012) *citing Keith v. Mitchell*, 455 F.3d 662, 673 (6th Cir. 2006). Petitioner has not shown cause for this default nor is he alleging actual innocence, therefore the *Maupin* factors have been met and the Court should dismiss Petitioner's Sixth Ground for relief as procedurally defaulted.

Ground Eight

Similarly, in Petitioner's Eighth Ground for relief, he complains that confusing and inadequate jury instructions deprived him of his right to due process and a fair trial. (Doc. 18, at 58). The Eighth District reviewed this decision for plain error on direct appeal because Petitioner had not objected to them during the trial as required by the contemporaneous objection rule. (Doc. 8-1, Ex. 10).

Once again, the *Maupin* standard is met; Petitioner failed to comply with a procedural rule, the Eighth District actually enforced the procedural bar, and it constituted adequate and independent grounds for the appellate court's decision. *See Paprocki v. Foltz*, 869 F. 2d 281 (6th Cir. 1989). Petitioner has not provided the court with cause for his failure to object; therefore the Court should dismiss Petitioner's Eighth Ground for relief as procedurally defaulted.

<u>Ground Nine</u>

In his Ninth Ground for relief, Petitioner argues he received ineffective assistance of counsel because his trial counsel (1) failed to use evidence that he had been the victim of a violent attack which would affected his subjective belief about the need to use self-defense; (2) failed to consider that the court might not allow the program they had been using to show the angle of the bullets into evidence because it might not be accurate; (3) failed to obtain a computer expert to testify about the reliability of the computer program; and (4) failed to object to improper evidence and erroneous jury instructions and court rulings, specifically failing to request a *Remmer* hearing after learning the trial judge had provided a ride to a sitting juror; "opening the door" by comparing Petitioner's actions to a police officer; and failing to object to a confusing jury instruction that switched the burden of proof. (Doc. 1, at 54-58).

On appeal of Petitioner's motion for post-conviction relief, the Eighth District declined to address Petitioner's claims his counsel was ineffective due to his failure to anticipate problems with the computer program and his failure to introduce evidence he was the victim of an attack because Petitioner had not raised these issues on direct appeal and he could have. (Doc. 8-1, Ex. 26).

As stated in Ground Four, the Sixth Circuit has generally held that Ohio's application of its *res judicata* is an adequate and independent state ground that forecloses federal habeas review. *Monzo*, 281 F.3d at 577. However, such a claim is not procedurally barred when the claim could not have been raised on direct appeal because it is, "based primarily on credible evidence outside the record". *Hartman*, 492 F. 3d at 358.

Here, Petitioner has not alleged that these claims are based primarily on evidence outside the record and it is not evident to this Court that there is any evidence outside the record that would be a primary part of his claim. (Doc. 1-1, at 39-44; Doc. 18, at 61-63). Therefore, the *Maupin* standard is met; the state court actually enforced a procedural bar that constituted an adequate and independent state bar to reviewing Petitioner's claim and Petitioner has not shown cause, prejudice, or alleged actual innocence. Therefore, the Court should dismiss Ground Nine in part; as procedurally defaulted, allowing only the claim his counsel was ineffective for failing to object to improper evidence and jury instructions, to remain.

Non-cognizable Claims

Before turning to the merits of Petitioner's claims, the Court must determine whether Petitioner's claims are cognizable for the purposes of habeas corpus jurisdiction. The Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA") governs what claims may be are cognizable on habeas corpus review. 28 U.S.C. § 2254(a). The Sixth Circuit has held that because the Supreme Court has not determined that a combination of distinct constitutional claims are entitled to habeas relief, "it cannot be said that the judgment of the Ohio courts is contrary to *Berger*, or any other Supreme Court decision so as to warrant relief under AEDPA" when a cumulative error claim is made. *Lorraine v. Coyle*, 291 F.3d 416, 446 (6th Cir.

2002) (discussing *Berger v. United State*, 295 U.S. 78 (1935)).

Ground Ten

Petitioner asserts in Ground Ten that the cumulative errors of the trial court, prosecution, and the ineffectiveness of his defense counsel deprived him of a fair trial. (Doc. 1, at 60). Since this claim rests on a combination of constitutional claims rather than a single one, this Court should dismiss Petitioner's Tenth Ground for relief as non-cognizable.

STANDARD OF REVIEW

Federal habeas claims previously adjudicated by the state courts are governed by AEDPA, codified at 28 U.S.C. § 2254(d). AEDPA provides that a federal court may not grant a writ of habeas to a petitioner in state custody with respect to any claim adjudicated on the merits in state court unless (1) the state court's decision was "contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court" or (2) the state court's decision "was based on an unreasonable determination of the facts in light of the evidence presented in the [s]tate court proceedings." *Taylor v. Withrow*, 288 F.3d 846, 850 (6th Cir. 2002) (quoting 28 U.S.C. §2254(d)).

A state court decision is considered "contrary to . . . clearly established federal law" if the two are "diametrically different, opposite in character or nature, or mutually opposed." *Williams v. Taylor*, 529 U.S. 362, 405 (2000). To be deemed an "unreasonable application" of clearly established federal law, a state-court decision on the merits must be "objectively unreasonable", not simply erroneous or incorrect. *Id*; *Keith v. Mitchell*, 455 F.3d 662, 669 (6th Cir. 2006). Meaning, a "state prisoner must show that the state court's ruling on the claim being presented in federal court was so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fair-minded disagreement." *Harrington v. Richter*, 131 S. Ct. 770, 786-87 (2011).

Ground One

In his first ground for relief, Petitioner argues the trial court improperly permitted police and lay witnesses to testify regarding the key elements of self-defense, including the duty to retreat and the reasonableness of the use of deadly force. (Doc. 1, at 21). Specifically, the trial court permitted police officers to offer "expert" opinions on whether Petitioner was reasonable in his use of deadly force and allowed police and lay witnesses to provide their opinion on whether Petitioner could or should have been able to safely retreat without using deadly force. (Doc. 1, at 21). This argument is addressed on its merits.

The Eighth District analyzed these errors as follows:

> To the extent any witness who actually testified to seeing the altercation that led to the shooting gave their opinion that deadly force was unwarranted under the circumstances, those opinions were properly admitted under Evid.R. 701.
>
> Although Ohio uses a subjective standard for self-defense, the state is not barred from offering

testimony to counter what the defendant "subjectively" claims to have believed at the time. In *Koss,* the Supreme Court approved a jury instruction on the reasonableness of a defendant's use of deadly force that stated: "In determining whether the Defendant had reasonable grounds for an honest belief that she was in imminent danger, you must put yourself in the position of the Defendant ***. You must consider the conduct of [the assailant] and determine if such acts and words caused the Defendant to reasonably and honestly believe that she was about to be killed or to receive great bodily harm." *Id.*, 49 Ohio St.3d at 216. The Supreme Court later described this as "a combined subjective and objective test." *Thomas,* 77 Ohio St.3d at 330. This was consistent with previous decisions holding that a defendant's use of deadly force was to be viewed "on the grounds of the bona fides of defendant's belief, and reasonableness therefor, and whether, under the circumstances, he exercised a careful and proper use of his own faculties." *State v. Sheets* (1926), 115 Ohio St. 308, 310, 152 N.E. 664.

The opinions were offered by eyewitnesses who actually saw events unfold. The opinions were thus helpful to giving the jury a clear understanding of whether Warmus could reasonably believe that deadly force was necessary and whether he exercised sound judgment in doing so. The court did not err by allowing the opinions into evidence.

***

Detective Lem Griffin did not witness the shooting, so he could not give a lay opinion as to whether Warmus was justified in using deadly force. See *Johnson,* 10th Dist. No. 02AP-373, at ¶36. At no point in Griffin's testimony, however, did the court permit him to give his opinion on whether Warmus was justified in shooting Williams - the detective only testified to his opinion of when a *police officer* could use deadly force under similar circumstances and that he did not believe that a headlock constituted an imminent threat on one's life. This might seem like a fine distinction to make, but the state's line of questioning to this witness was prompted by an assertion made in defense counsel's opening statement:

"The third thing that the evidence as a whole shows is that Mr. Warmus responded to the gun threat just as a police officer would have responded. We certainly expect that a police officer confronted with or confronting a suspect who has a gun pulled or even appears to be pointing a gun, we expect that police officer to shoot until the gun drops in self-defense, and that's what Matt did."

By referencing what police officers would have done under similar circumstances, Warmus opened the door to testimony by police officers as to how they would have responded in a similar situation. Though opening statements of counsel are not evidence, *State v. Frazier,* 73 Ohio St.3d 323, 338, 1995-0hio-235, 652 N.E.2d 1000, they usually state the defense's theory of the case.

> Defense counsel told the jury that the evidence would show that Warmus "responded to the gun threat just as a police officer would have responded." The state was thus entitled to offer police testimony to rebut that assertion by offering evidence from police officers to the effect that officers acting in similar circumstances would not have resorted to deadly force. Cf. *State v. Haines,* 112 Ohio St.3d 393, 2006-0hio-6711, 860 N.E.2d 91, ~44 (when a victim's credibility is attacked during opening statements, the prosecution can present rehabilitative evidence during the state's case-in-chief); *United States v. Marin* (C.A.1, 2008), 523 F.3d 24, 31. Griffin's testimony viably countered Warmus's assertion by showing that he, as a police officer, would not in similar circumstances have used deadly force. There was nothing improper about either the state's question or the detective's answer.

(Doc. 8-1, Ex. 10).

Upon review, the Eighth District's reasoning is sound. Ohio Evidence Rule 701 permits a lay witness to testify as to his opinion if such testimony is (1) rationally based on the perception of the witness and (2) helpful to clear understanding of the witnesses' testimony or the determination of a fact at issue. The lay witnesses' who testified as to whether Petitioner could have retreated, had witnessed the event, and their testimony would help the jury determine a fact at issue. (Doc. 8-1, Ex. 10). Although Petitioner argues this is not the case, because Ohio uses a subjective test for self-defense, as the Eighth District states, the subject test is a hybrid theory, where although the person's own perception matters, we use outside information to determine whether the defendant's *bona fide* belief is reasonable and the result of proper care under the circumstances. In other words, the witnesses' testimony would assist the jury in determining if Petitioner's alleged subjective belief was reasonable under the circumstances; therefore, it was properly admitted under Evid. R. 701.

Similarly, by asserting that Petitioner responded to the threat just as a police officer would have responded, Petitioner opened the door to testimony about how a police officer would respond. Although, Petitioner argues the questioning of Detective Griffin by the prosecutor was unfair because it failed to fully address the specific situation Petitioner was in, he has not shown that this unfairness rises to the level of a constitutional violation let alone that it violates Ohio law. (Doc. 18, at 11-13).

Therefore, Petitioner has failed to identify how the questioning of witnesses during his trial violated clearly established federal law and his first ground for relief should be dismissed on its merits.

Ground Two

In his second ground for relief, Petitioner asserts the trial court allowed an audio expert to invade the province of the jury by testifying to a recording's contents which the jury was perfectly capable of hearing for themselves. (Doc. 1, at 29-34). The audio expert had examined the tape of the 911 call made at the scene of the crime. (Doc. 8-1, Ex. 10). The expert testified that at a difficult to decipher portion of the record Petitioner was saying, "if the gun's here, it's my fault," however the Defense had argued that he was saying "it's his gun. Why are you going to say it's my fault? Why?" (Doc. 8-1, Ex. 10).

The Eighth District held that allowing such testimony was in error, Petitioner fundamentally disagreed with what words were spoken, thus this was an issue for the jury to resolve. However the Eighth District further held:

> Despite this error, we cannot say that it was prejudicial. Having independently reviewed the audio of the 911 call, we cannot confidently say that either interpretation by the state or defense was completely accurate. The jury heard the audio and was able to compare it to the transcriptions made by both parties and weigh them against the actual recording. Moreover, to the extent the jury may have given undue weight to the expert's conclusions, that error was certainly harmless given the overwhelming evidence of Warmus's guilt. Even had the court excluded the expert's testimony, there is no probability that the outcome of the trial would have been different.

(Doc. 8-1, Ex. 10).

Petitioner argues this error meets the high burden of showing the state court's error was contrary to clearly established federal law. Specifically, Petitioner takes issue with the Appellate Court's finding of harmless error, calling the testimony, "probably the most prejudicial evidence, let alone unfairly prejudicial statement in the whole case." However, Petitioner offers nothing to refute the Eighth District's conclusion that the overwhelming evidence of his guilt renders this error harmless. Moreover, as the Eighth District accurately indicates, the jury did have the opportunity to hear the recording for themselves and could have concluded that they heard something different. (Doc. 8-1, Ex. 10).

Upon review, there is nothing unreasonable about the appellate court's conclusion that in light of the jury having actually heard the tape for themselves, in addition to other evidence of Petitioner's guilt, this error is harmless. Therefore, the Court should dismiss Ground Two of the Petition on its merits.

Ground Three

In his Third Ground for relief Petitioner argues the prosecutor engaged in misconduct which so infected the trial with unfairness as to render it a violation of his due process rights. (Doc. 1, at 35-39). Petitioner alleges the following acts of misconduct were committed during his trial:

1. The prosecutor improperly elicited expert and non-expert testimony as set forth in claim one.

2. The prosecutor improperly questioned the defense psychiatric expert to create an inference that Petitioner suffered from a personality or psychiatric disorder.

3. The prosecutor improperly questioned a character witness by asking the question, "where did you learn that type of military

style execution?" despite this having no basis in fact.

4. During the question of Petitioner, the state improperly suggested that he had the burden to bring in witnesses to corroborate his testimony and insinuated that he "fought' the state in a pre-trial discovery matter.

5. The prosecutor improperly referred to the shot that hit the victim as an "execution".

6. The state introduced improper allegations designed to create the impression that Petitioner illegally transported a firearm in his vehicle.

(Doc. 1, at 36).

Respondent first argues this claim has been procedurally defaulted except to the extent that Petitioner alleges prosecutorial misconduct due to the prosecutor referring to the shooting as an "execution" and the prosecutor wrongly suggesting Petitioner was illegally transporting a firearm in his vehicle, because Petitioner failed to raise these claims on direct appeal. (Doc. 8, at 35). Respondent is correct, Petitioner does not avoid procedural default by merely presenting a legal theory to the courts, he must present each factual claim. *Nicholas v. Bell*, 440 F. Supp. 2d 730, 755 (E.D. Tenn. 2006); *citing Pillette v. Foltz*, 824 F.2d 494, 497-98 (6th Cir. 1987).

Petitioner argues he did present the claims but that the Eighth District refused to address them on the basis of App.R. 16(A)(7) which requires the appellant raise an argument with respect to each assignment of error presented. (Doc. 8-1, Ex. 10). Petitioner had not "separately argue[d] why these claimed instances deprived him of a fair trial" so the Eighth District did not address them. (Doc. 8-1, Ex. 10). Upon review of Petitioner's Brief on direct appeal (Doc. 8-1, Ex.7), it is unclear why this rule was enforced against most, but not all of Petitioner's claims of prosecutorial misconduct. As such, this Court declines to procedurally default any portion of Petitioner's claim and will address Petitioner's prosecutorial misconduct claim on its merits.

"Although the State is obliged to 'prosecute with earnestness and vigor,' it 'is as much [its] duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one.'" *Cone v. Bell*, 556 U.S. 449, 469 (2009) (quoting *Berger v. United States*, 295 U.S. 78, 88 (1935)). To assert a successful claim for prosecutorial misconduct in a habeas proceeding, a prosecutor's conduct must be "so egregious as to render the petitioner's trial fundamentally unfair." *Buell v. Mitchell*, 274 F.3d 337, 364 (6th Cir. 2001). It "is not enough that the prosecutors' remarks were undesirable or even universally condemned. 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 (1986) (quoting *Donnelly v. DeChristoforo*, 416 U.S. 637, 642 (1974)); *Durr v. Mitchell*, 487 F.3d 423, 439 (6th Cir. 2007). Thus, the analysis must focus on "'the fairness of the trial, not the culpability of the prosecutor.'" *Byrd*, 209 F.3d at 529 (quoting *Serra v. Michigan Dep't of Corrections*, 4 F.3d 1348, 1355 (6th Cir. 1993)).

The Sixth Circuit set forth the standards to apply to habeas claims of prosecutorial misconduct, explaining that courts must apply a "two-part test to determine whether the state court reasonably applied the federal standard in holding that prosecutorial misconduct did not render [the petitioner's] trial fundamentally unfair." *Wogenstahl v. Mitchell*, 668 F.3d 307, 328 (6th Cir. 2012) (quoting *Irick v. Bell*, 565 F.3d 315, 324 (6th Cir. 2009)). First, the court must determine whether the prosecution's conduct was improper. Second, it must determine whether that improper conduct was flagrant by considering four factors: (1) whether the evidence against the defendant was strong; (2) whether the conduct of the prosecution tended to mislead the jury or prejudice the defendant; (3) whether the conduct or remarks were isolated or extensive; and (4) whether the remarks were made deliberately or accidentally. *Id*.

Upon review, with the exception of Petitioner's claims about the firearm and referring to the shooting as an execution, Petitioner, who is represented by counsel, has failed to articulate why these actions were improper and further has failed to explain how the conduct would have prejudiced the jury. The Eighth District overruled a few of the errors in the trial by finding harmless error because the evidence against Petitioner was very strong. (Doc. 8-1, Ex. 10). Petitioner has not refuted this claim, thus this Court cannot find that the prosecutor's actions were in error or even if they were, that they prejudiced Petitioner to such a degree as to render his trial fundamentally unfair.

<u>The "Execution" Statement</u>

The Eighth District analyzed Petitioner's claim that referring to the shooting as an execution was improper as follows:

> Given the entry point of the bullet at the back of the head and the close proximity from which the gun was fired, the state's remarks about an "execution-style" shooting were not improper. Courts have previously described similar shootings as "execution-style." For example, in *State v. Hale,* 119 Ohio St.3d 118, 2008-0hio-3426, 892 N.E.2d 864, the Supreme Court described four gunshots, at least three of which were "at close range, to the head" as an "execution-style" murder. Id. at ¶ 139. See, also, *State v. Palmer,* 80 Ohio St.3d 543, 570, 1997-0hio-312, 687 N.E.2d 685 (describing as "execution-style manner" shots fired on either side of the victim's head into his temple).

(Doc. 8-1, Ex. 10).

Petitioner argues this analysis was not sufficient because "[t]he court failed to cite cases or analyze the issue relative to unfettered use of the term and argument to a jury without any definition or supportive expert testimony which would justify the use of such a conclusory term." However, Petitioner does not provide any law which suggests the court was required to perform such an analysis. Therefore, the prosecutor's comments were not improper.

Illegal Firearm Issue

Lastly, the Eighth District analyzed Petitioner's complaint about the prosecutor giving the jury the impression he was carrying a firearm illegally as follows:

> Questions about Warmus's transportation of a loaded firearm did not reasonably fall within any exception to the prohibition on other acts evidence under Evid.R. 404(B). They did not touch on "proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." The state cites to no exception for admissibility under the rule, nor can we discern any plausible basis for application of the rule.
>
> The questions were likewise inadmissible to impeach Warmus on his assertion that he led a law-abiding life. R.C. 2923.16(B) defines the offense of improperly handling firearms in a motor vehicle and states: "No person shall knowingly transport or have a loaded firearm in a motor vehicle in such a manner that the firearm is accessible to the operator or any passenger without leaving the vehicle." Warmus testified that he took firearms seriously and that he received training in firearm use and handling, but was unaware that it was illegal to transport a loaded firearm in a vehicle when that firearm was within reach of the driver or passenger. The state now claims that "it did not create the impression that the Appellant illegally transported a firearm in his vehicle," Appellee's Brief at 23, but this claim belies what

> transpired at trial. The state asked Warmus whether he was "familiar" with R.C. 2923.16(B) and later said, "you had no idea that it was illegal to convey a loaded weapon?" Finally, the state characterized Warmus's act of transporting a loaded gun inside the car as "committing a crime by conveying it[.]" These questions created the impression that Warmus had broken the law, as the phrase "committing a crime" allows for no other reasonable conclusion but that Warmus illegally transported a firearm.
>
> Despite the error in the state's questions, we cannot find them so prejudicial that they deprived Warmus of a fair trial. Warmus conceded that he shot the victim, so questions about whether he illegally transported his firearm paled by comparison. We do not think it is remotely possible that questions about Warmus' illegally transporting the gun somehow swayed the jury into rejecting the self-defense claim. Any misconduct by the state was thus harmless beyond a doubt.

(Doc. 8-1, Ex. 10).

Petitioner argues this error was not harmless; at issue was whether Petitioner shot the victim in self-defense and the implication that he had a gun illegally gave the jury the false impression he did not come to the fray with clean hands. (Doc. 18, at 32). While this may be true, as the state court indicated, the jury would have learned Petitioner was carrying a gun regardless. The prosecutor's remarks were brief, and it is difficult, at best, to say that the knowledge Petitioner carried the firearm illegally would have swayed the jury into rejecting his self-defense claim any more than the knowledge that he had brought a gun at all might sway the jury. Moreover, even if this knowledge had had some impact on the jury, it is difficult to say that the admission of these remarks was so egregious that it rendered Petitioner's trial fundamentally unfair.

Thus, because the prosecutor's remarks were generally within the bounds of the law and because the few errors made cannot be said to be so egregious as to render Petitioner's trial unfair and violate his due process rights, the undersigned recommends the Court dismiss Ground Three of the Petition on its merits.

Ground Five

In his Fifth Ground for relief, Petitioner asserts that Ohio's law placing the burden of self-defense on the criminal defendant is unconstitutional. Petitioner cites *District of Columbia v. Heller*, 554 U.S. 570 (2008) for the premise that the right to self-defense is a fundamental right guaranteed by the Second Amendment and then alleges that Ohio's placement of the burden of proof of self-defense on the criminal defendant fails to provide the heightened protection against governmental interference that is required for fundamental rights. (Doc. 1, at 42-46).

However, the Supreme Court has not found Ohio's duty to retreat requirement or its burden of proof of self-defense to be unconstitutional. As the Eighth District points out, although the duty to retreat has been rejected in many states it is difficult to say it violates the Second Amendment, given that "it undeniably existed when the Second Amendment was adopted." (Doc. 8-1, Ex. 10). Although Petitioner argues that Ohio's duty to retreat is not the same as its burden shifting, the fact remains that no court has found Ohio's self-defense law to be unconstitutional and Petitioner has not provided a clear argument on how this fundamental right is compromised by Ohio's law. Therefore, the Court should dismiss Ground Five on its merits.

<u>Ground Seven</u>

Petitioner argues the trial court unduly restricted his ability to confront key prosecution witnesses. (Doc. 1, at 50). Specifically, Petitioner argues he was not permitted to fully cross-examine Eric Livingston and Detective Lem Griffin. (Doc. 1, at 50-51). The Eighth District analyzed this claim as follows:

> The Fifth and Sixth Amendments concomitantly provide a criminal defendant the right to present a defense by compelling the attendance and presenting the testimony of witnesses for the defense. *Washington v. Texas* (1967), 388 U.S. 14, 18-19, 87 S.Ct. 1920, 18 L.Ed.2d 1019. In addition, "[the necessary ingredients of the [Fifth and] Fourteenth Amendment[s'] guarantee that no one shall be deprived of liberty without due process of law include a right to be heard and to offer testimony[.]" *Rock v. Arkansas* (1987), 483 U.S. 44, 51, 107 S.Ct. 2704, 97 L.Ed.2d 37. The right to present a criminal defense, however, is not absolute. *United States v. Valenzuela-Bernal* (1982), 458 U.S. 858, 875, 102 S.Ct. 3440, 73 L.Ed.2d 1193. The defendant is entitled to only "an opportunity for effective cross-examination, not cross-examination that is

effective in whatever way, and to whatever extent, the defense might wish." *Delaware v. Fensterer* (1985), 474 U.S. 15, 20, 106 S.Ct. 292, 89 L.Ed.2d 674. Accordingly, the court has "wide latitude insofar as the Confrontation Clause is concerned to impose reasonable limits on such cross-examination based on concerns about, among other things, harassment, prejudice, confusion of the issues, the witness' safety, or interrogation that is repetitive or only marginally relevant." *Delaware v. Van Arsdall* (1986), 475 U.S. 673, 679, 106 S.Ct. 1431, 89 L.Ed.2d 674. To establish a Confrontation Clause violation, the defendant must show that he was "prohibited from engaging in otherwise appropriate cross-examination" and "[a] reasonable jury might have received a significantly different impression of [the witness's] credibility had [the defendant's) counsel been permitted to pursue his proposed line of cross-examination." *Id.* at 680.

***

Livingstone gave his opinion that Warmus was not in any danger at the time he retrieved his gun and shot the victim. On cross-examination, defense counsel asked: "Now, from your vantage point, when you say this all happened and you say that you never saw [the victim] pull or point a gun, you must be surprised ultimately to find out the [the victim] actually had a gun out before he was shot?" The court sustained the state's objection and ordered defense counsel to rephrase the question. Defense counsel then asked, "[w]ere you surprised to find out ultimately that [the victim] in fact had a gun out before he was shot?" The state again objected. At the sidebar, the court told defense counsel that he was mischaracterizing prior testimony by an emergency medical technician. The court told defense counsel: "I'll permit you to ask do you know if a gun was found, do you know when the gun came out, do you know if the gun was out before he was shot, but to say that the EMS guy said the gun was out before he was shot is not technically accurate." Defense counsel told the court that he had the right to ask any question on cross-examination and that he was "not tying it into what the EMS person said." Defense counsel admitted to the court that up to that point in the trial, no person had testified to seeing the victim having "a gun out."

As defense counsel was forced to concede, there had been no testimony prior to that point in trial where any witness claimed to have seen Williams holding a gun. During questioning of the emergency medical technician who treated the victim on the scene, he responded to the question, "[b]ut you definitely recall seeing a gun near [the victim's] head on the pavement," by saying, "I did not see a weapon." So any question posed to Livingstone that presumed that the victim "actually had a gun out before he was shot" had no basis in fact. The court did not abuse its discretion by sustaining the state's objection to it because the question had the potential to confuse the jury by injecting facts not in the record. Moreover, Livingstone's testimony that Warmus could have safely retreated without shooting Williams was premised on his opinion that he did not see Williams holding a gun and that Warmus was in no danger from Williams. Even had Livingstone been aware that the victim possessed (but did not display) a gun, that fact would have been immaterial to his conclusion that Warmus was not in any danger at the time he went to his trunk and retrieved his gun.

***

During Detective Lem Griffin's testimony, he gave his understanding of the circumstances under which a police officer would be justified in using deadly force. On cross-examination, Griffin acknowledged that he was not a lawyer and defense counsel asked, "[s]o the legal opinions you just expressed are not the opinions of a lawyer." The court sustained the state's objection.

The court did not abuse its discretion by sustaining the objection. Griffin's opinions were based on questions premised on the idea of how a police officer would have responded in the same situation - a premise first put forth by Warmus in opening statement when he claimed that he responded to the victim's threat in the same way a police officer would have responded. Griffin's opinion was thus grounded on his personal experience as a police officer, not as an attorney, a fact he readily acknowledged in his testimony. Defense counsel's question was thus misleading and arguably intended to confuse the

> jury on issues that were not relevant. In any event, by conceding that he was not an attorney, Griffin arguably answered the defense's question about whether his opinions were that of a lawyer. Warmus can show no prejudice.

(Doc. 8-1, Ex. 10).

With respect to Eric Livingston's testimony, as the state appellate court indicated, Petitioner's questioning was attempting to mislead the jury about what another witness, the EMS Tech, had said. Petitioner argues that this ignores evidence during the suppression hearing that the gun had been found near the victim. (Doc. 18, at 54). However, as the court correctly indicated, no witness had testified that the victim had a gun out, thus there was no basis in fact to assume the victim had had a gun out, only that a gun was later found next to him, a question that the trial court would have permitted. Thus, as the Eighth District indicated, the trial court properly sustained the state's objections to prevent confusion of the issues in this case.

With respect to Detective Griffin's testimony, as discussed in Ground One, the state's questioning as to whether a police officer would be justified in using deadly force was proper as it pertained to his experience as a police officer and was not a legal question. As the Eighth District explained defense counsel likely was trying to confuse the jury about the question. Therefore, the state appellate court properly analyzed the issues and the Court should dismiss Ground Seven on its merits because Petitioner has not shown the trial court deprived him of his right of confrontation.

Ground Nine

In the portion of Ground Nine that has not been procedurally defaulted, Petitioner argues he received ineffective assistance of counsel because his trial counsel failed to object to improper evidence and erroneous jury instructions and court rulings, specifically failing to request a *Remmer* hearing after learning the trial judge had provided a ride to a sitting juror, opening the door by comparing Petitioner's actions to a police officer, and failing to object to a confusing jury instruction that switched the burden of proof. (Doc. 1, at 54-58).

Effective assistance of trial counsel is guaranteed by the Sixth Amendment. *Strickland v. Washington*, 466 U.S. 668, 685 (1984). To prevail on an ineffective assistance of counsel claim, a petitioner must satisfy both prongs of the test set forth in *Strickland*: that counsel's performance was deficient and that the deficient performance prejudiced the defense so as to render the trial unfair and unreliable. *Strickland*, 466 U.S. at 698; *See also Harries v. Bell*, 417 F.3d 631, 636 (6th Cir. 2005) (citing *Strickland*, 466 U.S. at 686–692).

To meet the deficient performance prong, counsel's representation must fall below an objective standard of reasonableness under prevailing professional norms. *Strickland*, 466 U.S. at 688. To meet the prejudice prong, there must exist a reasonable probability that, absent counsel's unprofessional errors, the results of the proceeding would have been different. *Id.* at 694. When considering the prejudice element, the focus is on whether counsel's errors undermined the reliability of and confidence in the result. *West v. Seabold*, 73 F.3d

81, 84 (6th Cir. 1996) (citing *Lockhart v. Fretwell*, 506 U.S. 364, 370 (1993)). This is a high burden:

> Judicial scrutiny of counsel's performance must be highly deferential. It is all too tempting for a defendant to second-guess counsel's assistance after conviction or adverse sentence, and it is all too easy for a court, examining counsel's defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable. A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time. Because of the difficulties inherent in making the evaluation, a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy.

Strickland, 466 U.S. at 689.

Review of a *Strickland* claim is doubly deferential in a § 2254 proceeding. *Yarborough v. Gentry*, 540 U.S. 1, 6 (2003) (per curiam) ("Judicial review of a defense attorney[] . . . is . . . highly deferential – and doubly deferential when conducted through the lens of federal habeas."). This double deference arises because the *Strickland* standard is a general standard, giving a state court even more latitude to reasonably determine that a defendant has not satisfied the standard.

Knowles v. Mirzayance, 556 U.S. 11, 123 (2009). "A state court must be granted a deference and latitude that are not in operation when the case involves review under the *Strickland* standard itself." *Richter*, 131 S. Ct. 770, 785 (2011). Accordingly, the pivotal question in any § 2254 action that presents an ineffective assistance claim, is "whether the state court's application of the *Strickland* standard was unreasonable." *Id*. at 785.

Here, the Eighth District Court of Appeals rejected Petitioner's ineffective assistance of counsel claim as follows:

> Although counsel did not request a *Remmer* hearing upon learning that the trial judge gave an alternate juror a ride to the courthouse, we stated in our discussion of the fifth assignment of error that a *Remmer* hearing was unnecessary because the judge made it clear that he did not discuss anything about the case with the juror. The judge explained that he studiously avoided any conversation relating to the case. Defense counsel had no reason to doubt the court's recapitulation of the conversation and offered no objection to the way the court handled the matter. Defense counsel thus exercised his judgment that no impropriety occurred. Even were we of a mind to second-guess this decision, nothing on the record suggests to us that the court's explanation was so lacking in veracity that a full *Remmer* hearing was necessary.

***

Regarding the preliminary jury instruction on self-defense, we agreed that the court erred by transposing the word "state" for "defendant" when assigning the burden of proving self-defense. Counsel had an obligation to object to this instruction under Crim.R. 30 and failed to do so, thus violating an essential duty.

We nonetheless find that even had the court correctly stated the burden of proof in its preliminary instructions to the jury, there is no reasonable probability that the outcome of the trial would have been different. The evidence overwhelmingly showed that Warmus could have safely retreated without resorting to deadly force. Indeed, while the victim did possess a firearm, none of the many eyewitnesses to the shooting saw that weapon. At best, one witness, who worked with the victim, said only that he "tried to reach for his gun" at the time he was shot, but that he did so only because Warmus had first pulled out his own gun. Warmus was the only witness to say that the victim pulled the gun first, a claim that was self-interested and against the great weight of the testimony.

Every other witness agreed that the fight had ended and that the victim had turned away from Warmus and resumed tending to parking lot customers. Warmus could have easily and safely retreated without resorting to deadly force. And if Williams had pulled a gun first, it is unclear how Warmus thought it believable that he could walk to his car, retrieve his gun, and return to Williams while aiming a gun at him. If Williams

> had manifested an immediate intention to shoot Warmus, surely Warmus would not have risked walking to the trunk of his car to get a gun, all the while being held at gunpoint himself. The jury obviously found Warmus's version of events unbelievable.
>
> Finally, to the extent the court erred in instructing the jury on the burden of proof, it is difficult to see how that error was prejudicial to Warmus. In his fourth assignment of error he complained that Ohio's statutory requirement that a defendant bear the burden of proof on self-defense was unconstitutional because the burden should rest with the state. Assuming that the jury did put the burden of proving self-defense on the state, it inadvertently gave Warmus what he wished for all along. Even if the instruction did confuse the jury, that confusion would undoubtedly have worked in Warmus's favor as it might have caused the jury to split on whether he or the state proved the elements of self-defense. He cannot now complain that he was prejudiced by the court's error and we find no basis for finding that the outcome of the trial would have been different had the jury been correctly instructed.

(Doc. 8-1, Ex. 10).

Upon review, the state court's analysis that Petitioner's counsel's failure to request a *Remmer* hearing was a proper exercise of discretion is correct. There was no reason for anyone to doubt the veracity of the judge's statements; therefore the failure to conduct a hearing was not deficient performance.

Similarly, it is difficult for this Court to ascertain how the trial court mistakenly stating that the burden of proof for self-defense was on the state could possibly have prejudiced Petitioner. This should have been a benefit to his client. Therefore, Petitioner's counsel was not ineffective under *Strickland* and the Court should dismiss the remainder of Ground Nine on its merits.

CONCLUSION AND RECOMMENDATION

Following review, and for the reasons stated above, the undersigned recommends the Court deny and dismiss the Petition.

s/James R. Knepp II
United States Magistrate Judge

ANY OBJECTIONS to this Report and Recommendation must be filed with the Clerk of Court within fourteen days of service of this notice. Failure to file objections within the specified time WAIVES the right to appeal the Magistrate Judge's recommendation. *See U.S. v. Walters*, 638 F.2d 947 (6th Cir. 1981); *Thomas v. Arn*, 474 U.S. 140 (1985).

APPENDIX D

[Cite as *State v. Warmus*, 197 Ohio App.3d 383, 2011-Ohio-5827.]

COURT OF APPEALS OF OHIO

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 96026

[Filed November 10, 2011]

THE STATE OF OHIO,	)
	)
APPELLEE,	)
	)
v.	)
	)
WARMUS,	)
	)
APPELLANT.	)
	)

JUDGMENT: AFFIRMED IN PART, REVERSED IN PART, AND REMANDED

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-536383

BEFORE: Stewart, P.J., Cooney, J., and S. Gallagher, J.

RELEASED AND JOURNALIZED: November 10, 2011

ATTORNEYS:

William D. Mason, Cuyahoga County Prosecuting Attorney, and Lauren Bell, Aaron Brockler, and Daniel A. Cleary, Assistant Prosecuting Attorneys, for appellee.

David L. Doughten and Robert A. Dixon, for appellant.

MELODY J. STEWART, Presiding Judge.

{¶ 1} A jury found defendant-appellant, Matthew Warmus, guilty of murdering a parking-lot attendant in a dispute over a parking fee, rejecting his claim that he acted in self-defense. In this appeal, he sets forth 11 assignments of error that collectively raise issues concerning the court's admission of testimony, the jury instructions, ineffective assistance of counsel, and the imposition of a fine.

{¶ 2} The relevant facts of this case are stated in summary form. The state showed that Warmus and his female companion for the evening entered a downtown Cleveland parking lot that advertised $10 parking. Warmus parked in a space next to the lot entrance, but the victim-attendant, David Williams, told him that he had parked in a $20 parking space. Believing he was being cheated, Warmus began to argue with Williams. The argument escalated, and Warmus pushed Williams. Williams pushed back, and the two men grappled until Williams put Warmus in a headlock and punched him three times. During this struggle, the attendant told Warmus's companion to "calm your boy down." The companion told Williams that they would leave, so he released Warmus and went to assist other drivers who had entered the lot. Warmus went to the trunk of his car and retrieved a handgun. He pointed the gun at Williams and told him to get on the ground. Williams began reaching for his own gun when Warmus fired three shots from a range of no more than three feet: one shot struck Williams in the back of the head; the other two struck him in the abdomen.

{¶ 3} Warmus claimed to have acted in self-defense. He said that Williams's headlock caused him to lose his breath. Once released from the hold, he said that he struggled to regain his breath and heard Williams tell him to leave. Warmus replied that he was going to call the police and the owner of the parking lot to complain. At that point, Williams said, "[N]o you're not," and pulled out a gun. Warmus said he walked to his car, opened the trunk, and grabbed his gun. Warmus pointed the gun at Williams and told him to drop his gun, but Williams refused. Warmus then "shot until [Williams's] gun wasn't in his hand anymore." He placed his gun back in the trunk of the car and called the police to report the shooting.

{¶ 4} Eyewitnesses disputed Warmus's version of events. Although all of the eyewitnesses saw Warmus shoot Williams, none of them saw Williams holding a gun, much less pointing one at Warmus (one witness saw Williams reaching for his gun as Warmus shot him). When the police arrived, Warmus said that he knew Williams from a similar interaction a month earlier when he tried to park in the same spot and was charged an additional fee, saying, "I know him. We argued over this in the past." As Warmus sat in a police cruiser following his arrest, he told an officer that after Williams released him from the headlock, he went back to selling parking spaces. And at no point in speaking with the officer, or at any other point in the investigation, did Warmus say that he acted in self-defense. The police also found it unusual that a number of witnesses approached them after the fact to report the shooting. One of them appeared to embody the views of these witnesses by saying that she did so because she "felt that if nobody was witness for [Williams], because he was wrongly shot, I thought I should stand up for him."

I

{¶ 5} Warmus's first assignment of error is that the court abused its discretion by allowing state witnesses to offer their opinion on key elements of self-defense—primarily their opinions that Warmus was not acting reasonably in his use of force and that he could have or should have safely retreated without using force. He complains that these opinions amounted to opinion testimony on whether he was justified in using deadly force to defend himself. He argues that justification for deadly force was a question of fact for the jury and that the so-called expert testimony usurped this function.

A

{¶ 6} The elements of self-defense are that "(1) the defendant was not at fault in creating the violent situation, (2) the defendant had a bona fide belief that she was in imminent danger of death or great bodily harm and that her only means of escape was the use of force, and (3) that the defendant did not violate any duty to retreat or avoid the danger." *State v. Thomas (1997),* 77 Ohio St.3d 323, 326, 673 N.E.2d 1339, citing *State v. Williford* (1990), 49 Ohio St.3d 247, 249, 551 N.E.2d 1279.

{¶ 7} Ohio uses a subjective test to determine whether the defendant held a bona fide belief of imminent danger, death, or great bodily harm. The defendant acts in self-defense if he "honestly believes" that death or great bodily harm is imminent and that the only means of escape from such danger is in the use of deadly force. *State v. Sallie (1998)*, 81 Ohio St.3d 673, 676, 693 N.E.2d 267, citing *State v. Koss* (1990), 49 Ohio St.3d 213, 215, 551 N.E.2d 970.

{¶ 8} Though the defendant bears the burden of proving self-defense by a preponderance of the evidence, *State v. Jackson* (1986), 22 Ohio St.3d 281, 283, 490 N.E.2d 893, this does not mean that the state is barred from offering evidence to rebut the assertion of the affirmative defense in its case-in-chief. The state may offer testimony on the circumstances surrounding the events leading to the use of self-defense as a means of rebutting the defendant's assertion that he honestly believed the use of deadly force was in response to an imminent threat of death or great bodily harm. The question in this appeal is whether the state's witnesses may offer their *opinion* that the circumstances did not justify the defendant's use of deadly force.

{¶ 9} Although some of the witnesses were current or retired law-enforcement officers, none were offered as expert witnesses. An "expert" witness is allowed to testify to matters beyond the knowledge or experience possessed by lay persons if the witness has specialized knowledge or skill and the witness's testimony is based on reliable scientific, technical, or other specialized information. See Evid.R. 702. The law-enforcement officers were offered as fact witnesses because they actually witnessed the shooting. And the conclusions they drew about Warmus's state of mind at the time were not based on any specialized knowledge or training but were, like those of the civilian witnesses who gave similar testimony, premised on their perception of events as they witnessed them.

{¶ 10} A witness who is not an "expert" may testify to opinions, but is "limited to those opinions or inferences which are (1) rationally based on the perception of the witness and (2) helpful to a clear understanding of the witness' testimony or the determination of a fact in issue." See Evid.R. 701. We have interpreted Evid.R. 701 to allow a lay witness to express opinions that "merely summarize complex factual observations, which testimony is a composite of fact and opinion." *State v. Morris* (1982), 8 Ohio App.3d 12, 16, 455 N.E.2d 1352.

{¶ 11} Importantly, a lay witness cannot testify only to a "fact in issue" but can also testify to "an ultimate issue." Evid.R. 704 states that the testimony of a witness "in the form of an opinion or inference otherwise admissible is not objectionable solely because it embraces an ultimate issue to be decided by the trier of fact." Neither Evid.R. 701 nor 704 limits the subject matter of lay-opinion testimony, so "there is no theoretical prohibition against allowing lay witnesses to give their opinions as to the mental states of others." *United States v. Rea* (C.A.2, 1992), 958 F.2d 1206, 1214-1215 (construing analogous federal rules). For example, it has been stated that "[l]ay opinion of a witness as to a person's sanity is admissible if the witness is sufficiently acquainted with the person involved and has observed his conduct" and has personal knowledge "regarding the person's unusual, abnormal or bizarre conduct." *United States v. LeRoy* (C.A.10, 1991), 944 F.2d 787, 789. See also *State v. Nicholas* (July 30, 1986), 1st Dist. No. C-850713 (when an insanity defense was raised, lay opinion of a police officer concerning the defendant's mental state was appropriate on ability to perceive and respond to the display of authority of uniformed officers at the scene).

{¶ 12} Allowing an opinion as to whether a defendant had the required state of mind when acting in self-defense is not the same thing as allowing a lay witness to express an opinion as to what the witness would have done in similar circumstances. In *State v. Johnson*, 10th Dist. No. 02AP-373, 2002-Ohio-6957, the court held that it was improper for police officers who did not witness the crime to state that based on their training as law-enforcement officers and faced with the same facts and circumstances as presented in the case, they would not have shot another in an act of self-defense as claimed by the defendant. These statements were inadmissible as lay opinion because they were not helpful to the jury—neither police officer in *Johnson* actually witnessed the crime, so their conclusions based on the same facts as heard by the jury failed to meet the Evid.R. 701 test of aiding the trier of fact in deciding an ultimate issue. *Id.* at ¶ 36. *Johnson* held that the jury was just as capable of drawing conclusions from the evidence as were the police officers who did not actually witness the crime.

B

{¶ 13} Timothy Zvoncheck saw the altercation between Warmus and Williams as he pulled into the parking lot. He testified that 30 seconds elapsed from the time that Williams released Warmus from the headlock to when Warmus went to the trunk of his car to get the gun. When asked if "there was anything preventing the defendant from simply leaving the parking lot," Zvoncheck replied, "[N]o." The state went on to ask, "[A]fter [the victim] released the defendant from the headlock, did you believe that the defendant's life was in danger?" Over objection, Zvoncheck replied, "[N]o." Zvoncheck later reaffirmed that "I believe [Warmus] could have left the parking lot."

{¶ 14} Eric Livingstone parked his car in the parking lot and was walking to the arena when he saw the shooting. When asked by the state whether "there was anything preventing [Warmus] from simply leaving the parking lot," Livingstone answered, "[N]o." The state then asked, "[F]rom your vantage point as you were watching this happen, the initial fight when the defendant goes to his trunk, did you think in your opinion the defendant was in any danger?" Livingstone again replied "[N]o."

{¶ 15} Demetrius Jaggers was in the passenger seat of a car that was being held up in traffic near the parking lot. He saw Warmus and Williams wrestling until Williams put Warmus in a headlock. Williams released Warmus and started to walk to the parking attendant's booth. Jaggers saw Warmus reach into his trunk and pull out the gun. As Jaggers turned to tell his wife about the gun, he heard three shots and saw Williams on the ground. Jaggers said that Williams did not attempt to prevent Warmus from walking away after releasing him from the headlock. The state then asked, "[F]rom your observations, did you believe that the defendant had a reason to fear for his life?" Jaggers answered, "[N]o."

{¶ 16} Rebecca Beall testified that she pulled into the lot and saw two men wrestling, with one holding the other in a headlock. She saw Warmus's companion grab Williams's arm and tell him that she and Warmus would leave. Williams walked to the front of Beall's car while Warmus went to the trunk of his car and pulled out a gun. Beall's 12-year-old son asked, "[I]s that guy going to shoot him?" She covered her son for protection because he was on the same side of the car as Warmus and then saw Warmus shoot Williams. She saw Williams make no aggressive movements toward Warmus after releasing him from the headlock. The state asked her, "[F]rom your vantage point in this car where you are, did this incident with Mr. Warmus going to the trunk and reapproaching and shooting [Williams], and from your vantage point, did this have to happen?" She replied, "[N]o."

{¶ 17} Stuart Shoaff, a retired agent for the Federal Bureau of Investigation, was in his car waiting in traffic near the parking lot when he saw two individuals wrestling. He recounted that Williams had Warmus in a headlock and punched Warmus with "three little quick punches" that he said "didn't look very hard to me." The two men broke apart, and he saw Warmus walk to his car and get something from his trunk, although he could not see what it was. Warmus walked back toward Williams, and Shoaff heard three quick pops that he knew were gunshots. Shoaff said that Williams made no aggressive moves toward Warmus after Warmus started for the trunk of his car. The state then asked, "[D]id you believe that [Warmus] was in imminent fear of his life?" Shoaff replied, "[N]o."

{¶ 18} Cleveland police detective Lem Griffin investigated the murder. In describing the guidelines that the police had to follow before they could use deadly force, Griffin explained that it was a continuum in which the force used had to be proportionate to the threat. The state then asked, "[B]ased on your understanding of deadly force, would you be permitted to use deadly force in response to a real strong headlock?" Griffin replied, "[N]o." He further explained that before a police officer could fire a gun in response to danger, the officer had to be "not 100 percent sure, but sure enough that you feel there's an imminent threat on your life." Finally, in response to the question "[I]f someone is putting you in danger but you had the opportunity to safely leave, by law do you have to exercise that opportunity," Griffin replied, "[Y]ou should, sir."

C

{¶ 19} To the extent any witnesses who actually testified to seeing the altercation that led to the shooting gave their opinions that deadly force was unwarranted under the circumstances, those opinions were properly admitted under Evid.R. 701.

{¶ 20} Although Ohio uses a subjective standard for self-defense, the state is not barred from offering testimony to counter what the defendant "subjectively" claims to have believed at the time. In *Koss,* the Supreme Court approved a jury instruction on the reasonableness of a defendant's use of deadly force that stated: "In determining whether the Defendant had reasonable grounds for an honest belief that she was in imminent danger, you must put yourself in the position of the Defendant * * *. You must consider the conduct of [the assailant] and determine if such acts and words caused the Defendant to reasonably and honestly believe that she was about to be killed or to receive great bodily harm." 49 Ohio St.3d at 216. The Supreme Court later described this as "a combined subjective and objective test." *Thomas,* 77 Ohio St.3d at 330. This was consistent with previous decisions holding that a defendant's use of deadly force was to be viewed "on the grounds of the *bona fides* of defendant's belief, and reasonableness therefor, and whether, under the circumstances, he exercised a careful and proper use of his own faculties." *State v. Sheets* (1926), 115 Ohio St. 308, 310, 152 N.E. 664.

{¶ 21} The opinions were offered by eyewitnesses who actually saw events unfold. The opinions were thus helpful to giving the jury a clear understanding of whether Warmus could reasonably believe that deadly force was necessary and whether he exercised sound judgment in doing so. The court did not err by allowing the opinions into evidence.

D

{¶ 22} Detective Lem Griffin did not witness the shooting, so he could not give a lay opinion as to whether Warmus was justified in using deadly force. See *Johnson*, 10th Dist. No. 02AP-373, at ¶ 36. At no point in Griffin's testimony, however, did the court permit him to give his opinion on whether Warmus was justified in shooting Williams—the detective only testified to his opinion of when a *police officer* could use deadly force under similar circumstances and that he did not believe that a headlock constituted an imminent threat on one's life. This might seem like a fine distinction to make, but the state's line of questioning to this witness was prompted by an assertion made in defense counsel's opening statement:

{¶ 23} "The third thing that the evidence as a whole shows is that Mr. Warmus responded to the gun threat just as a police officer would have responded. We certainly expect that a police officer confronted with or confronting a suspect who has a gun pulled or even appears to be pointing a gun, we expect that police officer to shoot until the gun drops in self-defense, and that's what Matt did."

{¶ 24} By referring to what police officers would have done under similar circumstances, Warmus opened the door to testimony by police officers on how they would have responded in a similar situation. Though opening statements of counsel are not evidence, *State v. Frazier* (1995), 73 Ohio St.3d 323, 338, 652 N.E.2d 1000, they usually state the defense's theory of the case. Defense counsel told the jury that the evidence would show that Warmus "responded to the gun threat just as a police officer would have responded." The state was thus entitled to offer police testimony to rebut that assertion by offering evidence from police officers to the effect that officers acting in similar circumstances would not have resorted to deadly force. Cf. *State v. Haines*, 112 Ohio St.3d 393, 2006-Ohio-6711, 860 N.E.2d 91, ¶ 44 (when a victim's credibility is attacked during opening statements, the prosecution can present rehabilitative evidence during the state's case-in-chief); *United States v. Marin* (C.A.1, 2008), 523 F.3d 24, 31. Griffin's testimony viably countered Warmus's assertion by showing that he, as a police officer, would not in similar circumstances have used deadly force. There was nothing improper about either the state's question or the detective's answer.

II

{¶ 25} Warmus complains that the court erred by allowing a state expert to invade the province of the jury by testifying outside his area of expertise to an ultimate issue to be decided by the jury. The witness, an expert in audio and video technology, examined a recording of a 9-1-1 call made from the scene of the shooting. He testified that after optimizing the audio track for clarity, he could hear Warmus arguing with a bystander saying, "[I]f my gun's here, it's my fault." Warmus disagreed with the expert's conclusion, offering his own transcription of the 9-1-1 call in which he claimed he said, "[I]t's his gun. Why are you going to say it's my fault. Why?" He maintains that the jury should have been allowed to draw its own conclusions about what words were spoken.

{¶ 26} An audio recording made contemporaneously with events is always the best evidence of that event. *Harleysville Mut. Ins. Co. v. Santora* (1982), 3 Ohio App.3d 257, 260-261, 444 N.E.2d 1076. The court may in its discretion allow a transcript of an audio recording to be presented to the jury as a *listening aid* as long as there are no material differences between the recording and the transcript. *State v. Waddy* (1992), 63 Ohio St.3d 424, 445, 588 N.E.2d 819. When a party disputes the accuracy of a transcribed recording, a person who was present and who heard the conversation in question at the time the recording was made may testify for the purpose of clarifying inaudible or unintelligible portions of the tape. See Evid.R. 602; *State v. Skatzes*, 104 Ohio St.3d 195, 2004-Ohio-6391, 819 N.E.2d 215, ¶ 100; *State v. Gearo* (July 1, 1993), 8th Dist. No. 63056.

{¶ 27} The state's expert was not present at the scene when the 9-1-1 call was made. Nevertheless, courts have allowed expert testimony to clarify garbled or unintelligible audio recordings. In *State v. Williams* (1983), 4 Ohio St.3d 53, 446 N.E.2d 444, the syllabus states:

{¶ 28} "The Ohio Rules of Evidence establish adequate preconditions for admissibility of expert testimony, such as spectrographic voice analysis. It is within the sound discretion of the state's judiciary, on a case by case basis, to decide whether such testimony is relevant and will assist the trier of fact to understand the evidence or to determine a fact in issue."

{¶ 29} The state's expert testified that he enhanced the audio on the recording of the 9-1-1 call, and Warmus does not contest the manner in which the 9-1-1 call was enhanced. He does, however, contest the expert's interpretation of the words spoken. He claims that expertise in filtering audio recordings is not the same thing as expertise in being able to decipher words. He argues that the expert failed to explain how his training and background gave him the ability to interpret the words spoken on the audio recording.

{¶ 30} The court should not have allowed the expert to render an opinion as to what words he heard spoken on the tape. Because Warmus and the state fundamentally disagreed on what words were spoken, this became a factual issue for the jury to resolve. The court should have instructed the jury that the interpretation of what words were spoken on the 9-1-1 tape was for it to decide and that the audio recording was the best evidence.

{¶ 31} Despite this error, we cannot say that it was prejudicial. Having independently reviewed the audio of the 9-1-1 call, we cannot confidently say that either interpretation by the state or defense was completely accurate. The jury heard the audio and was able to compare it to the transcriptions made by both parties and weigh them against the actual recording. Moreover, to the extent that the jury may have given undue weight to the expert's conclusions, that error was certainly harmless given the overwhelming evidence of Warmus's guilt. Even had the court excluded the expert's testimony, there is no probability that the outcome of the trial would have been different.

III

{¶ 32} The coroner testified that Williams had been shot twice in the abdomen and once behind the left ear. The state later made several references to the shot behind the ear as an "execution-style" shooting; for example, asking Warmus during cross-examination: "Where did you learn that type of military style execution?" Warmus complains that continued references to the shot behind the victim's ear as an execution-style shot constituted prosecutorial misconduct.

A

{¶ 33} We analyze claims of prosecutorial misconduct by determining "whether remarks were improper and, if so, whether they prejudicially affected substantial rights of the accused." *State v. Jones* (2000), 90 Ohio St.3d 403, 420, 739 N.E.2d 300, citing *State v. Smith* (1984), 14 Ohio St.3d 13, 14, 470 N.E.2d 883. Ultimately, this means we must determine whether "the conduct complained of deprived the defendant of a fair trial." *State v. Fears* (1999), 86 Ohio St.3d 329, 332, 715 N.E.2d 136, citing *State v. Apanovitch* (1987), 33 Ohio St.3d 19, 24, 514 N.E.2d 394.

B

{¶ 34} One of Warmus's gunshots struck Williams behind the left ear, leaving what the coroner described as a "neurologically incapacitating wound" that severed the victim's brainstem. Both the coroner and trace-evidence expert found stippling (or gunshot residue) near the wound, indicating that Warmus had fired the gun from a distance of between 12 and 24 inches from the victim. Although Warmus claimed that he had been aiming only at the victim's gun, there was evidence that the three shots he fired were "two initial shots, a pause, and then a final third shot." The gunshots to the abdomen were located no more than a quarter of an inch apart, implying that they had been fired in quick succession. The third shot thus could have corresponded to the bullet wound near the victim's ear.

{¶ 35} Given the entry point of the bullet at the back of the head and the close proximity from which the gun was fired, the state's remarks about an execution-style shooting were not improper. Courts have previously described similar shootings as "execution-style." For example, in *State v. Hale*, 119 Ohio St.3d 118, 2008-Ohio-3426, 892 N.E.2d 864, the Supreme Court described four gunshots, at least three of which were "at close range, to the head" as an "execution-style" murder. Id. at ¶ 139. See also *State v. Palmer (1997)*, 80 Ohio St.3d 543, 570, 687 N.E.2d 685 (describing as "execution-style manner" shots fired on either side of the victim's head into his temple).

{¶ 36} Assuming that the shot to the back of the victim's head followed the two quick shots to the abdomen, it could be inferred that there was a slight pause as the victim's body twisted from the initial shots. This pause, however momentary, could have allowed Warmus to aim his gun at the back of the victim's head. Under this scenario, Warmus could accurately be said to have fired a "kill" shot or have engaged in an execution-style shooting. The state did not commit misconduct by so characterizing the shot to the back of the head.

C

{¶ 37} Warmus next argues that the state committed misconduct by creating the impression that he illegally transported his firearm, despite not being charged with that offense. The state argues that this was other-acts evidence under Evid.R. 404(B) and properly introduced to counter Warmus's assertion on direct examination that the "most trouble" he had been in before the shooting was "a speeding ticket."

{¶ 38} Questions about Warmus's transportation of a loaded firearm did not reasonably fall within any exception to the prohibition on other-acts evidence under Evid.R. 404(B). They did not touch on "proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." The state cites no exception for admissibility under the rule, nor can we discern any plausible basis for application of the rule.

{¶ 39} The questions were likewise inadmissible to impeach Warmus on his assertion that he led a law-abiding life. R.C. 2923.16(B) defines the offense of improperly handling firearms in a motor vehicle and states: "No person shall knowingly transport or have a loaded firearm in a motor vehicle in such a manner that the firearm is accessible to the operator or any passenger without leaving the vehicle." Warmus testified that he took firearms seriously and that he received training in firearm use and handling but was unaware that it was illegal to transport a loaded firearm in a vehicle when that firearm was within reach of the driver or passenger. The state now claims that "it did not create the impression that the Appellant illegally transported a firearm in his vehicle," but what happened at trial belies this claim. The state asked Warmus whether he was familiar with R.C. 2923.16(B) and later said, "[Y]ou had no idea that it was illegal to convey a loaded weapon?" Finally, the state characterized Warmus's act of transporting a loaded gun inside the car as "committing a crime by conveying it." These questions created the impression that Warmus had broken the law, as the phrase "committing a crime" allows for no other reasonable conclusion but that Warmus illegally transported a firearm.

{¶ 40} Despite the error in the state's questions, we cannot find them so prejudicial that they deprived Warmus of a fair trial. Warmus conceded that he shot the victim, so questions about whether he illegally transported his firearm paled by comparison. We do not think it is remotely possible that questions about Warmus's illegally transporting the gun somehow swayed the jury into rejecting the self-defense claim. Any misconduct by the state was thus harmless beyond a doubt.

D

{¶ 41} Warmus raises other claims of prosecutorial misconduct but does not separately argue why these claimed instances deprived him of a fair trial. This constitutes a failure under App.R. 16(A)(7), which requires the appellant to raise an argument "with respect to each assignment of error presented for review and the reasons in support of the contentions."

IV

{¶ 42} The fourth assignment of error complains that R.C. 2901.05(A), which requires the defendant to bear the burden of proof when raising a self-defense claim, is unconstitutional. We assume that Warmus raises this assignment only to preserve it for further federal review because the United States Supreme Court approved R.C. 2901.05(A) in *Martin v. Ohio* (1987), 480 U.S. 228, 233-234, 107 S.Ct. 1098, 94 L.Ed.2d 267. As an inferior court to the United States Supreme Court, we have no ability to overturn *Martin*.

{¶ 43} Warmus argues that *Martin* should be reviewed in light of the United States Supreme Court's decision in *Dist. of Columbia v. Heller* (2008), 554 U.S. 570, 128 S.Ct. 2783, 171 L.Ed.2d 637, in which the Supreme Court held that the Second Amendment to the United States Constitution conferred an individual right to keep and bear arms, that statutes banning handgun possession in the home violated the Second Amendment, and that any statute containing a prohibition against rendering any lawful firearm in the home operable for purposes of immediate self-defense violated the Second Amendment. *Heller* also held that the right to self-defense was a "central component" to the right to bear arms, id. at 599 (emphasis omitted), so Warmus argues that placing the burden of proof on a person claiming to act in self-defense runs counter to the purpose of the Second Amendment.

{¶ 44} Courts, in light of *Heller*, have been analyzing Second Amendment claims under a two-prong approach. For example, in *United States v. Marzzarella* (C.A.3, 2010), 614 F.3d 85, the United States Court of Appeals for the Third Circuit stated:

{¶ 45} "As we read *Heller*, it suggests a two-pronged approach to Second Amendment challenges. First, we ask whether the challenged law imposes a burden on conduct falling within the scope of the Second Amendment's guarantee. *Cf. United States v. Stevens*, 533 F.3d 218, 233 (C.A.3, 2008), *aff'd* ___ U.S. ___, 130 S.Ct. 1577, 176 L.Ed.2d 435 (recognizing the preliminary issue in a First Amendment challenge is whether the speech at issue is protected or unprotected). If [the law] does not [impose such a burden], our inquiry is complete. If it does, we evaluate the law under some form of means-end scrutiny. If the law passes muster under that standard, it is constitutional. If it fails, it is invalid." (Footnote omitted.) Id. at 89. See also *United States v. Chester* (C.A.4, 2010), 628 F.3d 673, 680 (a "two-part approach to Second Amendment claims seems appropriate under *Heller*"); *United States v. Reese* (C.A.10, 2010), 627 F.3d 792, 800-801 (same); *United States v. Skoien* (C.A.7, 2010), 614 F.3d 638, 641-642 (en banc).

{¶ 46} Nothing in R.C. 2901.05(A) imposes a burden on conduct protected by the Second Amendment. It is important to understand the distinction between the right to carry a firearm (which Warmus lawfully exercised at the time of the shooting) and the limits the law places on how one can defend oneself. At the time of the amendment's framing, prevailing attitudes on self-defense required a duty to "retreat to the wall" in cases that did not involve the defense of one's home. See *Erwin v. State* (1876), 29 Ohio St. 186, 194. While the duty to retreat has been rejected by many states in modern times, see Forell, What's Reasonable?: Self-Defense and Mistake in Criminal and Tort Law (Winter 2010), 14 Lewis & Clark L.Rev. 1401, 1403, fn. 5, it undeniably existed when the Second Amendment was adopted. That Ohio continues to require a duty to retreat before the use of deadly force in self-defense has no impact on Warmus's right to possess a firearm.

{¶ 47} The Ninth Appellate District recently addressed and rejected this same argument in *State v. Geter-Grey*, 9th App. No. 25374, 2011-Ohio-1779, finding that *Heller* "did not in any way modify the underlying right to self-defense." Id. at ¶ 26. We agree, as nothing in *Heller* purports to alter the way the states have defined self-defense. It recognizes there is a right to self-defense and, at best, stands for the proposition that whenever the use of deadly force is justified when acting in self-defense, a person can use "arms," including firearms.

V

{¶ 48} For his fifth assignment of error, Warmus complains that the court erred by failing to conduct a hearing pursuant to *Remmer v. United States* (1954), 347 U.S. 227, 74 S.Ct. 450, 98 L.Ed. 654, after the trial judge told the parties that he gave a juror a ride to the courthouse during the trial.

{¶ 49} The judge explained on the record that while driving to the courthouse he received a telephone call informing him that an alternate juror was unable to find transportation to the courthouse. Knowing that the defense was presenting expert witnesses with a very tight window of availability and that one juror was about to give birth to a child, the judge decided to meet the juror and give him a ride to the courthouse. The judge said that he dropped the juror off in front of the Justice Center before proceeding to park his car. The court waited until the two expert witnesses testified before informing the parties. The court assured the parties that "at no time did I have any conversation with this juror about any aspect of this case. We didn't mention the trial, no Matthew Warmus or any witnesses or anything with this case at all." The court told the parties that "I will permit you all to think about it and motion it if you wish" and further told them that he would "permit you to depose the juror at the conclusion of the litigation if you wish." Neither party objected nor did Warmus depose the juror at the end of trial.

{¶ 50} In *Remmer*, the United States Supreme Court stated:

{¶ 51} "In a criminal case, any private communication, contact, or tampering directly or indirectly, with a juror during a trial about the matter pending before the jury is, for obvious reasons, deemed presumptively prejudicial, if not made in pursuance of known rules of the court and the instructions and directions of the court made during the trial, with full knowledge of the parties. The presumption is not conclusive, but the burden rests heavily upon the Government to establish, after notice to and hearing of the defendant, that such contact with the juror was harmless to the defendant." Id. at 229.

{¶ 52} Nonetheless, "due process does not require a new trial every time a juror has been placed in a potentially compromising situation. * * * Due process means a jury capable and willing to decide the case solely on the evidence before it, and a trial judge ever watchful to prevent prejudicial occurrences and to determine the effect of such occurrences when they happen. Such determinations may properly be made at a hearing like that ordered in *Remmer* * * *." *Smith v. Phillips* (1982), 455 U.S. 209, 217, 102 S.Ct. 940, 71 L.Ed.2d 78.

{¶ 53} Warmus did not object to the court's actions when given a clear opportunity to do so, therefore he has forfeited the right to argue anything but plain error on appeal. See *State v. Lewers*, 5th Dist. No. 2009-CA-00289, 2010-Ohio-5336, ¶ 78. We find no plain error. *Remmer* creates a presumption that any contact or communication about "the matter pending before the jury" is prejudicial. The judge clearly understood this rule of law and made it clear to the parties that he and the juror did not discuss the case—they spoke about a football game and other sports. It may have been better for the court to arrange for someone else to drive the juror to the courthouse, but the judge took pains to prevent any conversation about the trial. Moreover, it is difficult for Warmus to argue that he was prejudiced by the court's actions when those actions undeniably assisted the defense—one of Warmus's experts could only testify between 9 a.m. and 12 p.m. that day. Had the court been forced to postpone trial for a day or even a few hours, the expert would not have been available. By giving the juror a ride, the court ensured that Warmus could offer the expert's testimony.

VI

{¶ 54} During the direct examination of a police officer, who was one of the first law-enforcement officials to arrive on the scene, the officer testified that he heard Warmus's companion say, "I knew bad things were going to happen." The court allowed the statement into evidence as an excited utterance. Warmus argues that the companion's statement did not meet the requirements for being an excited utterance because the statement was too remote in time to the startling event.

A

{¶ 55} Although hearsay, excited utterances are excepted from the hearsay rule under Evid.R. 803(2) as long as the statement relates to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition. In *State v. Duncan* (1978), 53 Ohio St.2d 215, 373

N.E.2d 1234, the Ohio Supreme Court established a four-part test to determine whether a hearsay statement is admissible under Evid.R. 803(2): the proponent of the statement must establish that (1) there was an event startling enough to produce a nervous excitement in the declarant, (2) the statement must have been made while under the stress of excitement caused by the event, (3) the statement must relate to the startling event, and (4) the declarant must have had an opportunity to personally observe the startling event. Id. at paragraph one of the syllabus, approving and following *Potter v. Baker* (1955), 162 Ohio St. 488, 124 N.E.2d 140, paragraph two of the syllabus. As with other kinds of evidentiary rulings when the court is required to make a factual finding as a predicate for admitting evidence, the court's finding that a statement qualifies as an excited utterance is within its discretion, reviewable only for an abuse of that discretion. *State v. Graham* (1979), 58 Ohio St.2d 350, 390 N.E.2d 805.

{¶ 56} The victim's shooting was a startling event to Warmus's companion. Her statement related to the shooting, and she personally witnessed the shooting. The only point of contention is the second element—whether the statement had been made while she was under the stress of excitement caused by the event.

{¶ 57} The evidence showed that the police responded to the scene within moments of the shooting—Warmus himself testified that he was still on the telephone with the 9-1-1 operator when the police arrived. The officer who related the companion's statement said that he looked into the open trunk of

Warmus's car, saw the gun, and moved to secure it. At the same time, Warmus's companion tried to retrieve her purse from the trunk. The officer "yelled at [her] not to go in the trunk," at which time she "fell to pieces," collapsed on the ground beside the trunk, and said words to the effect that she knew "when [Warmus] went to the trunk of the car that bad things were going to happen." The officer said that by "falling to pieces" he meant that she became "hysterical" when told that she could not retrieve her purse from the trunk of Warmus's car.

{¶ 58} We cannot find that the court's decision to admit the companion's statement as an excited utterance was an abuse of discretion. The evidence showed that police responded almost immediately after the shooting and the court could rationally have concluded that the companion was still in an excited condition after having witnessed a shooting death just moments earlier. As Warmus concedes, there are no rigid rules for determining what length of time constitutes too much time for the kind of reflection that would qualify a statement as spontaneous. *Duncan*, 53 Ohio St.2d at 219-220. Given the "hysterical" nature of the companion's response to being told not to retrieve her purse, spontaneity seemed assured, as it was unlikely that her comment had been the product of conscious thought. Instead, it was an organic comment, made under the stress of having witnessed Warmus shoot a parking lot attendant over a $10 dispute, and thus one the trustworthiness of which seemed unassailable. The court was acting well within its discretion by allowing the companion's statement into evidence as an excited utterance.

B

{¶ 59} Warmus also complains that even if the statement qualified as a hearsay exception, the state could not use it as extrinsic evidence to impeach the companion, who earlier denied making the statement.

{¶ 60} Extrinsic evidence is inadmissible to impeach a witness on a collateral matter having no bearing on the issue to be decided at trial. See *State v. Smith*, 10th Dist. No. 04AP-726, 2005-Ohio-1765, ¶ 39. Extrinsic evidence may be admissible to impeach a witness under Evid.R. 616(C), but only if the extrinsic evidence is permitted by Evid.R. 608(A), 609, 613, 616(A) or (B), or 706, or by the common law of impeachment not in conflict with the Rules of Evidence. *State v. Spence*, 10th Dist. No. 05AP-891, 2006-Ohio-6257, ¶ 62.

{¶ 61} But we need not decide whether the state improperly used the officer's testimony to impeach the companion because while "portions of testimony may be inadmissible for some purposes, they may also be found admissible for other purposes." *Buck v. Dayton Heidelberg Distrib. Co., Inc*. (Nov. 29, 1983), 2d Dist. No. 8067. When the state offered the officer's testimony, Warmus objected on impeachment grounds, but the state claimed that it was offering the testimony as an excited utterance. The court specifically admitted the statement as an excited utterance, a decision that we have found was not an abuse of discretion. Because the statement was admissible for that purpose, it is immaterial whether it violated any other rules of evidence.

VII

{¶ 62} In his seventh assignment of error, Warmus complains of several instances in which he claims the court unfairly restricted his ability to cross-examine numerous state witnesses. These "numerous" state witnesses were, in fact, only two in number: Eric Livingstone and Detective Lem Griffin. We restrict our discussion accordingly.

A

{¶ 63} The Fifth and Sixth Amendments provide a criminal defendant the right to present a defense by compelling the attendance and presenting the testimony of witnesses for the defense. *Washington v. Texas* (1967), 388 U.S. 14, 18-19, 87 S.Ct. 1920, 18 L.Ed.2d 1019. In addition, "[t]he necessary ingredients of the [Fifth and] Fourteenth Amendment[s'] guarantee that no one shall be deprived of liberty without due process of law include a right to be heard and to offer testimony." *Rock v. Arkansas* (1987), 483 U.S. 44, 51, 107 S.Ct. 2704, 97 L.Ed.2d 37.

{¶ 64} The right to present a criminal defense, however, is not absolute. *United States v. Valenzuela-Bernal* (1982), 458 U.S. 858, 875, 102 S.Ct. 3440, 73 L.Ed.2d 1193. The defendant is entitled to only "an *opportunity* for effective cross-examination, not cross-examination that is effective in whatever way, and to whatever extent, the defense might wish." *Delaware v. Fensterer* (1985), 474 U.S. 15, 20, 106 S.Ct. 292, 88 L.Ed.2d 15. Accordingly, the court has "wide latitude insofar as the Confrontation Clause is concerned to impose reasonable limits on such cross-examination based on concerns about, among other things, harassment, prejudice, confusion of the issues, the witness' safety, or interrogation that is repetitive or only marginally relevant." *Delaware v. Van Arsdall* (1986), 475 U.S. 673, 679, 106 S.Ct. 1431, 89 L.Ed.2d 674. To establish a Confrontation Clause violation, the defendant must show that he was "prohibited from engaging in otherwise appropriate cross-examination" and "[a] reasonable jury might have received a significantly different impression of [the witness's] credibility had [the defendant's] counsel been permitted to pursue his proposed line of cross-examination." Id. at 680.

B

{¶ 65} Livingstone gave his opinion that Warmus was not in any danger at the time he retrieved his gun and shot the victim. On cross-examination, defense counsel asked: "Now, from your vantage point, when you say this all happened and you say that you never saw [the victim] pull or point a gun, you must be surprised ultimately to find out the [the victim] actually had a gun out before he was shot?" The court sustained the state's objection and ordered defense counsel to rephrase the question. Defense counsel then asked, "[W]ere you surprised to find out ultimately that [the victim] in fact had a gun out before he was shot?" The state again objected. At the sidebar, the court told defense counsel that he was mischaracterizing prior testimony by an emergency medical technician. The court told defense counsel: "I'll permit you to ask do you know if a gun was found, do you know when the gun came out, do you know if the gun was out before he was shot, but to say that the EMS guy said the gun was out before he was shot is not technically accurate." Defense counsel told the court that he had the right to ask any question on cross-examination and that he was "not tying it into what the EMS person said." Defense counsel admitted to the court that up to that point in the trial, no person had testified to seeing the victim having "a gun out."

{¶ 66} As defense counsel was forced to concede, there had been no testimony prior to that point in trial where any witness claimed to have seen Williams holding a gun. During questioning of the emergency medical technician who treated the victim on the scene, the technician responded to the statement, "[B]ut you definitely recall seeing a gun near [the victim's] head on the pavement" by saying, "I did not see a weapon." So any question posed to Livingstone that presumed that the victim "actually had a gun out before he was shot" had no basis in fact. The court did not abuse its discretion by sustaining the state's objection to it because the question had the potential to confuse the jury by injecting facts not in the record. Moreover, Livingstone's testimony that Warmus could have safely retreated without shooting Williams was premised on his opinion that he did not see Williams holding a gun and that Warmus was in no danger from Williams. Even had Livingstone been aware that the victim possessed (but did not display) a gun, that fact would have been immaterial to his conclusion that Warmus was not in any danger at the time he went to his trunk and retrieved his gun.

C

{¶ 67} During Detective Lem Griffin's testimony, he gave his understanding of the circumstances under which a police officer would be justified in using deadly force. On cross-examination, Griffin acknowledged that he was not a lawyer, and defense counsel asked, "[S]o the legal opinions you just expressed are not the opinions of a lawyer." The court sustained the state's objection.

{¶ 68} The court did not abuse its discretion by sustaining the objection. Griffin's opinions were based on questions premised on the idea of how a police officer would have responded in the same situation—a premise first put forth by Warmus in opening statement when he claimed that he responded to the victim's threat in the same way a police officer would have responded. Griffin's opinion was thus grounded on his personal experience as a police officer, not as an attorney, a fact he readily acknowledged in his testimony. Defense counsel's question was thus misleading and arguably intended to confuse the jury on issues that were not relevant. In any event, by conceding that he was not an attorney, Griffin arguably answered the defense's question about whether his opinions were that of a lawyer. Warmus can show no prejudice.

VIII

{¶ 69} Warmus next complains that the court gave an inaccurate jury instruction on self-defense.

{¶ 70} Before closing argument, the court gave this preliminary instruction to the jury:

{¶ 71} "If you find that the *State* proved beyond a reasonable doubt all of the essential elements of the offense of self-defense against the danger of death or great bodily harm, and if you further find that the defendant failed to prove by a preponderance of the evidence the defense of self-defense, then your verdict must be guilty, so on the other hand, if you find the *State* failed to prove beyond a reasonable doubt any one of the essential elements of the offense of self-defense against danger of death or great bodily harm, or if you find that the defendant proved by a preponderance of the evidence the defense of self-defense, then you must find the defendant not guilty." (Emphasis added.)

{¶ 72} Warmus complains, and the state agrees, that the court erroneously transposed the word "state" for "defendant" in the instruction, thus creating confusion as to the proper law the jury was to apply in its deliberations. Importantly, however, Warmus did not object to the court's instruction. Crim.R. 30 prohibits an appealing party from assigning as error the giving of a jury instruction unless a party objected to the instruction before the jury retired to consider its verdict. When there is a failure to object as required by Crim.R. 30, the allegedly faulty instruction is subject to review only for plain error. *State v. Adams* (1980), 62 Ohio St.2d 151, 154, 404 N.E.2d 144. Plain error exists only if "the outcome of the trial clearly would have been otherwise." *State v. Long* (1978), 53 Ohio St.2d 91, 372 N.E.2d 804, paragraph two of the syllabus.

{¶ 73} Although the court's preliminary instruction erroneously told the jury that the state bore the burden of proving self-defense, the court made it clear to the jury that written instructions would be provided for their use and stated, "[Y]ou'll be able to refer to it and review it as often as you like, okay?" Those written instructions correctly stated that Warmus bore the burden of proving self-defense by a preponderance of the evidence. Given the strength of the evidence against Warmus's claim of self-defense, we have no reason to believe that the jury based its conclusion on an erroneous transposition about who bore the burden of proof.

IX

{¶ 74} The ninth assignment of error is that counsel was ineffective for failing to request a *Remmer* hearing and for failing to object to the jury instruction regarding the burden of proof on self-defense.

A

{¶ 75} A claim of ineffective assistance of counsel requires a defendant to show that (1) the performance of defense counsel was seriously flawed and deficient and (2) the result of the defendant's trial or legal proceeding would have been different had defense counsel provided proper representation. *Strickland v. Washington* (1984), 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674. This analysis requires two distinct lines of inquiry. First, we determine "whether there has been a substantial violation of any of defense counsel's essential duties to his client." *State v. Bradley* (1989), 42 Ohio St.3d 136, 538 N.E.2d 373, paragraph two of the syllabus. When making this inquiry, we presume that licensed counsel has performed in an ethical and competent manner. *Vaughn v. Maxwell* (1965), 2 Ohio St.2d 299, 209 N.E.2d 164. Second, we determine whether "the defense was prejudiced by counsel's ineffectiveness." *Bradley*, 42 Ohio St.3d 136, 141-142, 538 N.E.2d 373. Prejudice requires a showing to a reasonable probability that but for counsel's unprofessional errors, the result of the proceeding would have been different. Id. at paragraph three of the syllabus.

B

{¶ 76} Although counsel did not request a *Remmer* hearing upon learning that the trial judge gave an alternate juror a ride to the courthouse, we stated in our discussion of the fifth assignment of error that a *Remmer* hearing was unnecessary because the judge made it clear that he did not discuss anything about the case with the juror. The judge explained that he studiously avoided any conversation relating to the case. Defense counsel had no reason to doubt the court's recapitulation of the conversation and offered no objection to the way the court handled the matter. Defense counsel thus exercised his judgment that no impropriety occurred. Even were we of a mind to second-guess this decision, nothing on the record suggests to us that the court's explanation was so lacking in veracity that a full *Remmer* hearing was necessary.

C

{¶ 77} Regarding the preliminary jury instruction on self-defense, we agreed that the court erred by transposing the word "state" for "defendant" when assigning the burden of proving self-defense. Counsel had an obligation to object to this instruction under Crim.R. 30 and failed to do so, thus violating an essential duty.

{¶ 78} We nonetheless find that even had the court correctly stated the burden of proof in its preliminary instructions to the jury, there is no reasonable probability that the outcome of the trial would have been different. The evidence overwhelmingly showed that Warmus could have safely retreated without resorting to deadly force. Indeed, while the victim did possess a firearm, none of the many eyewitnesses to the shooting saw that weapon. At best, one witness, who worked with the victim, said only that he "tried to reach for his gun" at the time he was shot but that he did so only because Warmus had first pulled out his own gun.

{¶ 79} Warmus was the only witness to say that the victim pulled the gun first, a claim made in self-interest and against the great weight of the testimony. Every other witness agreed that the fight had ended and that the victim had turned away from Warmus and resumed tending to parking-lot customers. Warmus could have easily and safely retreated without resorting to deadly force. And if Williams had pulled a gun first, it is unclear how Warmus thought it believable that he could walk to his car, retrieve his gun, and return to Williams while aiming a gun at him. If Williams had manifested an immediate intention to shoot Warmus, surely Warmus would not have risked walking to the trunk of his car to get a gun, all the while being held at gunpoint himself. The jury obviously found Warmus's version of events unbelievable.

{¶ 80} Finally, to the extent that the court erred in instructing the jury on the burden of proof, it is difficult to see how that error was prejudicial to Warmus. In his fourth assignment of error he complained that Ohio's statutory requirement that a defendant bear the burden of proof on self-defense was unconstitutional because the burden should rest with the state.

Assuming that the jury did put the burden of proving self-defense on the state, it inadvertently gave Warmus what he wished for all along. Even if the instruction did confuse the jury, that confusion would undoubtedly have worked in Warmus's favor, as it might have caused the jury to split on whether he or the state proved the elements of self-defense. He cannot now complain that he was prejudiced by the court's error, and we find no basis for finding that the outcome of the trial would have been different had the jury been correctly instructed.

X

{¶ 81} The tenth assignment of error is that cumulative errors deprived Warmus of a right to a fair trial.

{¶ 82} The cumulative-error doctrine states that "a conviction will be reversed where the cumulative effect of errors in a trial deprives a defendant of the constitutional right to a fair trial even though each of the numerous instances of trial court error does not individually constitute cause for reversal." *State v. Garner (1995)*, 74 Ohio St.3d 49, 64, 656 N.E.2d 623. However, "'[t]here can be no such thing as an error-free, perfect trial, and * * * the Constitution does not guarantee such a trial.'" *State v. Hill* (1996), 75 Ohio St.3d 195, 212, 661 N.E.2d 1068, quoting *United States v. Hasting* (1983), 461 U.S. 499, 508-509, 103 S.Ct. 1974, 76 L.Ed.2d 96.

{¶ 83} As we have previously discussed, the only demonstrable errors we have found to this point are the court's decision to allow an audio expert to testify to his interpretation of words spoken on an audio recording of a 9-1-1 call, the state's misconduct in questioning Warmus about the illegal transportation of a firearm, and the court's inadvertent transposition of which party bore the burden of proving self-defense. These errors neither adversely affected the outcome of trial nor cumulatively affected Warmus's right to a fair trial.

XI

{¶ 84} Finally, Warmus complains that the court erred as a matter of law by imposing a fine of $20,000, claiming that under R.C. 2929.02(B)(4) the maximum allowable fine for murder is $15,000. The state concedes the court's error, and we agree. We therefore sustain this assignment of error and remand with instructions for the court to modify the fine to $15,000.

{¶ 85} This cause is affirmed in part, reversed in part, and remanded for proceedings consistent with this opinion.

Judgment affirmed in part

and reversed in part,

and cause remanded.

CONWAY COONEY and GALLAGHER, JJ., concur.