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**UNITED STATES DISTRICT COURT
DISTRICT OF ARIZONA**

Benjamin Patrick Holden,)	
)	CV-09-435-TUC-DCB
Petitioner,)	
v.)	
)	
Charles L. Ryan, et al.,)	ORDER
)	
Respondents.)	
)	
_____)	

Petitioner, Benjamin Patrick Holden, filed a Petition for Writ of Habeas Corpus pursuant to 28 U.S.C. §2254. (Doc. 1.) This matter was referred to the United States Magistrate Judge pursuant to 28 U.S.C. §636(b) and the local rules of practice of this Court for a Report and Recommendation (R&R) on the habeas petition. In the R&R, the Magistrate Judge recommends to the Court that the petition should be denied and the action should be dismissed. Before the Court are the Magistrate Judge’s R&R and Petitioner’s Objections.¹ Having conducted a de novo review, this Court will adopt the Report and Recommendation in its entirety, deny the habeas petition and dismiss this action.

FACTUAL BACKGROUND

The Arizona Court of Appeals articulated the facts, as follows:

On July 29, 2002, the victim, T., arrived uninvited at the home of L., an acquaintance. A group of people, including

¹Upon request of the Court, the state trial record was also filed. (Docs. 14-17.)

1 Holden, were gathered at L.'s home. T., who was both
2 intoxicated and confrontational, entered L.'s bedroom, where
3 L. was in bed with an injured leg. L. and his girlfriend,
4 K., repeatedly asked T. to leave L.'s home, but T. refused.
5 As the argument between L. and T. escalated, L. and K.
6 summoned Holden to the bedroom to "get [T.] out of here."
7 Holden asked T. to leave the home but T. refused and
8 advanced upon him, holding a ceramic cow's head and large
9 conch shells.

10 Holden brandished a handgun and ordered T. several times to
11 leave the home, threatening to shoot him if he did not
12 comply.

13 T. refused and Holden shot him in the head, killing him.
14 Holden was arrested approximately one week later, and a
15 grand jury indicted him for first-degree murder. The jury
16 rejected Holden's alternative theories of self-defense and
17 accident and found him guilty as charged. The trial court
18 sentenced Holden to life in prison.

19 (Doc. 9-1 at 3-4.)

20 **PROCEDURAL BACKGROUND**

21 On July 21, 2003, a jury in the Pima County Superior Court returned
22 a guilty verdict for first degree murder of Daniel Tilley. Petitioner
23 was sentenced to life in prison. The Arizona Court of Appeals affirmed
24 the verdict and sentence on the direct appeal and the Arizona Supreme
25 Court denied review. Although his first petition for post-conviction
26 relief was denied without a hearing, the Arizona Court of Appeals
27 corrected the sentence imposed to 25 to life imprisonment and remanded
28 for an evidentiary hearing to determine whether Petitioner had
established his counsel was ineffective for depriving him of his right
to testify. The state trial court denied the claim on December 30, 2008
without a hearing. Petitioner did not appeal that ruling.

On August 7, 2009, Petitioner timely filed the herein federal
petition for habeas corpus, making the following claims: (1) "Holden's
conviction and sentence violated the Sixth Amendment because of the
ineffective assistance of trial counsel through failure to consult and

1 present necessary experts"; (2) "The erroneous denial of Holden's request
2 for a crime prevention jury instruction denied Holden due process under
3 the Fourteenth Amendment"; (3) "The State's submission of an unredacted
4 tape to the jury and counsel's failure to investigate [the] tape
5 constituted prosecutorial misconduct and a violation of Holden's right
6 to effective counsel"; and (4) "The improper comments made by the
7 prosecutor violated the defendant's right to due process." Respondents
8 filed an Answer on December 9, 2009. The Report and Recommendation
9 issued on June 28, 2012.

10 The R&R recommends that Ground 2, failure to instruct jury on crime
11 prevention, was fairly exhausted and may be resolved on the merits;
12 Grounds 3 and 4, regarding prosecutorial misconduct were not properly
13 exhausted and procedurally defaulted, such that they are not subject to
14 review on the merits. As the remainder go to ineffective assistance of
15 trial counsel, the R&R resolved the claims on the merits, finding no
16 violation of the 6th Amendment with reference to lack of expert testimony,
17 failure to instruct the jury on crime prevention, and the mistakenly
18 unredacted audio tape of Petitioner's statement to the police.

19 **STANDARD OF REVIEW**

20 When objection is made to the findings and recommendation of a
21 magistrate judge, the district court must conduct a de novo review.
22 *United States v. Reyna-Tapia*, 328 F.3d 1114, 1121 (9th Cir. 2003).

23 **PETITIONER'S OBJECTIONS**

24 Petitioner objects to the analysis and conclusions contained in the
25 R&R, as follows: "Claim 1 sought relief because of a violation of the
26 Sixth Amendment's right to effective assistance of counsel based on a
27 failure to consult and present necessary experts. Claim 2 presented a due
28

1 process claim under the Fourteenth Amendment based on a denial of
2 Petitioner's request for a crime prevention jury instruction."
3 (Objection at 1.) Both claims are essentially based in the allegation
4 of ineffective assistance of trial and appellate counsel, as articulated
5 in *Strickland v. Washington*, 466 U.S. 668 (1984)

6 Under *Strickland's* first prong, a defendant must prove that
7 counsel's performance was "deficient." *Knowles v. Mirzayance*, 556 U.S.
8 111 (2009). Counsel's performance will be held constitutionally deficient
9 only if the defendant proves that it "fell below an objective standard
10 of reasonableness," as measured by "prevailing professional norms."
11 *Strickland*, 466 U.S. at 688. In reviewing counsel's performance for
12 deficiency, courts "must be highly deferential" and avoid the temptation
13 to "conclude that a particular act or omission of counsel was
14 unreasonable" simply because in hindsight the defense has proven to be
15 unsuccessful. *Id.* at 689. Courts are required to "indulge a strong
16 presumption that counsel's conduct falls within the wide range of
17 reasonable professional assistance." *Id.* The defendant bears the burden
18 of overcoming the strong presumption that counsel performed adequately.
19 *Id.*

20 Even if the defendant succeeds in showing that counsel's
21 performance was deficient, the second prong of the *Strickland* test
22 requires the defendant to prove that counsel's deficiencies were
23 prejudicial to the defense. *Id.* at 692. To establish prejudice, the
24 defendant "must show that there is a reasonable probability that, but for
25 counsel's unprofessional errors, the result of the proceeding would have
26 been different." *Id.* at 694. "A reasonable probability is a probability
27 sufficient to undermine confidence in the outcome." *Id.* "It is not enough

1 for the defendant to show that the errors had some conceivable effect on
2 the outcome of the proceeding." *Id.* at 693. As with deficiency,
3 *Strickland* places the burden of proving prejudice on the defendant, not
4 the government. *Wong v. Belmontes*, 558 U.S. 15 (2009).

5 The Supreme Court has provided two reasons why the federal court
6 must apply a "doubly deferential" judicial review to a state court's
7 application of the *Strickland* standard under the AEDPA. *Yarborough v.*
8 *Gentry*, 540 U.S. 1, 5-6 (2003). First, as noted above, *Strickland*
9 instructs courts to review a defense counsel's effectiveness with great
10 deference, *Strickland*, 466 U.S. at 689, and AEDPA requires federal courts
11 to defer to the state court's decision unless its application of Supreme
12 Court precedent was objectively unreasonable, *Renico v. Lett*, --- U.S.
13 ----, 130 S.Ct. 1855, 1862 (2010). When a federal court reviews a state
14 court's *Strickland* determination under AEDPA, both AEDPA and *Strickland's*
15 deferential standards apply; hence, the Supreme Court's description of
16 the standard as "doubly deferential." *Yarborough*, 540 U.S. at 6.

17 Second, our review is "doubly deferential" because *Strickland*
18 provides courts with a general standard, rather than a specific legal
19 rule. *Knowles*, 556 U.S. at 123; see also *Bobby v. Van Hook*, 558 U.S. 4
20 (2009) (holding that *Strickland* necessarily established a general standard
21 because "[n]o particular set of detailed rules for counsel's conduct can
22 satisfactorily take account of the variety of circumstances faced by
23 defense counsel or the range of legitimate decisions regarding how best
24 to represent a criminal defendant" (internal quotation marks omitted)).
25 Because judicial application of a general standard "can demand a
26 substantial element of judgment," the more general the rule provided by
27 the Supreme Court, the more latitude the state courts have in reaching

1 reasonable outcomes in case-by-case determinations. *Yarborough*, 541 U.S.
2 at 664. In turn, the state courts' greater leeway in reasonably applying
3 a general rule translates to a narrower range of decisions that are
4 objectively unreasonable under AEDPA. *See id.* Accordingly, we review a
5 state court's decision applying *Strickland's* general principles with
6 increased, or double, deference. *See Knowles*, 556 U.S. at 123. When
7 applying this heightened deferential standard, we review the "last
8 reasoned decision" by the state court addressing the petitioner's claim.
9 *Robinson v. Ignacio*, 360 F.3d 1044, 1055 (9th Cir.2004).

10 Here, the last reasoned decision addressing Petitioner's
11 ineffective assistance of counsel claim is that of the Arizona Court of
12 Appeals on state post-conviction review.

13 **A. Claim 1: Failure to Present Expert Testimony**

14 In a nutshell, Petitioner claims that trial counsel was ineffective
15 in that no counter expert testimony was offered during the jury trial.
16 Petitioner argues that the analysis taken in the R&R followed the same
17 missteps taken by the Arizona Court of Appeals; the decision of the state
18 court was based on an unreasonable determination of the facts in light
19 of the evidence presented and was an unreasonable application of
20 *Strickland's* prejudice prong. Petitioner claims that the R&R and the
21 state court failed to embrace the facts pointed to by Petitioner. With
22 respect to the potential impact of Dr. Enoka's expert testimony, the R&R
23 took aim at Petitioner's inability to offer evidence "...to undermine the
24 appellate court's finding that 'none of the three eyewitnesses to the
25 shooting corroborated that Danny aggressively lunged at Holden.'" R&R at
26 14:15-18. Petitioner claims that the R&R, like the Court of Appeals,
27 miscasts the facts upon which Enoka relied, commenting that "neither

1 witness whose testimony he (Enoka) was provided was able to see what
2 happened at the time the weapon was discharged." (Doc. 10 at 18-20.)
3 Petitioner maintains that the failure to present an expert such as Enoka
4 prejudiced his case before the jury, because there was at least a
5 reasonable probability that opinions such as Enoka's and Bevel's would
6 have favorably impacted the jury. For example, jurors would have learned
7 that the blood patterns in the bedroom supported Petitioner's explanation
8 and that his assertion of no intent to pull the trigger was an acceptable
9 explanation under the facts. The expert opinions would have countered the
10 prosecutor's insistence that Petitioner's alleged threats, issued in his
11 effort to make victim leave, conclusively established intent to kill.

12 During the state post-conviction relief proceeding, Petitioner
13 submitted two affidavits containing the opinions of two experts: one,
14 Enoka, to support his theory that the gun had discharged involuntarily
15 and two, Bevel, to corroborate his theory of how the incident had
16 happened through the analysis of bloodstain patterns. (Doc. 1-1 at 5.)
17 After a review of the record and the two affidavits, the appellate court
18 found that Petitioner did not establish prejudice and that there was no
19 reasonable probability that the result of the trial would be different
20 but for the inclusion of the expert testimony.

21 A state court's factual findings "are presumed correct unless
22 rebutted by clear and convincing evidence." See *Gonzalez v. Pliker*, 341
23 F.3d 897, 903 (9th Cir. 2003); *Williams v. Taylor*, 529 U.S. 362, 400
24 (2000). "When a federal claim has been presented to a state court and the
25 state court has denied relief, it may be presumed that the state court
26 adjudicated the claim on the merits in the absence of any indication or
27 state-law procedural principles to the contrary." *Harrington v. Richter*, -

1 -- U.S.--- , 131 S. Ct. 770, 784 (2011). "Clearly established Federal
2 law" means federal law clearly defined by the holdings of the Supreme
3 Court at the time of the state court decision. *Cullen v. Pinholster*,---
4 U.S.--- , 131 S. Ct. 1495 (2011) "A state court's determination that a
5 claim lacks merit precludes federal habeas relief so long as 'fairminded
6 jurists could disagree' on the correctness of the state court's
7 decision." *Harrington v. Richter*, 131 S. Ct. at 786 (citation omitted).
8 When the claim is ineffective assistance of counsel, *Strickland* provides
9 the clearly established federal law here. 466 U.S. at 690.

10 The Arizona Court of Appeals addressed this claim. (Answer, Ex.
11 H at 4-10.) At this juncture, as a federal court, the issue becomes
12 whether trial attorney decisions were unreasonable resulting in such
13 prejudice to the Petitioner that his due process fundamental right to a
14 fair trial was violated. "The right of an accused in a criminal trial
15 to due process is, in essence, the right to a fair opportunity to defend
16 against the State's accusations. The right[] ... to call witnesses in
17 one's own behalf ha[s] long been recognized as essential to due process."
18 *Chambers v. Mississippi*, 410 U.S. 284, 294 (1973); see also *Crane v.*
19 *Kentucky*, 476 U.S. 683, 690 (1986) (holding that "an essential component
20 of procedural fairness is an opportunity to be heard"); *Washington v.*
21 *Texas*, 388 U.S. 14, 19 (1967) ("The right to offer the testimony of
22 witnesses ... is in plain terms the right to present a defense, the right
23 to present the defendant's version of the facts.... [The accused] has the
24 right to present his own witnesses to establish a defense. This right is
25 a fundamental element of due process of law.").

26 That the Constitution affords Petitioner the right to present
27 witnesses in his defense does not mean that this right is absolute. "Even

1 relevant and reliable evidence can be excluded when the state interest
2 is strong." *Perry v. Rushen*, 713 F.2d 1447, 1450 (9th Cir.1983). While
3 "[t]he right to present a defense is fundamental," *id.*, "the state's
4 legitimate interest in reliable and efficient trials is also compelling."
5 *Id.* at 1451. Here the focus is on whether or not the failure to present
6 such an expert witness amounted to constitutional prejudice to
7 Petitioner's case before the jury, ie, experts to contradict the
8 testimony of witnesses against Petitioner.

9 The appellate court dealt with this issue, as follows:

10 Holden argues his trial counsel was ineffective for failing
11 to consult with experts or present expert testimony to
12 support his defense. As part of his post-conviction
13 petition, Holden submitted affidavits containing the
14 opinions of two experts: one to support his theory that the
15 gun had discharged involuntarily and one to corroborate his
16 theory of how the incident had happened through the analysis
17 of bloodstain patterns.

18 Holden cites cases from Arizona as well as other
19 jurisdictions in which courts have found counsel ineffective
20 for failing to consult with an expert or secure scientific
21 testimony in defending a case. See, e.g., *State v. Edwards*,
22 139 Ariz. 217, 221, 677 P.2d 1325, 1329 (App.1983) (counsel
23 ineffective in context of insanity defense when he failed
24 to interview defendant's psychiatrist until day of trial);
25 see also *Dugas v. Coplan*, 428 F.3d 317, 331-32 (1st
26 Cir.2005) (finding counsel ineffective because "hopelessly
27 unprepared" to challenge state's "many expert witnesses" on
28 arson); *Holsomback v. White*, 133 F.3d 1382, 1387-88 (11th
Cir.1998) (finding counsel ineffective for not calling or
consulting expert witness in sexual abuse case with no
medical evidence of abuse and only evidence of guilt
testimony of alleged victim); *Foster v. Lockhart*, 9 F.3d
722, 726-27 (8th Cir.1993) (finding counsel ineffective for
failing to investigate or present defense of impotency in
rape case when "uncontradicted medical evidence" showed
defendant was "physically incapable of committing the rape
in the manner the victim and the State alleged at trial");
Sims v. Livesay, 970 F.2d 1575, 1580-81 (6th Cir.1992)
(trial counsel's failure to investigate role of guilt in
shooting was ineffective when evidence would have "presented
the defense with a theory of the case that squared fully
with [defendant]'s version of events"). But our evaluation
of ineffective assistance of counsel claims is case

1 specific, and Holden is only entitled to relief on this
2 basis if counsel's failure to secure scientific testimony
3 constituted both deficient performance of counsel and could
4 have affected the outcome of the case. See *Strickland*, 466
5 U.S. at 687, 104 S.Ct. at 2064.

6 Because Holden has not shown he was prejudiced as a result,
7 we need not decide whether his counsel's performance was
8 deficient. See *State v. Fulminante*, 161 Ariz. 237, 260, 778
9 P.2d 602, 625 (1988) (applying prejudice prong first to
10 ineffective assistance of counsel claim); see also *State v.*
11 *Salazar*, 146 Ariz. 540, 541, 707 P.2d 944, 945 (1985)
12 (failure of one prong of the *Strickland* test results in
13 failure of claim). Holden contends an expert was needed to
14 refute Pima County Sheriff's Detective Marcus Amado's
15 testimony about the location of Danny's body and the lack
16 of blood in the area Holden claimed Danny had lunged.^{FN1} In
17 support of this argument, he submitted the opinion of Tom
18 Bevel, a forensic consultant.

19 Holden also claims Bevel's expert bloodstain analysis
20 supports his claim Danny "had moved to within an arm's
21 length of Holden, who was standing near the doorway." But
22 Bevel's opinion was that Danny had been "standing in the
23 bedroom near the foot of the bed at the time he was shot."
24 This opinion does not conflict with the state's theory, and
25 therefore, we fail to see how it would have changed the
26 outcome of the case had Bevel's opinion been introduced at
27 trial. See *Bennett*, 213 Ariz. 562, ¶ 25, 146 P.3d at 69
28 (defendant only suffers prejudice from counsel's alleged
errors if reasonable probability result of trial would have
been different but for errors).

Holden also emphasizes that Bevel stated Danny could have
remained upright for a few moments after he had been shot.
He argues this evidence "supports the inference that [Danny]
could have moved after being shot." But he does not specify
how such an inference would have helped his defense when he
was claiming Danny had moved toward him before he was shot.
Similarly, Holden emphasizes that, in Bevel's opinion,
Danny's arm probably was in a raised position when he had
been shot. But Bevel never stated that such evidence
supports Holden's contention that Danny had been reaching
for the gun. Rather, Bevel opines that the bloodstains are
consistent with Danny's hand having been up by his head or
face, rather than Danny reaching out in front of him.
Because Bevel's opinion would not have changed the result
at trial, Holden has not established he suffered prejudice
as a result of counsel's failure to present that testimony.
Holden also argues his trial counsel was ineffective for
failing to use crime scene photographs to impeach Amado's
testimony that no blood was found near the doorway where
Holden said he was standing when he shot Danny. The

1 photograph at issue, which was not admitted at trial, shows
2 a tiny bloodstain on the ceiling. At trial, the prosecutor
3 asked Amado, "Did y[ou] find any bloodstains in the area
described by Mr. Holden as the area where the incident
occurred?" And the detective responded, "No, I did not.

4 Assuming for the sake of argument Amado's answer was
5 erroneous because of the photograph in question, Holden has
6 not demonstrated he suffered prejudice as a result. Holden's
7 own expert, Bevel, concluded that the photograph "further
8 substantiates that [Danny] was standing in the bedroom near
9 the foot of the bed at the time he was shot, as his head
10 would be near the ceiling and the backspatter would be
capable of reaching this area of the ceiling." Thus,
Holden's own proffered expert testimony does not support the
inferences Holden would have us draw from the location of
the ceiling bloodstain. Holden has not demonstrated that the
admission of the photograph would have changed the outcome
of the case.

11 Holden has not shown he suffered prejudice by counsel's
12 failure to call a witness on the topic. Enoka would not
13 conclude with certainty the evidence showed the discharge
14 had been accidental but simply concluded the circumstances
15 surrounding the shooting "could have caused Mr. Holden to
16 hold the gun more firmly and thereby unintentionally pull[
17] the trigger." And many of the circumstances on which he
18 based that conclusion were taken from Holden's version of
19 events—a version that was discredited on many points by the
20 testimony of other witnesses. In addition, had the jury
21 believed Holden's version of the events, the jury could have
22 drawn many of the same inferences as Enoka without the
23 benefit of his expert testimony. See *Gorney v. Meaney*, 214
24 Ariz. 226, ¶ 15, 150 P.3d 799, 804 (App.2007) (expert
25 testimony inappropriate when jury can determine issue
26 without it).

27 Thus, although Enoka's testimony would have provided a
28 scientific explanation for Holden's theory that he had
accidentally pulled the trigger, it would not have been
enough to change the outcome of this case, given evidence
that strongly contradicted Holden's assertion that the gun
had discharged accidentally. Holden discharged the gun
within three inches of Danny's head, he did so after
repeatedly threatening to kill Danny, and none of the three
eyewitnesses to the shooting corroborated that Danny
aggressively lunged at Holden. Therefore, although the
testimony most likely would have been relevant and
admissible, Holden did not suffer prejudice by its absence
and the trial court did not err by dismissing the claim.

State v. Holden, 2008 WL 4559872 (Ariz.App. January 8, 2008.)

1 unreasonable. Petitioner objects that the appellate court bent the facts
2 to sustain the denial of the instruction.

3 Two questions are raised: first whether there was ineffective
4 assistance of appellate counsel and second whether or not the state
5 appellate court properly resolved the issue of the jury instruction.
6 Because the appellate court directly addressed this issue, there is no
7 *Strickland* prejudice with reference to the ineffective assistance of
8 appellate counsel claim.

9 The other question is whether or not the failure to give the jury
10 instruction can be raised to a federal constitutional due process
11 violation as interpreted and applied by the state trial and appellate
12 courts. See *Estelle v. McGuire*, 502 U.S. 62, 71-72 (recognizing that
13 erroneous jury instruction under state law could only be cognizable in
14 federal habeas if it so infected trial it violated due process); *Souch*
15 *v. Schaivo*, 289 F.3d 616, 623 (9th Cir.) (recognizing that generally
16 state law errors are not cognizable in federal habeas corpus
17 proceedings), *cert. denied*, 537 U.S. 859 (2002). The state court and the
18 appellate court engaged in factfinding to resolve this issue. The AEDPA
19 requires federal courts to accord more deference to state court decisions
20 underlying a §2254 petition with regards to both law and facts. See
21 *Harrington*, 131 S. Ct. at 785; see also *Robinson v. Schriro*, 595 F.3d
22 1086, 1099 (9th Cir. 2010), *cert. denied*, 131 S. Ct. 566 (2010). Under
23 the AEDPA, "state court findings of fact are presumed correct unless
24 rebutted by clear and convincing evidence." *Gonzalez v. Pliker*, 341 F.3d
25 897, 903 (9th Cir. 2003) (citing 28 U.S.C. § 2254(e)(1)). "Even in the
26 context of federal habeas, ... [d]eference does not by definition preclude
27 relief. A federal court can disagree with a state court's credibility

1 defendant's proposed instruction on his theory of the case if other
2 instructions, in their entirety, adequately cover that defense theory."
3 *Duckett v. Godinez*, 67 F.3d 734, 743 (9th Cir. 1995)(quotation marks
4 omitted). The issue was addressed by the appellate court, as follows:

5 At trial, Holden requested the jury be instructed on the crime
6 prevention justification set forth in A.R.S. § 13-411. The
7 trial court refused the instruction. Holden now contends his
8 appellate counsel was ineffective in failing to challenge that
9 ruling on appeal.

10 Section 13-411(A) provides a defense to the use of physical
11 force or deadly physical force against another person "if and
12 to the extent the person reasonably believes that physical
13 force or deadly physical force is immediately necessary to
14 prevent the other's commission of [one of the enumerated
15 crimes]." The statute further provides there is no duty to
16 retreat before using deadly or nondeadly physical force and
17 that a person "is presumed to be acting reasonably" when
18 acting pursuant to the statute. § 13-411(B), (C). Holden
19 contends he was entitled to this instruction because, in
20 attempting to remove Danny from the residence, he was
21 preventing Danny from committing aggravated assault. See §
22 13-411(A) (aggravated assault committed under § 13-1204(A)(1)
23 or (2) one of enumerated crimes under crime prevention
24 statute). The trial court refused the requested instruction
25 after the state argued that the defense was not supported by
26 the evidence.

27 A defendant is entitled to any justification instruction
28 "supported by 'the slightest evidence.'" *State v. Hussain*,
189 Ariz. 336, 337, 942 P.2d 1168, 1169 (App.1997), quoting
State v. Dumaine, 162 Ariz. 392, 404, 783 P.2d 1184, 1196
(1989). Holden emphasizes the crime prevention defense is
broader than the other justification defenses. Its only
limitation upon the use of deadly force is "the reasonableness
of the response," *State v. Korzep*, 165 Ariz. 490, 492, 799
P.2d 831, 833 (1990), while "the other justification defenses
require an immediate threat to personal safety before deadly
force may be used." *Id.* Therefore, the self-defense
instruction was not necessarily adequate because a jury could
find one without the other. See *id.* (emphasizing differences
between § 13-411 and other justification defenses); *State v.*
Garfield, 208 Ariz. 275, ¶ 15, 92 P.3d 905, 909 (App.2004)
(because crime prevention justification "presents a unique
defense," not harmless error when jury merely instructed on
self-defense); *Hussain*, 189 Ariz. at 339, 942 P.2d at 1171
(self-defense instruction did not adequately cover the
requested instruction based on § 13-411); see also *State v.*
Taylor, 169 Ariz. 121, 123, 817 P.2d 488, 490 (1991)

1 (reversible error to fail to instruct jury when slightest
2 evidence supported crime prevention justification).

3 Holden contends that, had appellate counsel raised the issue
4 to this court, the outcome of his appeal might have been
5 different. [footnote omitted] See *Bennett*, 213 Ariz. 562, ¶
6 25, 146 P.3d at 69. He relies on *Garfield*, issued while his
7 appeal was pending in this court, in which we reversed a
8 conviction for the trial court's refusal to instruct the jury
9 on the crime prevention defense. See 208 Ariz. 275, ¶ 15, 92
10 P.3d at 909. Holden complains that his counsel failed to seek
11 leave to file a supplemental brief pursuant to *Garfield* and,
12 in the alternative, that his appellate counsel could have made
13 the same argument the defendant made in *Garfield* in his
14 opening brief—that the crime prevention instruction applies to
15 an invited guest—based on Arizona law at that time. See
16 *Korzep*, 165 Ariz. at 493-94, 799 P.2d at 834-35 (holding crime
17 prevention defense applicable to resident of house protecting
18 against crime by another resident and suggesting defense
19 applicable to even broader classes of persons).

20 In *Garfield*, the trial court had refused to provide an
21 instruction on the crime prevention defense because the
22 defendant was only a guest in the home he was arguably trying
23 to protect. 208 Ariz. 275, ¶ 10, 92 P.3d at 908. Anchoring our
24 analysis in the legislative intent behind the
25 statute—protecting Arizona homes from crime—we rejected that
26 distinction and found that such an instruction was reasonably
27 supported by the evidence. *Id.* ¶¶ 14-15, 92 P.3d 905. We
28 reversed the defendant's conviction, finding he had suffered
prejudice, in part because the self-defense instruction had
not been an adequate substitute. *Id.* ¶ 15, 92 P.3d 905.

We agree with Holden that *Garfield* might have changed the
outcome of his case if the evidence supported such an
instruction. But unlike in *Garfield*, where we held the
defendant was entitled to the crime prevention instruction
based on evidence the victim had drawn a gun before the
defendant shot him, *id.* ¶ 12, 92 P.3d 905, there was no
evidence Danny was threatening anyone with a deadly weapon or
dangerous instrument at the time Holden entered the bedroom in
an effort to make Danny leave. And even assuming the cow's
head or conch shells could be considered dangerous
instruments, the record is clear Holden continued to point the
gun at Danny well after Danny had put any such items down.
Although Holden emphasizes the breadth of the crime prevention
defense in comparison to self-defense, the former defense is
not available to a defendant who uses greater force than
necessary to prevent the crime. See *State v. Martinez*, 202
Ariz. 507, ¶ 12, 47 P.3d 1145, 1147-48 (App.2002) (defendant
must have reasonable belief that force need be used and amount
of force is necessary to justify actions under crime
prevention defense). Holden presented no evidence that, at the

1 time he first threatened and then used deadly physical force
2 against Danny, Holden could have "reasonably believe[d]" that
3 such force was "immediately necessary" to prevent Danny from
4 assaulting anyone with a deadly weapon or dangerous
5 instrument. § 13-411(A). Therefore, Holden could not have
suffered prejudice when the trial court refused the
instruction and when appellate counsel failed to raise the
issue on appeal. We find no abuse of discretion in the trial
court's dismissal of this claim.

6 *State v. Holden*, 2008 WL 4559872 (Ariz.App. January 8, 2008.)

7 Having reviewed the trial transcript, this Court does not find that
8 the appellate court's decision was objectively reasonable. Further, the
9 claim of ineffective assistance of appellate counsel lacks a showing of
10 prejudice such that no further review is warranted.

11 **CONCLUSION**


12 Accordingly, after conducting a de novo review of the record, which
13 included reading the entire record and the transcript of the trial,

14 **IT IS ORDERED** that the Court **ADOPTS** the Report and Recommendation
15 (Doc. 10) in its entirety. The Objections (Doc. 13) raised by the
16 Petitioner are **OVERRULED**.

17 **IT IS FURTHER ORDERED** that the Court has determined, without need
18 for additional argument, to **DENY** the Certificate of Appealability. Rule
19 11, Rules Governing Section 2254 Cases. The Court has considered
20 specific issues that serve to satisfy the showing required by 28 U.S.C.
21 §2253(c)(2), and finds none present in this case.

22 **IT IS FURTHER ORDERED** that the Petition for Writ of Habeas Corpus
23 (Doc. 1) is **DENIED** and this action is **DISMISSED**. A Final Judgment shall
24 enter separately. This case is closed.

25 DATED this 21th day of September, 2012.

26 
27 David C. Bury
28 United States District Judge