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APPENDIX A

FILED
United States Court of Appeals
Tenth Circuit

July 2, 2024

Christopher M. Wolpert
Clerk of Court

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

ERIC ST. GEORGE,

Petitioner - Appellant,

v.

JASON LENGERICH, Warden of BVCF; PHILIP J. WEISER,

Respondents - Appellees.

No. 23-1280
(D.C. No. 1:22-CV-02312-WJM)
(D. Colo.)

ORDER DENYING CERTIFICATE OF APPEALABILITY*

Before **MORITZ**, **ROSSMAN**, and **FEDERICO**, Circuit Judges.

Eric St. George seeks a certificate of appealability (COA) to appeal the district court's denial of his 28 U.S.C. § 2254 petition. *See* 28 U.S.C. § 2253(c)(1)(A) (requiring a COA to appeal the denial of a § 2254 petition). We deny a COA and dismiss this matter.

I

A Colorado jury convicted St. George on two counts of attempted second-degree murder, two counts of first-degree assault, three counts of felony menacing, one count of illegal discharge of a firearm, and one count of unlawful sexual contact. The convictions

* This order is not binding precedent except under the doctrines of law of the case, res judicata, and collateral estoppel. It may be cited, however, for its persuasive value consistent with Fed. R. App. P. 32.1 and 10th Cir. R. 32.1.

stemmed from an altercation St. George had with an escort and an ensuing gunfight he had with police. He was sentenced to thirty-two years in prison, and the Colorado Court of Appeals (CCA) affirmed his convictions on direct appeal. St. George sought to file an untimely petition for certiorari with the Colorado Supreme Court, but that court denied his request and dismissed his case. St. George then turned to the federal courts for relief.

In his § 2254 petition, St. George asserted four claims, three of which alleged the trial court erred by: 1) failing to suppress statements he made to police in violation of *Miranda v. Arizona*, 384 U.S. 436 (1966); 2) failing to appoint substitute counsel; and 3) admitting evidence of guns found in his apartment. His fourth claim alleged prosecutorial misconduct during closing arguments. Each of these claims was rejected by the CCA, and the district court concluded the CCA's decision was not an unreasonable application of federal law and denied him a COA. St. George seeks a COA to challenge the district court's denial of relief.[1]

II

To obtain a COA, a COA applicant "must make a substantial showing of the denial of a constitutional right." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000). Where, as here,

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[1] In addition to the four claims described above, St. George's COA application includes a separate section entitled, "The Verdict was Based Upon Insufficient Evidence." COA Appl. at 29 (capitalization omitted). The district court declined to review or construe these arguments as a fifth claim because St. George did not raise and exhaust an insufficient-evidence claim in state court, nor did he raise such a claim in his § 2254 petition; he merely argued in a reply and supplement that, presuming his underlying claims established a constitutional violation, there could not have been sufficient evidence to sustain his convictions. Although St. George maintains there was insufficient evidence to support his convictions, he does not contend the district court's refusal to consider the sufficiency of the evidence as a fifth claim is reasonably debatable.

the district court denied the claims on the merits, an applicant "must demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong." *Id.* We conduct "an overview of the claims . . . and a general assessment of their merits." *Miller-El v. Cockrell*, 537 U.S. 322, 336 (2003). In doing so, we account for the deferential treatment afforded to state court decisions by the Antiterrorism and Effective Death Penalty Act (AEDPA). *Dockins v. Hines*, 374 F.3d 935, 938 (10th Cir. 2004). AEDPA precludes habeas relief on claims adjudicated on the merits in state court unless the state court's decision "was contrary to, or involved an unreasonable application of, clearly established Federal law as determined by the Supreme Court of the United States," or "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). "We look to the District Court's application of AEDPA to petitioner's constitutional claims and ask whether that resolution was debatable amongst jurists of reason." *Miller-El*, 537 U.S. at 336.

A. Claim One—Miranda Waiver

St. George claimed the trial court erred in admitting audio recorded statements he made to police in violation of *Miranda*. *Miranda* held a defendant may waive rights attending a custodial police interrogation so long as the waiver is voluntary, knowing, and intelligent. 384 U.S. at 444. St. George argued he was subjected to a custodial interrogation at the hospital after his gunfight with police, and his *Miranda* waiver was not knowing and intelligent because he was intoxicated by alcohol and pain medication after

having been shot.[2] The CCA rejected this claim, and the district court concluded the CCA's decision was not an unreasonable application of federal law. We conclude that reasonable jurists would not debate the district court's decision.

As an initial matter, the district court correctly recognized the CCA's recitation of the facts was presumptively correct and St. George did not present clear and convincing evidence to rebut that presumption. *See* 28 U.S.C. § 2254(e)(1). According to the CCA, both a police officer and a physician's assistant described St. George as intoxicated, and a toxicology analyst assessed his blood alcohol at the time of the shooting to be .28 to .29, but later, when asked at the hospital if he was sober, St. George told the police he was "fine," R. at 194 (internal quotation marks omitted). He was oriented to his surroundings and the situation, his speech was not slurred, and he was responsive to questions and remorseful for his actions. Additionally, after receiving his *Miranda* advisement, he told police he understood his *Miranda* rights and the seriousness of the situation, stating: "I understand that and I will be very plain. It is 4:00 a.m., and I am lying here in the hospital with two gunshot wounds, so I will not be very verbose, all right." *Id.* at 195 (internal quotation marks omitted). Given these facts, the CCA determined he "was aware of the nature of the rights he was waiving" and there was "no indication that St. George

[2] St. George disputes the district court's conclusion that he failed to challenge the voluntariness of his waiver. Although his opening brief to the CCA discussed the legal standards for assessing voluntariness and made the conclusory statement that his waiver was not knowing, intelligent, and voluntary, *see* R. at 99-101, his arguments challenged only the knowing and intelligent elements of his waiver, *id.* at 105. Consequently, he failed to exhaust the voluntary element of his claim. *See Milton v. Miller*, 812 F.3d 1252, 1265 (10th Cir. 2016) (recognizing AEDPA requires exhaustion of issues in state court).

was in any way so intoxicated or so medicated that he didn't understand exactly what was being asked of him." *Id.* at 195-96 (internal quotation marks omitted). Thus, considering the totality of circumstances, the CCA concluded his *Miranda* waiver was knowing and intelligent.

The district court ruled it was not an unreasonable application of federal law for the CCA to conclude that the "waiver was 'made with a full awareness of both the nature of the right[s] being abandoned and the consequences of the decision to abandon [them].'" *Id.* at 304-05 (quoting *Berghuis v. Thompkins*, 560 U.S. 370, 382-83 (2010)). Although St. George contends he could not have understood he was being accused of a crime, he was given a *Miranda* advisement and fails to cite any clear and convincing evidence to rebut the state court's presumptively correct factual findings. Nor does he explain how the CCA's conclusion is an unreasonable application of federal law. He therefore fails to show the district court's decision is reasonably debatable.

B. Claim Two—Substitute Counsel

St. George also claims his Sixth Amendment rights were violated when the trial court declined to appoint substitute counsel for him. *See Gideon v. Wainwright*, 372 U.S. 335 (1963) (recognizing the Sixth Amendment right to counsel for indigent criminal defendants). Although he had standby counsel, he contends the trial court should have appointed substitute counsel because conflicts with his attorney compelled him to proceed pro se. *See United States v. Lott*, 310 F.3d 1231, 1249 (10th Cir. 2002) ("To warrant a substitution of counsel, the defendant must show good cause, such as a conflict of interest, a complete breakdown of communication or an irreconcilable conflict which leads to an

apparently unjust verdict." (internal quotation marks omitted)). The district court concluded the CCA's rejection of this claim was not an unreasonable application of clearly established federal law because there was no actual conflict or breakdown of communication with his attorney. We conclude the district court's decision is not reasonably debatable.

The district court first ruled the CCA's decision was not based on an unreasonable determination of the facts. The district court explained that an independent state judge held a hearing on St. George's conflict argument and found he failed to show good cause for substitution of counsel because there was neither a breakdown in communication nor an actual conflict with his attorney. As the CCA observed, there was not a total breakdown in communication because St. George's attorney consistently maintained communication with him, shared some discovery, and kept him apprised of the status of his case. Nor was there an actual conflict because St. George merely sought to control the strategy of his case. *See id.* ("Good cause for substitution of counsel consists of more than a mere strategic disagreement between a defendant and his attorney[.]"). Although St. George disputes these findings, they are presumptively correct, and he cites no clear and convincing evidence to rebut that presumption. 28 U.S.C. § 2254(e)(1).

As for the district court's legal assessment, the court concluded that under these circumstances, the CCA's decision was not contrary to or an unreasonable application of clearly established federal law. St. George insists he was entitled to substitute counsel, but the district court correctly recognized that he fails to cite clearly established federal law requiring substitution of counsel when there is no actual conflict. *See House v. Hatch*,

527 F.3d 1010, 1018 (10th Cir. 2008) ("The absence of clearly established federal law is dispositive under § 2254(d)(1)."). The district court also recognized that "the Supreme Court has made it clear that the Sixth Amendment does not guarantee a meaningful relationship between an accused and his counsel.'" R. at 310 (quoting *Morris v. Slappy*, 461 U.S. 1, 14 (1983)). Reasonable jurists would not debate the district court's decision.

C. Claim Three—Admission of Gun Evidence

At trial, St. George sought to exclude evidence of multiple guns that police found in his apartment after the firefight. He argued some of the guns were not relevant to his offenses and the evidence was unduly prejudicial. The CCA affirmed admission of the evidence on a res gestae theory.[3] In his § 2254 petition, St. George claimed the trial court abused its discretion in admitting the evidence because its probative value was substantially outweighed by the danger of unfair prejudice, denying him a fair trial. The district court denied the claim, ruling there is no Supreme Court case clearly establishing a standard by which to assess the state court's admission of the evidence.

St. George disputes the district court's decision, insisting habeas relief is available if admission of the evidence resulted in a fundamentally unfair trial. *See Estelle v. McGuire*, 502 U.S. 62, 67-68 (1991). *Estelle* considered whether a defendant's due process rights were violated by the admission of evidence establishing the child-victim had previously suffered injuries consistent with "battered-child syndrome." *Id.* at 68 (internal

[3] Res gestae is "intrinsic evidence inextricably connected to the charged crimes." *United States v. Piette*, 45 F.4th 1142, 1155 (10th Cir. 2022) (internal quotation marks omitted).

quotation marks omitted). The Court held there was no due process violation because the evidence tended to prove the child's death was not an accident, but rather the result of an intentional act. *Id.* at 69-70. St. George does not explain how *Estelle* clearly establishes that admission of the gun evidence here rendered his trial so fundamentally unfair as to violate his due process rights. In any event, "we may not extract clearly established law from the general legal principles developed in factually distinct contexts." *Holland v. Allbaugh*, 824 F.3d 1222, 1229 (10th Cir. 2016) (internal quotation marks omitted). St. George cites no clearly established federal law holding that admission of evidence like the gun evidence here renders a trial fundamentally unfair. *See House*, 527 F.3d at 1018. The district court's denial of this claim is not reasonably debatable.

D. Claim Four—Prosecutorial Misconduct

During summation, the prosecutor referenced St. George's gunfight with police:

> Two Lakewood police officers gunned down in the line of duty. How close were we to that headline on the morning of August 1st. All because of the defendant's unreasonable and dangerous decisions that he made that night. Decisions that came out of his need to control people, control things, his frustration when he could not, his access to too much alcohol and too many guns.
>
> . . . .
>
> And the only reason that we didn't wake up on August 1st to that narrative of two Lakewood police officers killed in the line of duty was because he was too drunk to shoot straight.

R. at 207-08 (internal quotation marks omitted). St. George did not contemporaneously object to these comments, and thus the CCA reviewed only for plain error and concluded the statements were fair commentary on the evidence, grounded in the facts, and within the

bounds of permissible oratorical embellishment. In his § 2254 petition, St. George argued the prosecutor's statements denied him a fundamentally fair trial because they were inherently prejudicial and appealed to the passions and prejudices of the jury. The district court denied the claim, concluding that the CCA's decision was not an unreasonable application of clearly established law. The district court's decision is not subject to reasonable debate.

The district court correctly recognized that under the clearly established federal standard, courts ask "whether the prosecutor's comments so infected the trial with unfairness as to make the resulting conviction a denial of due process." *Darden v. Wainwright*, 477 U.S. 168, 181 (1986) (internal quotation marks omitted). Had we reviewed this claim for plain error, as the CCA did, we might well have reached a different conclusion than the CCA. *See United States v. Kepler*, 74 F.4th 1292, 1316 (10th Cir. 2023) ("A prosecutor's comments are improper if they . . . invite the jury to base its decision on irrelevant considerations."). But on habeas review, St. George was required to clear a higher bar: "an unreasonable application constitutes more than an incorrect application of federal law." *House*, 527 F.3d at 1019. "The focus of the . . . inquiry is on whether the state court's application of clearly established federal law is objectively unreasonable . . . ." *Bell v. Cone*, 535 U.S. 685, 694 (2002). And "because the *Darden* standard is a very general one," the CCA had "more leeway" to reach the conclusion it did. *Parker v. Matthews*, 567 U.S. 37, 48 (2012) (internal quotation marks omitted).

Indeed, the district court recognized *Darden* itself concluded that more inflammatory comments than those here did not warrant habeas relief. *See* 477 U.S. at 180

& n. 12 (referring to defendant as an "animal" that "shouldn't be out of his cell unless he has a leash on him and a prison guard at the other end of that leash," and wishing a victim had "blown [his] face off" (internal quotation marks omitted)). Although St. George argues that the prosecutor's comments were designed to compare his case to other police shootings in the media, he does not explain how the CCA unreasonably applied *Darden*. Absent that explanation, he fails to show the district court's denial of relief is reasonably debatable.

III

Accordingly, we deny a COA and dismiss this matter. St. George's motion to proceed without prepayment of costs and fees is granted.

Entered for the Court

Richard E.N. Federico
Circuit Judge

APPENDIX D

FILED
United States Court of Appeals
Tenth Circuit

August 26, 2024

Christopher M. Wolpert
Clerk of Court

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

ERIC ST. GEORGE,

Petitioner - Appellant,

v.

JASON LENGERICH, Warden of BVCF, et al.,

Respondents - Appellees.

No. 23-1280
(D.C. No. 1:22-CV-02312-WJM)
(D. Colo.)

I file Cert. before 25 Nov '24

ORDER

Before **MORITZ**, **ROSSMAN**, and **FEDERICO**, Circuit Judges.

Appellant's petition for rehearing is denied.

The petition for rehearing en banc was transmitted to all of the judges of the court who are in regular active service. As no member of the panel and no judge in regular active service on the court requested that the court be polled, that petition is also denied.

Entered for the Court

CHRISTOPHER M. WOLPERT, Clerk

B

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
Judge William J. Martínez

Civil Action No. 22-cv-2312-WJM

ERIC ST. GEORGE,

Applicant,

v.

JASON LENGERICH (Warden of BVCF), and
PHILIP J. WEISER, Attorney General of the State of Colorado,

Respondents.

ORDER ON APPLICATION FOR WRIT OF HABEAS CORPUS

Applicant, Eric St. George, is a prisoner in the custody of the Colorado Department of Corrections. Mr. St. George has filed *pro se* an Application for a Writ of Habeas Corpus Pursuant to 28 U.S.C. § 2254 (ECF No. 1) (the "Application") challenging the validity of his conviction and sentence in Jefferson County District Court case number 16CR2509. On December 17, 2022, Respondents filed an Answer (ECF No. 24). On April 24, 2023, Mr. St. George filed a Reply to the State's Answer (ECF No. 36) and a Supplement to Habeas Corpus Application (ECF No. 37).

After reviewing the record, including the Application, the Answer, the Reply, the Supplement, and the state court record, the Court concludes Mr. St. George is not entitled to relief.

I. FACTUAL AND PROCEDURAL BACKGROUND

Following a jury trial at which he represented himself with the assistance of advisory counsel, Mr. St. George was convicted on two counts of attempted murder in

the second degree, two counts of assault in the first degree, three counts of felony menacing, one count of illegal discharge of a firearm, and one count of unlawful sexual contact. The Colorado Court of Appeals summarized the relevant background as follows:

> On the night in question, St. George contacted "Denver Ladies," an escort service. The agency connected St. George with E.E., who agreed to go to his residence. Upon arrival, she refused to perform the acts that St. George demanded. After he called the agency to complain, however, the agency convinced him to keep her services for an hour, as initially agreed. When E.E. began a striptease and lap dance for him, he began to inappropriately touch her and continued to do so after repeated warnings. She left.
>
> As E.E. did so, St. George demanded his money back and blocked her exit. E.E. pushed past him, but St. George, armed with a handgun, followed her out the front door into a common breezeway and shot a round into the air. E.E. ran to her car. She testified that St. George fired another shot in her direction before she was able to flee. She called 911 to report the incident.
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> In response to the 911 call, Officers Brennan and Trimmer and Sergeants Muller and Maines went to St. George's residence to investigate. Brennan and Muller each made contact with St. George via phone, identified themselves as Lakewood police officers (their phone numbers appear as unavailable or restricted on caller ID), and asked St. George to exit his residence. St. George expressed disbelief that the police were calling him and said that he did not understand why he was being contacted because "nothing happened." The officers noticed that St. George had slurred speech and seemed annoyed.
>
> After receiving one of these calls, St. George turned out the lights and then exited the back of his residence holding a cell phone. Trimmer, who was stationed near the rear door, testified that she could see him due to the "glow from his cell phone." Then, he briefly went back inside, exited again, and Trimmer and Maines heard the sound of a shotgun being racked.
>
> A firefight followed, during which St. George discharged his shotgun in the direction of both Trimmer and Maines. Neither officer was

> injured, but St. George was shot in both legs. St. George retreated into his apartment and police officers then heard three more gunshots. St. George eventually exited with a handgun but dropped it and surrendered.
>
> Maines testified that St. George "was clearly intoxicated" when taken into custody and that he had "incoherent, slurred speech." The treating physician assistant likewise testified that St. George smelled of alcohol, appeared intoxicated, and had slurred speech. St. George received three blood draws at roughly thirty-minute intervals, and a forensic toxicology analyst extrapolated that St. George had a blood alcohol level of between .28 and .29 at the time of the shooting.
>
> A few hours before the blood draws, Detective Feik arrived at the hospital, introduced himself, and first noticed that St. George did not appear to be very intoxicated. He read St. George his *Miranda* rights. St. George said that he understood his rights and agreed to speak to Feik, who then conducted an interview that lasted nearly two hours. During that interview, which was audio-recorded, St. George made statements that the prosecution introduced at trial.

(ECF No. 10-4 at pp.2-4.)

Mr. St. George was sentenced to a total term of thirty-two years in prison. On December 16, 2021, the judgment of conviction was affirmed on direct appeal. (*See id.*) Mr. St. George failed to file a timely petition for writ of certiorari and, on March 16, 2022, the Colorado Supreme Court dismissed the case. (*See* ECF No. 10-7.)

Mr. St. George asserts four claims in the Application. He contends the trial court erred by denying his motion to suppress statements and evidence (claim 1), by finding no conflict of interest requiring appointment of new counsel (claim 2), by admitting highly prejudicial evidence about guns obtained from his apartment (claim 3), and by allowing the prosecution to make a prejudicial closing argument (claim 4). Mr. St. George also argues in his Reply and Supplement that there was insufficient evidence to support the convictions. Additional facts pertinent to each claim are set forth below.

II. STANDARDS OF REVIEW

The Court must construe the Application and other papers filed by Mr. St. George liberally because he is not represented by an attorney. *See Haines v. Kerner*, 404 U.S. 519, 520-21 (1972); *Hall v. Bellmon*, 935 F.2d 1106, 1110 (10th Cir. 1991). However, the Court should not be an advocate for a *pro se* litigant. *See Hall*, 935 F.2d at 1110.

Title 28 U.S.C. § 2254(d) provides that a writ of habeas corpus may not be issued with respect to any claim that was adjudicated on the merits in state court unless the state court adjudication:

> (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). Mr. St. George bears the burden of proof under § 2254(d). *See Cullen v. Pinholster*, 563 U.S. 170, 181 (2011).

The Court's inquiry is straightforward "when the last state court to decide a prisoner's federal claim explains its decision on the merits in a reasoned opinion." *Wilson v. Sellers*, 138 S. Ct. 1188, 1192 (2018). "In that case, a federal habeas court simply reviews the specific reasons given by the state court and defers to those reasons if they are reasonable." *Id.* When the last state court decision on the merits "does not come accompanied with those reasons . . . the federal court should 'look through' the unexplained decision to the last related state-court decision that does provide a relevant rationale [and] presume that the unexplained decision adopted the same reasoning." *Id.*

The presumption may be rebutted "by showing that the unexplained affirmance relied or most likely did rely on different grounds than the lower state court's decision, such as alternative grounds for affirmance that were briefed or argued to the state supreme court or obvious in the record it reviewed." *Id.*

The threshold question the Court must answer under § 2254(d)(1) is whether Mr. St. George seeks to apply a rule of law that was clearly established by the Supreme Court at the time the state court adjudicated the claim on its merits. *Greene v. Fisher*, 565 U.S. 34, 38 (2011). Clearly established federal law "refers to the holdings, as opposed to the dicta, of [the Supreme] Court's decisions as of the time of the relevant state-court decision." *Williams v. Taylor*, 529 U.S. 362, 412 (2000). If there is no clearly established federal law, that is the end of the Court's inquiry pursuant to § 2254(d)(1). *See House v. Hatch*, 527 F.3d 1010, 1018 (10th Cir. 2008).

"[R]eview under § 2254(d)(1) is limited to the record that was before the state court that adjudicated the claim on the merits." *Cullen*, 563 U.S. at 181. A state court decision is contrary to clearly established federal law if the state court either applies a rule that contradicts governing Supreme Court law or decides a case differently than the Supreme Court on materially indistinguishable facts. *See House*, 527 F.3d at 1018. "A state court decision involves an unreasonable application of clearly established federal law when it identifies the correct governing legal rule from Supreme Court cases, but unreasonably applies it to the facts." *Id.* A decision is objectively unreasonable "only if all fairminded jurists would agree that the state court got it wrong." *Stouffer v. Trammel*, 738 F.3d 1205, 1221 (10th Cir. 2013) (internal quotation marks omitted).

> [E]valuating whether a rule application was unreasonable requires considering the rule's specificity. The more general the rule, the more

> leeway courts have in reaching outcomes in case-by-case determinations. [I]t is not an unreasonable application of clearly established Federal law for a state court to decline to apply a specific legal rule that has not been squarely established by [the Supreme] Court.

Harrington v. Richter, 562 U.S. 86, 101 (2011) (internal quotation marks and citation omitted, first and second set of brackets in original). In conducting this analysis, the Court "must determine what arguments or theories supported or . . . could have supported[] the state court's decision" and then "ask whether it is possible fairminded jurists could disagree that those arguments or theories are inconsistent with the holding in a prior decision of [the Supreme] Court." *Id.* at 102.

Under this standard, "only the most serious misapplications of Supreme Court precedent will be a basis for relief under § 2254." *Maynard v. Boone*, 468 F.3d 665, 671 (10th Cir. 2006); *see also Richter*, 562 U.S. at 102 (stating "that even a strong case for relief does not mean the state court's contrary conclusion was unreasonable").

> As a condition for obtaining habeas corpus from a federal court, a state prisoner must show that the state court's ruling on the claim being presented in federal court was so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement.

Richter, 562 U.S. at 103.

Section 2254(d)(2) allows the Court to grant a writ of habeas corpus only if the relevant state court decision was based on an unreasonable determination of the facts in light of the evidence presented to the state court. The Court must presume the state court's factual determinations are correct and Mr. St. George bears the burden of rebutting the presumption by clear and convincing evidence. *See* 28 U.S.C. § 2254(e)(1). The presumption of correctness applies to factual findings of the trial court as well as state appellate courts. *See Al-Yousif v. Trani*, 779 F.3d 1173, 1181 (10th Cir.

2015). The presumption of correctness also applies to implicit factual findings. *See Ellis v. Raemisch*, 872 F.3d 1064, 1071 n.2 (10th Cir. 2017). "But if the petitioner can show that the state courts plainly misapprehend[ed] or misstate[d] the record in making their findings, and the misapprehension goes to a material factual issue that is central to petitioner's claim, that misapprehension can fatally undermine the fact-finding process, rendering the resulting factual finding unreasonable." *Smith v. Duckworth*, 824 F.3d 1233, 1241 (10th Cir. 2016) (internal quotation marks omitted, brackets in original).

Finally, the Court's analysis is not complete even if Mr. St. George demonstrates the state court decision is contrary to or an unreasonable application of clearly established federal law or was based on an unreasonable determination of the facts in light of the evidence presented. *See Harmon v. Sharp*, 936 F.3d 1044, 1056 (10th Cir. 2019). If the requisite showing under § 2254(d) is made, the Court must consider the merits of the constitutional claim *de novo*. *See id.* at 1056-57.

Likewise, if a claim was not adjudicated on the merits in state court, and if the claim is not procedurally barred, the Court also must review the claim *de novo* and the deferential standards of § 2254(d) do not apply. *See id.* at 1057. However, even if a claim is not adjudicated on the merits in state court, the Court still must presume the state court's factual findings pertinent to the claim are correct under § 2254(e). *See id.*

III. MERITS OF APPLICANT'S CLAIMS

A. Claim 1

Mr. St. George contends in claim 1 that statements and evidence were admitted against him in violation of *Miranda v. Arizona*, 384 U.S. 436 (1966). Although he refers

to both statements and evidence, Mr. St. George primarily focuses in the Application on his statements during the hospital interview with Detective Feik and he does not specifically identify any other evidence that should have been suppressed. In a later filing, Mr. St. George indicated the other evidence is a blood draw and the surreptitious audio recording of the hospital interview. (*See* ECF No. 12.) But Mr. St. George himself relies heavily on the results of the blood draw to support his argument that his *Miranda* waiver was not knowing and intelligent and it is not clear that the audio recording of the interview involves any evidence other than Mr. St. George's statements during the interview.

In the Reply and Supplement, Mr. St. George focuses exclusively on the statements obtained during the hospital interview. His discussion of claim 1 in the Reply is captioned "CLAIM ONE: FEIK INTERROGATION" and he argues that "the record shows that St. George's waiver was neither knowing or intelligently made." (ECF No. 36 at p.4.) The discussion of claim 1 in the Supplement is captioned "Claim 1: Intoxicated during the interrogation" and he argues that "[t]he interrogation should have been suppressed on the grounds that he was too intoxicated, and too coerced, to waive his *Miranda* rights." (ECF No. 37 at pp.2, 3.) The Court will similarly limit its analysis of claim 1 to Mr. St. George's statements during the hospital interview.

"The *Miranda* Court formulated a warning that must be given to suspects before they can be subjected to custodial interrogation." *Berghuis v. Thompkins*, 560 U.S. 370, 380 (2010). *Miranda* holds that "[t]he defendant may waive effectuation" of the rights conveyed in the warnings "provided the waiver is made voluntarily, knowingly and

intelligently." *Miranda*, 384 U.S. at 444.

> The waiver inquiry has two distinct dimensions: waiver must be voluntary in the sense that it was the product of a free and deliberate choice rather than intimidation, coercion, or deception, and made with a full awareness of both the nature of the right being abandoned and the consequences of the decision to abandon it.

Berghuis, 560 U.S. at 382-83 (internal quotation marks omitted).

The Colorado Court of Appeals addressed the merits of Mr. St. George's *Miranda* claim. The state court began its analysis by noting that "[a] *Miranda* waiver must, under the totality of the circumstances, be voluntary, knowing, and intelligent." (ECF No. 10-4 at p.6.) The Colorado Court of Appeals considered only whether Mr. St. George's *Miranda* waiver was knowing and intelligent because he did not argue in his opening brief that the waiver was involuntary. (*See id.* at p.7.) Additionally, the Colorado Court of Appeals addressed only Mr. St. George's post-*Miranda* statements at the hospital because he did not challenge on appeal any pre-*Miranda* statements while he was being taken into custody. (*See id.*) The state court outlined the relevant standards as follows:

> A waiver is knowing and intelligent when the suspect is "fully aware 'both of the nature of the right being abandoned and the consequences of the decision to abandon it.'" *Madrid*, 179 P.3d at 1016 (citation omitted).
>
> Courts evaluate a defendant's waiver of *Miranda* rights based on the totality of the circumstances and can consider various facts such as the clarity and form of the defendant's acknowledgement and waiver. "Intoxication, when raised, is also one of the factors the trial court may consider . . . ." *Platt*, 81 P.3d at 1065-66 (citation omitted).
>
> When intoxication is self-induced, courts evaluate whether the defendant was so intoxicated that he could not have made a knowing and intelligent waiver. *Id.* at 1066. Although intoxication can diminish mental

faculties, it will not invalidate an otherwise valid *Miranda* waiver if the defendant "was capable of understanding the nature of his or her rights and the ramifications of waiving them." *Id.*

When considering intoxication as a factor, the inquiry rests on the following:

> [W]hether the defendant seemed oriented to his or her surroundings and situation; whether the defendant's answers were responsive and appeared to be the product of a rational thought process; whether the defendant was able to appreciate the seriousness of his or her predicament, including the possibility of being incarcerated; whether the defendant had the foresight to attempt to deceive the police in hopes of avoiding prosecution; whether the defendant expressed remorse for his or her actions; and whether the defendant expressly stated that he or she understood their rights.

Id.

(*Id.* at pp.8-9.)

Mr. St. George does not argue that the state court decision is contrary to clearly established federal law under § 2254(d)(1). That is, he does not cite any contradictory governing law set forth in Supreme Court cases or any materially indistinguishable Supreme Court decision that would compel a different result. *See House*, 527 F.3d at 1018. Therefore, the Court considers only whether the state court decision is an unreasonable application of clearly established federal law under § 2254(d)(1) or based on an unreasonable determination of the facts in light of the evidence presented under § 2254(d)(2). The state court provided the following analysis of the *Miranda* claim:

> The detective turned his recording device on as he walked into the room to meet with St. George and turned it off after he left. The audio recording in the record thus captures the entire interaction that gave rise to St. George's motion to suppress.

When he began the interview, the detective "was aware that [St. George] had been given pain meds of some kind," although he did not know the "specific dosages or type." He also understood that St. George had been drinking but did not have information about his blood alcohol level. St. George did not mention medications to the detective, but he did say that he was in pain and that he had been drinking. When queried about whether he was sober, St. George responded that he was "fine."

Applying the *Platt* factors in light of these undisputed facts and our review of the audio recording, we make the following observations:

- St. George was oriented to his surroundings and situation. He was fully aware that he was in the hospital after being shot, that the detective was a police officer, and that the detective wanted to question him about the incident. His voice remained steady throughout the interview and his speech was not slurred.

- St. George's answers were responsive and appeared to be the product of a rational thought process. In fact, he told the detective that he planned on asking questions of his own about how and why he had been shot, and he did so throughout the interview.

- St. George understood the seriousness of his predicament and expressly stated that he understood his rights. After receiving the *Miranda* advisement, he responded, "I understand that and I will be very plain. It is 4:00 a.m., and I am lying here in the hospital with two gunshot wounds, so I will not be very verbose, all right."

- St. George had the foresight to attempt to deceive the police in an attempt to avoid prosecution. For example, he initially told the detective that no one else had been in his apartment the night of the shooting, and he denied that there had been any kind of "altercation" there. When pressed on the issue, he eventually admitted that he had a "girl" over to his apartment, but then he told the detective that he "d[idn't] know if she belonged to a service or not."

- St. George expressed remorse for his actions, stating that he "hope[d] like hell [he] didn't hurt anyone."

Every one of these factors weighs in favor of a conclusion that St. George fully understood the situation that he was in – although perhaps not exactly how he got there – and was aware of the nature of the rights

> that he was waiving by choosing to speak with the detective. We agree with the trial court's determination that the audio recording contains no indication that St. George "was in any way so intoxicated or so medicated that he didn't understand exactly what was being asked of him." Taking the totality of the circumstances into account, we conclude that St. George's waiver of his *Miranda* rights was knowing and intelligent. Accordingly, we discern no error.

(ECF No. 10-4 at pp.9-12 (brackets in original).)

Mr. St. George argues his statements during the interrogation should have been suppressed because he "was significantly intoxicated, suffering from severe pain and shock, and fatigued from the stress of the day," which "precluded him from making a knowing and intelligent *Miranda* waiver." (ECF No. 1 at pp.9, 13.) He expands on the argument in his Reply as follows:

> Under the totality of the circumstances using the *Platt* factors, considering St. George's high BAC, the pain of the gunshot wounds, the lack of rest, the psychological trauma of the Lakewood police ambush, the coercive pressure of the interrogation techniques and armed police presence after having been shot by police, St. George's waiver of the *Miranda* rights cannot reasonably be determined knowing and intelligent. The courts below, District and CCA[,] have both made unreasonable findings of fact and conclusions of law in having permitted the recording of this interrogation to come into the trial.

(ECF No. 36 at p.9.)

The Court is not persuaded that Mr. St. George is entitled to relief. First, he fails to demonstrate the decision of the Colorado Court of Appeals was based on an unreasonable determination of the facts in light of the evidence presented. The Colorado Court of Appeals listened to the audio recording of the interview and considered the totality of the circumstances, including the facts that Mr. St. George had been drinking and required pain medication because he had been shot as well as the

nature of the interaction between Mr. St. George and the police during the interview. The Colorado Court of Appeals determined Mr. St. George was oriented to his surroundings and situation in the hospital, his answers were responsive and appeared to be the product of a rational thought process, he understood the seriousness of his predicament and expressly stated that he understood his rights, he had the foresight to attempt to deceive the police and avoid prosecution, and he expressed remorse for his actions. (*See* ECF No. 10-4 at pp.10-11.) Mr. St. George does not agree with these factual findings, but the Court presumes the state court's factual findings are correct and Mr. St. George does not present any clear and convincing evidence to rebut the presumption of correctness. *See* 28 U.S.C. § 2254(e)(1). In any event, the Court's review of the audio recording confirms the state court's factual findings. Mr. St. George also fails to demonstrate the Colorado Court of Appeals "plainly misapprehend[ed] or misstate[d] the record in making their findings." *Smith*, 824 F.3d at 1241 (brackets in original). Thus, he has not shown the state court decision is based on an unreasonable determination of the facts in light of the evidence presented under § 2254(d)(2).

The Court also cannot conclude the Colorado Court of Appeals unreasonably applied clearly established Supreme Court law under § 2254(d)(1). That is, Mr. St. George fails to demonstrate the state court's rejection of his *Miranda* claim, based on its consideration of the totality of the circumstances, "was so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement." *Richter*, 562 U.S. at 103. To the contrary, in light of the factual findings discussed above, it was not unreasonable to conclude Mr.

St. George's waiver was "made with a full awareness of both the nature of the right[s] being abandoned and the consequences of the decision to abandon [them]." *Berghuis*, 560 U.S. at 382-83.

For these reasons, the Court finds that Mr. St. George is not entitled to relief on claim 1.

B. Claim 2

Claim 2 is a Sixth Amendment claim in which Mr. St. George challenges the trial court's decision not to appoint substitute counsel. The Sixth Amendment right to counsel includes not only the right to retain counsel, but also the right of an indigent defendant to have counsel appointed for him at state expense. *Gideon v. Wainwright*, 372 U.S. 335 (1963). With respect to the issue of substitute counsel, a criminal defendant has a constitutional right to representation by counsel that is free from conflicts of interest. *See Cuyler v. Sullivan*, 446 U.S. 335, 348 (1980).

During pretrial proceedings, Mr. St. George requested appointment of a new attorney because "he was having difficulties with counsel regarding communication, correspondence, motions, and finding common ground." (ECF No. 1 at p.13.) An independent judge held a conflict hearing, referred to as a *Bergerud* hearing, *see People v. Bergerud*, 223 P.3d 686 (Colo. 2010), and heard testimony from Mr. St. George and his public defender. The independent judge found there was no conflict that would warrant appointment of a new attorney. Mr. St. George subsequently elected to proceed *pro se* and he represented himself with the assistance of advisory counsel.

On direct appeal, the Colorado Court of Appeals addressed the Sixth

Amendment claim on the merits and concluded Mr. St. George failed to demonstrate good cause to warrant substitute counsel. The state court provided the following explanation:

> During the hearing before the judge who sat to hear his motion for substitute counsel, St. George explained that his public defender
>
> • failed to provide him full access to the discoverable evidence that he would need to prepare his defense;
>
> • had not filed motions that St. George had requested;
>
> • had not kept St. George up to date on the progress of the case; and
>
> • had failed to respond to correspondence.
>
> The conflict court inquired into the nature of St. George's grievances with the following colloquy:
>
> [Court]: Okay. I mean, it sounds like a lot of it comes down to a concern that you'd like more control over the direction of the case, the strategies that you pursue, the motions you might file.
>
> [St. George]: Yes, Your Honor.
>
> [Q]: Is that fair?
>
> [A]: That is very fair.
>
> [Q]: Now, if that – if those are for an attorney to make, then why would it – I'm not sure that it would be any different for any other attorney, would it?
>
> [A]: If not full control, at least input.
>
> . . . .
>
> And if there is, as you said, a strategic decision is typically made by the attorney, but I should at least, at bare minimum, be made knowledgeable as to those strategies and the purposes thereby.

Applying the first two *Bergerud* factors to the conflict court's ruling, St. George's motion was timely, and the court adequately inquired into St. George's complaint by directly addressing St. George's allegations and hearing testimony from defense counsel.

With regard to *Bergerud's* third factor, the conflict court found that there was not a total breakdown in communication. The court noted that "there is not a total lack of communication or any indication before the Court here that the situation . . . would prevent an adequate defense in this case." *See People v. Jenkins*, 83 P.3d 1122, 1126 (Colo. App. 2003) (determining complete breakdown of communication not established where counsel met with the defendant only once in nine months and had not discussed potential witnesses with him or given him copies of discovery). There is substantial support for this conclusion. Defense counsel testified that he consistently maintained communication with St. George through correspondence (although perhaps not to the degree that St. George would have preferred), shared at least 1,284 pages of printed discovery and "some, if not all, of the photos," and kept him apprised of case progress, such as informing him of motions hearings and his retention of an expert witness.

As for *Bergerud's* fourth factor, the conflict court determined that St. George contributed to his alleged conflict with defense counsel. Based on his testimony before the conflict court, St. George wanted to take on a more active role in directing the strategy of his case. But counsel is captain of the ship when it comes to strategic decisions. *See People v. Krueger*, 2012 COA 80, ¶ 14 ("Disagreements pertaining to matters of trial preparation, strategy, and tactics do not establish good cause for substitution of counsel." (quoting *Kelling*, 151 P.3d at 653)); *People v. Garcia*, 64 P.3d 857, 863-64 (Colo. App. 2002) (disagreement over theory of defense did not warrant substitute counsel). Further, as the conflict court noted, St. George's desire to dictate case strategy would likely be a consistent challenge with any attorney. *See People v. Outlaw*, 998 P.2d 20, 25 (Colo. App. 1999) (determining substitute counsel would not solve defendant's dissatisfaction with rule that attorney, and not defendant, determines trial strategy), *rev'd on other grounds*, 17 P.3d 150 (Colo. 2001).

The record reflects that the conflict court conducted a thorough inquiry into St. George's concerns, and, with record support, concluded that the attorney-client relationship had not deteriorated to the point where counsel was unable to give effective assistance. Accordingly, the conflict

> court did not abuse its discretion when finding that St. George's allegations did not sufficiently show good cause to warrant substitute counsel.

(ECF No. 10-4 at pp.15-18.)

Mr. St. George's argument in support of claim 2 is premised on what he describes as a complete and total breakdown in communication with counsel. As noted above, he alleges generally in the Application that "he was having difficulties with counsel regarding communication, correspondence, motions, and finding common ground." (ECF No. 1 at p.13.) He expands on the argument in his Supplement and Reply, contending the complete and total breakdown in communication resulted from counsel's failure to perform an adequate investigation into the State's false narrative, counsel denying him complete access to the discovery pursuant to a policy of the Public Defender's Office regarding clients who are in custody, and counsel pressuring him to plead guilty to crimes he had not committed. Mr. St. George also points to the fact that counsel testified at the *Bergerud* hearing, which he characterizes as counsel testifying against him, and he makes a vague and conclusory allegation that, "[b]ecause [his public defender] was representing his own interests and those of his Office and those of the Court, he was unable to adequately represent St. George's interests, leading to the complete breakdown in communications." (ECF No. 36 at p.9 (citation omitted).)

The Court will not consider Mr. St. George's new allegations in the Supplement and Reply in support of claim 2 because the new allegations were not part of the claim he raised and exhausted on direct appeal and Mr. St. George has not sought or obtained leave to file an amended application. Furthermore, "review under § 2254(d)(1)

is limited to the record that was before the state court that adjudicated the claim on the merits." *Cullen*, 563 U.S. at 181.

Mr. St. George fails to demonstrate the state court decision is based on an unreasonable determination of the facts in light of the evidence presented under § 2254(d)(2). The state courts found as a factual matter that there was not a complete breakdown in communication between Mr. St. George and counsel and that there was not an actual conflict of interest. Mr. St. George obviously disagrees, but the Court presumes these facts are correct and Mr. St. George does not present any clear and convincing evidence to rebut the presumption of correctness. *See* 28 U.S.C. § 2254(e)(1). He also fails to demonstrate the Colorado Court of Appeals "plainly misapprehend[ed] or misstate[d] the record in making their findings." *Smith*, 824 F.3d at 1241 (brackets in original). The Court's review of the state court record confirms that no actual conflict of interest existed and that Mr. St. George merely disagreed with the manner in which appointed counsel was handling his case.

Because there was no actual conflict of interest, the state court's determination that Mr. St. George's Sixth Amendment rights were not violated is not contrary to or an unreasonable application of clearly established Supreme Court law under § 2254(d)(1). The Supreme Court has recognized at least the possibility of a conflict of interest between a criminal defendant and his or her attorney in various circumstances. *See, e.g.*, *Mickens v. Taylor*, 535 U.S. 162, 164-65 (2002) (recognizing a "potential conflict of interest" when appointed counsel previously represented the murder victim in a separate case); *Wood v. Georgia*, 450 U.S. 261, 270-72 (1981) (suggesting strong

"*possibility* of a conflict of interest" when defendants were represented by a lawyer hired by their employer); *Cuyler*, 446 U.S. at 348 ("Since a possible conflict inheres in almost every instance of multiple representation, a defendant who objects to multiple representation must have the opportunity to show that potential conflicts impermissibly imperil his right to a fair trial.") However, Mr. St. George fails to identify any clearly established Supreme Court law that provides an indigent criminal defendant with a constitutional right to substitute counsel in the absence of an actual conflict of interest. *See Plumlee v. Masto*, 512 F.3d 1204, 1211 (9th Cir. 2008) ("Plumlee has cited no Supreme Court case – and we are not aware of any – that stands for the proposition that the Sixth Amendment is violated when a defendant is represented by a lawyer free of actual conflicts of interest, but with whom the defendant refuses to cooperate because of dislike or distrust."). In fact, the Supreme Court has made it clear that the Sixth Amendment does not guarantee "a 'meaningful relationship' between an accused and his counsel." *Morris v. Slappy*, 461 U.S. 1, 14 (1983). Thus, a disagreement with counsel about trial strategy does not require substitution of counsel. *See United States v. Lott*, 310 F.3d 1231, 1249 (10th Cir. 2002).

For these reasons, the Court finds that Mr. St. George is not entitled to relief with respect to claim 2.

C. Claim 3

Claim 3 challenges a state court evidentiary ruling that allowed admission of evidence relating to guns Mr. St. George owned and had in his apartment. According to Mr. St. George, "[t]he trial court abused its discretion by admitting evidence describing

all the guns obtained from [his] apartment," which "painted [him] as a Second Amendment 'gun nut'" and deprived him of "an impartial jury and fair trial." (ECF No. 1 at p.19.) Mr. St. George does not challenge admission of evidence relevant to the guns used during the incident. Thus, he argued on direct appeal only that the trial court "erroneously admitted evidence about the number of guns he had at his residence at the time of the incident, rather than limiting the prosecution's presentation to only the guns used during the incident." (ECF No. 10-4 at p.18.)

The Colorado Court of Appeals reasoned as follows in rejecting Mr. St. George's claim:

> Police found at St. George's residence, and the prosecution offered as evidence, eleven firearms, most of which were loaded, and three of which St. George had fired at various points during the incident. At trial, St. George (who was representing himself) argued that the court should limit the evidence about the extent of his gun collection:
>
> > Your Honor, if we're going to discuss my entire ownership of firearms, I have a feeling that this is going to be more prejudice to the jury than it is probative, and it's not relevant to this case, as none of those firearms were used in this incident, and so they have no bearing on this incident.
> >
> > . . . .
> >
> > And there are other firearms that are not of my ownership that I was storing for a friend. And that's where I think that we have the potential for more prejudice than probative value.
>
> Evidence of the extent of St. George's collection was relevant. St. George was charged with, among other things, attempted first degree murder, and as the prosecution argued at trial, his selection of "an extremely lethal weapon that was the most useful for a close combat situation" – rather than one of the other firearms available to him – was relevant to his intent and whether he acted after deliberation.

> We reject St. George's contention that any prejudice to St. George was unfair or substantially outweighed the probative value associated with the evidence of his gun collection. Although St. George asserts that the prosecution intended to paint him as a "Second Amendment 'gun nut'" to inflame the passions of the jury, the prosecution did not make such an argument.
>
> Further, the jury acquitted St. George of both charges of attempted first degree murder. *See Zoll v. People*, 2018 CO 70, ¶ 29 (stating that the jury's not guilty verdict on one charge shows that its guilty verdicts on other charges were not influenced by bias or prejudice, and that it decided the case "by applying the rules of law" set forth in the jury instructions and the evidence presented at trial"). Thus, even if admission of evidence of the extent of the gun collection was somehow erroneous, presenting the evidence of the guns to the jury did not unduly influence the verdict.

(ECF No. 10-4 at pp.20-22.)

Mr. St. George does not argue the state court's decision is based on an unreasonable determination of the facts in light of the evidence presented. Therefore, he is not entitled to relief on claim 3 under § 2254(d)(2).

As noted above, the threshold question the Court must answer under § 2254(d)(1) is whether Mr. St. George seeks to apply a rule of law that was clearly established by the Supreme Court at the time the state court adjudicated the claim on its merits. *Greene*, 565 U.S. at 38. Here, "[t]here does not appear to be any Supreme Court decision clearly establishing a standard for wrongfully admitted trial evidence." *Wyatt v. Crow*, 812 F. App'x 764, 767 (10th Cir. 2020) (citing *Holland v. Allbaugh*, 824 F.3d 1222, 1229 & n.2 (10th Cir. 2016)). Mr. St. George cites *Dowling v. United States*, 493 U.S. 342, 352 (1990), for the proposition that due process forbids introduction of evidence that is so unfair as to violate fundamental conceptions of justice. But *Dowling* does not set forth any clearly established federal law applicable to the evidentiary ruling

Mr. St. George challenges in claim 3. In *Dowling*, the Supreme Court considered on direct appeal the defendant's claim that the Due Process Clause barred the use of testimony relating to a prior conviction admitted under Rule 404(b) of the Federal Rules of Evidence. *Id.* at 344. In this action, Mr. St. George is not challenging admission of evidence of a prior conviction and his claim comes before the Court on collateral review in a habeas corpus proceeding. Given these differences, the Court cannot conclude *Dowling* is clearly established federal law applicable to the evidentiary ruling Mr. St. George challenges in claim 3. *See Andrew v. White*, 62 F.4th 1299, 1315 (10th Cir. 2023) (rejecting claim challenging a state court evidentiary ruling based on the absence of clearly established federal law "that establishes a due-process violation arising from ordinary evidentiary rulings at trial"); *Stewart v. Winn*, 967 F.3d 534, 539-40 (6th Cir. 2020) (rejecting the petitioner's "reliance on the general rule that the Due Process Clause prohibits 'fundamentally unfair' procedures - without a specific Supreme Court holding covering the type of due-process error he asserts"); *Holley v. Yarborough*, 568 F.3d 1091, 1101 (9th Cir. 2009) ("[The Supreme Court] has not yet made a clear ruling that admission of irrelevant or overtly prejudicial evidence constitutes a due process violation sufficient to warrant issuance of the writ.").

Because Mr. St. George fails to identify any clearly established federal law applicable to claim 3, the claim lacks merit. *See House*, 527 F.3d at 1018 (instructing that, if there is no clearly established federal law, that is the end of the Court's inquiry pursuant to § 2254(d)(1)).

In any event, even assuming *Dowling* is clearly established federal law that

prohibits admission of irrelevant and/or prejudicial evidence that renders a trial fundamentally unfair, the Court is not persuaded that the ruling of the Colorado Court of Appeals on claim 3 is an unreasonable application of *Dowling*. Under *Dowling*, introduction of evidence fails the due process test of "fundamental fairness" if the evidence "is so extremely unfair that its admission violates 'fundamental conceptions of justice.'" *Dowling*, 493 U.S. at 352 (quoting *United States v. Lovasco*, 431 U.S. 783, 790 (1977)). Significantly, the Supreme Court has "defined the category of infractions that violate 'fundamental fairness' very narrowly." *Id.* Thus, "mere prejudice to a defendant does not mean that such prejudice is *unfair*; indeed, *all* evidence tending to prove guilt is prejudicial to a criminal defendant." *Sanborn v. Parker,* 629 F.3d 554, 576 (6th Cir. 2010) (internal quotation marks omitted). Instead, a Court considering whether fundamental fairness was violated should "determine only whether the action complained of violates those fundamental conceptions of justice which lie at the base of our civil and political institutions, and which define the community's sense of fair play and decency." *Dowling*, 493 U.S. at 353 (quoting *Lovasco*, 431 U.S. at 790) (citations, internal quotation marks, and ellipsis omitted). Additionally, "because a fundamental-fairness analysis is not subject to clearly definable legal elements, when engaged in such an endeavor a federal court must tread gingerly and exercise considerable self restraint." *Duckett v. Mullin,* 306 F.3d 982, 999 (10th Cir. 2002) (internal quotation marks and brackets omitted).

Mr. St. George concedes that admission of evidence pertaining to the three weapons he fired during the events in question was proper. The Court agrees with the

state courts that Mr. St. George's selection of those particular firearms from the various firearms that were available was relevant to the charges against him. Therefore, Mr. St. George fails to demonstrate the decision of the Colorado Court of Appeals regarding the state court's evidentiary ruling "was so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement." *Richter*, 562 U.S. at 103.

For these reasons, the Court finds that Mr. St. George is not entitled to relief with respect to claim 3.

D. Claim 4

Claim 4 is a prosecutorial misconduct claim. Mr. St. George asserts in the Application "that police killings were always the backdrop of this case" because "[t]he media and news were rife with stories of recent police killings throughout the country and in the Denver metro area." (ECF No. 1 at p.28.) With that context, he argues "it was highly prejudicial for the prosecution to begin and end closing statements by asking the jury to envision the possible deaths of Agent Trimmer and Sergeant Maines." (*Id.*) He further argues in the Application that "the prosecution extended this improper argument by emphasizing Mr. St. George had access to 'too many guns,' an inference he is a Second Amendment 'gun nut' . . ., much like the extremists seen in the news, who own AR-15's, and kill innocent citizens and police officers." (*Id.*) According to Mr. St. George, "it is reasonably probable [the prosecution's argument] aroused the passions and prejudices of the jury and destroyed the impartiality of the jury and the fundamental fairness of the trial." (*Id.*) Mr. St. George made the same arguments in his opening brief

on direct appeal. (*See* ECF No. 10-2 at pp.55-60.)

Mr. St. George expands on the prosecutorial misconduct claim in the Supplement with additional factual allegations regarding the length of closing arguments, the prosecution misleading the jury during its opening statement, and the prosecution misrepresenting the evidence and the law during closing arguments. Similarly, Mr. St. George's argument in support of claim 4 in the Reply far exceeds the scope of the prosecutorial misconduct claim in the Application, a point he concedes when he acknowledges "[t]hat which was presented to the CCA below was the closing arguments made by both Freeman and Decker, which were meant to bring the jury's attention to the killings of several police officers in the month leading up to St. George's trial." (ECF No. 26 at p.12.) The Court will not consider Mr. St. George's new allegations and argument in the Supplement and Reply in support of the prosecutorial misconduct claim because the new allegations and argument were not part of the claim Mr. St. George raised and exhausted on direct appeal and Mr. St. George has not sought or obtained leave to file an amended application. Furthermore, "review under § 2254(d)(1) is limited to the record that was before the state court that adjudicated the claim on the merits." *Cullen*, 563 U.S. at 181.

The clearly established federal law relevant to a constitutional claim challenging a prosecutor's allegedly improper comments is the Supreme Court's decision in *Darden v. Wainwright*, 477 U.S. 168 (1986). *See Parker v. Matthews*, 567 U.S. 37, 45 (2012) (per curiam). In *Darden*, the Supreme Court explained that a prosecutor's improper comments violate the Constitution only when the misconduct "'so infected the trial with

unfairness as to make the resulting conviction a denial of due process.'" *Darden*, 477 U.S. at 181 (quoting *Donnelly v. DeChristoforo*, 416 U.S. 637, 643 (1974)). To determine whether prosecutorial misconduct rendered the trial fundamentally unfair the Court must consider "the totality of the circumstances, evaluating the prosecutor's conduct in the context of the whole trial." *Jackson v. Shanks*, 143 F.3d 1313, 1322 (10th Cir. 1998). "[T]he *Darden* standard is a very general one, leaving courts 'more leeway . . . in reaching outcomes in case-by-case determinations.'" *Parker*, 567 U.S. at 48 (quoting *Yarborough v. Alvarado*, 541 U.S. 652, 664 (2004)).

The Colorado Court of Appeals reviewed the prosecutorial misconduct claim for plain error and concluded the challenged comments did not undermine the fundamental fairness of the trial. The state court reasoned as follows:

> During closing argument, the prosecutor said:
>
> > Two Lakewood police officers gunned down in the line of duty. How close were we to that headline on the morning of August 1st. All because of the defendant's unreasonable and dangerous decisions that he made that night. Decisions that came out of his need to control people, control things, his frustration when he could not, his access to too much alcohol and too many guns.
> >
> > . . . .
> >
> > And the only reason that we didn't wake up on August 1st to that narrative of two Lakewood police officers killed in the line of duty was because he was too drunk to shoot straight.
>
> These statements were a fair commentary on the evidence. St. George fired a pistol grip 12-gauge shotgun at two Lakewood police officers responding to a 911 call at his residence. The prosecutor's statement was thus grounded in the facts and was a proper use of oratorical embellishment. *See People v. Strock*, 252 P.3d 1148, 1153 (Colo. App. 2010) (finding proper oratorical embellishment when prosecutor stated during closing argument that "there were

other people on that highway that night traveling west on I-70, and [defendant] was a loaded gun for every single one of them" when statement was based on evidence).

Similarly, we perceive no impropriety in the prosecutor's statement that St. George "had access to . . . too many guns." As we have already discussed, both the prosecution and St. George presented evidence of the number of guns available to him at his residence.

Because the prosecutor's remarks were supported by the record and were within the bounds of permissible oratorical embellishment, they were not improper. And even if they had been improper, it does not appear that they unduly influenced the jury, which acquitted St. George of the most serious charges against him. *See People v. Manyik*, 2016 COA 42, ¶ 40 ("[T]he fact that the jury acquitted [the defendant] of the most serious charge . . . indicates that the jurors based their verdict on the evidence presented and were not swayed by the prosecutor's inflammatory appeal to their sympathy for the victim."); *see also People v. Nardine*, 2016 COA 85, ¶ 66 ("Even if the prosecutorial remarks are improper, they do not necessarily warrant reversal if the combined prejudicial impact of the statements does not seriously affect the fairness or integrity of the trial."). Accordingly, we find no plain error.

(ECF No. 20-4 at pp.23-25.)

Mr. St. George makes no argument regarding claim 4 under the "contrary to" clause of § 2254(d)(1). That is, he does not cite any contradictory governing law set forth in Supreme Court cases or any materially indistinguishable Supreme Court decision that would compel a different result. *See House*, 527 F.3d at 1018. He does argue that the particular statements he challenges in claim 4 "do not exist in a vacuum" and "must be evaluated through the prism of the entirety of the proceedings." (ECF No. 36 at p.12.) But that is what the state court did. (*See* ECF No. 10-4 at p.23 ("When reviewing allegedly improper comments during closing arguments, we must consider the comments in the context of the prosecutor's closing argument as a whole and in light of all the evidence."). Therefore, Mr. St. George is not entitled to relief on claim 4

under the "contrary to" clause of § 2254(d)(1).

Mr. St. George also fails to demonstrate the state court decision with respect to claim 4 was based on an unreasonable determination of the facts in light of the evidence presented. He does make a conclusory assertion in his Reply that the state court unreasonably determined the challenged statements were a fair commentary on the evidence. To the extent the state court's "fair commentary" conclusion is a factual determination, the Court presumes the determination is correct and Mr. St. George does not present any clear and convincing evidence to rebut the presumption of correctness. *See* 28 U.S.C. § 2254(e)(1). He also fails to demonstrate the Colorado Court of Appeals "plainly misapprehend[ed] or misstate[d] the record in making their findings." *Smith*, 824 F.3d at 1241 (brackets in original). The record is clear, as the state court recited in support of its "fair commentary" conclusion, that Mr. St. George "fired a pistol grip 12-gauge shotgun at two Lakewood police officers responding to a 911 call at his residence." (ECF No. 10-4 at p.24.) Thus, Mr. St. George is not entitled to relief on claim 4 under § 2254(d)(2).

Mr. St. George also fails to demonstrate the state court unreasonably applied the very general *Darden* standard. In *Darden*, the Supreme Court concluded a closing argument that was considerably more inflammatory than the prosecution's closing argument in Mr. St. George's trial did not warrant habeas relief. *See Darden*, 477 U.S. at 180, n.11 (referring to the defendant as an "animal"); *id.* at 180, n.12 ("[The defendant] shouldn't be out of his cell unless he has a leash on him and a prison guard at the other end of that leash"; "I wish that I could see [the defendant] sitting here with

no face, blown away by a shotgun").

Based on a review of the state court record, the Court cannot conclude that the state court's application of the very general *Darden* standard "was so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement." *Richter*, 562 U.S. at 103. Most importantly, even if the statements Mr. St. George challenges in claim 4 are "understood as directing the jury's attention to inappropriate considerations," that is not enough to demonstrate the state court's "rejection of the *Darden* prosecutorial misconduct claim 'was so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement.'" *Parker*, 567 U.S. at 47 (quoting *Richter*, 562 U.S. at 103).

For these reasons, Mr. St. George is not entitled to relief with respect to claim 4.

E. Sufficiency of the Evidence

Finally, as noted above, Mr. St. George argues in his Reply and in the Supplement that there was insufficient evidence to support the convictions. According to Mr. St. George, "[b]ecause these foregoing Constitutional violations [in claims 1 thru 4] lead us to the inference that the conviction was based on a compromise verdict reached by the jury, this Court may also consider the insufficiency of the evidence at the trial." (ECF No. 36 at p.13.) The Court does not construe this argument as a stand-alone, fifth claim for relief based on the sufficiency of the evidence because Mr. St. George did not raise and exhaust an insufficient evidence claim on direct appeal and he has not sought or obtained leave to file an amended application to raise such a

claim. Instead, the Court considers the insufficient evidence argument in the context of *de novo* review. As noted above, if the requisite showing under § 2254(d) is made for any particular claim, the Court must consider the merits of the claim *de novo*. *See Harmon*, 936 F.3d at 1056-57. Here, however, Mr. St. George has not made the requisite showing under § 2254(d) for any of his claims. Therefore, the Court has no occasion to review the claims *de novo* and consider the sufficiency of the evidence.

IV. CONCLUSION

For the reasons discussed in this order, Mr. St. George is not entitled to relief. Accordingly, it is

ORDERED that the Application for a Writ of Habeas Corpus Pursuant to 28 U.S.C. § 2254 (ECF No. 1) is DENIED and this case is DISMISSED WITH PREJUDICE. It is further

ORDERED that there is no basis on which to issue a certificate of appealability pursuant to 28 U.S.C. § 2253(c).

Dated this 11th day of August, 2023.

BY THE COURT:

William J. Martínez
Senior United States District Judge

APX C

APPENDIX C

18CA0962 Peo v St. George 12-16-2021

COLORADO COURT OF APPEALS

Court of Appeals No. 18CA0962
Jefferson County District Court No. 16CR2509
Honorable Lily W. Oeffler, Judge

The People of the State of Colorado,

Plaintiff-Appellee,

v.

Eric James St. George,

Defendant-Appellant.

JUDGMENT AFFIRMED

Division VII
Opinion by JUDGE GROVE
Navarro and Pawar, JJ., concur

NOT PUBLISHED PURSUANT TO C.A.R. 35(e)
Announced December 16, 2021

Philip J. Weiser, Attorney General, Melissa D. Allen, Senior Assistant Attorney General, Denver, Colorado, for Plaintiff-Appellee

Victor T. Owens, Alternate Defense Counsel, Parker, Colorado, for Defendant-Appellant

¶ 1 Defendant, Eric James St. George, appeals the judgment of conviction entered on jury verdicts finding him guilty of two counts of attempted murder in the second degree, two counts of assault in the first degree, three counts of felony menacing, one count of illegal discharge of a firearm, and one count of unlawful sexual contact. We affirm.

I. Background

¶ 2 On the night in question, St. George contacted "Denver Ladies," an escort service. The agency connected St. George with E.E., who agreed to go to his residence. Upon arrival, she refused to perform the acts that St. George demanded. After he called the agency to complain, however, the agency convinced him to keep her services for an hour, as initially agreed. When E.E. began a striptease and lap dance for him, he began to inappropriately touch her and continued to do so after repeated warnings. She left.

¶ 3 As E.E. did so, St. George demanded his money back and blocked her exit. E.E. pushed past him, but St. George, armed with a handgun, followed her out the front door into a common breezeway and shot a round into the air. E.E. ran to her car. She

testified that St. George fired another shot in her direction before she was able to flee. She called 911 to report the incident.

¶ 4 In response to the 911 call, Officers Brennan and Trimmer and Sergeants Muller and Maines went to St. George's residence to investigate. Brennan and Muller each made contact with St. George via phone, identified themselves as Lakewood police officers (their phone numbers appear as unavailable or restricted on caller ID), and asked St. George to exit his residence. St. George expressed disbelief that the police were calling him and said that he did not understand why he was being contacted because "nothing happened." The officers noticed that St. George had slurred speech and seemed annoyed.

¶ 5 After receiving one of these calls, St. George turned out the lights and then exited the back of his residence holding a cell phone. Trimmer, who was stationed near the rear door, testified that she could see him due to the "glow from his cell phone." Then, he briefly went back inside, exited again, and Trimmer and Maines heard the sound of a shotgun being racked.

¶ 6 A firefight followed, during which St. George discharged his shotgun in the direction of both Timmer and Maines. Neither officer

was injured, but St. George was shot in both legs. St. George retreated into his apartment and police officers then heard three more gunshots. St. George eventually exited with a handgun but dropped it and surrendered.

¶ 7 Maines testified that St. George "was clearly intoxicated" when taken into custody and that he had "incoherent, slurred speech." The treating physician assistant likewise testified that St. George smelled of alcohol, appeared intoxicated, and had slurred speech. St. George received three blood draws at roughly thirty-minute intervals, and a forensic toxicology analyst extrapolated that St. George had a blood alcohol level of between .28 and .29 at the time of the shooting.

¶ 8 A few hours before the blood draws, Detective Feik arrived at the hospital, introduced himself, and first noticed that St. George did not appear to be very intoxicated. He read St. George his *Miranda* rights. St. George said that he understood his rights and agreed to speak to Feik, who then conducted an interview that lasted nearly two hours. During that interview, which was audio-recorded, St. George made statements that the prosecution introduced at trial.

II. Issues on Appeal

¶ 9 St. George contends the trial court erred by (1) denying his motion to suppress statements that he made during the interview at the hospital; (2) denying his motion to appoint him a different defense attorney; and (3) admitting evidence of guns found in his residence. He also argues that (4) the prosecutor committed misconduct during closing argument that warrants reversal of his convictions. We address each argument in turn.

A. Motion to Suppress

¶ 10 St. George contends the trial court erroneously denied his motion to suppress statements made during his interview at the hospital.

1. Standard of Review

¶ 11 A trial court's ruling on a motion to suppress presents a mixed question of law and fact. *People v. Ramadon*, 2013 CO 68, ¶ 21. We defer to a trial court's findings where they are supported by competent evidence in the record, but the legal effect of those findings constitutes a question of law that we review de novo. *Id.* Where an interrogation is audio- or video-recorded and there are no disputed facts outside the recording controlling the issue of

suppression, we may independently review the recorded statements to determine whether the court correctly ruled on the motion to suppress. *People v. Madrid*, 179 P.3d 1010, 1013-14 (Colo. 2008).

¶ 12 The parties agree that St. George preserved this issue for appeal.

2. *Miranda* Waiver

¶ 13 Prior to custodial interrogation, a suspect is entitled to an advisement of his right to remain silent; that anything he says can be used against him in court; that he has a right to the presence of an attorney; and that if he cannot afford an attorney, one will be appointed for him prior to any questioning if he so desires. *Miranda v. Arizona*, 384 U.S. 436, 478-79 (1966). A defendant's statement made during custodial interrogation is ordinarily inadmissible unless it is provided pursuant to a valid waiver of constitutional rights. *Id.* at 444.

¶ 14 A *Miranda* waiver must, under the totality of the circumstances, be voluntary, knowing, and intelligent. *Madrid*, 179 P.3d at 1016. Only if the totality of the circumstances reveals the requisite level of comprehension may a court properly conclude that constitutional rights under *Miranda* have been validly waived.

People v. Owens, 969 P.2d 704, 706-07 (Colo. 1999); *see also People v. Platt*, 81 P.3d 1060, 1067 (Colo. 2004) (finding the trial court erred when failing to consider the totality of the circumstances). The prosecution has the burden of proving the validity of a *Miranda* waiver and must prove by a preponderance of the evidence that the waiver was voluntarily, knowingly, and intelligently made. *People v. Clayton*, 207 P.3d 831, 834-35 (Colo. 2009).

a. Scope of Appellate Arguments

¶ 15 In his motion to suppress, St. George challenged "any statements he made while being taken into custody because he was in shock at the time and could not have acted knowingly and voluntarily at the time." However, he does not complain on appeal that any of his pre-*Miranda* statements should have been suppressed. And with respect to his post-*Miranda* statements, he does not argue in his opening brief that his waiver was involuntary, and instead focuses only on whether it was knowing and intelligent.[1]

---

[1] St. George does raise the issue of voluntariness in his reply brief, but we decline to consider it because it is not properly before us. *See People v. Czemerynski*, 786 P.2d 1100, 1107 (Colo. 1990)

b. Knowing and Intelligent Waiver

¶ 16 A waiver is knowing and intelligent when the suspect is "fully aware 'both of the nature of the right being abandoned and the consequences of the decision to abandon it.'" *Madrid*, 179 P.3d at 1016 (citation omitted).

¶ 17 Courts evaluate a defendant's waiver of *Miranda* rights based on the totality of the circumstances and can consider various factors such as the clarity and form of the defendant's acknowledgment and waiver. "Intoxication, when raised, is also one of the factors the trial court may consider . . . ." *Platt*, 81 P.3d at 1065-66 (citation omitted).

¶ 18 When intoxication is self-induced, courts evaluate whether the defendant was so intoxicated that he could not have made a knowing and intelligent waiver. *Id.* at 1066. Although intoxication can diminish mental faculties, it will not invalidate an otherwise valid *Miranda* waiver if the defendant "was capable of

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(argument raised for the first time in a reply brief is not properly raised on appeal and will not be considered).

understanding the nature of his or her rights and the ramifications of waiving them." *Id.*

¶ 19 When considering intoxication as a factor, the inquiry rests on the following:

> [W]hether the defendant seemed oriented to his or her surroundings and situation; whether the defendant's answers were responsive and appeared to be the product of a rational thought process; whether the defendant was able to appreciate the seriousness of his or her predicament, including the possibility of being incarcerated; whether the defendant had the foresight to attempt to deceive the police in hopes of avoiding prosecution; whether the defendant expressed remorse for his or her actions; and whether the defendant expressly stated that he or she understood their rights.

Id.

c. Analysis

¶ 20 The detective turned his recording device on as he walked into the room to meet with St. George and turned it off after he left. The audio recording in the record thus captures the entire interaction that gave rise to St. George's motion to suppress.

¶ 21 When he began the interview, the detective "was aware that [St. George] had been given pain meds of some kind," although he did not know the "specific dosages or type." He also understood

that St. George had been drinking but did not have information about his blood alcohol level. St. George did not mention medications to the detective, but he did say that he was in pain and that he had been drinking. When queried about whether he was sober, St. George responded that he was "fine."

¶ 22 Applying the *Platt* factors in light of these undisputed facts and our review of the audio recording, we make the following observations:

- St. George was oriented to his surroundings and situation. He was fully aware that he was in the hospital after being shot, that the detective was a police officer, and that the detective wanted to question him about the incident. His voice remained steady throughout the interview and his speech was not slurred.
- St. George's answers were responsive and appeared to be the product of a rational thought process. In fact, he told the detective that he planned on asking questions of his own about how and why he had been shot, and he did so throughout the interview.

- St. George understood the seriousness of his predicament and expressly stated that he understood his rights. After receiving the *Miranda* advisement, he responded, "I understand that and I will be very plain. It is 4:00 a.m., and I am lying here in the hospital with two gunshot wounds, so I will not be very verbose, all right."
- St. George had the foresight to attempt to deceive the police in an attempt to avoid prosecution. For example, he initially told the detective that no one else had been in his apartment the night of the shooting, and he denied that there had been any kind of "altercation" there. When pressed on the issue, he eventually admitted that he had a "girl" over to his apartment, but then he told the detective that he "d[idn't] know if she belonged to a service or not."
- St. George expressed remorse for his actions, stating that he "hope[d] like hell [he] didn't hurt anyone."

¶ 23 Every one of these factors weighs in favor of a conclusion that St. George fully understood the situation that he was in — although perhaps not exactly how he got there — and was aware of the

nature of the rights that he was waiving by choosing to speak with the detective. We agree with the trial court's determination that the audio recording contains no indication that St. George "was in any way so intoxicated or so medicated that he didn't understand exactly what was being asked of him." Taking the totality of the circumstances into account, we conclude that St. George's waiver of his *Miranda* rights was knowing and intelligent. Accordingly, we discern no error.

B. Substitution of Counsel

¶ 24 St. George contends that the trial court erred when finding he did not have a conflict of interest with his attorney warranting substitution of counsel. We are not persuaded.

1. Standard of Review

¶ 25 A trial court's denial of an indigent defendant's request for substitution of counsel is reviewed for an abuse of discretion. *People v. Thornton*, 251 P.3d 1147, 1151 (Colo. App. 2010). A court abuses its discretion when its decision is manifestly arbitrary, unreasonable, or unfair. *People v. Pasillas-Sanchez*, 214 P.3d 520, 524 (Colo. App. 2009).

2. Applicable Law

¶ 26 The Sixth Amendment right to counsel includes the right to counsel of a defendant's choice, and the right to effective assistance of counsel. U.S. Const. amend. VI; *see also* Colo. Const. art. II, § 16. However, "the right to counsel of choice does not extend to a defendant who requires counsel to be appointed for him." *Ronquillo v. People*, 2017 CO 99, ¶ 18. Rather, "[h]e is guaranteed only effective assistance of counsel." *Id.*

¶ 27 An indigent defendant is entitled to new counsel only if he demonstrates good cause to require substitute counsel. *People v. Kelling*, 151 P.3d 650, 653 (Colo. App. 2006). Good cause consists of a conflict of interest, a complete breakdown of communication, or an irreconcilable conflict that would lead to an apparently unjust verdict. *Thornton*, 251 P.3d at 1151. A court is not required to appoint substitute counsel unless it determines, after investigation, that a defendant's complaints are well founded. *People v. Johnson*, 2016 COA 15, ¶ 30.

¶ 28 When a defendant objects to court-appointed counsel, the trial court must inquire into the reasons for dissatisfaction. *Kelling*, 151 P.3d at 653. This inquiry considers: (1) the timeliness of the

motion; (2) the adequacy of the court's inquiry into the defendant's complaint; (3) whether the attorney-client conflict is so great that it resulted in a total lack of communication or otherwise prevented an adequate defense; and (4) the extent to which the defendant substantially and unreasonably contributed to the underlying conflict with the attorney. *People v. Bergerud*, 223 P.3d 686, 695 (Colo. 2010). In doing so, the court may consider, among other things, "the possibility that any new counsel will be confronted with similar difficulties." *People v. Hodges*, 134 P.3d 419, 425 (Colo. App. 2005), *aff'd on other grounds*, 158 P.3d 922 (Colo. 2007).

¶ 29 If a defendant establishes good cause, the trial court must appoint substitute counsel. *People v. Gonyea*, 195 P.3d 1171, 1172 (Colo. App. 2008). However, if "the court has a reasonable basis for concluding that the attorney-client relationship has not deteriorated to the point where counsel is unable to give effective assistance, the court is justified in refusing to appoint new counsel." *Id.* at 1173.

3. Analysis

¶ 30 St. George argues that the trial court erred by denying his motion for substitute counsel.

¶ 31 During the hearing before the judge who sat to hear his motion for substitute counsel, St. George complained that his public defender

- failed to provide him full access to the discoverable evidence that he would need to prepare his defense;
- had not filed motions that St. George had requested;
- had not kept St. George up to date on the progress of the case; and
- had failed to respond to correspondence.

¶ 32 The conflict court inquired into the nature of St. George's grievances with the following colloquy:

> [Court]: Okay. I mean, it sounds like a lot of it comes down to a concern that you'd like more control over the direction of the case, the strategies that you pursue, the motions you might file
>
> [St. George]: Yes, Your Honor.
>
> [Q]: Is that fair?
>
> [A]: That is very fair.
>
> [Q]: Now, if that – if those are for an attorney to make, then why would it – I'm not sure that it would be any different for any other attorney, would it?

> [A]: If not full control, at least input.
>
> . . . .
>
> And if there is, as you said, a strategic decision is typically made by the attorney, but I should at least, at bare minimum, be made knowledgeable as to those strategies and the purposes thereby.

¶ 33 Applying the first two *Bergerud* factors to the conflict court's ruling, St. George's motion was timely, and the court adequately inquired into St. George's complaint by directly addressing St. George's allegations and hearing testimony from defense counsel.

¶ 34 With regard to *Bergerud*'s third factor, the conflict court found that there was not a total breakdown in communication. The court noted that "there is not a total lack of communication or any indication before the Court here that the situation . . . would prevent an adequate defense in this case." *See People v. Jenkins*, 83 P.3d 1122, 1126 (Colo. App. 2003) (determining complete breakdown of communication not established where counsel met with the defendant only once in nine months and had not discussed potential witnesses with him or given him copies of discovery). There is substantial support for this conclusion. Defense counsel testified that he consistently maintained communication with St.

George through correspondence (although perhaps not to the degree that St. George would have preferred), shared at least 1,284 pages of printed discovery and "some, if not all, of the photos," and kept him apprised of case progress, such as informing him of motions hearings and his retention of an expert witness.

¶ 35 As for *Bergerud*'s fourth factor, the conflict court determined that St. George contributed to his alleged conflict with defense counsel. Based on his testimony before the conflict court, St. George wanted to take on a more active role in directing the strategy of his case. But counsel is captain of the ship when it comes to strategic decisions. *See People v. Krueger*, 2012 COA 80, ¶ 14 ("Disagreements pertaining to matters of trial preparation, strategy, and tactics do not establish good cause for substitution of counsel." (quoting *Kelling*, 151 P.3d at 653)); *People v. Garcia*, 64 P.3d 857, 863-64 (Colo. App. 2002) (disagreement over theory of defense did not warrant substitute counsel). Further, as the conflict court noted, St. George's desire to dictate case strategy would likely be a consistent challenge with any attorney. *See People v. Outlaw*, 998 P.2d 20, 25 (Colo. App. 1999) (determining substitute counsel would not solve defendant's dissatisfaction with rule that attorney,

and not defendant, determines trial strategy), *rev'd on other grounds*, 17 P.3d 150 (Colo. 2001).

¶ 36 The record reflects that the conflict court conducted a thorough inquiry into St. George's concerns, and, with record support, concluded that the attorney-client relationship had not deteriorated to the point where counsel was unable to give effective assistance. Accordingly, the conflict court did not abuse its discretion when finding that St. George's allegations did not sufficiently show good cause to warrant substitute counsel.

C. Evidentiary Issues

¶ 37 St. George contends that, at trial, the court erroneously admitted evidence about the number of guns he had at his residence at the time of the incident, rather than limiting the prosecution's presentation to only the guns used during the incident. We perceive no reversible error.

1. Standard of Review

¶ 38 We review a trial court's evidentiary ruling for an abuse of discretion. *People v. Reed*, 2013 COA 113, ¶ 13. We will not overturn such a ruling absent a showing that it is either manifestly arbitrary, unreasonable, or unfair. *People v. Castro*, 854 P.2d 1262

(Colo. 1993), or based on an erroneous view of the law, *People v. Moore*, 226 P.3d 1076, 1081 (Colo. App. 2009).

2. Applicable Law

¶ 39 "Res gestae is a theory of relevance which recognizes that certain evidence is relevant because of its unique relationship to the charged crime." *People v. Greenlee*, 200 P.3d 363, 368 (Colo. 2009). Generally, such evidence is closely related in both time and nature to the charged offense. *People v. Quintana*, 882 P.2d 1366, 1373 (Colo. 1994). Res gestae evidence is not subject to the procedural requirements of CRE 404(b) and may be admitted without a limiting instruction. *People v. Skufca*, 176 P.3d 83, 86 (Colo. 2008). To be admissible, res gestae evidence must be relevant and its probative value must not be substantially outweighed by the danger of unfair prejudice. *See Quintana*, 882 P.2d at 1374.

¶ 40 "[I]n assessing the admissibility of [res gestae] evidence on appeal, we must assume the maximum probative value of the evidence [at issue], and the minimum prejudice reasonably to be expected, and we must accord substantial deference to the trial

court's decision on this issue." *People v. Gladney*, 250 P.3d 762, 768 (Colo. App. 2010).[2]

3. Analysis

¶ 41 Police found at St. George's residence, and the prosecution offered as evidence, eleven firearms, most of which were loaded, and three of which St. George fired at various points during the incident. At trial, St. George (who was representing himself) argued that the court should limit the evidence about the extent of his gun collection:

> Your Honor, if we're going to discuss my entire ownership of firearms, I have a feeling that this is going to be more prejudice to the jury than it is probative, and it's not relevant to this case, as none of those firearms were used in this incident, and so they have no bearing on this incident.
>
> . . . .
>
> And there are other firearms that are not of my ownership that I was storing for a friend. And that's where I think that we have the potential for more prejudice than probative value.

---

[2] On appeal, St. George argues that the challenged evidence was improperly admitted under both CRE 404(b) and res gestae. We do not address the CRE 404(b) argument because we conclude that the challenged evidence was properly admitted under the res gestae theory of relevance.

¶ 42 Evidence of the extent of St. George's collection was relevant. St. George was charged with, among other things, attempted first degree murder, and as the prosecution argued at trial, his selection of "an extremely lethal weapon that was the most useful for a close combat situation" — rather than one of the other firearms available to him — was relevant to his intent and whether he acted after deliberation.

¶ 43 We reject St. George's contention that any prejudice to St. George was unfair or substantially outweighed the probative value associated with the evidence of his gun collection. Although St. George asserts that the prosecution intended to paint him as a "Second Amendment 'gun nut'" to inflame the passions of the jury, the prosecution did not make such an argument.

¶ 44 Further, the jury acquitted St. George of both charges of attempted first degree murder. *See Zoll v. People*, 2018 CO 70, ¶ 29 (stating that the jury's not guilty verdict on one charge shows that its guilty verdicts on other charges were not influenced by bias or prejudice, and that it decided the case "by applying the rules of law" set forth in the jury instructions and the evidence presented at

trial"). Thus, even if the admission of evidence of the extent of the gun collection was somehow erroneous, presenting the evidence of the guns to the jury did not unduly influence the verdict.

D. Prosecutorial Misconduct

¶ 45 Last, St. George contends that the district attorney committed prosecutorial misconduct by making improper and prejudicial statements during closing arguments. Again, we disagree.

1. Standard of Review

¶ 46 Because St. George did not object to the alleged misconduct at trial, we review for plain error. *Wilson v. People*, 743 P.2d 415, 419 (Colo. 1987). Prosecutorial misconduct amounts to plain error when it is "flagrant or glaring or tremendously improper and . . . so undermine[s] the fundamental fairness of the trial as to cast serious doubt on the reliability of the judgment of conviction." *People v. Weinreich*, 98 P.3d 920, 924 (Colo. App. 2004), *aff'd*, 119 P.3d 1073 (Colo. 2005). Prosecutorial misconduct in closing arguments rarely constitutes plain error. *Id.*

2. Applicable Law

¶ 47 A prosecutor may use legitimate means to bring about a just conviction but must avoid using improper methods designed to

obtain an unjust result. *Domingo-Gomez v. People*, 125 P.3d 1043, 1048 (Colo. 2005). When making closing arguments, prosecutors may "employ rhetorical devices and engage in oratorical embellishment and metaphorical nuance, so long as [the argument] does not thereby induce the jury to determine guilt on the basis of passion or prejudice." *People v. Allee*, 77 P.3d 831, 837 (Colo. App. 2003).

¶ 48 When reviewing allegedly improper comments during closing arguments, we must consider the comments in the context of the prosecutor's closing argument as a whole and in light of all the evidence. *People v. Serpa*, 992 P.2d 682, 685 (Colo. App. 1999). Prosecutors have wide latitude during closing arguments and "may comment on the evidence admitted at trial, the reasonable inferences that can be drawn from the evidence, and the instructions given to the jury." *People v. Welsh*, 176 P.3d 781, 788 (Colo. App. 2007).

3. Analysis

¶ 49 During closing argument, the prosecutor said:

> Two Lakewood police officers gunned down in the line of duty. How close were we to that headline on the morning of August 1st. All

> because of the defendant's unreasonable and dangerous decisions that he made that night. Decisions that came out of his need to control people, control things, his frustration when he could not, his access to too much alcohol and too many guns.
>
> . . . .
>
> And the only reason that we didn't wake up on August 1st to that narrative of two Lakewood police officers killed in the line of duty was because he was too drunk to shoot straight.

¶ 50 These statements were a fair commentary on the evidence. St. George fired a pistol grip 12-gauge shotgun at two Lakewood police officers responding to a 911 call at his residence. The prosecutor's statement was thus grounded in the facts and was a proper use of oratorical embellishment. *See People v. Strock*, 252 P.3d 1148, 1153 (Colo. App. 2010) (finding proper oratorical embellishment when prosecutor stated during closing argument that "there were other people on that highway that night traveling west on I-70, and [defendant] was a loaded gun for every single one of them" when statement was based on evidence).

¶ 51 Similarly, we perceive no impropriety in the prosecutor's statement that St. George "had access to . . . too many guns." As we have already discussed, both the prosecution and St. George

presented evidence of the number of guns available to him at his residence.

¶ 52 Because the prosecutor's remarks were supported by the record and were within the bounds of permissible oratorical embellishment, they were not improper. And even if they had been improper, it does not appear that they unduly influenced the jury, which acquitted St. George of the most serious charges against him. *See People v. Manyik*, 2016 COA 42, ¶ 40 ("[T]he fact that the jury acquitted [the defendant] of the most serious charge . . . indicates that the jurors based their verdict on the evidence presented and were not swayed by the prosecutor's inflammatory appeal to their sympathy for the victim."); *see also People v. Nardine*, 2016 COA 85, ¶ 66 ("Even if the prosecutorial remarks are improper, they do not necessarily warrant reversal if the combined prejudicial impact of the statements does not seriously affect the fairness or integrity of the trial."). Accordingly, we find no plain error.

III. Conclusion

¶ 53 We affirm the judgment of conviction.

JUDGE NAVARRO and JUDGE PAWAR concur.

APPENDIX D

No. 23-1280

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

Eric St. George,
Petitioner-Appellant,

v.

Jason Lengerich, et al.,
Respondents-Appellees.

On Appeal from the United States District Court for the District of Colorado (Civil Action No. 22-cv-02312-WJM Judge William J. Martínez)

PETITION FOR PANEL REHEARING OR FOR REHEARING EN BANC

Eric St. George, pro-se
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PO Box 999
Canon City, CO 81215-0999

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EXCEPTIONAL IMPORTANCE

Consideration by the full court is necessary to secure and maintain uniformity of the court's decisions and involves questions of exceptional importance. The Estelle v. McGuire case was extended to the factual context of possession of weapons by an accused used as evidence against him to prove his guilt by McKinney v. Rees. It is constitutional trial error that renders the proceeding fundamentally unfair as to deprive him of due process. Dowling clearly established this law from which authority to grant a writ of habeas corpus flows; it continues to be controlling law post-AEDPA today.

This Court acknowledges it has authority to conduct cumulative-error analyses via authorities that clearly establish the right to a fair trial. Two such errors exist in this case, but no cumulative-error analysis was conducted.

The Court has the authority to do more justice, which is a matter of exceptional importance. The public confidence in the adjudication of state court cases has been eroded by unjust and unconstitutional convictions.

PROCEDURAL HISTORY

The events giving rise to this case occurred in the evening of 31 July 2016 into the following early morning. On 9 February 2018 a jury convicted Mr. St. George of crimes based upon a trial that was fundamentally unfair due to constitutional errors. The CCA upheld the conviction on direct appeal; the mandate issued in March of 2022. Mr. St. George had sought habeas relief beginning in 2021 due to the delay in his direct appeal. This action was filed 8 September 2022 and dismissed by Judge Martínez on 11 August 2023. Mr. St. George applied for a COA and filed his Opening Brief 18 January 2024. This Court's Order denying a COA and dismissing the matter was filed 2 July 2024. Mr. St. George sought an expansion of time to petition for a panel rehearing or a rehearing en banc by Motion on 15 July 2024. This petition follows.

INTRODUCTION

Mr. St. George was ambushed and shot during a backyard raid at his home by Lakewood Police. The officers ordered him from his house by cellphone; their caller-ID blocked. When he twice emerged unarmed to investigate, LPD hid and refused to announce themselves. When Mr. St. George exited a third time, armed with a shotgun, LPD laid in wait and chose not to shout out a required warning of potential--imminent--force. When he began to walk the perimeter of his home he came into view of a hiding Officer Trimmer who opened fire without warning. Mr. St. George defended himself to the extent he was able. In an attempt to avoid liability for the assault, the LPD referred Mr. St. George to the sympathetic local prosecutor to be convicted of crimes. He never had a chance at a fair trial, his fate was set from the start. This petition seeks justice for the wrongful, baseless, and amoral conviction of Mr. St. George. He prays this Court rehear the appeal as a panel, or en banc, as the Court may deem just.

ARGUMENT

Access to the Writ of Habeas Corpus for the illicitly convicted is a matter of exceptional importance.

This case presents two matters of exceptional importance that merit the attention of a panel rehearing or that of the full court: (1) Estelle v. McGuire did clearly establish that the admission of irrelevant gun evidence against Mr. St. George did render his trial fundamentally unfair as to violate his due process rights. This is so because of the Ninth Circuit's consideration of McKinney v. Rees in light of Estelle. The authority flows from Dowling's fundamental fairness authority--clearly established law. (2) A cumulative-error analysis is clearly established by Supreme Court authority where two or more constitutional trial errors exist. This circuit finds a split among the circuits, conducting cumulative-error analyses under the clearly established right to a fair trial and due process. This long-standing Tenth Circuit holding comes from adjacent authorities, in exactly the same process Mr. St. George proposes for Estelle-McKinney-Dowling above. Propensity is the "forbidden inference" and evidentiary rules are too often flouted by overzealous prosecutors, willing to go to any length to convict. In the context of federal habeas, deference post-AEDPA does not equate to abandonment or abdication of judicial review. Significant deference is due state court decisions, but not the turning of a blind eye to obvious judicial errors.

A PROSECUTORIAL MISCONDUCT ERROR WAS FOUND

The State opened closing argument with "Two Lakewood Police officers gunned down in the line of duty..." asking the jury to imagine the officers as victims and dead. The rebuttal closing completed with "Fortunately, agents didn't have to put that badge, that band around their badge to mark two fallen officers, to honor lost lives of Agent Trimmer and Sergeant Maines." Having bookended the summation in this way, attention was focused on imagining the the two officers as dead and to convict on these grounds.

The intended backdrop to the case, confessed by Freeman himself, was three police officers that had been shot dead and whose deaths were widely publicized. The black memorial bands worn by the litany of LPD in the gallery and on the stand were worn to commemorate the

lost officers. The State led Officer Brennan on direct to bring the jury's attention to the bands; he elicited testimony about the recent killing of police officers which were not relevant to Mr. St. George. They were not probative of any fact in this case. No permissible inference could be drawn by the jury from this evidence. Mr. St.George completely summarized this error in his Supplement, Reply to the State's Answer, and his Opening Brief in this Appeal.

Mr. St. George used an on point direct appeal case, State v.Twitty 2002-Ohio-5595, ¶77, to analyze. That court considered arguendo a single reference to a black band worn to commemorate "police memorial week" and "pay tribute to those officers who had died in the line of duty." (not a specific death) The reference came from the victim herself, Officer Beale, who testified from a wheelchair due to paralyzation by the defendant. He'd shot her while she was unarmed, "surrender position" de-escalating the situation. The court opined that despite no contemporary objection, the testimony was irrelevant, inflammatory, and should have been excluded. The overwhelming evidence against the defendant suggested that the testimony did not affect the outcome of the trial and thus was not a plain error.

In Mr. St. George's case the testimony was deliberately elicited by the State to inflame the emotions of the jury. Unlike Twitty, it then bookended the summation with references to the black memorial bands, the imagined deaths of Trimmer and Maines, and a backdrop of three well publicized officer killings in the month preceding trial. The chosen word "headline" made obvious allusion to the nightly reports of the killings on local TV news and in the newspapers.

Nothing in Mr. St. George's case was overwhelming as to guilt. Zero relevant evidence was presented to overcome his self-defense theory. Contrarily, all of the State's evidence corroborated that Mr. St. George acted in self-defense. All LPD witnesses admitted they'd plotted an ambush, laid in wait, refused to announce their presence after Mr. St. George thrice emerged unarmed to investigate the curtilige of his home, and chose not to warn prior to opening fire on him. Mr. St. George was acting in self-defense.

Inviting the jury to convict on irrelevant considerations is plain error.

This Court did identify US v. Kepler, 74 F.4th 1292, 1316 (10th

Cir. 2023) as federal law that holds "A prosecutor's comments are improper if they encourage the jury to allow victim sympathy to influence its decision, distort the record by misstating the evidence, or otherwise invite the jury to base its decision on irrelevant considerations." This Court says that it "might well have reached a different conclusion than the CCA" "had we reviewed this claim for plain error."

The error was plain. The error in Mr. St. George's case was far more egregious than found in Twitty. Mr. St. George argued that the prosecutor's misconduct did have a substantial and injurious effect on the jury and rendered the entire trial fundamentally unfair in light of the totality of the circumstances. Especially where the State's evidence was weak, as here, the writ must issue. As cited Darden clearly established this right. Also DeChristoforo, 416 US 637, 645 (1974); Greer v. Miller, 483 US 756, 765 (1987); Smith v. Phillips, 455 US 209,219 (1982); and others from the circuits. In the Tenth post-AEDPA this still holds, eg. Underwood v. Royal, 894 F.3d 1154, 1167 (10th Cir. 2018); Cuesta-Rodriguez v. Carpenter, 916 F.3d 885, 913-14 (10th Cir. 2019) While Mr. St. George believes this trial error to be of Constitutional dimension sufficient to demand issuance of the writ on its own, he does not hang his hat upon this. The error was inextricably intertwined with the "gun evidence" that was erroneously admitted. No cumulative-error analysis was performed; Mr. St. George had argued cumulative error. We consider further below.

ESTELLE V. MCGUIRE WAS EXTENDED TO WEAPON EVIDENCE USED AS BAD CHARACTER/PROPENSITY EVIDENCE BY MCKINNEY V. REES

St. George

Mr. St. George objected to the admission of weapons that were "unrelated to the case" being admitted into evidence at trial. The weapons in question belonged to Troy Loftus, who was living in an RV with his wife and didn't feel it a sufficiently secure location to store them. The guns were stored in Mr. St. George's master bedroom closet inside hard cases and zippered storage bags. They were separate from any of Mr. St. George's firearms, and pre-trial in the words of the prosecutor, "unrelated to the case." In trial the State chose to admit these guns as evidence. Mr. St. George objected citing relevance, Second Amendment concerns and potential to inflame the prejudices of

the jury. Mr. St. George stated he would not object admittance of his unfired weapons not used against the LPD ambush. The objection was to the "unrelated" guns owned by Mr. Loftus; two AR-15s, a .308 Springfield, and a 9mm Glock.

The judge overruled with the caveat the prosecutor not make any argument that Mr. St. George was guilty because he owned guns. The testimony regarding the guns runs for pages of the trial record. The guns were raised in cross examination of Mr. St. George. The jury asked questions about the guns, most relevant if Mr. St. George had prior firearms-related charges brought against him. The jury drew the inference the State had implied. In closing, the State sought a guilty verdict because Mr. St. George had access to "too many guns." These facts are better chronicled in the Supplement and Reply to the State's Answer below, and the instant Opening Brief on appeal.

In its Order, the panel states that Mr. St. George "does not explain how Estelle clearly establishes that admission of the gun evidence here rendered his trial so fundamentally unfair as to violate his due process rights." Mr. St. George had cited Estelle for its holding that state court evidentiary matters don't ordinarily give rise to cognizable federal claims, unless the state court error so infected the trial with fundamental unfairness so as to be a violation of due process.

Estelle

The Estelle case involves a father on trial for the death of his daughter. Evidence of "battered child syndrome" was admitted. McGuire was convicted. He was granted habeas relief by the Ninth Circuit under the auspices of the evidence having been improperly admitted under state law. Estelle v. McGuire, 902 F.2d 749 (9th Cir. 1990) reh'g denied 919 F.2d 578 (9th Cir. 1990) On certiorari, the Supreme Court reversed and remanded on the grounds that the battered child syndrome was relevant to show intent. To the extent that the case invited the court to create a clearly established prohibition on all "prior crime" propensity evidence, it reserved judgment. Estelle, 502 US @ 75 n.5.

McKinney

Two years after Estelle in 1993, on remand from the United States Supreme Court, following vacatur of the circuit's conditional grant of

the writ in McKinney v. Rees, the Ninth Cir. were ordered to consider the case "in light of Estelle v. McGuire." They did so, and they affirmed the grant of the writ again. 993 F.2d @ 1379. The State later petitioned for another writ of certiorari to the SCOTUS, which was denied. 510 US 1020 (Dec. 6, 1993) Thus, McKinney is a Supreme Court extension of Estelle to the factual context of weapons as evidence of guilt. (House v. Hatch, 527 F.3d 1010, 1016 (10th Cir 2008)) It seems axiomatic that the denial of the writ of cert. is sufficient to show that the SCOTUS refused to take jurisdiction because it recognized that the Ninth Circuit decision was correct. The logical inference is that McKinney is settled law via Estelle.

The opinion in McKinney delves deep into the rules of evidence and the history and providence of "other acts" and character evidence in trials. This case investigates the fundamental conceptions of justice. McKinney is as on-point as one could find to compare to the "gun evidence" error suffered by Mr. St. George. Michael McKinney was charged with murder. The trial court admitted evidence of McKinney's knife collection, and that he wore camoflage pants and had made a carving of "Death is His" in a door. None of the knives were the murder weapon. The State claimed the knives were probative of opportunity. The reviewing court found that the evidence drew no permissible inferences by the jury. Instead "it served only to prey on the emotions of the jury, to lead them to mistrust McKinney, and to believe more easily that he was the type of son who would kill his mother in her sleep without much apparent motive."

Here, the gun evidence against Mr. St. George was equally or more prejudicial, and devoid of relevance. Mr. St. George does not own, nor has he ever owned an assault rifle. The AR-15s belonged to Mr. Loftus, and the State had returned them to him pre-trial. AR-15 has much more emotional stigma than knives, they are the tool of choice of mass shooters--not least of which the Columbine or Aurora Theatre shootings in the community where Mr. St. George was tried. The .308 Springfield was used by Mr. Loftus to hunt deer and elk; the "sniper rifle" moniker applied for greater effect on the jury. Against a backdrop of three police officer killings in the weeks before his trial, one featuring use of an AR-15 and 300+ rounds fired, the unfair prejudice against

Mr. St. George was intensified. There was no permissible inference to be drawn from the gun evidence. We know the jury drew the propensity inference that Mr. St. George was a prior gun criminal or previously charged. He was not. No limiting instruction was given. The State did not heed the judge's order not to say that Mr. St. George was "guilty because he has guns." The State asked the jury to convict because Mr. St. George had "too many guns."

The McKinney court said it "is mindful of the reiteration by the Estelle court that 'the category of [evidence] infractions that violate 'fundamental fairness' is a very narrow one.'" quoting Dowling v. US, 493 US 342, 352 (1990). Mr. St. George cited to Dowling in his Opening Brief for the clear establishment of "fundamental unfairness," that evidence that "is so extremely unfair that its admission violates fundamental conceptions of justice may violate due process."

ADDITIONAL PERSUASIVE SUPPORTING AUTHORITY

That the use of guns not owned by the accused to arouse fear and prejudice in a jury is not harmless error is found in US v. Hitt, 981 F.2d 422 (9th Cir 1992). In Hitt, the defendant was charged with owning a machine gun (an illegal automatic weapon.) The government introduced a photograph of a dozen guns. The majority were owned by Hitt's roommate. "Once the jury was misled into thinking all the weapons were Hitt's, they might well have concluded Hitt was the sort of person who'd illegally own a machine gun, or was so dangerous he should be locked up regardless of whether or not he committed this offense. Rightly or wrongly, many people view weapons, especially guns, with fear and distrust." Hitt @ 424. Cf. State v. Rupe, 683 P.2d 571 (Wash. 1984) (defendant was entitled under the constitution to possess weapons without incurring the risk that the State would use their mere possession in a criminal trial that was unrelated to their use.)

ANALYSIS

It is beyond argument by any fairminded jurist that the use of a man's lawful ownership or possession of weapons as evidence of his guilt in a criminal trial is a violation of state and federal evidentiary rules, and is a violation of his constitutional right to a fair trial. The right to keep and bear arms is protected conduct under the

Second Amendment. Dist. of Columbia v. Heller, 554 US 570 (2008) The Fourteenth Amendment binds this right onto the states. How is using Mr. St. George's possession of unrelated firearms against him in a criminal trial as proof of guilt not an infringement of his 2A rights? The prosecutor could have told a robust story of the encounter between Mr. St. George and the LPD without mentioning the AR-15s or "sniper" rifle buried at the back of his closet. They were not "inextricably intertwined" in any fashion.

Did the SCOTUS not leave open a clearly established narrow keyhole using the Estelle-McKinney-Dowling path to the specific factual context of habeas claims against unrelated and irrelevant weapons possession to prove a defendant's guilt? The SCOTUS ordered the Ninth Cir. to consider McKinney in light of Estelle on remand. The Ninth did so, and re-granted the writ. The SCOTUS then elected not to grant cert. following that decision. The famous Estelle footnote: "Because we need not reach the issue, we express no opinion on whether a state law would violate the Due Process Clause if it permitted the use of **'prior crimes'** evidence to show propensity to commit a charged crime," (**emp. mine**) does not forclose granting writs for erroneous admittance of propensity evidence. It is dicta. Further, it is specific to the context of prior crimes; second amendment possession of firearms is not a crime, it is protected lawful activity.

Why wouldn't the SCOTUS create a bright-line clearly established law against the use of irrelevant propensity evidence? It doesn't need to. The clearly established right to a fair trial already stands for the prohibition against irrelevant propensity evidence where: (1) no permissible inferences that the jury may draw from the evidence exists, (2) the evidence so infected the trial with unfairness as to make the resulting conviction a denial of due process, and (3) there is no overwhelming evidence of guilt present in the properly admitted evidence. See Dowling, Williams, Lisenba, Alcala (collecting all cases) In addition, there are factual contexts where propensity evidence is permitted and deemed reasonable, eg. sex crimes, gang crimes. Further, the judicial and social costs of overturning every case where an overzealous prosecutor injected unnecessary propensity evidence and the properly admitted evidence was overwhelming would be too great.

Dowling continues to be the clearly established law for fundamental unfairness post-AEDPA. Albeit narrow, the route does exist. Using McKinney as an on-point measuring stick this Court may conduct a fundamental-fairness inquiry. The inquiry requires examination of the entire proceedings--taking note of all of the State's misrepresentations of the facts to the jury--and the lack of any overwhelming evidence of guilt of Mr. St. George. Cf. Le v. Mullin, 311 F.3d 1002, 1013 (10th Cir 2002); Andrew v. White, 62 F.4th 1299, 1313 (10th Cir 2023) (cited to collect cases and outline process, not facutal context or outcome) Most of these inquiries die upon the overwhelming evidence of an applicant's guilt. Indeed, most habeas cases are not close. Here, no overwhelming evidence of guilt exists as to Mr. St. George. Many holdings like Holley v. Yarborough, 568 F.3d 1091, 1101 (9th Cir 2009) which point to the famous Estelle footnote as foreclosure of relief, do so only in the factual contexts of their specific cases. No bright-line rule against the grant of the writ in all propensity evidence claims exists. Dowling still controls as clearly established law as cited in Estelle. Of course, as in Williams v. Taylor, 529 US 362,377 n.9 (2000) "most cases are factually distinguishable in some respect;" the authorities Mr. St. George have cited are on point.

Mr. St. George devoted much of his Opening Brief pointing to the CCA's use of the gun evidence as res gestae as a backstop to deny relief on direct appeal. The decision is an admission that the gun evidence was inadmissible under CRE 403/404(b). Before the mandate issued in Mr. St. George's appeal, the CCA's Rojas decision abolished res gestae as a theory of evidence. The gun evidence was a state trial error under Rojas, was a federal law trial error under McKinney, and was a violation of due process of constitutional dimension under Estelle-McKinney-Dowling. The gun evidence was trial error by any standard, an error that was not harmless and did have an injurious effect on the verdict in this case.

CUMULATIVE ERROR

In the Tenth Circuit case Darks v. Mullin, 327 F.3d 1001 (10th Cir. 2003) this Court announced that it finds the Supreme Court authority for cumulative-error review in cases: Van Arsdall, 475 US @ 681; Taylor v. Kentucky, 436 US 478, 487-88 (1978); and Donnely v.

DeChristoforo, 416 US 637 (1974). In Hooks v. Workman, 689 F.3d 1148, 1194 n.24 (10th Cir 2012) the Court says it has "long conducted cumulative-error analyses in a review of federal habeas claims."

In his Supplement to Habeas Corpus Application, Mr. St. George argued that even if the errors taken singly could be viewed as harmless, the cumulative effect of the errors in his trial led to an error that was not harmless. He cited relevant authorities. In his Reply to the State's Answer, he concluded with a similar argument for cumulative error, citing authority. In his Opening Brief to this Court, Mr. St. George again asks for cumulative error analysis citing relevant authorities. In his brief, Mr. St. George also argues very specifically how the prosecutorial misconduct--black memorial bands with allusion to "headlines" to elicit consideration of police killings in the news and asking to imagine Trimmer and Maines dead alongside those others--intertwined with the gun evidence and "too many guns," "assault rifles," and "sniper rifle" remarks in summation had a synergistic effect to become far more prejudicial and unfair than either taken singly. These were the first words of closing argument and the last words heard in rebuttal before the jury deliberated. There can be no doubt that this was the State's marquis evidence, its most critical issue, against Mr. St. George: he possesses AR-15s and "sniper" rifles just like the people that kill police officers in the news, he is a dangerous man, so he must be guilty or locked up regardless. The State even admitted this intent at Mr. St. George's sentencing, telling the judge that the police killings were the "backdrop on this case."

Considered through the prism of the totality of the circumstances --Mr. St. George was denied counsel at the conflict hearing and forced to represent himself; the State suborned perjury from witnesses Elliot, Trimmer and Maines; the State misrepresented the facts of the case that were adduced from its own witnesses in summation; there was no evidence presented to rebut the self-defense theory; there was no overwhelming evidence of guilt admitted; and the State ridiculed Mr. St. George's lack of memory of the traumatic ambush (dissociative amnesia) in closing--the cumulative trial errors were not harmless and demand a reversal of the conviction. The synergistic effect of the

cumulative errors which were closely intertwined made two constitutional errors which may have been reversible taken singly unquestionably an error that cannot be deemed harmless analyzed together.

CONCLUSION

On July 31, 2016, the Lakewood Police set up an ambush in the curtilige of Mr. St. George's home, searched his home through the windows, laid in wait for hours in his backyard, called him on his cellphone from a blocked caller-ID, refused to announce their presence on three occasions when Mr. St. George did exit his home and seen to be unarmed twice, did not warn Mr. St. George prior to using force, and opened fire on Mr. St. George when he unwittingly walked into their immediate proximity. The LPD, its officers and investigators, worked hand-in-glove with the district attorney and district court judge to stage a trial that presented a false narrative to the jury. The State introduced evidence that Mr. St. George possessed two AR-15 "Assault Rifles" and a "sniper" rifle stored in his bedroom closet that were "unrelated to the case." The State asked the jury to convict because Mr. St. George had "too many guns." The State elicited testimony about black memorial bands worn by LPD on the witness stand and in the gallery. The bands memorialized three officers killed in the weeks leading up to trial; one that Monday during trial, as the witness testified. The killings were sensationalized widely on TV and in the papers. The overzealous prosecution sought to convict Mr. St. George in spite of great evidence that he'd acted only to defend himself. The government sought to avoid liability for their use of excessive force in ambushing and shooting Mr. St. George by convicting him of false crimes. The trial was fundamentally unfair. Can this Court sincerely tell itself that it has confidence in this verdict? Can the Court say that there has not been a complete miscarraige of justice? If not, it must issue a COA and rehear this case.

ERIC ST GEORGE DATE