

IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

U N I T E D S T A T E S,) RESPONSE BRIEF ON BEHALF OF
 Appellee) APPELLEE
))
 v.) Crim. App. Dkt. No. 20050703
))
Sergeant (E-5)) **USCA Dkt. No. 11-0143/AR**
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United States Army,))
 Appellant)

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TO THE HONORABLE, THE JUDGES OF THE
UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES

Granted Issue

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DEFENSE WERE INCORRECT AND INCOMPLETE, AND IF SO,
WHETHER THE LOWER COURT ERRED IN CONCLUDING THAT
THIS CONSTITUTED HARMLESS ERROR.

Statement of Statutory Jurisdiction

The United States Army Court of Criminal Appeals (Army Court) reviewed this case pursuant to Article 66, Uniform Code of Military Justice (UCMJ).¹ This Court has jurisdiction under Article 67(a)(3), UCMJ,² because it granted appellant's petition for review on the foregoing issue.

Statement of the Case

A panel of officer and enlisted members, sitting as a general court-martial, tried appellant on May 2, May 12, May 26, and June 6-11, 2005, and on June 9, 2006. Appellant was convicted, contrary to his pleas, of two specifications of premeditated murder in violation of Article 118, UCMJ.³ In addition, appellant was convicted, pursuant to his pleas, of unauthorized absence, failing to obey a lawful order, wrongful possession of marijuana with intent to distribute, wrongful distribution of methamphetamines, wrongful use of

¹ 10 U.S.C. § 866.

² 10 U.S.C. § 867(a).

³ 10 U.S.C. § 918.

methamphetamines, and adultery in violation of Articles 86, 92, 112a, and 134, UCMJ.⁴

The panel sentenced appellant to confinement for life without eligibility for parole, reduction to the rank of Private (E-1), and a dishonorable discharge.⁵ The convening authority approved the adjudged sentence.⁶

On September 29, 2010, the Army Court affirmed the findings and sentence in a memorandum opinion.⁷ On May 25, 2011, this Honorable Court granted appellant's petition for review on the issue presented above.⁸

Statement of Facts

Appellee adopts appellant's statement of facts, except that portion which asserts Staff Sergeant (SSG) Matthew Werner was on one or both knees trying to stab Sergeant (SGT) Eric Colvin when appellant shot SSG Werner to death. However, the government agrees that appellant presented this version of events at trial.⁹ Additionally, the following facts are material to the issue presented to this Honorable Court.

⁴ 10 U.S.C. §§ 886, 892, 912a, and 934 (2004).

⁵ J.A. at 835.

⁶ J.A. at 838. Appellant was credited with 271 days against his sentence to confinement.

⁷ *United States v. Stanley*, Army No. 20050703 (Sep. 29, 2010) (mem.).

⁸ *United States v. Stanley*, USCA Dkt. No. 11-0143/AR (Mar 31, 2011) (Order Granting Review).

⁹ Appellant's Br. 16.

Appellant is an infantryman trained in rifle combat.¹⁰ At his murder trial, appellant testified that SSG Werner threatened to kill him on multiple occasions before appellant ultimately killed SSG Werner.¹¹ When asked about SSG Werner's threats, appellant testified, "[A]t that point, I took that threat as extremely real."¹² After returning to his farmhouse turned meth-factory, appellant heard SSG Werner and Specialist (SPC) Hymer arrive, so he hid in the closet known as the "arms room."¹³ Appellant could have hidden in the adjoining bedroom's closet which did not contain loaded firearms.¹⁴

While hiding in the arms room, appellant testified that he heard SGT Colvin yell for help.¹⁵ At that point, appellant exited the arms room, "immediately pointed the gun at [SPC] Hymer, and [] told him, 'Don't move.'"¹⁶ Appellant testified that he then "held him at gunpoint."

SGT Colvin testified that appellant brought SPC Hymer into the kitchen, and that appellant had a pistol in one hand and a rifle in the other.¹⁷ Appellant, however, testified that he had already left the rifle in the kitchen corner leading into the

¹⁰ J.A. at 447, 452-53.

¹¹ J.A. at 426, 433.

¹² J.A. at 428.

¹³ J.A. at 442-43.

¹⁴ J.A. at 477.

¹⁵ J.A. at 445.

¹⁶ J.A. at 445.

¹⁷ J.A. at 211-12.

dining room.¹⁸ Appellant testified that once he brought SPC Hymer into the kitchen, SGT Colvin was bleeding and screamed, "He fucking stabbed me, he fucking stabbed me" and asked appellant to shoot SSG Werner's hands.¹⁹ In the kitchen, appellant searched SPC Hymer at gunpoint, pulling his pants down to mid-thigh and making him sit Indian-style on the floor.²⁰ Appellant testified that he then turned his back to SPC Hymer as he searched SSG Werner.²¹ SGT Colvin testified that appellant was stepping away backwards and tripped on SGT Colvin's rifle lying on the floor.²² SGT Colvin further testified that appellant picked up the rifle, an 8mm Mauser, and threw it on the porch.²³

Shortly thereafter, SPC Hymer grabbed that rifle, pointed it, and pulled the trigger, but it "clicked" and did not fire.²⁴ Appellant testified that he tried to run out the back door away from SPC Hymer, then made a hard left onto the porch.²⁵ Appellant testified that he looked over his right shoulder and saw a "big fire burst" and heard "a big blast."²⁶ SGT Colvin stated the blast was "very loud" and "overwhelming" and that

¹⁸ J.A. at 479, 504.

¹⁹ J.A. at 446-47.

²⁰ J.A. at 214, 447-48.

²¹ J.A. at 449.

²² J.A. at 216.

²³ J.A. at 217-18.

²⁴ J.A. at 218.

²⁵ J.A. at 451, 508.

²⁶ J.A. at 451.

after SPC Hymer fired, SPC Hymer started to run into the dining room.²⁷

Appellant testified that after this shot, appellant ran back into the kitchen and began firing on SPC Hymer.²⁸ Appellant said that he believed SPC Hymer was trying to kill him, that he had no recollection of how many times he fired at Hymer, and that he fired until SPC Hymer "went down."²⁹ SGT Colvin, on the other hand, testified that SPC Hymer had turned to run into the dining room when he was hit, and that his legs gave out and he fell face down at the entrance to the living room.³⁰ SGT Colvin testified that as SPC Hymer lay face down on the ground, appellant stood over him and fired two more rounds into him, then said, "He's fucking dead, he's dead."³¹

According to SGT Colvin, appellant then walked back into the kitchen, and said "I didn't fuck your wife and now you're going to die," and shot the unarmed SSG Werner as he lay on the floor.³² SGT Colvin stated that appellant stood at SSG Werner's feet, held his pistol at waist-height and fired four shots at SSG Werner, including a final shot at appellant's knee level

²⁷ J.A. at 219-20.

²⁸ J.A. at 451, 521-22, 529.

²⁹ J.A. at 452, 505-6, 522.

³⁰ J.A. at 220-22.

³¹ J.A. at 223-24.

³² J.A. at 224-25.

directly into SSG Werner's face at a range of about two feet.³³ SGT Colvin also testified that SSG Werner's head turned right as he was hit, his left shoulder flinched, and his chin moved to the right.³⁴

The Government utilized Mr. Alexander Jason, an independent crime scene analyst, as an expert witness. He provided a reconstruction of the shootings and provided an opinion with respect to the forensic evidence gathered at the farmhouse.³⁵ Mr. Jason examined law enforcement reports and physical evidence, visited the crime scene, and interviewed SGT Colvin as well.³⁶ The reports he reviewed included crime scene photos, bloodstain pattern analysis, and firearms testing.³⁷

Mr. Jason testified that the forensic evidence was consistent with SGT Colvin's testimony.³⁸ Mr. Jason concluded that SPC Hymer was shot six times and SSG Werner was shot five times, although he testified that SSG Werner likely suffered a re-entry wound through the forearm and to the chest.³⁹ Three bullets or their fragments were found in SSG Werner's body, while the other two wounds were perforating.⁴⁰

³³ J.A. at 224-26, 237, 261.

³⁴ J.A. at 239.

³⁵ J.A. at 336-37.

³⁶ J.A. at 339-40.

³⁷ J.A. at 339.

³⁸ J.A. at 342-43, 373, 655.

³⁹ J.A. at 341.

⁴⁰ J.A. at 341.

Mr. Jason conceded that there were no bullet holes found in the floor where SSG Werner and SPC Hymer fell.⁴¹ Mr. Jason also acknowledged that there was some movement in the house immediately following the shootings when SGT Colvin was tending to SPC Hymer and SSG Werner.⁴² Mr. Jason also acknowledged that appellant's guard dog and the police working dog moved through the farmhouse.⁴³

To avoid influencing SGT Colvin's account, Mr. Jason purposely did not show SGT Colvin any of his own drawings, notes, illustrations, or crime scene photos before or during the interview.⁴⁴ He also testified that the lack of bullet holes in the floor was not inconsistent with SGT Colvin's testimony that SSG Werner and SPC Hymer were shot as they lay on the ground.⁴⁵ He testified that based on the trajectories of the wounds, he would not expect to find bullet holes in the floor.⁴⁶ And during rebuttal, Mr. Jason pointed out that stippling is not always present, even when one is shot at close range.⁴⁷ Also, in SPC Hymer's case, Mr. Jason testified that the absence of residue on

⁴¹ J.A. at 374-75.

⁴² J.A. at 377.

⁴³ J.A. at 376-77.

⁴⁴ J.A. at 817-18.

⁴⁵ J.A. at 378-79.

⁴⁶ J.A. at 378-79.

⁴⁷ J.A. at 653-54. Stippling is caused when gunpowder particles strike the skin causing an abrasion or embedding the particles in the skin.

the skin would not be unusual since SPC Hymer's clothing acted as an "intermediate" barrier.⁴⁸

Those additional facts necessary for disposition of the granted issue are contained in argument below.

Summary of Argument

The military judge did not plainly err by omitting instructions on regaining the right to self-defense based on a theory that SPC Hymer or SSG Werner escalated the violence. From the very beginning, the conflict at appellant's farmhouse was a deadly one. Therefore, it was factually impossible for SPC Hymer to escalate it any further against appellant. Furthermore, the evidence does not support a theory that appellant could have used deadly force to defend SGT Colvin, because either SGT Colvin never lost his right to self-defense or SGT Colvin lost this right in a manner which made it impossible for SSG Werner to escalate the violence. Finally, in a confrontation beginning with loaded weapons, an inability to withdraw, standing alone, does not revive an aggressor's, provocateur's, or mutual combatant's right to self-defense. For that reason, the evidence does not support that either appellant or SGT Colvin could have regained the right to self-defense.

However, if this Court does find a technical error in not instructing upon a theory of regaining the right to self-defense

⁴⁸ J.A. at 653-54.

or defense of another, then it was certainly harmless beyond a reasonable doubt. The facts overwhelmingly prove that appellant intended to engage in a deadly affray from the very beginning. Appellant first introduced loaded weapons into the confrontation and acted in retaliation when SPC Hymer and SSG Werner refused to back down. For that reason, an instruction on a hypothetical ability to regain a right to self-defense would not have changed the outcome of the trial. Accordingly, this Honorable Court should affirm the Army Court's decision.

Standard of Review

Appellant's claim is reviewed for plain error. To preserve an error for review at this Court, even those arising from mandatory instructions, an appellant must timely object to the alleged erroneous instructions.⁴⁹ In this case, appellant forfeited review of the granted issue because he failed to object before, during, or after the self-defense instructions were provided to the panel on two separate occasions.⁵⁰

To prevail under a plain error analysis, appellant has the burden to show that (1) there was an error, (2) the error was plain, and (3) the error resulted in material prejudice to a

⁴⁹ *United States v. McMurrin*, 70 M.J. 15, slip op. at 8 (C.A.A.F. 2011) (holding that the plain error standard was proper where the appellant failed to object to lesser-included offense instructions that became erroneous due to a change in the law following trial).

⁵⁰ J.A. at 362-63, 658; Appellant's Br. 32 n.7.

substantial right.⁵¹ This Court reviews allegations of error regarding self-defense instructions de novo.⁵² Furthermore, an error is "plain" if it is "clear or, equivalently, obvious."⁵³ Finally, "[i]f instructional error is found, because there are constitutional dimensions at play, [the appellant's] claims must be tested for prejudice under the standard of harmless beyond a reasonable doubt."⁵⁴ "The inquiry for determining whether constitutional error is harmless beyond a reasonable doubt is whether, beyond a reasonable doubt, the error did not contribute to the defendant's conviction or sentence."⁵⁵

Ultimately, this Court should not exercise its discretion to notice a forfeited error "unless the error 'seriously affect[s] the fairness, integrity, or public reputation of judicial proceedings.'"⁵⁶ This final prong of the plain error

⁵¹ Article 59(a), UCMJ, 10 U.S.C. § 859(a); *United States v. Maynard*, 66 M.J. 242, 244 (C.A.A.F. 2008).

⁵² *United States v. Dearing*, 63 M.J. 478, 482 (C.A.A.F. 2006).

⁵³ *United States v. Olano*, 507 U.S. 725, 734 (1993) (quotations omitted); *United States v. Baker*, 57 M.J. 330, 337 (C.A.A.F. 2002) (Crawford, C.J., dissenting) ("[A]n error is 'plain' if it is so egregious and obvious that a trial judge and prosecutor would be derelict in permitting it...." (quoting *United States v. Thomas*, 274 F.3d 655, 667 (2d Cir. 2001))).

⁵⁴ *Dearing*, 63 M.J. at 482 (quoting *United States v. Wolford*, 62 M.J. 418, 420 (C.A.A.F. 2006)).

⁵⁵ *Id.* (quoting *Wolford*, 62 M.J. at 420, quoting *United States v. Kreutzer*, 61 M.J. 293, 298 (C.A.A.F. 2005) (internal quotation marks omitted)).

⁵⁶ *Johnson v. United States*, 520 U.S. 461, 469-70 (1997) (quoting *Olano*, 507 U.S. at 732); see also *Puckett v. United States*, 129 S.Ct. 1423, 1429, 173 L.Ed.2d. 266 (2009) (quoting *Olano*, 507 U.S. at 736); *United States v. Paige*, 67 M.J. 442, 453 (C.A.A.F.

standard is necessary to determine whether this Court should notice a prejudicial plain error in order to prevent a "miscarriage of justice."⁵⁷

Applicable Law

Rule for Courts-Martial (R.C.M.) 920(e)(3) requires that a military judge's instructions include a "description of any special defense under R.C.M. 916 in issue." A special defense is "in issue" when "some evidence, without regard to its source or credibility, has been admitted upon which members might rely if they choose."⁵⁸ Self-defense is considered a special defense under R.C.M. 916(e) because "although not denying that the accused committed the objective acts constituting the offense charged, [it] denies, wholly or partially, criminal responsibility for those acts."⁵⁹

An accused may claim self-defense to premeditated murder where (1) the accused reasonably believed he was in imminent danger of the wrongful infliction of death or grievous bodily harm from his adversary, and (2) the accused actually believed

2009) (Stucky, J., dissenting in part and concurring in the result).

⁵⁷ *United States v. Frady*, 456 U.S. 152, 163 n.14 (1982); *United States v. Powell*, 49 M.J. 460, 465 (C.A.A.F. 1998).

⁵⁸ R.C.M. 920(e) discussion; *Dearing*, 63 M.J. at 482 ("The touchstone against which we measure the validity of the military judge's refusal to give an instruction on self-defense is whether there is in the record some evidence from which a reasonable inference can be drawn that the affirmative defense was in issue.").

⁵⁹ R.C.M. 916(a).

that the force used was necessary for protection against death or grievous bodily harm.⁶⁰ However, an accused loses this right to self-defense when he is "an aggressor, engaged in mutual combat, or provoked the attack" against which he claims self-defense.⁶¹

Notwithstanding the foregoing, an aggressor, provocateur, or mutual combatant may regain his right to self-defense in one of two ways. First, the right to self-defense can be regained by withdrawing from the confrontation in good faith.⁶² Second, an aggressor, provocateur, or mutual combatant regains his right to self-defense where his adversary escalates the level of violence.⁶³ The latter exception is applicable even where the aggressor, provocateur, or mutual combatant does not first attempt to withdraw,⁶⁴ because he is still entitled to use self-

⁶⁰ R.C.M. 916(e)(1). R.C.M. 916 was created by the President pursuant to congressional delegation under Article 36, UCMJ.

⁶¹ R.C.M. 916(e)(4).

⁶² R.C.M. 916(e)(4).

⁶³ *United States v. Dearing*, 63 M.J. 478, 482-84 (C.A.A.F. 2006); *United States v. Cardwell*, 15 M.J. 124, 126 (C.M.A. 1983) ("Even a person who starts an affray is entitled to use self-defense when the opposing party escalates the level of the conflict.").

⁶⁴ *Dearing*, 63 M.J. at 483 (noting that "an initial aggressor is still entitled to use deadly force in his own defense, just as he would if he withdrew completely from combat and was then attacked by his opponent, in instances where the adversary escalates the level of conflict" (citing *Cardwell*, 15 M.J. at 126)).

defense if the escalation creates circumstances such that he is unable to withdraw.⁶⁵

The principles of self-defense apply equally to defense of another.⁶⁶ In fact, "[o]ne who acts in defense of another stands in the shoes of and has no greater right than the party defended."⁶⁷ In that regard, "[t]he accused acts at the accused's peril when defending another."⁶⁸ Thus, "if, unbeknownst to the accused, the apparent victim was in fact the aggressor and not entitled to use self-defense," then the accused cannot claim the protections of defense of another.⁶⁹

Argument

I. The Military Judge's Instructions were not Plainly Erroneous.

Appellant's allegation of error fails on both the law and the facts. Initially, appellant relies on an incorrect proposition of law to advance his flawed argument; namely, that "the right to self-defense [is not] lost if there is no

⁶⁵ *United States v. Lewis*, 65 M.J. 85, 88-89 (C.A.A.F. 2007) (holding that the appellant, who was a mutual combatant, could have regained his right to self-defense when his adversaries escalated the level of force and the appellant was unable to withdraw).

⁶⁶ R.C.M. 916(e)(5).

⁶⁷ *United States v. Jenkins*, 59 M.J. 893, 900 (Army Ct. Crim. App. 2004) (quoting *United States v. Cole*, 54 M.J. 572, 581 (Army Ct. Crim. App. 2000)); R.C.M. 916(e)(5).

⁶⁸ R.C.M. 916(e)(5) discussion.

⁶⁹ R.C.M. 916(e)(5) discussion.

opportunity to withdraw in good faith.”⁷⁰ That is not the holding of *United States v. Lewis*.⁷¹ The simple inability to withdraw does not confer a right to self-defense upon an aggressor, provocateur, or mutual combatant. To regain a right to self-defense based on an inability to withdraw, the aggressor’s, provocateur’s, or mutual combatant’s adversary must first escalate the conflict.⁷²

In this case, the evidence does not reasonably support an escalation of force scenario. Appellant entered into the conflict with loaded weapons. As such, it was impossible for SPC Hymer to “escalate” the conflict such that appellant could regain the right to self-defense. Similarly, any scenario involving SGT Colvin’s status as an aggressor, provocateur, or mutual combatant is untenable because it also depends upon an impossible theory of escalation. Accordingly, the military judge did not plainly err by omitting self-defense instructions about unsupportable theories of regaining the right to self-defense.

⁷⁰ Appellant’s Br. 35; see also Appellant’s Br. 34 (stating “a mutual combatant may still claim self-defense, even if there is no effort to withdraw, if the opposing party escalates the level of the conflict or there is no opportunity to withdraw”).

⁷¹ *United States v. Lewis*, 65 M.J. 85, 88-89 (C.A.A.F. 2007).

⁷² *United States v. Dearing*, 63 M.J. 478, 483 (C.A.A.F. 2006).

A. *United States v. Lewis* does not Create a Stand-Alone "Inability to Withdraw" Exception to the Aggressor, Provocateur, and Mutual Combatant Exclusions.

United States v. Lewis does not stand for the proposition that an aggressor, provocateur, or mutual combatant can claim self-defense by starting a deadly affray from which he is unable to withdraw. Admittedly, the *Lewis* opinion does state that "a mutual combatant could regain the right to self-defense when the conflict is escalated or, as here, when he is unable to withdraw in good faith."⁷³ However, this language is dicta, contradicted by other parts of the opinion, and inapplicable in the instant case.

First, *Lewis* was decided within a factual context where violence was escalated against the accused, and against a legal backdrop ostensibly requiring a withdrawal in good faith. Thus, the *Lewis* Court necessarily decided that, where violence has been escalated against an aggressor or a mutual combatant, then he may regain the right to self-defense even where he is unable to withdraw in good faith.⁷⁴ *Lewis* did not address a situation where the accused was simply unable to withdraw in the absence of escalation. Thus, to the extent the language in *Lewis* supports an alleged, previously unrecognized revival of the right to self-defense based on an inability to withdraw alone,

⁷³ *Lewis*, 65 M.J. at 89.

⁷⁴ *Id.*

it is dicta. Furthermore, this dicta in *Lewis* is not persuasive because it is at odds with other portions of the opinion. This singular sentence itself implies that there was no evidence of escalation in the *Lewis* case, whereas the remainder of the opinion clearly concludes to the contrary.⁷⁵ Moreover, the opinion later describes this same issue in the conjunctive, stating that the accused was prevented "from fully asserting that he rightfully defended himself (1) after an escalation of violence; and (2) when he was incapable of withdrawing in good faith."⁷⁶

Ultimately, *Lewis* cannot stand for the proposition that an accused may start a duel yet still act in self-defense by simply claiming an inability to withdraw when bullets start to fly. In a confrontation beginning with loaded weapons, an "inability to withdraw" exception runs contrary to the very purpose of the aggressor, provocateur, and mutual combatant exclusions. As this Court's predecessor stated in *United States v. Cardwell*, "In a situation . . . where the accused had entered willingly into combat with the expectation that deadly force might be

⁷⁵ *Id.* ("Once Mr. Bryant escalated the fight to the level that Appellee could reasonably apprehend he would suffer death or grievous bodily injury from kicks to his head and punches to his body, Appellee was entitled, under our decision in *Dearing*, to defend himself even if he was the original aggressor or was engaged in mutual combat, as long as he responded in a manner proportionate to the threat he faced.").

⁷⁶ *Id.*

employed, he is not allowed to claim self-defense."⁷⁷ To hold otherwise is to completely remove the aggressor, provocateur, and mutual combatant exclusions from the law. Accordingly, this Court should clarify that the law requires an aggressor, provocateur, or mutual combatant be first subjected to an escalation of violence by his adversary, and be thereafter unable to withdraw, before he can regain his right to self-defense.

B. The Evidence does not Support an Instruction About Appellant Regaining his Right to Self-Defense due to SPC Hymer Escalating the Level of Violence Against Him.

Appellant's claim before this Court regarding his use of deadly force against SPC Hymer logically presumes there was some evidence that appellant was an aggressor, provocateur, or mutual combatant.⁷⁸ Moreover, as discussed above, an inability to withdraw, standing alone, is insufficient to circumvent the aggressor, provocateur, and mutual combatant exclusions. Thus, to be entitled to an instruction informing the panel that appellant could regain his right to self-defense, there must be some evidence that SPC Hymer escalated the level of violence

⁷⁷ *United States v. Cardwell*, 15 M.J. 124, 126 n.3 (C.M.A. 1983).

⁷⁸ If there was no evidence that appellant was an aggressor, provocateur, or mutual combatant, then he would not be entitled to the very instructions he now claims the military judge should have provided to the panel.

against appellant.⁷⁹ However, due to the very nature of the conflict, it is impossible to reach such a conclusion.

Nonetheless, appellant argues, without elaborating, that SPC Hymer escalated the level of violence against him.⁸⁰ Presumably, appellant's claim is based upon SPC Hymer's actions in attempting and then actually firing a rifle at appellant. However, this occurred after appellant introduced loaded weapons into the conflict and while appellant was holding SPC Hymer at gunpoint. If, as appellant's argument logically presumes, appellant was an aggressor, provocateur, or mutual combatant, then SPC Hymer could not have escalated the level of violence in this situation – appellant was already threatening him with a loaded weapon.

The foregoing proposition is implicit within the very definition of self-defense. For example, in California, the escalation exception only "applies when the initial aggression involves a simple assault, and the victim suddenly and wrongfully escalates the level of force and violence by responding with excessive – i.e., unreasonable – force, making it impossible for the aggressor to retreat."⁸¹ Thus,

⁷⁹ *United States v. Dearing*, 63 M.J. 478, 483 (C.A.A.F. 2006).

⁸⁰ Appellant's Br. 37.

⁸¹ *McKean v. Yates*, 2010 WL 761308, slip op. at 10 (N.D. Cal. March 3, 2010) (Attached at Appendix).

California's escalation exception, by its very terms, does not apply when the initial assault involves deadly force.⁸²

The law of self-defense applicable to courts-martial also recognizes this proposition. In general, the law recognizes that a person is justified in defending himself against the wrongful infliction of bodily harm.⁸³ In a situation where an aggressor, provocateur, or mutual combatant attempts to wrongfully inflict bodily harm upon another, that other person would be entitled to act in self-defense. However, the force used in defense against an assault not involving deadly force must be "less than force reasonably likely to produce death or grievous bodily harm."⁸⁴ Therefore, if the defender employs deadly force to defend against a simple assault, then he no longer acts within his right to self-defense. Instead, the aggressor, provocateur, or mutual combatant would regain his

⁸² *People v. Hecker*, 42 P. 307 (Cal. 1895) ("Where one is the first wrongdoer, but his unlawful act is not felonious, as a simple assault upon the person of another, or a mere trespass upon his property, even though forcible, and this unlawful act is met by a counter assault of a deadly character, the right of self-defense to the first wrongdoer is not lost; for, as his acts did not justify upon the part of the other the use of deadly means for their prevention, his killing by the other would be criminal, and one may always defend himself against the criminal taking of his life.").

⁸³ R.C.M. 916(e)(2), and (3).

⁸⁴ R.C.M. 916(e)(3); see also R.C.M. 916(e)(2) (allowing for an offer but not an attempt or application of deadly force in defense against certain aggravated assaults); *United States v. Yanger*, 67 M.J. 56 (C.A.A.F. 2008) (per curiam).

right to act in self-defense due to the initial defender's wrongful escalation of violence.

However, in a situation where the aggressor, provocateur, or mutual combatant begins with an assault that could reasonably inflict death or grievous bodily harm, then the defender's application of deadly force is not similarly limited.⁸⁵ Therefore, the aggressor, provocateur, or mutual combatant could not regain his right to self-defense (short of actually withdrawing), because it would be impossible for the defender to escalate the violence leveled against him. It is that impossibility upon which appellant's claim depends.

In the instant case, appellant's theory of error requires the Court to presume that appellant became an aggressor, provocateur, or mutual combatant by pointing a loaded weapon at SPC Hymer. Consequently, appellant could not have regained his right to self-defense based on a theory that SPC Hymer escalated the violence against him. Based on appellant's theory of error (which runs counter to his entire defense at trial) SPC Hymer was the individual entitled to use deadly force.⁸⁶ Accordingly,

⁸⁵ R.C.M. 916(e)(1).

⁸⁶ Alternatively, SPC Hymer could be considered a mutual combatant in a deadly affray, also not entitled to use self-defense; however, that does not change the fact that it was impossible for him to escalate the violence against appellant. See, e.g., *Strong v. State*, 109 S.W. 536, 538 (Ark. 1908) ("Appellant at this time had his shot gun, and was heard to say that 'Garretson would not haul any corn that day unless he

there is no evidence supporting an instruction that appellant could regain a previously forfeited right to self-defense against SPC Hymer.

C. The Evidence does not Support an Instruction that Appellant, Standing in SGT Colvin's Shoes, Could Have Regained his Right to Defend SGT Colvin Against SSG Werner.

Similar to his claim of self-defense against SPC Hymer, appellant's claim of defense of another depends upon an unarticulated argument that SSG Werner "escalated the confrontation."⁸⁷ Presumably, given the "alter ego" rule of defense of another,⁸⁸ the escalation claimed was committed by SSG Werner against SGT Colvin. Furthermore, to be entitled to an instruction that SGT Colvin regained his right to self-

hauled it over his [appellant's] dead body.' . . . [Garretson] had his pistol, and his every act indicated that he intended to haul the corn, and, if resisted by appellant, to take his life, if necessary, to accomplish his purpose. On the other hand, appellant was on the ground with his shot gun, and equally determined to prevent Garretson from hauling the corn, even to the extent of taking his life, if necessary, to accomplish his purpose to prevent him. The jury were justified in finding that it was a mutual combat, in which both engaged after having ample time for premeditation and deliberation, and there was proof of express malice. So the facts fully warranted the jury in finding appellant guilty of murder in the first degree.").

⁸⁷ Appellant's Br. 37.

⁸⁸ 2 Wayne R. LaFare, *Substantive Criminal Law* § 10.5 (2d ed. 2010) ("One set of cases adopts what is sometimes called the 'alter ego' rule, which holds that the right to defend another is coextensive with the other's right to defend himself; thus the defender A who intervenes to protect B against C takes the risk that B is not in fact privileged to defend himself in the manner he employs; so that, where B is not privileged, A is guilty of assault and battery or murder of B in spite of his reasonable belief that B is privileged."); R.C.M. 916(e)(5).

defense, SGT Colvin must have first lost his right of self-defense. In this respect, appellant's right to act in SGT Colvin's defense is co-extensive with SGT Colvin's right to defend himself.⁸⁹ There are three arguments for how SGT Colvin may have lost his right to self-defense:

- (1) SGT Colvin became a mutual combatant when he armed himself with a loaded rifle after travelling to the farmhouse with appellant.⁹⁰
- (2) SGT Colvin became a mutual combatant when he engaged in a fist fight with SSG Werner, prior to appellant exiting the "arms room" with loaded weapons;⁹¹ or
- (3) SGT Colvin became an aggressor or provocateur by yelling at appellant to shoot SSG Werner in the hands while appellant was holding SSG Werner at gunpoint.⁹²

All of the foregoing scenarios fail to establish plain error, but for different reasons.

The first scenario indicated above does not establish instructional error for the same reasons that appellant's own claim of self-defense against SPC Hymer fails. Specifically, SGT Colvin could not have regained his right to self-defense in this scenario, because SGT Colvin would have already entered into the affray with deadly intentions. As discussed *supra* in Part I.B., it is impossible for an adversary to escalate the level of violence in this type of situation.

⁸⁹ R.C.M. 916(e)(5).

⁹⁰ J.A. at 174-75, 198-201.

⁹¹ J.A. at 206-10.

⁹² J.A. at 446-47.

As for the second scenario, it is unsupported by the evidence. The record does not support that SGT Colvin lost his right to defend against deadly force when SSG Werner initially confronted him at the farmhouse. Either SGT Colvin had already lost that right by engaging in a deadly affray, as described in the first scenario above, or he was still entitled to act in defense of himself. SGT Colvin testified that he had put down his rifle and let SSG Werner into the house.⁹³ It was at this point that SSG Werner attacked SGT Colvin.⁹⁴ According to appellant's testimony, he was in the closet when he heard SSG Werner initially confronting SGT Colvin; so, he did not know what transpired.⁹⁵ Thus, there is no evidence that SGT Colvin voluntarily engaged in a simple fist fight with SSG Werner. To the contrary, the evidence indicated that SSG Werner was the aggressor.⁹⁶ Appellant's implication that SSG Werner's use of a knife to stab SGT Colvin constitutes "escalation" misses the point - there is no evidence that SGT Colvin first lost his right to self-defense. Consequently, appellant's claim of instructional error based upon this factual scenario unravels at its inception.

⁹³ J.A. at 206-7.

⁹⁴ J.A. at 206-7, 258-59.

⁹⁵ J.A. at 441-46.

⁹⁶ J.A. at 247-60.

In contrast to the foregoing theory, the final factual scenario of SGT Colvin's loss of his right to self-defense is actually supported by the evidence; however, similar to the first factual scenario described above, it does not allege a viable escalation of violence claim. In other words, appellant's testimony that SGT Colvin asked appellant to fire a rifle into SSG Werner's extremities implicates a deadly confrontation, or at least one likely to cause grievous bodily harm. It would have been impossible for SSG Werner to then escalate the violence beyond that.⁹⁷

In conclusion, appellant's claim of instructional error is unsupported, not only by the facts, but also by the law. This Court should reaffirm that, to regain a previously forfeited right to self-defense, the accused must either withdraw or be subjected to an escalation of violence by his adversary making him unable to withdraw. In this case, appellant failed to show how there is "some evidence" that raises either of the foregoing situations. It is undisputed that appellant did not actually withdraw. Furthermore, given appellant's initiation of the deadly encounter, it was impossible for him to be subjected to an escalation of violence. In addition, appellant's claim of

⁹⁷ R.C.M. 916(e)(1) ("It is a defense to homicide . . . that the accused apprehended, on reasonable grounds, that death or grievous bodily harm was about to be inflicted wrongfully on the accused. . . ." (emphasis added)).

defense of another is similarly meritless. Where his claim of escalation is supported by the law, it is unsupported by the facts, and, where it is supported by the facts, it is unsupported by the law. Accordingly, this Court should hold that the military judge did not plainly err by omitting instructions on the theoretical ability to regain a previously forfeited right to self-defense.

II. Any Instructional Error is Harmless Beyond a Reasonable Doubt.

Since appellant failed to preserve the error in this case, it is his burden to demonstrate prejudice.⁹⁸ This Court's precedent to the contrary (requiring the government to disprove prejudice) is badly reasoned and should be overruled.⁹⁹ Instead, this Court should require appellant to prove that a reasonable

⁹⁸ *United States v. Olano*, 507 U.S. 725, 734-35 (1993).

⁹⁹ See *United States v. Paige*, 67 M.J. 442, 453 (C.A.A.F. 2009) (Stucky, J., dissenting in part and concurring in the result) (Noting that the precedent upon which the Court relied to depart from the plain error doctrine "was derived from dictum in [*United States v.*] *Powell*, 49 M.J. [460,] 464-65 [(C.A.A.F. 1998)], that was based on *United States v. Adams*, 44 M.J. 251, 252 ([C.A.A.F.] 1996), a case in which neither the issue granted for review nor this Court's opinion discussed plain error."); *United States v. Olano*, 507 U.S. 725, 734-35 (1993) (noting an "important difference" between preserved and forfeited errors is that, for a forfeited error, "It is the defendant rather than the Government who bears the burden of persuasion with respect to prejudice"); *United States v. Rorie*, 58 M.J. 399, 406 (C.A.A.F. 2003) (noting that "[s]tare decisis is a principle of decision making, not a rule, and need not be applied when the precedent at issue is unworkable or . . . badly reasoned" (citing *United States v. Tualla*, 52 M.J. 228, 230-31 (C.A.A.F. 2000) (internal citations and quotations omitted))).

doubt exists as to whether the error contributed to the findings or sentence.¹⁰⁰ In conducting this analysis, there is no rule against considering the strength of the evidence presented at trial.¹⁰¹ In this case, assessing the strength of the evidence is especially appropriate given the attenuated theories appellant advances.

As the argument in Part I., *supra*, illustrates, appellant's claim of error, depends upon an outlandish series of events that are overwhelmingly disproved by the facts of his case. First, appellant's claim is that he wanted to withdraw, but was unable to, despite the fact that he was a trained infantryman, he successfully escaped onto the porch, and the person shooting at him, SPC Hymer, began running away. And second, that he had to defend SGT Colvin against SSG Werner who was attempting to kill SGT Colvin with a knife – unbeknownst to SGT Colvin – while appellant was armed with a pistol and had just murdered SPC Hymer. Although this theory is conveniently supported by

¹⁰⁰ *Olano*, 507 U.S. at 734-35.

¹⁰¹ *Cf. United States v. Kerr*, 51 M.J. 401, 405 (C.A.A.F. 1999) ("We evaluate prejudice from an erroneous evidentiary ruling by weighing (1) the strength of the Government's case, (2) the strength of the defense case, (3) the materiality of the evidence in question, and (4) the quality of the evidence in question."); *but cf. United States v. Wells*, 52 M.J. 126, 131 (C.A.A.F. 1999) ("An appellate court does not normally evaluate the credibility of the evidence presented in a case to determine harmless error, especially in a case like appellant's, where evidence on the disputed matters is not overwhelming." (emphasis added)).

appellant's testimony, it is not supported by much else, to include common sense. Appellant did not act in self-defense or defense of another. He acted in retaliation.

The Government's case against appellant was exhaustive and included extensive expert testimony on bullet trajectories and blood spatter evidence to prove that SSG Werner and SPC Hymer were killed, not during an escalating self-defense scenario, but in a retaliatory execution.¹⁰² The testimony from both appellant and SGT Colvin established that, during a mutual, deadly affray, appellant shot SPC Hymer multiple times.¹⁰³ The evidence is uncontested that appellant first introduced loaded weapons into the confrontation, not SPC Hymer. Moreover, according to SGT Colvin, as SPC Hymer lay face down on the floor, appellant stood over him and fired two more rounds into him.¹⁰⁴ Appellant then loudly and aggressively said to SGT Eric Colvin, "He's fucking dead, he's dead."¹⁰⁵ Mr. Jason testified that the extensive forensic evidence he reviewed supported SGT Colvin's testimony.¹⁰⁶

The evidence further showed that appellant stood over SSG Werner while he had his hands up in a defensive posture begging

¹⁰² J.A. at 343-371, 780 (Pros. Ex. 93), 795-802 (Pros. Exs. 143-50), 805-10 (Pros. Exs. 162-67).

¹⁰³ J.A. at 218-24.

¹⁰⁴ J.A. at 223.

¹⁰⁵ J.A. at 223.

¹⁰⁶ J.A. at 342-43, 373, 655.

for his life.¹⁰⁷ SGT Colvin testified that appellant's response to SSG Werner was, "I didn't fuck your wife, and now you are going to die."¹⁰⁸ Appellant then emptied his .22 pistol into the unarmed SSG Werner, stopping only when his ammunition was spent and the slide locked to the rear.¹⁰⁹ The physical evidence bore this out at trial, as Mr. Jason testified that the blood spatter and other evidence was consistent with SGT Colvin's account of SSG Werner's execution-style shooting.¹¹⁰

After executing SSG Werner, appellant turned with the .22 pistol pointed towards SGT Colvin.¹¹¹ SGT Colvin took the weapon from his hand and placed it on the kitchen counter.¹¹² Appellant stated, "Now we have to bury them."¹¹³ SGT Colvin rejected this idea and instead stated that the two of them needed to go into town to get medical assistance.¹¹⁴

Appellant attempts to discount the evidence against him by attacking the credibility of SGT Colvin. However appellant's characterizations of SGT Colvin are misleading. For example, appellant states that "[a]t times [SGT Colvin] thought that

¹⁰⁷ J.A. at 225-26, 301.

¹⁰⁸ J.A. at 224-25.

¹⁰⁹ J.A. at 226.

¹¹⁰ J.A. at 343, 346.

¹¹¹ J.A. at 226.

¹¹² J.A. at 226-27, 741 (Pros. Ex. 36), 764 (Pros. Ex. 53).

¹¹³ J.A. at 228.

¹¹⁴ J.A. at 228.

people were reading his mind,"¹¹⁵ but the record only supports that, as SGT Colvin acknowledged, he experienced this type of paranoia when he was high on methamphetamines.¹¹⁶ There is no evidence that SGT Colvin suffers from a psychosis akin to schizophrenia, as appellant's argument would have this Court believe. Furthermore, although SGT Colvin admitted to initially lying to police officers, he later testified that this was to "cover for" appellant.¹¹⁷

Ultimately, the facts demonstrate that it was appellant, not his victims, who was responsible for the escalation of the conflict to the "lethal weapons" stage. The panel heard lengthy evidence put on by appellant with respect to self-defense, and the military judge provided detailed instructions on self-defense and defense of others.¹¹⁸ The panel nonetheless convicted appellant, and in so doing, found that the Government had proved beyond a reasonable doubt that appellant was not acting in self-defense.¹¹⁹ An instruction on escalation would not have changed the panel's verdict because, just as there was no self-defense, there was no escalation. Appellant armed himself first, forcibly searched his victims when they arrived at the farmhouse, shot both men to death execution-style, and

¹¹⁵ Appellant's Br. 19.

¹¹⁶ J.A. at 276-77.

¹¹⁷ J.A. at 241-42, 272-73.

¹¹⁸ J.A. at 660-66.

¹¹⁹ J.A. at 666, 836.

betrayed his guilt by suggesting he and SGT Colvin bury the bodies.¹²⁰ Accordingly, this Court should reject appellant's claim as meritless.

¹²⁰ J.A. at 190-93, 214-16, 223-28, 641-42.

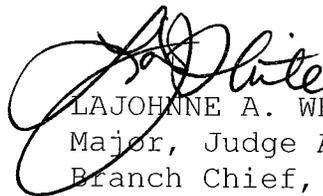
Conclusion

In this case, the evidence does not support a theory that either SPC Hymer or SSG Werner could have escalated the violence of the conflict. Therefore, it was not plainly erroneous for the military judge to omit instructions on the theoretical ability to regain a right to self-defense. Even assuming there is sufficient evidence to call for such an instruction, the facts overwhelmingly disprove the viability of such a defense. Accordingly, appellant cannot carry his burden of proving there was prejudicial plain error warranting relief.

WHEREFORE, the Government respectfully requests that this Honorable Court affirm the decision of the Army Court of Criminal Appeals.



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CERTIFICATE OF FILING AND SERVICE

I certify that the foregoing brief on behalf of appellee was electronically filed with the Court to efiling@armfor.uscourts.gov on June 15, 2011 and contemporaneously served electronically on civilian appellate counsel, Mary T. Hall, and military appellate defense counsel, Captain John L. Schriver.



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APPENDIX

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United States District Court,
 N.D. California.
 Ronald Paul McKEAN, Petitioner,
 v.
 James A. YATES, Warden, Respondent.

No. C 08-02450 JF (PR).
 March 3, 2010.

Ronald Paul McKean, Soledad, CA, pro se.

Amy Haddix, Deputy Attorney General, San Francisco, CA, for Respondent.

ORDER DENYING PETITION FOR WRIT OF
 HABEAS CORPUS AND DENYING REQUEST
 FOR CERTIFICATE OF APPEALABILITY
 JEREMY FOGEL, District Judge.

*1 Petitioner, a California prisoner proceeding *pro se*, seeks a writ of habeas corpus pursuant to 28 U.S.C. § 2254. The Court ordered Respondent to show cause why the petition should not be granted. Respondent filed an answer and a supporting memorandum of points and authorities addressing the merits of the petition, and Petitioner filed a traverse. Having reviewed the papers and the underlying record, the Court concludes that Petitioner is not entitled to habeas corpus relief and will deny the petition.

PROCEDURAL BACKGROUND

On August 19, 2003, a Santa Clara Superior Court jury convicted Petitioner of second degree murder, in violation of California Penal Code § 187, with enhancements for personal use of a firearm and intentional discharge of a firearm resulting in death, pursuant to California Penal Code §§ 12022.5 and 12022.53. On January 26, 2004, the trial court sentenced Petitioner to forty years to life in prison.

Petitioner appealed the judgment. On August 29, 2006, the California Court of Appeal affirmed. On December 20, 2006, the California Supreme Court denied review. On May 14, 2007, the United States Supreme Court denied Petitioner's petition for writ of

certiorari.

Petitioner filed the instant federal action on May 13, 2008.

FACTUAL BACKGROUND

Petitioner does not dispute the following facts, which are taken from the unpublished opinion of the California Court of Appeal^{FN1}:

FN1. *People v. McKean*, No. H027008, California Court of Appeal, Sixth Appellate District (August 29, 2006). (Resp.Ex. 6, p. 2-6.)

On January 11, 2002, around 6:20 a.m., [Petitioner] and Joseph Carney, residents at a homeless shelter, got into an argument and exchanged insults belly to belly. Carney was mad and [Petitioner] for throwing out his deodorant. Carney suggested they out like men in a boxing ring at the YMCA. FN2. [Petitioner] replied, "Why don't I just go out and get my gun and shoot you" and "What if I blew your fucking brains out[.]" Carney again suggested a boxing match, and [Petitioner] said, "Well, do you want me to kill you now or kill you later?" A shelter worker heard them arguing and told them to go outside. At that point, Carney gathered his toiletries and went to the bathroom. [Petitioner] waited for him to leave, then went to his car, and got his handgun. He returned to the shelter, found Carney in the bathroom, and shot him to death. [Petitioner] went back to his car, disabled his gun, and put it on the hood. Richard Farris, another shelter resident, approached [Petitioner], and [Petitioner] asked him for a cigarette. Farris noticed the gun and nervously asked about it. [Petitioner] said, "Don't laugh." "I shot him. I'll probably get 20 years[.]"

FN2. Carney was 5 feet 10 inches tall and weighed 305 pounds; [Petitioner] is 5 feet 8 inches tall and weighs 187 pounds.

Doctor Gregory Schmunk, Chief Medical Examiner of the Santa Clara County Coroner's Office, examined Carney's body and reviewed and signed the autopsy report prepared by Doctor Gleckman,

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one of his medical examiners. He testified as an expert in forensic pathology. He explained that gunpowder stippling on Carney's chest indicated that the gun was fired from a few inches away. Because Carney was found lying on his back, Doctor Schmunk further opined that he was standing still or backing up when shot. He explained that if Carney had been moving forward, his momentum would have caused him to fall forward. He discounted the possibility that Carney may have staggered around before falling because the bullet penetrated his spinal cord, which would have caused instant paralysis.

The Defense

*2 [Petitioner] testified that his job at the shelter was cleaning the bathroom. He threw out Carney's deodorant, and, when Carney got upset about it, [Petitioner] said he was just doing his job. Carney said he did not like [Petitioner's] self-righteous attitude, pinned him against some cabinets, and cocked his fist. [Petitioner] feared Carney because he was so big. At that point, a shelter worker told them to "take it outside." Carney again condemned [Petitioner's] attitude, and each said he wanted to kick the other's ass. Carney suggested a boxing ring, but [Petitioner] thought this was ridiculous. He had some physical injuries and had never boxed before. However, feeling fearful, nervous, trapped, jittery, and anxious, [Petitioner] said, "How about I shoot you in the head[.]" He meant his comment as an overstatement.

Carney and [Petitioner] separated, but Carney warned, "I walk softly and carry a big stick." [Petitioner] no longer felt safe at the shelter. He gathered some things and went out to his car. He got his gun and loaded it for protection. He also got his shaving kit and went back into the shelter and to the bathroom to shave. To his surprise, Carney was standing at the sink. Carney turned around and took two steps toward [Petitioner], who was just outside the bathroom door. [Petitioner] drew his gun, pointed it at the ceiling, and said, "Don't fuck with me anymore." Carney calmly approached him and said, "Are you going to shoot me? Go ahead and shoot. I'm not afraid to die. I'm not afraid of you." [Petitioner] said, "I don't want to shoot you" a couple of times. He felt intimidated. He lowered his gun toward Carney, put his finger on the trigger, and took the safety off. Carney then grabbed the gun, pulled it

toward his chest, and said that he was not afraid to die. [Petitioner] thought, "[H]e's going to take the gun from me. He could take the gun from me. He could turn it on me and use it on me. That he could just twist it right out of my hands. He had a better grip on it than I did. My hand was shaking. I can't think of what to do. I m-I'm trying to diffuse [sic] the situation, but I can't-I can't concentrate. It's-I haven't calmed down from a few minutes before when we had the argument. And I'm not thinking clearly. I can't concentrate. My mind is racing."

Carney said, "Well, if you're not going to shoot me, put the gun down." [Petitioner] lowered the gun and started backing out of the bathroom. As he did, Carney said, "You're not the only one with a gun. I got a Beretta nine millimeter in storage." [Petitioner] did not know what "storage" meant and thought, "okay, gunfight at O.K. Corral." Carney said, "I want to get away from assholes like you." Then Carney, who was about five feet away, lunged at [Petitioner] with his arms outstretched and his hands open. [Petitioner] turned to avoid him, raised his gun, took off the safety, and pulled the trigger. Carney never reached [Petitioner]. When [Petitioner] looked back, Carney was on the floor on his back. [Petitioner] could hear Carney breathing. He did not think he needed CPR, so he left and walked back to his car. He emptied the gun and put it on the hood and put his shaving kit back into the car. Within two hours, [Petitioner] was interviewed by Detective Coffman. FN3.

FN3. The interview was recorded, and a partial transcript of the interview was admitted into evidence.

*3 During the interview, [Petitioner] did not mention that he went to his car for his shaving kit. He did not mention Carney's statement about walking softly and carrying a big stick. He told Detective Coffman that when he saw Carney in the bathroom, Carney turned and stepped toward him. However, he did not say that his hand was shaking or that Carney tried to take the gun away from him. He did not mention that Carney lunged at him or that he turned away just before he shot Carney. Instead, he reported that before Carney said a word to him, he said, "Mr. Carney, don't fuck with me." [Petitioner] further reported that when Carney asked him to lower the gun, he dropped it down by his

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side. When Carney suggested that they “put on the gloves,” [Petitioner] said, “I won’t get hurt, you will ...” FN4. He then pointed the gun, removed the safety, and shot Carney in the chest. Detective Coffman asked, “So what, what was going through your mind to make you pick that gun up again and point it at him and take the safety off?” [Petitioner] answered, “Because I felt that it wasn’t over. It, it wasn’t going to end. That I was still going to be found out there. Sometime. Somewhere.” When Detective Coffman asked, “In the future,” [Petitioner] said, “Yeah.”

FN4. [Petitioner] testified, however, that he only thought this; he did not say it.

At trial, [Petitioner] conceded that he did not tell Detective Coffman that he thought Carney was going to kill him right then and there. [Petitioner] also admitted to Detective Coffman that he should have just walked away. He said that if he had had a good attitude, he would not have felt it necessary to defend himself. [Petitioner] testified that he was in shock during the interview and suffered gaps in his memory.

Doctor James Misset testified as an expert on the effects of traumatic incidents. He explained that trauma and stress can both distract and concentrate one’s focus and undermine one’s memory of events. However, when the trauma and stress pass, memory and recall can, and do, improve.

Doctor Bruce Linenberg, a psychologist, testified that he treated [Petitioner] from August 21 to September 5, 2001, when [Petitioner] was an in-patient at the Veteran’s Administration Hospital. FN5. Doctor Linenberg explained that in-patient psychiatry deals with people who are in acute states of depression and psychosis and not stable enough for a day program. He diagnosed [Petitioner] with “a combination of dysthymic disorder and personality disorder with what seemed like perhaps avoidant and paranoid traits or features.” He explained that “dysthymic” means that [Petitioner] was depressed more of the time than not. [Petitioner’s] diagnosis involved a lack of impulse control, social inhibitions, and hypersensitivity. He opined that one could still be struggling with personality disorders for a few months after being discharged.

FN5. [Petitioner] is an Air Force veteran, and prior to January 2002, he had been homeless for 10 months. At the time of trial, defendant was 49 years old.

LEGAL CLAIMS

*4 Petitioner asserts the following claims for relief: (1) the trial court violated Petitioner’s due process rights by giving improper instructions that “diluted the law of self-defense” and “imperfect self-defense”; FN2 (2) the trial court violated Petitioner’s due process rights by giving improper instructions on the “legal concept of self-defense by an aggressor”; (3) the trial court violated Petitioner’s due process rights by giving “erroneous and incomplete instructions on imperfect self-defense”; (4) the prosecutor committed misconduct and violated Petitioner’s due process rights by misstating the law of implied malice during closing argument; (5) the prosecutor violated Petitioner’s due process rights by failing to disclose evidence which tended to impeach the credibility of a key prosecution witness; and (6) the cumulative effect of all these errors deprived Petitioner of a fair trial.

FN2. This claim combines Petitioner’s numbered claims 1 and 2.

DISCUSSION

A. *Standard of Review*

This Court will entertain a petition for a writ of habeas corpus “in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.” 28 U.S.C. § 2254(a). The petition may not be granted with respect to any claim adjudicated on the merits in state court unless the state court’s adjudication of the claim: “(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established federal law, as determined by the Supreme Court of the United States; or (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.” 28 U.S.C. § 2254(d).

“Under the ‘contrary to’ clause, a federal habeas court may grant the writ if the state court arrives at a conclusion opposite to that reached by [the Supreme] Court on a question of law or if the state court decides a case differently than [the] Court has on a set of materially indistinguishable facts.” *Williams (Terry) v.*

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Taylor, 529 U.S. 362, 412-413, 120 S.Ct. 1495, 146 L.Ed.2d 389 (2000). “Under the ‘reasonable application clause,’ a federal habeas court may grant the writ if the state court identifies the correct governing legal principle from [the] Court’s decisions but unreasonably applies that principle to the facts of the prisoner’s case.” *Id.* at 413. “[A] federal habeas court may not issue the writ simply because that court concludes in its independent judgment that the relevant state-court decision applied clearly established federal law erroneously or incorrectly. Rather, that application must also be unreasonable.” *Id.* at 411.

“[A] federal habeas court making the ‘unreasonable application’ inquiry should ask whether the state court’s application of clearly established federal law was ‘objectively unreasonable.’” *Id.* at 409. In examining whether the state court decision was objectively unreasonable, the inquiry may require analysis of the state court’s method as well as its result. *Nunes v. Mueller*, 350 F.3d 1045, 1054 (9th Cir.2003). The standard for “objectively unreasonable” is not “clear error” because “[t]hese two standards ... are not the same. The gloss of error fails to give proper deference to state courts by conflating error (even clear error) with unreasonableness.” *Lockyer v. Andrade*, 538 U.S. 63, 75, 123 S.Ct. 1166, 155 L.Ed.2d 144 (2003).

*5 A federal habeas court may grant the writ if it concludes that the state court’s adjudication of the claim “results in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.” 28 U.S.C. § 2254(d)(2). The court must presume correct any determination of a factual issue made by a state court unless the petitioner rebuts the presumption of correctness by clear and convincing evidence. 28 U.S.C. § 2254(e)(1).

Where, as here, the highest state court to consider Petitioner’s claims issued a summary opinion which does not explain the rationale of its decision, federal review under § 2254(d) is of the last state court opinion to reach the merits. See *Ylst v. Nunnemaker*, 501 U.S. 797, 801-06, 111 S.Ct. 2590, 115 L.Ed.2d 706 (1991); *Bains v. Cambra*, 204 F.3d 964, 970-71, 973-78 (9th Cir.2000). In this case, the last state court opinion to address the merits of Petitioner’s claims is the opinion of the California Court of Appeal.

B. Analysis of Legal Claims

1. Self-Defense and Imperfect Self-Defense

Petitioner claims that the trial court diluted the standard jury instructions on self-defense and imperfect self-defense by giving the instruction defining assault immediately after. Petitioner argues that given together, the instructions told the jury that in order for Petitioner to claim self-defense, the victim must have first committed assault on the Petitioner or committed some act on Petitioner that placed Petitioner in imminent peril. Further, Petitioner asserts that the assault instruction essentially told the jury that Petitioner had to prove that the victim committed an assault on him. Finally, Petitioner claims that the trial court erroneously told the jury that if the victim were acting in self-defense against Petitioner, then Petitioner could not be lawfully defending himself. Respondent contends that Petitioner procedurally defaulted this claim by failing to raise a contemporaneous objection to the challenged instructions at trial.

A federal court will not review questions of federal law decided by a state court if the decision also rests on a state law ground that is independent of the federal question and adequate to support the judgment. *Coleman v. Thompson*, 501 U.S. 722, 729-30, 111 S.Ct. 2546, 115 L.Ed.2d 640 (1991). Petitioner first raised this claim on direct appeal. The California Court of Appeal stated, in pertinent part:

Initially, the Attorney General argues that [Petitioner] waived his claim by failing to object to below. Generally, “a party may not complain on appeal that an instruction correct in law and responsive to the evidence was too general or incomplete unless the party has requested appropriate clarifying or amplifying language.” (*People v. Andrews* (1989) 49 Cal.3d 991, 1024, 264 Cal.Rptr. 386, 782 P.2d 627; accord, *People v. Catlin* (2001) 26 Cal.4th 81, 149, 109 Cal.Rptr.2d 31, 26 P.3d 357.) Here, [Petitioner] does not argue that the standard instructions on self-defense or assault are themselves erroneous. Moreover, none of the court’s instructions directly state that for a defendant to claim self-defense, he or she has to prove that the victim actually committed an assault first or put the defendant in actual danger. As noted, [Petitioner] claims that when the self-defense and assault instructions are read together, they erroneously suggested that [Petitioner] had such a burden. However, if [Petitioner] thought

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the assault instruction rendered the self-defense instructions unclear, misleading, ambiguous, or contradictory, he was not entitled to “remain mute at trial and scream foul on appeal for the court's failure to expand, modify, and refine standardized jury instructions.” (*People v. Daya* (1994) 29 Cal.App.4th 697, 714, 34 Cal.Rptr.2d 884.) He had an obligation to object and request clarifying language to eliminate whatever erroneous suggestion he perceived. (*People v. Rodrigues* (1994) 8 Cal.4th 1060, 1192, 36 Cal.Rptr.2d 235, 885 P.2d 1; *People v. Johnson* (1993) 6 Cal.4th 1, 53, 23 Cal.Rptr.2d 593, 859 P.2d 673.) Nevertheless, we shall exercise our discretion to overlook [Petitioner's] forfeiture and address his claim. (See *People v. Johnson* (2004) 119 Cal.App.4th 976, 984-985, 14 Cal.Rptr.3d 780.)

*6 (Resp.Ex. 6, p. 8-9.)

Under the applicable law, the state court decision must “explicitly invoke [] a state procedural bar rule as a separate basis for its decision.” *McKenna v. McDaniel*, 65 F.3d 1483, 1488 (9th Cir.1995). Federal review will not be precluded “unless the state court makes clear that it is resting its decision denying relief on an independent and adequate state ground.” *Siripongs v. Calderon*, 35 F.3d 1308, 1317 (9th Cir.1994).

The preceding passage from the state court's opinion contains no express or explicit statement, or any other clear indication, that Petitioner's claim was denied *because* of his failure to request a clarifying or additional instruction. The passage does not state the claim is denied, waived, not cognizable, barred, or will not be considered, nor does it use any other similar language that demonstrates that the state court rejected the claim because Petitioner did not request a clarifying instruction. Rather, the court simply noted that Petitioner had not requested such an instruction and then exercised its discretion to address the claim. Federal review of Claim 1 thus is not precluded by the contemporaneous objection rule because the rule was not relied upon clearly or explicitly by the state court as a basis for its decision denying the claim.

Moreover, this Court has the discretion to decide the claim on the merits without determining whether the claim is procedurally defaulted. See *Lambrix v. Singletary*, 520 U.S. 518, 525, 117 S.Ct. 1517, 137 L.Ed.2d 771 (1997) (a district court may address the merits without reaching procedural issues where the

interests of judicial economy are best served by doing so); *Franklin v. Johnson*, 290 F.3d 1223, 1232 (9th Cir.2002) (“Procedural bar issues are not infrequently more complex than the merits issues presented by the appeal, so it may well make sense in some instances to proceed to the merits if the result will be the same.”). Accordingly, the Court addresses the merits below.

The instructions at issue here include CALJIC Nos. 5.12,^{FN3} justifiable homicide in self-defense; 5.17,^{FN4} actual but unreasonable belief in necessity to defend-manslaughter; 5.30,^{FN5} self-defense against assault; 9.00,^{FN6} assault-defined; and 9.01,^{FN7} assault-present ability to commit injury necessary.

FN3. “The killing of another person in self-defense is justifiable and not unlawful when the person who does the killing actually and reasonably believes, one, that there is imminent danger that the other person will either kill him or cause him great bodily injury and, two, that it is necessary under the circumstances for him to use in self-defense force or means that might cause the death of the other person for the purpose of avoiding death or great bodily injury to himself. The fear of death or great bodily injury is not sufficient to justify homicide. To justify taking the life of another in self-defense, the circumstances must be such as would excite the fears of a reasonable person placed in a similar position, and the party killing must act under the influence of those fears alone. Those dangers must be apparent, present, immediate and instantly dealt with, or must so appear at the time to the slayer as a reasonable person, and the killing must be done under a well-founded belief that it is necessary to save one's life-er, excuse me-save oneself from death or great bodily harm.” (RT 975.)

FN4. “A person who kills another person in the actual but unreasonable belief in the necessity to defend against imminent peril to life or great bodily injury, kills unlawfully but does not harbor malice aforethought and is not guilty of murder. This would be so even though a reasonable person in the same situation seeing and knowing the same facts would not have had the same belief. Such an

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actual but unreasonable belief is not a defense to the crime of voluntary manslaughter.

As used in this instruction, an “imminent” peril or danger means one that is apparent, present, immediate and must be instantly dealt with, or must so appear at the time to the slayer. Imminent peril of danger-exclude me-imminent peril or danger must have existed or appear to the [Petitioner] to have existed at the very time the fatal shot was fired. In other words, the peril must appear to the [Petitioner] as immediate and present and not prospective nor in the future. However, this principle is not available and malice aforethought is not negated if the [Petitioner] by his wrongful conduct created the circumstances which legally justified his adversary's use of force, attack, or pursuit.” (RT 976.)

FN5. “It is lawful for a person who is being assaulted to defend himself from attack if, as a reasonable person, he has grounds for believing and does believe that bodily injury is about to be inflicted upon him. In doing so, that person may use all force and means which he believes to be reasonably necessary and which would appear to a reasonable person, in the same or similar circumstances, to be necessary to prevent the injury which appears to be imminent” (RT 976-77.)

FN6. “In order to prove an assault, each of the following elements must be proved: One, a person willfully and unlawfully committed an act which by its nature would probably and directly result in the application of physical force on another person. Two, the person committing the act was aware of facts that would lead a reasonable person to realize that as a direct, natural and probable result of this act that physical force would be applied to another person. And, three, at the time the act was committed, the person committing the act had the present ability to apply physical force to the person of another.

The word “willfully” means that the person committing the act did so intentionally.

However, an assault does not require an intent to cause injury to another person, or an actual awareness of the risk that injury might occur to another person.

To constitute an assault, it is not necessary that any actual injury be inflicted. However, if an injury is inflicted it may be considered in connection with other evidence in determining whether an assault was committed and, if so, the nature of the assault. A willful application of physical force upon the person of another is not unlawful when done in lawful self-defense.” (RT 977.)

FN7. “A necessary element of an assault is that the person committing the assault have the present ability to apply physical force to the person of another. This means that at the time of the act which by its nature would probably and directly result in the application of physical force upon the person of another, the perpetrator of the act must have the physical means to accomplish that result. If there is this ability, present ability exists even if there is no injury.” (RT 977-78.)

When a claim for federal collateral relief is based upon asserted instructional errors, an instruction may not be judged in artificial isolation, but must be considered in the context of the instructions as a whole and the trial record. *See Estelle v. McGuire*, 502 U.S. 62, 72, 112 S.Ct. 475, 116 L.Ed.2d 385 (1991). In other words, the Court must evaluate jury instructions in the context of the overall charge to the jury as a component of the entire trial process. *United States v. Frady*, 456 U.S. 152, 169, 102 S.Ct. 1584, 71 L.Ed.2d 816 (1982). The defined category of infractions that violate fundamental fairness is very narrow. “Beyond the specific guarantees enumerated in the Bill of Rights, the Due Process Clause has limited operation.” *Estelle*, 502 U.S. at 73.

*7 In reviewing ambiguous instructions, the inquiry is not how reasonable jurors could or would have understood the instruction as a whole; rather, the court must inquire whether there is a “reasonable likelihood” that the jury has applied the challenged instruction in a way that violates the Constitution. *See id.* at 72 & n. 4. In order to show a due process viola-

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tion, the Petitioner must show both ambiguity and a "reasonable likelihood" that the jury applied the instruction in an unconstitutional manner, for example, by relieving the state of its burden of proving every element beyond a reasonable doubt. *Waddington v. Sarausad*, --- U.S. ---, ---, 129 S.Ct. 823, 831, 172 L.Ed.2d 532 (2009).

The California Court of Appeal rejected Petitioner's claim, reasoning as follows:

First, and contrary to [Petitioner's] claim, the self-defense and assault instructions, even when read in isolation from the court's other instructions, do not "clearly and unequivocally" imply that self-defense requires proof that the ultimate victim posed actual danger. As noted, one of the assault instructions (CALJIC No. 5.30) itself explains that a person may defend himself "if, as a reasonable person, he has grounds for believing, and does believe" that he is about to be attacked; and he may use all force "he believes to be reasonably necessary, and which would appear to a reasonable person in the same or similar circumstances to be necessary, to prevent the injury which appears to be imminent." That instruction is facially inconsistent with any possible inference that actual danger is a prerequisite to self-defense.

However, even if the instructions in isolation could theoretically give the wrong impression about the need for actual danger, we note that the court also gave CALJIC No. 5.51, which expressly instructed the jury that "[a]ctual danger is not necessary to justify self-defense. If one is confronted by the appearance of danger which arouses [in] his mind—excuse me—arouses in his mind as a reasonable person an actual belief and fear that he is about to suffer bodily injury and if a reasonable person in a like situation seeing and knowing the same facts would be sufficient in believing himself in like danger and if that individual so confronted acts in self-defense upon these appearances and from that fear and actual beliefs, the person's right of self-defense is the same whether the danger is real or merely apparent." That instruction plainly and unequivocally rebuts any potential suggestion that actual danger might be necessary.

The alleged erroneous suggestion that [Petitioner] had to prove that Carney unlawfully assaulted him

first is an even more remote possibility. [Petitioner] teases this suggestion from the following language in the assault instruction: "to prove an assault, each of the following elements must be proved..." (CALJIC No. 9.00.) However, that language does not reasonably indicate that the [Petitioner] bears the burden to prove anything. Moreover, just before the court instructed the jury on assault, it told the jury that "[u]pon a trial of a charge of murder, a killing is lawful if it was justifiable. The burden is on the prosecution to prove beyond a reasonable doubt that the homicide was unlawful and, that is, not justifiable. If you have a reasonable doubt that the homicide was unlawful, you must find the [Petitioner] not guilty." (See CALJIC No. 5.15.)

*8 In determining the impact of the court's instructions and whether there is a reasonable likelihood that the jury misunderstood or misapplied them, we must also consider the arguments of counsel. (*People v. Young*, (2005) 34 Cal.4th 1149, 1202, 24 Cal.Rptr.3d 112, 105 P.3d 487.) Here, the prosecutor did not say or imply anything during closing argument to suggest that for [Petitioner] to claim self-defense and justifiable homicide, he had the burden to prove that Carney unlawfully assaulted him first. Nor did defense counsel's argument suggest that [Petitioner] had such a burden or was attempting to satisfy it.

In sum, [Petitioner] strains to conjure an erroneous legal theory from relevant and legally correct standard instructions. However, when all of the pertinent instructions are read together, they do not naturally or reasonably, expressly or implicitly, convey such a theory. We presume that the jurors followed the court's instruction to consider the instructions as a whole and were able to understand and correlate the instructions in reaching a verdict. (See *People v. Pinholster*, (1992) 1 Cal.4th 865, 919, 4 Cal.Rptr.2d 765, 824 P.2d 571; *People v. Adcox*, (1988) 47 Cal.3d 207, 253, 253 Cal.Rptr. 55, 763 P.2d 906; *People v. Scheer*, (1998) 68 Cal.App.4th 1009, 1023, 80 Cal.Rptr.2d 676; *People v. Scott*, (1988) 200 Cal.App.3d 1090, 1095, 246 Cal.Rptr. 406.) Accordingly, we find no reasonable likelihood that they misunderstood the instructions to impose a burden on [Petitioner] to prove actual danger or that the jury misapplied the instructions in that way. In sum, therefore, there was no instructional error concerning the law of

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self-defense arising from the court's assault instructions.

(Resp.Ex. 6, p. 9-10.)

We also reject [Petitioner's] complaint about language in the assault instruction that “[a] willful application of physical force upon the person of another is not unlawful when done in lawful self-defense.” According to [Petitioner], that language suggested to jurors that if in fact Carney was lawfully defending himself against [Petitioner], then [Petitioner] could not lawfully respond to Carney and claim self-defense. [Petitioner] argues that such a concept misstates the applicable law on self-defense, which focuses on what was reasonably apparent from the [Petitioner's] perspective and not what is real or actual.

However, the language in the assault instruction is proper and correct. “It is well established that the ordinary self-defense doctrine-applicable when a defendant reasonably believes that his safety is endangered-may not be invoked by a defendant who, through his own wrongful conduct (e.g., the initiation of a physical assault or the commission of a felony), has created circumstances under which his adversary's attack or pursuit is legally justified. [Citations.]” (*In re Christian S.*, (1994) 7 Cal.4th 768, 773, fn. 1, 30 Cal.Rptr.2d 33, 872 P.2d 574; see *People v. Smith* (1973) 33 Cal.App.3d 51, 68, 108 Cal.Rptr. 698 [“One who assails another and then brings on an attack may not claim self-defense as a ground of exemption from the consequences of killing his adversary”]; *People v. Garcia*, (1969) 275 Cal.App.2d 517, 523, 79 Cal.Rptr. 833 [“A man has not the right to provoke a quarrel, go to it armed, take advantage of it and then convert his adversary's lawful efforts to protect himself into grounds for further aggression against him under the guise of self-defense”].)

*9 (Resp.Ex. 6, p. 13.)

With respect to Petitioner's parallel claim that the assault instruction diluted the imperfect self-defense instruction, the state appellate court stated:

This claim is more far fetched than [Petitioner's] previous one because unlike the instruction on self-defense, which contains the phrase “person being assaulted” and thus has a verbal connection to

the assault instruction, the instruction on imperfect self-defense does not even include the word “assault.” Moreover, the imperfect self-defense instruction expressly, repeatedly, and unequivocally states that a person need only believe that he or she is in imminent peril, and imminent peril need only appear to exist. Finally, the court instructed the jury that “[t]o establish that the killing is murder and not manslaughter, the burden is on the People to prove beyond a reasonable doubt each of the elements of murder and that [the] act which caused the death was not done in the heat of passion or upon sudden quarrel or in the actual, even though unreasonable, belief in the necessity to defend against imminent peril to life or great bodily injury.” (See CALJIC No. 8.50.)

(Resp.Ex. 6, p. 14-15.)

Viewing the challenged instructions as a whole, this Court also rejects Petitioner's claim that the trial court diluted the self-defense and imperfect self-defense instructions. Petitioner concedes that the instructions were correct; he argues merely that together they may have suggested an improper interpretation. However, the trial court gave other instructions that clearly stated that actual danger was not necessary to justify self-defense, see CALJIC No. 5.51 (RT 978-79), and that the imminent peril need only to have *appeared* to exist to Petitioner, see CALJIC No. 5.17 (RT 976), 5.30 (RT 976-77). In addition, the trial court instructed the jury that the prosecution had the burden to prove that the homicide was both unlawful and unjustifiable, see CALJIC No. 5.15, negating the idea that the jury could believe that the burden of such proof was on Petitioner. Finally, the trial court's instruction that “a willful application of physical force upon the person of another is not unlawful when done in lawful self-defense” is a proper statement of the law.

Accordingly, the state court's determination was not contrary to, or an unreasonable application of, clearly established Supreme Court precedent, nor was it based on an unreasonable determination of the facts in light of the evidence presented. 28 U.S.C. § 2254(d)(1), (2).

2. Self-Defense by an Aggressor

Petitioner claims that although the trial court gave CALJIC No. 5.54,^{FN8} the trial court erred by failing to

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instruct the jury that “some or all of the requirements that would make self-defense available to an initial aggressor can be excused if the counterattack by the ultimate victim is so sudden and perilous that the initial aggressor cannot withdraw.” (Petition at Attachment Number 3.)

FN8. “The right of self-defense is only available to a person who initiated an assault, if he has done all the following ... number one, he has actually tried in good faith to refuse to continue fighting. Two, he has clearly informed his opponent that he wants to stop fighting. Three ... he has clearly informed his opponent that he has stopped fighting. After he has done these three things, he has the right to self-defense if his opponent continues to fight.” (RT 979.)

*10 Due process requires that “ ‘criminal defendants be afforded a meaningful opportunity to present a complete defense.’ ” *Clark v. Brown*, 450 F.3d 898, 904 (9th Cir.2006) (quoting *California v. Trombetta*, 467 U.S. 479, 485, 104 S.Ct. 2528, 81 L.Ed.2d 413 (1984)). Therefore, a criminal defendant is entitled to adequate instructions on the defense theory of the case. *See Conde v. Henry*, 198 F.3d 734, 739 (9th Cir.2000). However, a defendant is entitled to an instruction on his defense theory only “if the theory is legally cognizable and there is evidence upon which the jury could rationally find for the defendant.” *United States v. Boulware*, 558 F.3d 971, 974 (9th Cir.2009) (internal quotations omitted).

The California Court of Appeal rejected Petitioner's assertion, analyzing state case law which creates an exception to the law of self-defense as asserted by the aggressor. The court concluded that although the trial court's instruction in fact was incomplete, the exception was inapplicable to Petitioner based on the evidence produced at trial. (Resp.Ex. 6, p. 15-19.) Accordingly, it concluded that the failure to give an instruction based on the exception was not error. (*Id.*)

California law permits a wrongful aggressor to assert a right of self-defense against his victim if the victim's “counter assault [is] so sudden and perilous that no opportunity [is] given to decline or to make known to his adversary his willingness to decline the strife, if he cannot retreat with safety, then, as the

greater wrong of the deadly assault is upon his opponent, he would be justified in slaying forthwith in self-defense.” *People v. Hecker*, 109 Cal. 451, 464, 42 P. 307 (1895).

In essence, Petitioner argues that the failure to instruct the jury about the exception prevented the jury from finding a justifiable homicide if it concluded that even if Petitioner were the initial aggressor, Carney's sudden lunge at Petitioner made it impossible for Petitioner to retreat. However, as the California Court of Appeal observed:

[Petitioner] misunderstands the *Hecker* exception. The rule is that an unlawful aggressor must retreat and notify his victim before he can justify any further application of force against the victim as self-defense. This is so regardless of the nature of the initial aggression. The exception applies when the initial aggression involves a simple assault, and the victim suddenly and wrongfully escalates the level of force and violence by responding with excessive-i.e., unreasonable-force, making it impossible for the aggressor to retreat. Under such circumstances, the initial aggressor may respond to such an excessive counterattack with all the force reasonably necessary under the circumstances to prevent the threatened death or great bodily injury.

Insofar as [Petitioner] claims that the mere suddenness of Carney's counterattack entitled him to defend himself with deadly force, his claim fails. It is not the suddenness of a victim's counterattack that gives an aggressor the right of self-defense; it is the wrongfulness of the victim's counterattack, more specifically, the unreasonable and excessive use of force by the victim. Indeed, as *Hecker* explains, if an aggressor commits a deadly assault, and the victim suddenly responds with equally deadly force, the aggressor who fails to withdraw does not gain the right to respond in self-defense even if it is impossible to withdraw.

*11 Insofar as [Petitioner] claims that Carney's counterattack was excessive, unreasonable, an wrongful, his claim also fails. [Petitioner] admitted that during his initial confrontation with Carney, he threatened to shoot and kill him. [Petitioner] admitted that shortly after their confrontation, he armed himself and approached Carney in the bathroom. [Petitioner] further admitted that he took the

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gun out of his back pocket, pointed it toward the ceiling, said “[d]on't fuck with me anymore,” and pointed his gun toward Carney. [Petitioner's] own testimony establishes an assault with a firearm that posed an actual or apparent imminent threat of death or great bodily injury. Under the circumstances, Carney was entitled to use any and all reasonable force to defend himself and pursue [Petitioner] until he has secured himself from the apparent danger. (See *People v. Scoggins*, (1869) 37 Cal. 676, 683; e.g., *People v. Williams*, (1977) 75 Cal.App.3d 731, 735, 737, 740, 142 Cal.Rptr. 704; *People v. Garcia*, *supra*, 275 Cal.App.2d 517, 522-523, 79 Cal.Rptr. 833; see also CALJIC No. 5.50.) Next, it is undisputed that Carney did not counterattack with a deadly weapon or force. [Petitioner] testified that Carney merely lunged at him. However, [Petitioner] was holding a gun and had actually or apparently threatened him with it. Thus, even if we accept [Petitioner's] version of events, [Petitioner's] testimony is not sufficient to support a finding that Carney responded to [Petitioner] with excessive and unreasonable force that would have justified [Petitioner's] use of deadly force in response. In other words, the record does not support a finding that Carney escalated the level of force and violence, let alone, that he wrongfully did so.

(Resp.Ex. 6, p. 17-19.)

Here, based on the evidence produced at trial and Petitioner's own testimony, Petitioner's alleged initial confrontation with Carney was not a simple assault but one in which Petitioner was armed with a gun and pointed the gun at Carney. Carney's response could not reasonably be viewed as excessive, nor was it even an equal showing of deadly force. The record thus does not demonstrate that Petitioner was entitled to a *Hecker* instruction. See *Menendez v. Terhune*, 422 F.3d 1012, 1029 (9th Cir.2005) (stating that a defendant is not entitled to have a jury instruction embodying the defense theory if the evidence does not support it).

Accordingly, the state court's determination was not contrary to, or an unreasonable application of, clearly established Supreme Court precedent, nor was it based on an unreasonable determination of the facts in light of the evidence presented. 28 U.S.C. § 2254(d)(1), (2).

3. *Incomplete Instructions on Imperfect Self-Defense*

Petitioner claims that although the trial court properly gave CALJIC No. 5.17, *supra* note 4; the standard jury instruction on imperfect self-defense, that instruction was incomplete without also telling the jury that CALJIC Nos. 5.50^{FN9} (the assailed person need not retreat), 5.51^{FN10} (actual danger is not necessary), and 5.54 (regaining of the right to self-defense by the initial aggressor), *supra* note 8-the same concepts applicable to self-defense-were applicable to imperfect self-defense. Respondent again contends that Petitioner's claim is procedurally barred under the contemporaneous objection rule. However, for the same reasons the Court discussed in Section B.1, *supra*, the Court will address the merits. See *Lambrix*, 520 U.S. at 525; *Franklin*, 290 F.3d at 1232.

FN9. “A person threatened with attack-an attack that justifies the exercise of the right of self-defense need not retreat. In his exercise of his right of self-defense, a person may stand his ground and defend himself by the use of all force and means which would appear to be necessary to a reasonable person in a similar situation and with similar knowledge. And a person may pursue his assailant until he has secured himself from danger if that course likewise appears reasonably necessary. This law applies even though the assailed person might more easily have gained safety from flight or by running from the scene.” (RT 978.)

FN10. “Actual danger is not necessary to justify self-defense. If one is confronted by the appearance of danger which arouses his mind-excuse me-in his mind, as a reasonable person an actual belief and fear he is about to suffer bodily injury and if a reasonable person in a like situation, seeing and knowing the same facts, would be sufficient in believing himself in like danger and if that individual so confronted acts in self-defense upon these appearances and from that fear and actual belief, that person's right of self-defense is the same whether the danger is real or merely apparent.” (RT 978-79.)

*12 The California Court of Appeal rejected Petitioner's claim, concluding that additional instructions were unnecessary. (Resp.Ex. 6, p. 20.) Specifically,

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regarding CALJIC No. 5.50, the court noted that neither CALJIC No. 5.50 nor the imperfect self-defense instruction require that an assailed must retreat even if he would not be justified in taking action in self-defense. (Resp.Ex. 6, p. 21.) The court also noted Petitioner's failure to explain "what any such modification would have added to the instruction on imperfect self-defense that was material, necessary, but missing; and he fail [ed] to explain how such a modification might disabuse the jury of some popular misconception about imperfect self defense." (*Id.*)

With respect to CALJIC No. 5.51, the state appellate court concluded that adapting the instruction to imperfect self-defense would have been redundant and unnecessary because the imperfect self-defense instruction already instructs that there need only be an *appearance* of a threat to permit the defense of oneself. (*Id.* at 21-22.)

Petitioner fails to show how the addition of CALJIC Nos. 5.50 and 5.51 to the imperfect self-defense instruction deprived him of a fair trial. See *Dunckhurst v. Deeds*, 859 F.2d 110, 114 (9th Cir.1988). The omission of an instruction is less likely to be prejudicial than a misstatement of the law. See *Walker v. Endell*, 850 F.2d 470, 475-76 (9th Cir.1987) (citing *Henderson v. Kibbe*, 431 U.S. at 155). Thus, a habeas petitioner whose claim involves a failure to give a particular instruction bears an " 'especially heavy burden.' " *Villafuerte v. Stewart*, 111 F.3d 616, 624 (9th Cir.1997) (quoting *Henderson v. Kibbe*, 431 U.S. 145, 155, 97 S.Ct. 1730, 52 L.Ed.2d 203 (1977)). Here, neither instruction added anything new or material to a theory of imperfect self-defense.

With respect to CALJIC No. 5.54, the California Court of Appeal stated that theoretically, "[t]here could be circumstances under which an initial aggressor may not claim the right of self-defense but may properly claim imperfect self-defense." (*Id.* at 23.)

Theory aside, however, the question here is whether such circumstances-e.g., an unlawful assault; an excessive, but not deadly, counterattack; followed by an excessive and deadly response-would, or should, require the court to supplement the instruction on imperfect self-defense with language akin to that in CALJIC No. 5.54 that would explain the circumstances under which an

initial, wrongful aggressor gains the right to claim *imperfect* self-defense. We think not.

As noted, CALJIC No. 5.17, the standard instruction given by the court, bars imperfect self-defense when a defendant's wrongful conduct *legally justifies* the victim's counterattack. This is so even if the defendant harbors an actual belief in the need to defend himself. However, by its own terms, the instruction would not bar imperfect self-defense where the victim's conduct is not legally justified-i.e., imperfect self-defense is available where the victims response is legally unjustified. Thus, in the complicated scenario outlined above, where the victim responds to the aggressor with excessive and unreasonable force, that counterattack is not legally justified, and the bar against imperfect self-defense is not applicable. Thus, if a defendant actually believed that he that he needed to use deadly force against the victim's legally unjustified counterattack, but the belief was not reasonable, the defendant would be entitled to claim imperfect self-defense. Nothing in CALJIC No. 5.17 suggests otherwise. Consequently, we do not believe that in the absence of a request, a court has a suas onte duty to adapt CALJIC No. 5.54 to the doctrine of imperfect self-defense or otherwise supplement the imperfect self-defense with language concerning the exception outlined in *Hecker*.

*13 (Resp.Ex. 6, p. 23-24.) The court concluded that Petitioner's claim assumes that Carney's counterattack was not legally justified-an assumption that is not supported by the evidence. (*Id.* at 24.)

As noted previously, a defendant is not entitled to have a jury instruction embodying a defense theory if the evidence does not support it. *Menendez*, 422 F.3d at 1029. Based on the evidence produced at trial and Petitioner's own testimony, Carney's response was not excessive, nor was it an equal showing of deadly force.

4. Prosecutorial Misconduct-Misstatement

Petitioner next claims that the prosecutor committed misconduct when he argued in closing that if a killing is done by a defendant and nothing else is shown, the law presumes that the killing is malicious, and it is murder. The record shows that the prosecutor described the differences between first degree and second degree murder and express and implied malice

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as follows:

Deliberation and premeditation is not required for second-degree murder. It's just an intentional killing, essentially, a killing done with malice, a killing done expressly with express malice or implied malice, an intentional act. Deliberation and premeditation are not required for second degree murder.

What's an example of second-degree murder? If *A* kills *B* and that's all you know, it's second-degree murder. And the quote here from a California case: "When a killing is proved to have been committed by the Defendant and nothing further is shown, the presumption applies that it was malicious and an act of murder."

(RT 998.) Petitioner objected to this phrasing, and objected specifically to the use of the word "presumption." (RT 1000.) After hearing argument outside the presence of the jury, the trial court allowed the prosecutor to continue, provided that the prosecutor explain that the quote from the California case was meant to describe an example of implied malice. (RT 1002.) When the jury returned, the prosecutor clarified his point.

From the chart that you're looking at as an example of a second degree implied malice murder. And the case says, "It is settled that the necessary element of malice may be inferred from the circumstances of the homicide." Implied malice, this is an example. So if *A* kills *B* and that's all you know, that's an implied malice second-degree murder.

And the case goes on to say "When the killing is proved to have been committed by the Defendant and nothing further is shown, the presumption applies that it was malicious and an act of murder." In such a case, the verdict should be murder of the second degree and not murder of the first degree, which is why this is an example of a second.

(RT 1003.)

Prosecutorial misconduct is cognizable in federal habeas corpus. A defendant's due process rights are violated when a prosecutor's misconduct renders a trial "fundamentally unfair." See *Darden v. Wainwright*, 477 U.S. 168, 181, 106 S.Ct. 2464, 91 L.Ed.2d 144 (1986); *Smith v. Phillips*, 455 U.S. 209, 219, 102 S.Ct. 940, 71 L.Ed.2d 78 (1982) ("the touchstone of

due process analysis in cases of alleged prosecutorial misconduct is the fairness of the trial, not the culpability of the prosecutor"). Under *Darden*, the first issue is whether the prosecutor's remarks were improper; if so, the next question is whether such conduct infected the trial with unfairness. *Tan v. Runnels*, 413 F.3d 1101, 1112 (9th Cir.2005). However, "[a]rguments of counsel generally carry less weight with a jury than do instructions from the court." *Boyd v. California*, 494 U.S. 370, 384, 110 S.Ct. 1190, 108 L.Ed.2d 316 (1990).

*14 The California Court of Appeal rejected Petitioner's claim. It stated that while the prosecutor's statement was a correct statement of the law, it was improper as an instruction. (Resp.Ex. 6, p. 25-26.) However, the appellate court determined that the jury instructions given by the trial court removed any doubt that the jury was improperly influenced by that particular statement by the prosecutor. (*Id.*)

Here, even assuming that the challenged statement was improper, Petitioner has not shown that the statement infected the trial with unfairness. The jury is presumed to have followed the trial court's instructions. See *Francis v. Franklin*, 471 U.S. 307, 324 n. 9, 105 S.Ct. 1965, 85 L.Ed.2d 344 (1985). These instructions did not use the word "presumption" in the way that the prosecutor did. The trial court properly instructed the jury on express and implied malice, the prosecution's burden of proof, and on self-defense and imperfect self-defense. The court also advised the jury that it was to disregard any argument of counsel that conflicted with the court's instructions.

5. Prosecutorial Misconduct-Brady violation

Petitioner alleges that the prosecution improperly withheld material evidence that would have impeached the credibility of Doctor Schmunk, the chief medical examiner who testified for the prosecution at trial as an expert in determining the cause and manner of death.

At trial, Doctor Schmunk testified in accordance with the autopsy report that Carney was found lying on his back, that the bullet severed Carney's spinal cord, and that a severed spinal cord causes paralysis. In Doctor Schmunk's expert opinion, Carney was either standing still or moving backward when he was shot at close range. Doctor Schmunk testified that Carney could not have been moving forward.

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After Doctor Schmunk's testimony but before the conclusion of trial, a local newspaper printed an article reporting that Doctor Schmunk had an outstanding arrest warrant and criminal complaint from Wisconsin charging him with theft, alleging that he had stolen over \$400 worth of medical textbooks from his former employer, Brown County. After conducting a hearing, the trial court permitted defense counsel to re-call Doctor Schmunk to impeach him.

Doctor Schmunk testified that he found out about the criminal complaint in 2002, corresponded with the district attorney as well as other Wisconsin officials, and had considered the matter resolved. Doctor Schmunk testified that he eventually sent \$400 to local Wisconsin officials in full satisfaction of the claim.

After the jury returned a guilty verdict against Petitioner, Petitioner filed a motion for new trial based on the prosecutor's failure to disclose other impeachment material. Specifically, Petitioner discovered that in 1994, Doctor Schmunk and a co-worker in Sacramento County engaged in a dispute that resulted in the co-worker filing a lawsuit against Doctor Schmunk, which settled in June 1995. Then, in December 1999, Doctor Schmunk applied to carry a concealed weapon and falsely declared under penalty of perjury that he had not been a party to a lawsuit in the previous five years. Petitioner also discovered a confidential memorandum from the Santa Clara District Attorney's office, dated August 2003, that indicated that Special Assistant District Attorney Bill Larsen had received three newspaper articles in April 1999 regarding the dispute between Doctor Schmunk and his former employer in Wisconsin, which included additional details not discussed during trial.

*15 In *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963), the Supreme Court held that "the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." *Id.* at 87. The Supreme Court has since made clear that the duty to disclose such evidence applies even when there has been no request by the accused, *United States v. Agurs*, 427 U.S. 97, 107, 96 S.Ct. 2392, 49 L.Ed.2d 342 (1976), and that the duty encompasses impeachment evidence as well as exculpatory evidence, *United States v. Bagley*, 473

U.S. 667, 676, 105 S.Ct. 3375, 87 L.Ed.2d 481 (1985). Evidence is material "if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. A 'reasonable probability' is a probability sufficient to undermine confidence in the outcome." *Id.* at 682.

"There are three components of a true *Brady* violation: [t]he evidence at issue must be favorable to the accused, either because it is exculpatory, or because it is impeaching; that evidence must have been suppressed by the State, either willfully or inadvertently; and prejudice must have ensued." *Strickler v. Greene*, 527 U.S. 263, 281-82, 119 S.Ct. 1936, 144 L.Ed.2d 286 (1999). "[T]here is never a real '*Brady* violation' unless the nondisclosure was so serious that there is a reasonable probability that the suppressed evidence would have produced a different verdict." *Id.* at 281.

Here, the California Court of Appeal rejected Petitioner's claim, reasoning that the information was immaterial:

The impeachment value of the evidence arose from its tendency to show moral turpitude because evidence of moral turpitude can shake confidence in a witness's honesty and integrity and thereby undermine his credibility. (See *People v. Castro* (1985) 38 Cal.3d 301, 314-315, 211 Cal.Rptr. 719, 696 P.2d 111.) On the other hand, the subject matter of the impeachment evidence involved collateral matters. None of it had any direct connection to the facts of this case, Doctor Schmunk's professional qualifications and expertise as a medical examiner, the validity of the autopsy performed by Doctor Gleckman, or the soundness of Doctor Schmunk's analysis and opinion concerning Carney's position at the time he was shot. As to those material and critical matters, [Petitioner] was fully able to cross-examine Doctor Schmunk. [Petitioner] was also free to call his own forensic expert to contradict Doctor Schmunk and present a different theory consistent with [Petitioner's] testimony that Carney lunged at him just before the fatal shot.

We further note that Doctor Schmunk's opinion was based on undisputed evidence: (1) Carney was found lying on his back; (2) the bullet severed his spinal cord; and (3) a severed spinal cord causes

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instant paralysis. On the other hand, [Petitioner's] claim that Carney lunged at him was undermined by the fact that before trial, he never claimed or told anyone that Carney had lunged at him, even though that factual assertion was essential to his claim of perfect and imperfect self-defense.

*16 Last, we note that at trial, [Petitioner] was able to impeach Doctor Schmunk with information about the criminal complaint and allegations that he stole over \$400 worth of textbooks. Generally, "impeachment evidence has been found to be material where the witness at issue 'supplied the only evidence linking the defendant(s) to the crime,' [citations], or where the likely impact on the witness's credibility would have undermined a critical element of the prosecution's case [citation]." (*U.S. v. Payne* (2d Cir.1995) 63 F.3d 1200, 1210.) But "where the undisclosed evidence merely furnishes an additional basis on which to challenge a witness whose credibility has already been shown to be questionable or who is subject to extensive attack by reason of other evidence, the undisclosed evidence may be cumulative, and hence not material." (*U.S. v. Avellino* (2d Cir.1998) 136 F.3d 249, 257; *Tankleff v. Senkowski* (2d Cir.1998) 135 F.3d 235, 251; see also *Clay v. Bowersox* (8th Cir.2004) 367 F.3d 993, 1000; *Simental v. Matrisciano* (7th Cir.2004) 363 F.3d 607, 614.)

Under the circumstances, [Petitioner] cannot demonstrate, and we do not find, a reasonable probability that the jury would have returned a more favorable verdict or been hopelessly deadlocked had defense counsel been able to cross-examine Doctor Schmunk about his coworker's previous lawsuit and Doctor Schmunk's statement on his application for a gun license. (See *People v. Salazar*, *supra*, 35 Cal.4th at p. 1052, 29 Cal.Rptr.3d 16, 112 P.3d 14 [failure to disclose evidence to impeach credibility of county medical examiner not *Brady* violation because evidence not material].) Thus, we find no *Brady* violation.

(Resp.Ex. 6, p. 31-32.)

Petitioner argued that he should have been able to present Doctor Schmunk's prior conduct, which amounted to a crime of moral turpitude, to impeach Doctor Schmunk's testimony. See *People v. Wheeler*, 4 Cal.4th 284, 288-95, 14 Cal.Rptr.2d 418, 841 P.2d

938 (1992) (permitting admission of misdemeanor conduct that is relevant to impeachment). Doctor Schmunk's testimony was important to Petitioner's defense because it contradicted Petitioner's claim that Carney had lunged at him.

Evidence impeaching the testimony of a government witness falls within the *Brady* rule. See *Barker v. Fleming*, 423 F.3d 1085, 1095 (9th Cir.2005). However, here, the information contained in the three 1999 articles related to the criminal complaint for misdemeanor theft that was filed against Doctor Schmunk in Wisconsin, and about which the jury had heard testimony when defense counsel re-called Doctor Schmunk to the stand. See, e.g., *id.* at 1096 (affirming the district court's finding that four withheld convictions that could undermine the credibility of a key prosecution witness did not violate *Brady* because the convictions were immaterial and duplicative of the evidence already presented to the jury).

Further, the evidence regarding Doctor Schmunk's 1999 application to possess a concealed weapon was immaterial to Petitioner's guilt or innocence. See *United States v. Collins*, 551 F.3d 914, 924 (9th Cir.2009). While Doctor Schmunk's conduct could amount to a misdemeanor crime of moral turpitude, that information appears to be both cumulative to the theft charge and collateral to the issue of Petitioner's guilt or innocence. See *Schad v. Ryan*, 2010 WL 92758, *6-7 (9th Cir.2010) (per curiam) ("We are less likely to find the withholding of impeachment material prejudicial in cases in which the undisclosed materials would not have provided the defense with a new and different form of impeachment."). Moreover, Petitioner fails to demonstrate that the prosecution suppressed the information regarding the application for a concealed weapon. See *United States v. Price*, 566 F.3d 900, 909 (9th Cir.2009) ("[i]n order to comply with *Brady*, ... 'the individual prosecutor has a duty to learn of any favorable evidence known to the others acting on the government's behalf in th[e] case, including the police.'") (quoting *Strickler*, 527 U.S. at 281).

*17 Finally, evaluating the cumulative effect of the allegedly withheld impeachment material, see *Kyles*, 515 U.S. at 436, this Court concludes that in light of the strength of the prosecution's case, the material was not so critical as to undermine confi-

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dence in the outcome of Petitioner's trial. It was undisputed that Petitioner shot Carney and that Carney was found lying on his back with a severed spinal cord. Petitioner never told anyone prior to trial that Carney lunged at him. In fact, immediately after the shooting, Petitioner stated consistently to the police that he shot Carney because he believed that Carney would come back at him "sometime," "somewhere," and "in the future."

6. *Cumulative Error*

Petitioner claims that the cumulative effect of the instructional errors and prosecutorial misconduct warrants habeas relief. In some cases, although no single trial error is sufficiently prejudicial to warrant reversal, the cumulative effect of several errors may still prejudice a defendant so much that his conviction must be overturned. *See Alcala v. Woodford*, 334 F.3d 862, 893-95 (9th Cir.2003). However, where no single constitutional error is present, as here, nothing can accumulate to the level of a constitutional violation. *See Mancuso v. Olivarez*, 292 F.3d 939, 957 (9th Cir.2002).

Further, the Supreme Court has long recognized that, "given the myriad safeguards provided to assure a fair trial, and taking into account the reality of the human fallibility of the participants, there can be no such thing as an error-free, perfect trial, and that the Constitution does not guarantee such a trial." *United States v. Hasting*, 461 U.S. 499, 508-509, 103 S.Ct. 1974, 76 L.Ed.2d 96 (1983). The AEDPA mandates that habeas relief may only be granted if the state courts have acted contrary to or have unreasonably applied federal law as determined by the United States Supreme Court. *Williams v. Taylor*, 529 U.S. 362, 412, 120 S.Ct. 1495, 146 L.Ed.2d 389 (2000). In the absence of Supreme Court precedent recognizing a claim of "cumulative error," therefore, habeas relief cannot be granted.

C. *Certificate of Appealability*

The federal rules governing habeas cases brought by state prisoners recently have been amended to require a district court that denies a habeas petition to grant or deny a certificate of appealability ("COA") in its ruling. *See* Rule 11(a), Rules Governing § 2254 Cases, 28 U.S.C. foll. § 2254 (effective December 1, 2009). In light of the foregoing discussion, the Court concludes that Petitioner has not shown "that jurists of reason would find it debatable whether the petition

states a valid claim of the denial of a constitutional right [or] that jurists of reason would find it debatable whether the district court was correct in its procedural ruling." *Slack v. McDaniel*, 529 U.S. 473, 484, 120 S.Ct. 1595, 146 L.Ed.2d 542 (2000). Accordingly, the Court declines to issue a COA.

CONCLUSION

The Court concludes that Petitioner has failed to show any violation of his federal constitutional rights in the underlying state criminal proceedings. Accordingly, the petition for writ of habeas corpus and COA are DENIED.

*18 The Clerk shall terminate all pending motions, enter judgment and close the file.

IT IS SO ORDERED.

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