IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

ROBERT S. COMER,

Petitioner,

CASE NO. 2:13-CV-0003
JUDGE GEORGE C. SMITH
Magistrate Judge Norah McCann King

v.

WARDEN, Ohio State Penitentiary,

Respondent.

ORDER and
REPORT AND RECOMMENDATION

Petitioner, a state prisoner, brings this action for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. This matter is before the Court on the *Petition*, Doc. No. 2, Respondent's *Return of Writ*, Doc. No. 7, and the exhibits of the parties. Petitioner's *Motion to Complete the Record*, Doc. No. 8, is **DENIED**, as moot, since Respondent has filed the transcripts requested by that motion. *See Notice*, Doc. No. 12. For the reasons that follow, the Magistrate Judge **RECOMMENDS** that this action be **DISMISSED**.

FACTS and PROCEDURAL HISTORY

The Ohio Fourth District Court of Appeals summarized the facts and procedural history of this case as follows:

> On the evening of December 1, 2009, a number of people came together at the Lennex home on Shaffer Road in a part of Gallia County that borders right on Jackson County. Gathered at the Lennex home that evening, in anticipation of deer hunting the next day, were Edith Lennex, her sons Dustin and Cody, and Dustin's two children Aaleyah and Dominic. Also, Kristen Gandee, a family friend, had driven from Columbus with Alfred Bury and Joe Wheeler. At some point appellant, a next-door neighbor, visited the home. The evidence adduced at trial was replete with references that described appellant and the Lennex brothers as good friends, or even "best" friends.FN1

FN1. Kristen Gandee described appellant's and Dustin Lennex's relationship as being “like brothers.”

At approximately 9:00 PM, Gandee and a few others went to McDonald's to purchase food for themselves and others at the Lennex home. Upon their return, Cody Lennex and Joe Wheeler took approximately twenty cheeseburgers into the home while Gandee and Bury stayed in the car and talked. Inside the Lennex home, some of the younger members of the crowd were “rapping” to a Karaoke machine. Appellant supposedly “rapped” something of a sexual nature about Cody's girlfriend that promptly led to a fight. Both Edith and Dustin Lennex intervened to stop the fight between appellant and Cody.

Appellant stormed out of the Lennex home and slammed a screen door behind him. That screen door was apparently damaged and an angry Dustin Lennex pursued appellant into the yard. Appellant went to his home but, rather than follow him, Gandee motioned Dustin to her car and asked if anything had transpired that should worry her. Dustin answered in the negative and assured her that “we do this all the time.”

In the meantime, appellant entered his home in a rage—“put his fist in the wall” and overturned a coffee table. His cousin, Todd Dixon, was in the room attempting to text his father and heard appellant scream that he was going to shoot “them MF'ers.” Appellant grabbed a weapon, went outside and fired a “warning shot” into the air. Cody Lennex had already gone outside with his rifle and positioned himself to see the front door of appellant's home. Cody warned appellant that if he fired another shot, Cody would shoot him. Appellant then fired in Cody's direction. Cody returned fire and grazed appellant's “butt cheek.” He also, apparently, wounded Todd Dixon as well. FN2

FN2. The record indicates that Todd Dixon was not at the Lennex home that evening and was not involved in the fracas that took place. He explained he has not been to his cousins' place since the shooting and declared he “won't [ever] return.”

At this point, Dustin Lennex re-inserted himself into the fracas and began to walk toward appellant's home. The evidence adduced at trial shows that Dustin was unarmed, approached appellant's house trailer with his arms extended out on each side and asked him if appellant was going “going to shoot a motherfucker.” FN3 Apparently, appellant was prepared to do just that. He went to his home and shut the door. When Dustin stepped on appellant's

> porch, appellant fired a shot at him from the home's interior. Although some witnesses testified that they could hear Dustin gasping for air, the Gallia County Coroner, as well as the assistant Deputy Coroner of Montgomery County who performed the autopsy, explained that shrapnel from the gunshot pierced the victim's aorta and he died very quickly thereafter.FN4
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> FN3. We quote Kristen Gandee at this point, but Cody Lennex testified that his brother simply said "shoot me MF'er."
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> FN4. Dr. Dan Whitley, the Gallia County Coroner, and Dr. Kent Harshbarger, Deputy Montgomery County Coroner, both confirmed that the alcohol content in Dustin Lennex's blood exceeded the legal limit. Lennex also had "THC" in his bloodstream, which indicated that he had used marijuana.
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> The Gallia County Grand Jury returned an indictment that charged appellant with murder. At his jury trial appellant agreed that he and the Lennex brothers are friends, but stated that his cousin (Todd Dixon) lied about his reaction when he returned to the family house trailer. Appellant also denied that he intended to shoot to kill anyone and that he most certainly did not want "Dustin to die." Appellant explained that he shot his friend because he and his cousin had already been shot and that he feared for his life.
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> The jury returned a verdict of guilty with a firearm specification. The trial court sentenced appellant to serve an indefinite term of imprisonment of fifteen years to life on the murder charge, together with a three year term on the firearm specification, each to be served consecutively to one another. Although no immediate appeal was taken, this Court granted appellant leave to file delayed appeal and the matter is properly before us for review.

State v. Comer, No. 10CA15, 2012 WL 1831167, at *1-2 (Ohio App. 4th Dist. May 14, 2012). In his delayed appeal, Petitioner raised the following assignments of error:

> THE TRIAL COURT VIOLATED ROBERT COMER'S RIGHTS TO DUE PROCESS AND A FAIR TRIAL WHEN, IN THE ABSENCE OF SUFFICIENT EVIDENCE, IT ENTERED A JUDGMENT ENTRY, CONVICTING ROBERT OF MURDER AND THE ATTACHED FIREARM SPECIFICATION.
>
> THE TRIAL COURT COMMITTED A PREJUDICIAL ERROR AND DENIED ROBERT COMER DUE PROCESS OF LAW

> WHEN IT FAILED TO PROVIDE THE JURY WITH A PROPER JURY INSTRUCTION IN ACCORDANCE WITH R.C. 2901.09.
>
> THE TRIAL COURT COMMITTED A PREJUDICIAL ERROR AND DENIED ROBERT COMER DUE PROCESS OF LAW WHEN IT FAILED TO PROVIDE THE JURY WITH AN AUGMENTED JURY INSTRUCTION IN ACCORDANCE WITH R.C. 2901.09.
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> TRIAL COUNSEL PROVIDED INEFFECTIVE ASSISTANCE OF COUNSEL, IN VIOLATION OF THE SIXTH AMENDMENT TO THE UNITED STATES CONSTITUTION AND SECTION 10, ARTICLE I OF THE OHIO CONSTITUTION.

State v. Comer, 2012 WL 1831167, at *1. On May 14, 2012, the appellate court affirmed the judgment of the trial court. *Id*. On October 10, 2012, the Ohio Supreme Court dismissed Petitioner's subsequent appeal. *State v. Comer*, 133 Ohio St.3d 1411 (2012).

On January 3, 2012, Petitioner filed his petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254, alleging that the "Gallia County, Ohio, Court of Appeals unreasonably and contrarily applied *Strickland v. Washington*, 466 U.S. 668 (1984) when it ruled that defense counsel performed effectively."

INEFFECTIVE ASSISTANCE OF COUNSEL

Petitioner alleges that he was denied the effective assistance of counsel because his attorney failed to make a proper motion for judgment of acquittal under Crim.R. 29, failed to object to improper jury instructions as related to O.R.C. 2901.05(B), failed to request a no-retreat instruction in accordance with O.R.C. 2901.09(B), and failed to request a jury instruction on what it means to be at fault in creating the situation that gave rise to the death of another individual. Petitioner contends that defense counsel's failures, individually and collectively, prejudiced the outcome of his trial. *Petition*, PageID 18.

The state appellate court rejected Petitioner's claim of ineffective assistance of counsel. Portions of the appellate court's decision denying Petitioner's claims of insufficiency of evidence and denial of a fair trial based on the trial court's jury instructions are relevant to this Court's consideration of Petitioner's claim(s) of ineffective assistance of counsel and are therefore included here:

> Before we address the merits of the assignments, we first observe that they are all based on appellant's claim that he shot the victim in self-defense. Self-defense is an affirmative defense that must be proven by a preponderance of the evidence. R.C. 2901.05(A); *State v. Clark*, Fulton App. No. No. F–10–025, 2011–Ohio–6310, at ¶ 21; *State v. Warmus*, Cuyahoga App. No. 96026, 2011–Ohio–5827, at ¶ 8. To prove self-defense, an accused must show three elements: (1) that the defendant was not at fault in creating the violent situation, (2) that the defendant had a bona fide belief that he was in imminent danger of death or great bodily harm and that his only means of escape was the use of force, and (3) that the defendant did not violate any duty to retreat. *See State v. Goff*, 128 Ohio St.3d 169, 942 N.E.2d 1075, 2010–Ohio–6317, at ¶ 36; *State v. Thomas* (1997), 77 Ohio St.3d 323, 326, 673 N.E.2d 1339.
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> This duty of retreat, however, does not apply to one's own home. The maxim that a man's home is "his castle" has deep roots in English law. 4 Blackstone, Commentaries on the Laws of England (Rev. Ed.1979) 223, Chapter 16. That maxim has long been a cherished part of American law as well. *See e.g. State v. Batchelder* (N.H.Super.Ct.1832), 5 N.H. 549; Snowden v. Warder (PA.1831), 3 *Rawle* 101; *State v. Norris* (N.C.Super.Ct.1796), 2 N .C. 429. It is also a bulwark of Ohio law. *See e.g. State v. Smith* (1997), 80 Ohio St.3d 89, 110, 684 N.E.2d 668; *State v. Thomas* (1997), 77 Ohio St.3d 323, 327, 673 N.E.2d 1339.
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> The Ohio General Assembly has codified the castle doctrine in R.C. 2901.09(B). The statute states, *inter alia*, that "a person who lawfully is in that person's residence has no duty to retreat before using force in self-defense." Ohio courts have also extended the definition of "residence" to an attached porch. *See State v. Nappier* (1995), 105 Ohio App.3d 713, 721, 664 N.E.2d 1330; *State v. Cole* (Jan. 22, 1997), Hamilton App. No. C–950900; *State v. Copeland* (Apr. 13, 1993), Franklin App. No. 92AP–1486. With these principles in mind, we now turn our attention to the issues raised in the individual assignments of error.

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[On the sufficiency of evidence]: R.C. 2903.02(A) states that no person shall purposely cause the death of another. Here, no question exists that appellant shot and killed Dustin Lennex. Appellant also does not argue that his actions were not purposeful. Abundant testimony was adduced at trial from which the jury could conclude that appellant's actions were done purposely. Thus, sufficient evidence supports the conviction. The gist of appellant's argument is not that the prosecution lacked sufficient evidence for a conviction, but that his self-defense evidence rendered the prosecution's evidence insufficient. We disagree. In *Hancock*, *supra* at ¶ 37, the Ohio Supreme Court stated that proof of an affirmative defense does not detract from proof that an accused committed a crime beyond a reasonable doubt. Although *Hancock* involved an insanity defense rather than self-defense, our Tenth District colleagues arrived at the same conclusion with regard to self-defense. *See e.g. State v.. Hogg*, Franklin App. No. 11AP–50, 2011–Ohio–6454, at ¶ 15. We find *Hogg* persuasive. Whatever evidence may have been adduced regarding self-defense in this case, it does not detract from the evidence that appellant purposely caused the death of Dustin Lennex. Moreover, we again point out adequate evidence was adduced at trial for the jury to find the appellant guilty of murder with a firearm specification. Accordingly, we hereby overrule appellant's first assignment of error.

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[On Petitioner's claim regarding improper jury instructions]:
Because appellant's second and third assignments of error both assert that the trial court erred in the instructions it gave to the jury, we consider them together. At the outset, we point out that appellant did not object to the jury instructions. Further, after instructions, the court asked both the prosecution and defense if they wanted "corrections, deletions or additions." Both counsel answered in the negative. Thus, appellant has waived all but Crim.R. 52(B) plain error. *See State v. Cunningham*, 105 Ohio St.3d 197, 2004–Ohio–7007, 824 N.E.2d 504, at ¶ 56; also see *State v. Dickess*, 174 Ohio App.3d 658, 884 N.E.2d 92, 2008–Ohio–39 at ¶ 43. Generally, notice of plain error should be taken "with utmost caution, under exceptional circumstances, and only to prevent a manifest miscarriage of justice." *State v. Gardner*, 118 Ohio St.3d 420, 2008–Ohio–2787, 889 N.E.2d 995, ¶ 78; also see

State v. Patterson, Washington App. No. 05CA16, 2006–Ohio–1902, ¶ 13. Plain error exists when it affects a substantial rights. *State v. Chambers*, Adams App. No. 10CA902, 2011–Ohio–4352, at ¶ 42. Plain error is one that affects a substantial right when, but for the error, the outcome of the trial would have clearly been otherwise. *Id.; State v. Litreal*, 170 Ohio App.3d 670, 868 N.E.2d 1018, 2006–Ohio–5416, at ¶ 11.

. . . [A]ppellant argues that the trial court erroneously suggested to the jury that appellant had a duty to retreat, even in his home. Before we address that argument, however, as the prosecution vaguely suggests in its brief, we consider whether a "Castle Doctrine" instruction was warranted. As noted above, a self-defense instruction is warranted only if a defendant was not at fault in creating the situation. *Goff, supra* at ¶ 36; *Thomas*, at 326. Here, the evidence adduced at trial was uncontroverted that appellant fired the first shot in this fracas. When asked on cross-examination if either Dustin or Cody Lennex followed him to his house trailer after the fracas in the Lennex home, appellant replied negatively. When asked if he believed that his fight with Cody was over when he left the Lennex residence and returned to his residence, appellant replied "yeah."

Appellant went home, loaded his shotgun and went outside to fire a "warning shot" into the air. It appears that appellant created the deadly situation, or at least seriously escalated it, and was not entitled to a self-defense, or "Castle Doctrine" instruction. Be that as it may, we find no error, let alone plain error, in the trial court's instruction. The instructions appellant cites are as follows:

> "Now the defendant claims to have acted in self-defense. To establish a claim of self defense the defendant must prove by the greater weight of the evidence that A: He was not at fault in creating the situation giving rise to the death and B: He had reasonable grounds to believe and an honest belief even if mistaken that was in imminent or immediate danger of great, or death or great bodily harm and that his only means of retreat, escape of withdrawal from such danger was by the use of force and C: He had not violated any duty to retreat, escape or withdraw to avoid the danger. *Now the defendant is presumed to have acted in self-defense* or defense of another when using defensive force that was intended or likely to cause death or great bodily harm to another *if the person against whom the defensive*

> *force was used was in the process of entering or had entered unlawfully and without privilege to do so the residence occupied by the defendant.* Now the claims the presumption that the defendant acted in self defense or defense of another when using defensive force that was intended or likely to cause death or great bodily harm to another does not apply. * * * Now dwelling means a building of any kind ... A building includes but is not limited to an attached porch ... *Now the defendant had a duty to retreat*. If the, if he A: was at fault in creating the situation giving rise to the death or B: did not have a reasonable ground, or did not have grounds to believe and an honest belief that he was imminent or immediate danger of death or great bodily harm ..." (Emphasis added.)[1]

This excerpt spans approximately two pages of the trial transcript. Although we agree that the language may be a bit confusing, we are not convinced that it constitutes prejudicial error and we certainly do not believe that rises to the level of plain error. Our understanding of appellant's argument is that he objects to the third underlined portion of the above excerpt stating that he "had a duty to retreat." FN5 Had that instruction included a qualifier stating that appellant was outside his home at the time, then it would have been a correct statement of the law. At the same time, had it included a qualifier that appellant was inside his home, it was

[1] The instructions continued:

Now the defendant no longer had a duty to retreat if 1: he retreated, escaped or withdrew from the situation or reasonably indicated his intention to retreat, escape or withdraw from the situation and no longer participate in it and 2: he then had reasonable grounds to believe and an honest belief that he was in imminent or immediate danger of death or great bodily harm and 3: the only reasonable means of escape from that danger was by the use of deadly force even though he was mistaken as to the existence of that danger. Now reasonableness, words alone do not justify the use of deadly force or force. Resort to such force is not justified by abusive language, verbal threats or other words no matter how provocative. Now in deciding whether the defendant had reasonable grounds to believe and an honest belief that he was in imminent or immediate danger of death or great bodily harm or bodily harm you must put yourself in the position of the defendant with his characteristics, his knowledge or lack of knowledge and under the circumstances and conditions that surrounded him at the time. You must consider the conduct of Dustin Lennex and decide whether his acts and words caused the defendant reasonably and honestly to believe that he was about to be killed or receive great bodily harm or receive bodily harm.

Trial Transcript, PageID #1494-96.

erroneous. Did the instruction constitute error without either qualifier? We think not for the following reasons.

FN5. It is, of course, possible that the trial court's court reporter mistakenly inserted a period rather than simply omitting any punctuation mark and continuing the sentence. Transcribed conversations may not always correctly illustrate a speaker's inflections or intent in linking words and phrases.

First, a trial court's jury instructions must be considered in their totality. *State v. Rodriguez*, Wood App. No. WD–08–011, 2009–Ohio–4059, at ¶ 31; *State v. Doyle*, Pickaway App. No. 04CA23, 2005–Ohio–4072, at ¶ 50. Second, the first two italicized portions of the jury instructions are correct statements of the law and directed the jury that appellant was presumed to have acted in self-defense if the victim had unlawfully entered the premises (including the porch of the trailer). In light of the trial court's correct statement of the law, balanced against the somewhat confusing, but not necessarily incorrect, statement of the law, we are not persuaded that plain error exists.FN6 This is particularly true in light of our discussion that it is questionable whether a self-defense instruction was warranted under the facts and circumstances of this case.

FN6. In view of appellant's own testimony, it appears that the confrontation was over when he returned to his house trailer and that it escalated into a deadly confrontation only when he exited his house trailer and fired a warning shot into the air.

Appellant maintains in his third assignment of error that the trial court should have "augmented" its instructions to emphasize the provisions of R.C. 2901.05 that appellant had no duty to retreat inside his own home. However, defense counsel did not request any such instruction and, to be frank, we see little difference between his argument here and his argument in his second assignment of error.

We note that because appellant did not request an "augmented" jury instruction, the failure to give one is measured under the plain error standard. We also agree, as noted above, that the trial court's stray comment that appellant had a "duty to retreat" may or may not have been misleading to the jury. However, we are not persuaded that but for the absence of an augmented instruction, the outcome of the trial would have been otherwise. *Chambers*, at ¶ 42. *Id.; Litreal, supra at ¶ 11.*

In the case *sub judice*, appellant fired the first shot between [him] and the two Lennex brothers. That first shot also occurred after appellant retreated to his family's house trailer and re-emerged to fire the first "warning" shot, thereby precipitating the events that next occurred. With that in mind, we find no merit to appellant's second or third assignments or error and they are hereby overruled.

[A]ppellant argues that he received constitutionally ineffective representation from trial counsel. Appellant raises a number of issues to support that argument, but we find none persuasive.

Criminal defendants have a constitutional right to counsel, and this right includes the right to effective assistance from trial counsel. *McMann v. Richardson* (1970), 397 U.S. 759, 771, 90 S.Ct. 1441, 25 L.Ed.2d 763; *In re C.C., Lawrence* App. No. 10CA44, 2011–Ohio–1879, at ¶ 10. To establish ineffective assistance of counsel, a defendant must show (1) his counsel's performance was deficient, and (2) such deficient performance prejudiced the defense and deprived him of a fair trial. *Strickland v. Washington* (1984), 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674; also *see State v. Perez*, 124 Ohio St.3d 122, 920 N.E.2d 104, 2009–Ohio–6179, at ¶ 200. Both prongs of the *Strickland* test need not be analyzed, however, if a claim can be resolved under one prong. *State v. Madrigal* (2000), 87 Ohio St.3d 378, 389, 721 N.E.2d 52; *also see State v. Saultz*, Ross App. No. 09CA3133, 2011–Ohio–2018, at ¶ 19. In short, if it can be shown that an error, assuming arguendo that such an error did in fact exist, did not prejudice an appellant, an ineffective assistance claim can be resolved on that basis alone. To establish the existence of prejudice, a defendant must demonstrate that a reasonable probability exists that, but for his counsel's alleged error, the result of the trial would have been different. *See State v. White* (1998), 82 Ohio St.3d 16, 23, 693 N.E.2d 772; *State v. Bradley* (1989), 42 Ohio St.3d 136, 538 N.E.2d 373, at paragraph three of the syllabus.

Appellant's second and third arguments are that counsel was ineffective for those reasons he raises in his second and third assignments of error. However, in light of the fact that we found no merit to those arguments, we do not find any constitutionally ineffective assistance of counsel.

In particular, appellant's first argument is that trial counsel failed to request a Crim.R. 29(A) judgment of acquittal at the conclusion of the prosecution's case-in-chief. This argument is somewhat perplexing, however, as the record reveals that counsel made such

> a motion. To the extent that appellant claims that counsel was ineffective for not making the motion in light of his self-defense claim, as we noted in resolving appellant's first assignment of error, whatever claim appellant had to self-defense was irrelevant to the prosecution's evidence concerning whether he committed murder in violation of R.C. 2903.02(A).
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> Appellant's fourth argument is that trial counsel failed to "object to the State's elicitation of prior bad-act testimony." To begin, we do not believe that the incident to which appellant cites was an attempt to elicit "prior bad-act testimony." The prosecution simply asked Cody Lennex why he went outside with his gun after appellant left his residence and Cody explained "[b]ecause me and [appellant] got into an argument before when he was drunk he's threatened to bring a gun back and shoot me." The prosecution did not seek "prior bad-acts" concerning appellant but, rather, sought to explain why Cody went outside with a firearm. This was also cumulative of the evidence that the boys (Lennex and Comer) fought frequently and why the victim explained to Gandee that the confrontation between his younger brother and appellant was not important. In any event, appellant has not persuaded us that the outcome of his trial would have been different had defense counsel lodged an objection to the question and answer.
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> In his final argument, appellant argues that the cumulative total of his counsel's alleged errors deprived him of a fair trial. However, if a reviewing court finds no prior instances of error, the cumulative error doctrine has no application. *See State v. Hairston*, Scioto App. No. 06CA3089, 2007–Ohio–3707, at ¶ 41; *State v. Bennett*, Scioto App. No. 05CA2997, 2006–Ohio–2757, at ¶ 50. In the case sub judice, in view of the fact that we have found no merit in any of appellant's assignments of error, the cumulative error doctrine does not apply. Thus, we find no merit to appellant's fourth assignment of error and it is hereby overruled.

State v. Comer, 2012 WL 1831167, at *4-7.

The factual findings of the state appellate court are presumed to be correct.

> In a proceeding instituted by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination of a factual issue made by a State court shall be presumed to be correct. The applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence.

28 U.S.C. § 2254(e)(l). Further, a federal habeas court may not grant relief unless the state court's decision was contrary to or an unreasonable application of clearly established federal law, or based on an unreasonable determination of the facts in light of the evidence that was presented.

> An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim—
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> (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
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> (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). "The focus. . . is on whether the state court's application of clearly established federal law is objectively unreasonable. . . . [A]n unreasonable application is different from an incorrect one." *Bell v. Cone*, 535 U.S. 685, 694 (2002). To obtain habeas corpus relief, a petitioner must show that the state court's decision was "so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement." *Bobby v. Dixon*, -- U.S. -- , 132 S.Ct. 26 (201l) (quoting *Harrington v. Richter*, 562 U.S. --, 131 S.Ct. 770, 786–87 (2011)). This bar is "difficult to meet" because "habeas corpus is a 'guard against extreme malfunctions in the state criminal justice systems, not a substitute for ordinary error correction through appeal." *Harrington v. Richter*, 131 S.Ct at 786 (quoting *Jackson v. Virginia*, 443 U.S. 307, 332, n. 5 (1979) (Stevens, J., concurring). In short, "[a] state court's determination that a claim lacks merit precludes federal habeas relief so long as 'fairminded jurists could disagree' on the correctness of the state court's

decision." *Id*. (quoting *Yarborough v. Alvarado*, 541 U.S. 652, 664 (2004)). Petitioner has failed to meet this standard.

The United States Supreme Court has emphasized that the right to counsel guaranteed by the Sixth Amendment is the "right to effective assistance of counsel." *Strickland v. Washington*, 466 U.S. 668, 686 (1984). To prevail on a claim of ineffective assistance of counsel, a petitioner must demonstrate the following:

> First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.

Id. at 687. "Surmounting *Strickland's* high bar is never an easy task." *Padilla v. Kentucky*, — U.S. —, —, 130 S.Ct. 1473, 1485 (2010). "Establishing that a state court's application of *Strickland* was unreasonable under § 2254(d) is all the more difficult, since both standards are 'highly deferential.'" *Harrington v. Richter*, 131 S.Ct at 778 (quoting *Strickland*, 466 U.S. at 689). When both *Strickland* and § 2254(d) "'apply in tandem,' review is 'doubly'" deferential. *Premo v. Moore*, --U.S. --, 131 S.Ct. 733, 740 (2011)(quoting *Knowles v. Mirzayance*, 556 U.S. 111, 123 (2009).

Given the difficulties inherent in the analysis of whether an attorney's performance was constitutionally deficient, "a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance . . . ." *Strickland*, 466 U.S. at 687. Nevertheless, "[a]n error by counsel, even if professionally unreasonable, does not warrant setting aside the judgment of a criminal proceeding if the error had no effect on the judgment." *Id*. at 692. A habeas corpus petitioner must therefore establish prejudice in order to prevail on a

claim of ineffective assistance of counsel. *Id.* at 693. To do so, a petitioner must demonstrate that there is a reasonable probability that, but for counsel's errors, the result of the proceedings would have been different. *Id*. at 694. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id*. Because a petitioner must satisfy both prongs of the *Strickland* test to demonstrate the ineffective assistance of counsel, should a court determine that the petitioner has failed to satisfy one prong, it need not consider the other. *Id*. at 697.

In the case presently before the Court, Petitioner does not dispute the factual findings of the state appellate court. He does, however, indicate that additional facts, as set forth in his *Traverse* and in the supplemental transcript of Petitioner's statement to police, are required for consideration of his claim of ineffective assistance of counsel. Petitioner insists that he acted in self defense and, in pursuing this argument, refers, *inter alia*, to testimony indicating that Cody Lennex had shot Petitioner in the buttock as Petitioner was running toward his house and that Dustin Lennex, the decedent, had chased Petitioner to his front porch, yelling, "[C]ome on motherfucker. . . shoot me!" Petitioner states that he was inside his home and Dustin was on the front porch when Petitioner fired at Dustin. *See Traverse*.

Petitioner's preliminary arguments involve Ohio's "Castle Doctrine," as defined in O.R.C. § 2901.05(B).[2] Under that doctrine, a person is presumed to have acted in self defense

[2] Ohio Revised Code 2901.05 provides in relevant part:

> (B)(1) Subject to division (B)(2) of this section, a person is presumed to have acted in self defense or defense of another when using defensive force that is intended or likely to cause death or great bodily harm to another if the person against whom the defensive force is used is in the process of unlawfully and without privilege to do so entering, or has unlawfully and without privilege to do so entered, the residence or vehicle occupied by the person using the defensive force.
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> (2)(a) The presumption set forth in division (B)(1) of this section does not apply if the person against whom the defensive force is used has a right to be in, or is a lawful resident of, the residence or vehicle.

when using deadly force against another who is in the process of unlawfully entering that person's residence. Petitioner argues that he was entitled to a judgment of acquittal on this ground because the prosecution failed to rebut the presumption that he acted in self defense. Petitioner also argues that he was denied the effective assistance of counsel because his attorney failed to make this argument when moving for judgment of acquittal. In a related argument, Petitioner contends that he was denied the effective assistance of counsel when his attorney failed to request an instruction on the Castle Doctrine and an instruction indicating that he had no legal duty to retreat. According to Petitioner, the evidence was uncontroverted that he shot and killed Dustin while the latter was "pounding on the front door" and Petitioner was inside his home. PageID #1609. Petitioner also contends that, had defense counsel requested jury instructions on the issue of fault in starting the fray, *see* T*raverse*, PageID #1616, the outcome of the proceedings would have been different. Petitioner specifically argues that, had such instructions been given, the jury could have reasonably concluded that Cody Lennex started the altercation after objecting to Petitioner's rap. PageID #1617. Petitioner claims that his attorney should have asked the trial court to instruct the jury that the doctrine of self defense does not require "a showing that [Petitioner] played no part [in creating] the situation. . . ," but rather "that he had not engaged in such wrongful conduct toward his assailant that the assailant was provoked to attack [Petitioner]." PageID #1617. In making this argument, Petitioner refers to the prosecution's closing argument, which placed the entire blame for the events of that evening on Petitioner. PageID #1619. Petitioner also contends that the trial court improperly instructed the

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> (b) The presumption set forth in division (B)(1) of this section does not apply if the person who uses the defensive force uses it while in a residence or vehicle and the person is unlawfully, and without privilege to be, in that residence or vehicle.
>
> (3) The presumption set forth in division (B)(1) of this section is a rebuttable presumption and may be rebutted by a preponderance of the evidence.

jury that they could consider only the conduct of Dustin Lennex, the victim, in determining whether Petitioner had reasonable grounds to believe that he was in imminent danger of death or great bodily harm. Finally, Petitioner argues that the cumulative errors of his defense counsel denied him a fundamentally fair trial. PageID #1621.

None of these arguments is persuasive. The state appellate court rejected Petitioner's claim that a Castle Doctrine instruction was warranted and this Court must defer to a state court's interpretation of its own laws. *See Johnson v. Motley*, No. 07-351-DCR, 2008 WL 2758212, at *4 (E.D. Ky. June 10, 2008)(citing *Vroman v.. Brigano*, 346 F.3d 598, 604 (6th Cir. 2003)(federal courts are obligated to accept as valid a state court's interpretation of state law)).

Moreover, the record supports the appellate court's conclusion that Petitioner was not entitled to a jury instruction or judgment of acquittal under the Castle Doctrine. It was Petitioner himself who testified that the initial fracas was over when he left the Lennex home and returned to his home. *Trial Transcript*, PageID #1231-32. Cody Lennex did not follow Petitioner outside, PageID #504, and Dustin Lennex did not follow Petitioner at that time. PageID #1233. Petitioner returned to his home, loaded his gun, went outside and fired into the air. PageID #1241-43. He did this while looking at Dustin Lennex, who was approximately ten to fifteen feet away. *Id.* Todd Dixon testified that, when Petitioner returned to his residence to get his gun, he was cursing, he punched the wall, and he stated that he was going to shoot "those m—f-ers" PageID #472. Although Petitioner denied firing a second shot before going back inside his home, other witnesses testified that he fired a second shot and five spent yellow shell casings were taken from the scene of the crime. PageID #1283. Cody Lennex, who described himself as Petitioner's best friend, took his gun outside after Petitioner fired into the air and warned Petitioner that he would shoot if Petitioner fired again. PageID #966. Petitioner ran back to his

home, shooting as he re-entered the residence. *Id*. at 959, 966. Dustin Lennex was standing approximately fifteen feet from Petitioner at the time. PageID #960. Cody then shot at Petitioner. Dustin Lennex ran to the front porch of Petitioner's home, taunting Petitioner to shoot him. PageID #967. Dustin had his arms out, palms upward, when Petitioner shot and killed him. PageID #968. There was no testimony at trial that the victim was attempting to enter Petitioner's home at the time he was shot. To the contrary, Cody testified that Dustin Lennex was three or four feet from Petitioner's front door when Petitioner killed him. PageID # 978. Petitioner initially testified that someone was attempting to come through his front (screen) door when he fired but, on cross examination, he acknowledged that he never saw the victim touch the front door. PageID #1271, 1278. Cody Lennex testified that Petitioner fired at him yet again after shooting Dustin. PageID # 968. There was uncontroverted evidence that Dustin Lennex was unarmed. The transcript of Petitioner's initial statement to police, referred to by Petitioner in support of his claim, does not assist him because there were inconsistencies in that statement and he denied firing more than one shot.

In sum, in light of this record, this Court is not persuaded that Petitioner has established prejudice, as that term is defined in *Strickland*, based on his defense counsel's failure to request additional jury instructions, failure to request a jury instruction on the Castle Doctrine, or failure to make a proper motion for judgment of acquittal. The trial court could have granted a motion for judgment of acquittal, assuming that such a judgment was warranted by the evidence, regardless of whether defense counsel made an argument under the Castle Doctrine. Further, Petitioner has failed to establish that the jury instructions now requested by him were required under Ohio law or that those actually issued by the trial court were improper. In short, Petitioner's claims of ineffective assistance of trial counsel are without merit.

WHEREUPON, the Magistrate Judge **RECOMMENDS** that this action be **DISMISSED**. Petitioner's *Motion to Complete the Record*, Doc. 8, is **DENIED**, as moot, since Respondent has now filed the transcripts requested by that motion.

If any party objects to this *Report and Recommendation*, that party may, within fourteen (14) days of the date of this report, file and serve on all parties written objections to those specific proposed findings or recommendations to which objection is made, together with supporting authority for the objection(s). A judge of this Court shall make a *de novo* determination of those portions of the report or specified proposed findings or recommendations to which objection is made. Upon proper objections, a judge of this Court may accept, reject, or modify, in whole or in part, the findings or recommendations made herein, may receive further evidence or may recommit this matter to the magistrate judge with instructions. 28 U.S.C. § 636(b)(1).

The parties are specifically advised that failure to object to the *Report and Recommendation* will result in a waiver of the right to have the district judge review the *Report and Recommendation de novo,* and also operates as a waiver of the right to appeal the decision of the District Court adopting the *Report and Recommendation. See Thomas v. Arn*, 474 U.S. 140, (1985); *United States v. Walters*, 638 F.2d 947 (6th Cir.1981).

s/ Norah McCann King
Norah McCann King
United States Magistrate Judge

April 19, 2013