APPENDIX A

FILED
United States Court of Appeals
Tenth Circuit

June 11, 2019

Elisabeth A. Shumaker
Clerk of Court

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

RAY A. SMITH,

Petitioner - Appellant,

v.

JOHN CHAPDELAINE; THE ATTORNEY GENERAL OF THE STATE OF COLORADO,

Respondents - Appellees.

No. 18-1362
(D.C. No. 1:16-CV-02528-RBJ)
(D. Colo.)

ORDER DENYING CERTIFICATE OF APPEALABILITY*

Before **BRISCOE**, **McKAY**, and **LUCERO**, Circuit Judges.

Ray A. Smith, a Colorado pro se prisoner, seeks a certificate of appealability (COA) to challenge the district court's order denying his application for 28 U.S.C. § 2254 habeas relief. We deny a COA and dismiss this matter.

BACKGROUND

The Colorado Court of Appeals (CCA) summarized this case as follows:

> In January 2008, Smith spent a day drinking with his friend, Phillip Patterson, and another man, Jeffrey Crane. Later that day, after Patterson had fallen asleep, Smith stabbed Crane to death.
>
> Smith was arrested and charged with murder. While awaiting trial, he made phone calls from jail. During those calls, which were recorded, he

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* This order is not binding precedent except under the doctrines of law of the case, res judicata, and collateral estoppel.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.

> asked potential witnesses to testify untruthfully or to avoid appearing at trial. Consequently, he was charged with witness tampering.
>
> At trial [in the Denver District Court], the prosecution entered various types of incriminating evidence, including DNA and bloodstain evidence, the testimony of various witnesses (including Patterson), Smith's own statements to police and to his girlfriend, and recordings of Smith's calls from jail. Smith testified that he and Crane had struggled over a knife. Smith said that he did not remember stabbing Crane, but he "assumed" that that had occurred.
>
> The jury convicted Smith of first degree murder and seven counts of tampering with a witness.

R., Vol. I at 164. The trial court sentenced Smith to life without parole on the murder count, consecutive to six years' incarceration on the tampering counts. The CCA affirmed Smith's convictions.

Smith then sought state postconviction relief on a variety of theories. After those claims were rejected, he initiated the current federal habeas proceedings.

In his § 2254 application, Smith raised eight claims in the district court: (1) unlawful custodial interrogation; (2) unconstitutional state charging statute; (3) lack of specificity in the charging documents; (4) ineffective assistance of counsel during plea negotiations; (5) ineffective assistance of trial counsel; (6) ineffective assistance of appellate counsel; (7) judicial misconduct; and (8) prosecutorial misconduct. After thoroughly reviewing and considering the claims, the district court determined that many were procedurally barred and that the remainder did not warrant habeas relief. Accordingly, the district court denied Smith's application for habeas relief and declined to issue a COA.

DISCUSSION

I. Standards of Review

A COA is a jurisdictional prerequisite to our review. *See Miller-El v. Cockrell*, 537 U.S. 322, 336 (2003). To obtain a COA, a petitioner must make "a substantial showing of the denial of a constitutional right," 28 U.S.C. § 2253(c)(2), such "that reasonable jurists could debate whether (or, for that matter, agree that) the petition should have been resolved in a different manner or that the issues presented were adequate to deserve encouragement to proceed further," *Slack v. McDaniel*, 529 U.S. 473, 484 (2000) (internal quotation marks omitted). Where the district court has denied a claim on procedural grounds, the petitioner must show both "that jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling." *Id.*

In deciding whether to grant a COA, we incorporate the deferential treatment of state court decisions required by the Antiterrorism and Effective Death Penalty Act (AEDPA). *See Davis v. McCollum*, 798 F.3d 1317, 1319 (10th Cir. 2015). Where the state courts have ruled on the merits of a petitioner's claims, he is entitled to relief under AEDPA "only if [their] 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 the light of the evidence presented in the State court proceeding." *Id.* (citation and internal quotation marks omitted). And where the state courts have declined to consider the merits of a

federal claim based on independent and adequate state procedural grounds, a federal court will consider that claim barred and beyond review unless the petitioner can show cause for the default in state court and resulting prejudice, or a fundamental miscarriage of justice. *See Smith v. Workman*, 550 F.3d 1258, 1274 (10th Cir. 2008). Similarly, "[a]nticipatory procedural bar occurs when the federal courts apply procedural bar to an unexhausted claim that would be procedurally barred under state law if the petitioner returned to state court to exhaust it." *Moore v. Schoeman*, 288 F.3d 1231, 1233 n.3 (10th Cir. 2002) (internal quotation marks omitted).

Finally, although we liberally construe Smith's pro se filings, we "cannot take on the responsibility of serving as [his] attorney in constructing arguments and searching the record." *Garrett v. Selby Connor Maddux & Janer*, 425 F.3d 836, 840 (10th Cir. 2005).

II. Custodial Interrogation (Habeas Claim 1)

On direct appeal to the CCA, Smith argued that the trial court should have suppressed non-*Mirandized* statements he made to police the morning after Crane's stabbing. In rejecting Smith's argument, the CCA recounted the pertinent facts as follows:

> The morning after the stabbing, two Arvada police officers came to Smith's home. They were admitted by Smith's girlfriend. The officers woke Smith and told him that he was a potential witness to a crime in Denver.
>
> Officer Kristin Harris noticed that Smith had a large cut on his hand. She asked about the injury, and Smith replied that he had received it the previous day. Harris then reported the injury to the Denver Police Department and was informed that Smith was a suspect.
>
> The officers did not initiate further conversation with Smith. However, Smith spontaneously asked whether Patterson was okay, and he

> changed his story about the cut, saying that it had happened several days earlier.
>
> A short time later, Denver police officers arrived and took Smith to the police station, [where he was *Mirandized* and questioned further].

R., Vol. I at 165. The CCA found no error in the admission of Smith's non-*Mirandized* statements, as he was neither in custody nor subject to interrogation when he made them.

The federal district court concluded that the CCA's decision was not contrary to or an unreasonable application of clearly established federal law. In doing so, the district court acknowledged Smith's complaints that Officer Harris told him to not light a cigarette, that he could not move freely around the house after Denver police arrived, and that he was never told he could leave. But the district court stated that those circumstances did not turn his interaction with the Arvada police officers into a custodial interrogation requiring *Miranda* warnings.

Smith has not shown that the district court's decision is debatable. Unless and until an individual is subject to custodial interrogation, *Miranda* does not apply. *United States v. Cash*, 733 F.3d 1264, 1276 (10th Cir. 2013). "To be in custody, a person must be under formal arrest or have his freedom of action curtailed to a degree associated with formal arrest." *Id.* at 1277 (ellipsis and internal quotation marks omitted). "[I]nterrogation extends *only* to words or actions that the officers should have known were reasonably likely to elicit an incriminating response." *Id.* (internal quotation marks omitted).

Where, as here, officers question a person about the source of an injury in a non-coercive environment and without restricting his or her freedom of movement,

Miranda is generally not implicated. *See United States v. Scalf*, 725 F.2d 1272, 1276 (10th Cir. 1984). Moreover, "volunteered statements made [even] while in custody but not in response to questions posed by the police are not subject to the *Miranda* exclusionary rule." *United States v. Pettigrew*, 468 F.3d 626, 634 (10th Cir. 2006).

Smith is not entitled to a COA on this claim.

III. Colorado's Charging Statute (Habeas Claim 2)

After the CCA affirmed his conviction and sentence, Smith returned to the state trial court, filing successive motions complaining of jurisdictional defects arising from the district attorney's office commencing prosecution in the Denver County Court. The trial court could not ascertain Smith's legal argument, and it ultimately barred him from reasserting the argument. The CCA concluded that the argument was barred with respect to Smith's conviction and that it was meritless as to his sentence.

In his federal habeas application, Smith transformed his claim into a vague federal due-process challenge to Colo. Rev. Stat. § 16-5-205(3), which requires that criminal charging documents comply with the Colorado criminal-procedure rules. The federal district court determined that this claim had not been exhausted in state court and would be barred if Smith attempted to raise it there now. *See* Colo. R. Crim. P. 35(c)(3)(VII) (providing generally that "[t]he court shall deny any claim that could have been presented in an appeal previously brought or postconviction proceeding previously brought").[1]

[1] This rule is both independent and adequate because it is based on Colorado law and has been applied evenhandedly by the Colorado courts. *See LeBere v. Abbott*, 732 F.3d 1224, 1233 n.13 (10th Cir. 2013) (collecting unpublished cases determining that Rule 35(c)(3)(VII) is an independent and adequate state ground precluding federal habeas

We agree that Smith's federal due-process claim is unexhausted. *See Bland v. Sirmons*, 459 F.3d 999, 1012 (10th Cir. 2006) ("[P]resentation of a somewhat similar claim is insufficient to fairly present a federal claim before the state courts . . . ."); *cf. Poe v. Caspari*, 39 F.3d 204, 207 (8th Cir. 1994) ("Jurisdiction is no exception to the general rule that federal courts will not engage in collateral review of state court decisions based on state law . . . .").

We also agree with the district court's determination that Smith failed to surmount the resulting anticipatory procedural bar with a showing of either cause and prejudice or a miscarriage of justice. Smith cannot rely on ineffective assistance of appellate counsel as cause because such a claim must itself be exhausted, *see Edwards v. Carpenter*, 529 U.S. 446, 453 (2000), and Smith never claimed in state court that his appellate counsel was ineffective. Nor can Smith rely on a miscarriage of justice, as he has not identified new, reliable evidence of his innocence. *See Frost v. Pryor*, 749 F.3d 1212, 1231-32 (10th Cir. 2014) (explaining that the miscarriage-of-justice exception requires "new reliable evidence—whether it be exculpatory scientific evidence, trustworthy eyewitness accounts, or critical physical evidence—that was not presented at trial," and which "show[s] that it is more likely than not that no reasonable juror would have convicted the petitioner in the light of the new evidence" (internal quotation marks omitted)).

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review). Smith does not address the exhaustion of his claim; instead, he revisits the substance of his claim, "assert[ing] that he was brought before a tribunal and judged unlawfully and bound over for trial so the District Attorney's Office could rush to secure a conviction." Appl. for COA at 11. "A state prisoner bears the burden of showing he has exhausted available state remedies." *Hernandez v. Starbuck*, 69 F.3d 1089, 1092 (10th Cir. 1995).

We conclude that jurists of reason could not debate whether the district court correctly imposed an anticipatory procedural bar. We, therefore, deny a COA as to Claim 2.[2]

IV. Ineffective Assistance of Trial Counsel

To make out an ineffective-assistance claim, a defendant must show that trial counsel performed deficiently, and that the deficient performance was prejudicial. *Strickland v. Washington*, 466 U.S. 668, 687 (1984).

A. Plea Negotiations (Habeas Claim 4)

During his postconviction appeal to the CCA, Smith claimed for the first time that he received ineffective assistance during plea negotiations because his attorney inadequately advised him about the strength of the prosecution's case. The CCA declined to consider Smith's claim presented for the first time on appeal from the denial of postconviction relief. *See People v. Osorio*, 170 P.3d 796, 801 (Colo. App. 2007) (declining to consider ineffective-assistance claim not raised in defendant's postconviction motion).

The federal district court found the claim procedurally defaulted, and it recognized its inability to consider the claim in the absence of cause for the default and actual

[2] The district court also applied anticipatory procedural bar to Smith's claims that his due-process rights were violated because the time of the offense was omitted from the criminal complaint and information (Habeas Claim 3); that he received ineffective assistance of appellate counsel (Habeas Claim 6); and that the state judge who presided over his trial committed misconduct (Habeas Claim 7). The district court determined, for the reasons noted above in relation to Smith's second habeas claim, that Smith could not avoid the procedural bar. Because that determination is not debatable, we deny a COA on Habeas Claims 3, 6, and 7.

prejudice, or a fundamental miscarriage of justice. In assessing cause, the district court followed the rule that a prisoner may avoid defaulting an ineffective-assistance claim if the state courts did not appoint counsel in "the initial review proceeding in respect to the ineffective-assistance-of-trial-counsel claim," *Trevino v. Thaler*, 569 U.S. 413, 423 (2013), and the "prisoner [can] demonstrate that the underlying ineffective-assistance-of-trial-counsel claim is a substantial one, which is to say that the prisoner must demonstrate that the claim has some merit," *Martinez v. Ryan*, 566 U.S. 1, 14 (2012).[3] The district court determined, however, that Smith's ineffective-assistance claim was not substantial.

Reasonable jurists could not debate this determination. Smith alleged he had been offered a plea agreement with a likely thirty-two year sentence. When Smith asked defense counsel whether he should accept the plea agreement and hope that the judge would instead approve a sixteen-year sentence, defense counsel allegedly responded, "I can't tell you that, you have to figure that out for yourself." R., Vol. II at 382 (brackets and internal quotation marks omitted). The district court assumed that defense counsel was deficient, but it found no resulting prejudice because Smith had also alleged that (1) the prosecutor would not agree to a sixteen-year sentence, as the trial judge would not

[3] The district court further correctly noted that the *Martinez/Trevino* rule applies if the state either (1) "requires that an ineffective assistance of trial counsel claim be raised in an initial-review collateral proceeding," *Trevino*, 569 U.S. at 423 (alterations and internal quotation marks omitted); or (2) the "state procedural framework, by reason of its design and operation, makes it highly unlikely in a typical case that a defendant will have a meaningful opportunity to raise a claim of ineffective assistance of trial counsel on direct appeal," *id.* at 429. Colorado falls in the second category. *See Barker v. Raemisch*, 757 F. App'x 750, 753 n.2 (10th Cir. 2018) (unpublished and cited here under 10th Cir. R. 32.1(A) for its persuasive value).

approve it; and (2) he (Smith) was reluctant to accept a thirty-two year sentence. Thus, Smith failed to show a reasonable probability that he would have accepted the plea agreement if properly advised by counsel. *See Missouri v. Frye*, 566 U.S. 134, 147 (2012) (explaining that to establish prejudice on an ineffective-assistance claim where a plea offer has lapsed or been rejected, the defendant "must demonstrate a reasonable probability" that he would have accepted the putative plea offer and that "the plea would have been entered without the prosecution canceling it or the trial court refusing to accept it").

Smith is not entitled to a COA on this issue.

B. Trial (Habeas Claim 5)

The federal district court culled through Smith's habeas petition and identified sixteen claims of ineffective assistance of counsel during trial:

> (a) failure to have key evidence tested for fingerprints or DNA; (b) failure to subpoena two critical witnesses for Mr. Smith; (c) failure to obtain video tape from [the] lobby of [Mr. Smith's] apartment building; (d) failure to get video tape from two city buses that Mr. Smith rode home [from Patterson's apartment]; (e) failure to have Mr. Smith's BAC tested and the BAC of a witness tested; (f) failure to keep two African-American ladies on the jury that Mr. Smith wanted; (g) failure to find or present available witnesses, including expert witnesses; (h) use of a very vague line of questioning and presenting few substantial objections for key prosecution witnesses; (i) failure to confirm time-lines of crucial elements and events; and (j) failure to present any adversarial challenge by resting without providing a defense as promised in opening statement; (k) failure to raise the defense of intoxication; (l) failure to object to the prosecutor's insistence that Mr. Smith demonstrate the events surrounding the crime; (m) failure to highlight discrepancies in the evidence tending to disprove the prosecution's theory of racial prejudice and jealousy; (n) failure to present an alibi defense; (o) failure to present a defense strategy, which compelled Mr. Smith to testify to try to defend himself; and (p) failure to object to the

> jury handling evidence during deliberation that was not admitted into evidence.

R., Vol. I at 361.

1. Exhausted Ineffective-Assistance Claims

The district court noted that only two of the claims had been fully exhausted in state court: failing to find or present available witnesses, including expert witnesses (subclaim (g)); and providing only vague questions and limited objections to prosecution witnesses (subclaim (h)). The CCA had summarily rejected those claims as procedurally defaulted because Smith provided only vague and/or conclusory allegations of ineffective assistance in the postconviction court. *See Osorio*, 170 P.3d at 799 (authorizing the summary denial of an ineffective-assistance claim based on allegations that "are merely conclusory, vague, or lacking in detail").

The federal district court declined, however, to apply procedural bar, given that the CCA considered *Strickland* in determining whether Smith's allegations were sufficient. *Cf. Smith*, 550 F.3d at 1274 ("A state procedural default is 'independent' if it relies on state law, rather than federal law."). Thus, the district court addressed subclaims (g) and (h) on their merits, and it succinctly determined that *Strickland* had not been violated.

We conclude that a COA is not warranted. "Our review of ineffective-assistance claims under § 2254 . . . is doubly deferential, deferring both to the state court's determination that counsel's performance was not deficient and to the attorney's decision in how to best represent a client." *Goode v. Carpenter*, 922 F.3d 1136, 1155 (10th Cir.

2019) (ellipsis and internal quotation marks omitted). As the state postconviction court noted, Smith's vague claims about witnesses mostly reflected a disagreement with counsel about trial strategy. In his request for a COA, Smith offers no developed contrary argument. We therefore conclude that reasonable jurists could not debate denying habeas relief on subclaims (g) and (h).

2. Unexhausted Ineffective-Assistance Claims

As for Smith's fourteen other allegations of ineffective assistance, the district court separated them into two groups. In the first group, the district court noted that Smith had presented ten subclaims to the state postconviction court that he did not appeal to the CCA (subclaims (b), (d), (e), (f), (i), (j), (k), (m), (n), and (o)). These subclaims were procedurally defaulted because they were not exhausted in a full round of state review, *see Baldwin v. Reese*, 541 U.S. 27, 29 (2004), and would be barred if Smith returned to state court to assert them, *see* Colo. R. Crim. P. 35(c)(3)(VII).

The district court further correctly pointed out that Smith could not use the *Martinez/Trevino* rule to show cause for defaulting these claims. *See Norris v. Brooks*, 794 F.3d 401, 405 (3d Cir. 2015) (observing that an ineffective-assistance claim "presented on initial collateral review and only waived on collateral appeal" is subject to the ordinary cause-and-prejudice/miscarriage-of-justice rules). These subclaims were, therefore, beyond federal habeas review for the same reasons that plagued Smith's other defaulted claims. *See supra* discussion Part III. We conclude that no reasonable jurist could debate the district court's resolution of the procedural bar applicable to these ten subclaims of ineffective assistance of trial counsel.

In the second group, the district court noted that subclaims (a), (c), (l), and (p) were not raised in the initial state court postconviction proceedings (or on postconviction appeal to the CCA), and thus, were amenable to the *Martinez/Trevino* rule for cause—i.e., substantiality. The district court addressed each subclaim and determined that each was meritless. We conclude that the district court's determination is not debatable for the reasons that follow.

Subclaim (a) involved defense counsel's failure to have certain evidence tested for fingerprints and DNA. The district court concluded that defense counsel's decision to not conduct such tests was a reasonable strategic choice, given that DNA evidence already tied Smith to the murder and there was a chance that further testing might reveal more incriminating evidence. *See Newmiller v. Raemisch*, 877 F.3d 1178, 1198 (10th Cir. 2017) ("Strategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable." (brackets and internal quotation marks omitted)), *cert. denied*, 139 S. Ct. 59 (2018).

Additionally, even assuming that counsel performed deficiently, the district court concluded that Smith was not prejudiced, given the overwhelming evidence of his guilt. Indeed, the evidence showed that Crane was stabbed multiple times; Crane's DNA was found on Smith's shirt; Smith's DNA was found on the murder weapon and on Crane; Smith's blood was found in Peterson's sink and apartment stairwell and at the nearby bus stop; and Smith admitted the stabbing to his girlfriend and later called her from jail, telling her not to reveal his confession. Reasonable jurists could not debate the district court's resolution of subclaim (a).

In subclaim (c), Smith complained that defense counsel failed to obtain a video tape from the lobby of his apartment, which would have shown Smith returning home and not leaving again. The district court determined that even if such video existed and defense counsel should have retrieved it, Smith was not prejudiced because of the overwhelming evidence of his guilt. Reasonable jurists could not debate the merits of this subclaim.

In subclaim (l), Smith asserted that defense counsel was ineffective by not objecting to the prosecutor's use of Smith in demonstrations while Smith was being cross-examined. The district court rejected this claim by noting that defense counsel in fact objected. And again the district court referenced Smith's failure to show prejudice due to the overwhelming evidence of his guilt. The district court's resolution of this subclaim is not debatable.

Finally, subclaim (p) involved defense counsel's failure to object to the jury's handling of a knife. Smith alleged that counsel was ineffective because the knife had not been admitted into evidence. The district court aptly found the claim meritless because the knife was in fact admitted into evidence and because Smith failed to show prejudice.

As Smith failed to show that subclaims (a), (c), (l), or (p) were substantial, the district court applied procedural bar. We conclude that no reasonable jurist could debate that application of procedural bar.

Smith is not entitled to a COA on any of his unexhausted subclaims of ineffective assistance of trial counsel.

V. Prosecutorial Misconduct (Habeas Claim 8)

In a state postconviction motion, Smith claimed that the prosecutor committed misconduct by "1) repeated[ly] us[ing] . . . the term 'lie' and its iterations; 2) making false and inflammatory comments in closing arguments; and 3) fail[ing] to provide a theory of defense instruction." R., Vol. II at 62. The postconviction court found that the claims were barred because they could have been raised on direct appeal. The CCA agreed.

The federal district court found the claims procedurally defaulted, and it concluded that Smith failed to show cause for the default and actual prejudice or a fundamental miscarriage of justice. *See supra* discussion Part III.

We conclude that Smith is not entitled to a COA on this claim because the district court's application of procedural bar is not debatable.

CONCLUSION

We deny Smith's application for a COA, and we dismiss this matter. Smith's application for in forma pauperis status is granted.

Entered for the Court

Mary Beck Briscoe
Circuit Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
Judge R. Brooke Jackson

Civil Action No. 16-cv-02528-RBJ

RAY A. SMITH,

Applicant,

v.

JOHN CHAPDELAINE, and
ATTORNEY GENERAL OF THE STATE OF COLORADO,

Respondents.

ORDER DENYING APPLICATION FOR WRIT OF HABEAS CORPUS

This matter is before the Court on the Application for a Writ of Habeas Corpus Pursuant to 28 U.S.C. § 2254 (ECF No. 1) (the "Application") filed *pro se* by Applicant, Ray A. Smith, on October 11, 2016. Mr. Smith is currently incarcerated at the Centennial Correctional Facility in Canon City, Colorado. He is challenging his conviction in Denver District Court case 08CR314. He has paid the $5.00 filing fee. (ECF No. 8). Respondents have filed an Answer (ECF No. 37), and Mr. Smith has filed a "Reply Brief for Writ of Habeas Corpus 28 U.S.C. §2254" (ECF No. 42) ("the Traverse"). After reviewing the entire record before the Court, including the Application, the Answer, the Traverse, and the state court record, the Court FINDS and CONCLUDES that the Application should be denied and the case dismissed with prejudice.

I. FACTUAL AND PROCEDURAL BACKGROUND

On April 30, 2009, Mr. Smith was convicted by a jury of first degree murder and seven counts of tampering with a witness. (ECF No. 1 at 1-2). He was sentenced to life in prison without parole, plus a consecutive 6-year term. (*Id.* at 2 and ECF No. 14-1 at 16-17). The Colorado Court of Appeals ("CCA") provided the following factual summary:

> In January 2008, Smith spent a day drinking with his friend, Phillip Patterson, and another man, Jeffrey Crane. Later that day, after Patterson had fallen asleep, Smith stabbed Crane to death.
>
> Smith was arrested and charged with murder. While awaiting trial, he made phone calls from jail. During those calls, which were recorded, he asked potential witnesses to testify untruthfully or to avoid appearing at trial. Consequently, he was charged with witness tampering.
>
> At trial, the prosecution entered various types of incriminating evidence, including DNA and bloodstain evidence, the testimony of various witnesses (including Patterson), Smith's own statements to police and to his girlfriend, and recordings of Smith's calls from jail. Smith testified that he and Crane had struggled over a knife. Smith said that he did not remember stabbing Crane, but he "assumed" that that had occurred.
>
> The jury convicted Smith of first degree murder and seven counts of tampering with a witness.

(ECF No. 14-4 at 2) (*People v. Smith*, No. 09CA1748 (Colo. App. April 26, 2012) (unpublished) (*Smith I*)). The judgment of conviction was affirmed on direct appeal. (*See id.*) On November 27, 2012, the Colorado Supreme Court denied Mr. Smith's petition for writ of certiorari on direct appeal. (*See* ECF No. 14-6).

(ECF No. 1).

On April 28, 2017, the Court entered an Order to Dismiss in Part (ECF No. 29) and dismissed claims two, three, six, seven and eight as procedurally barred. Further, the Court found that claims one and five (g) and (h) were exhausted. However, the Court found that claims four and five (a) – (f) and (i) – (p) were procedurally defaulted, but deferred ruling on whether Applicant demonstrated cause for his procedural default of those claims pursuant to *Martinez v. Ryan*, 566 U.S. 1, 132 S. Ct. 1309 (2012). (*Id.*). The Court addresses Applicant's remaining claims below.

II. STANDARDS OF REVIEW

The Court must construe the Application and other papers filed by Mr. Smith liberally because he is not represented by an attorney. *See Haines v. Kerner*, 404 U.S. 519, 520-21 (1972) (per curiam); *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. Smith bears the burden of proof under § 2254(d). *See Woodford v. Visciotti*, 537 U.S. 19, 25 (2002) (per curiam).

The Court reviews claims of legal error and mixed questions of law and fact pursuant to 28 U.S.C. § 2254(d)(1). *See Cook v. McKune*, 323 F.3d 825, 830 (10th Cir. 2003). The threshold question the Court must answer under § 2254(d)(1) is whether Mr. Smith seeks to apply a rule of law that was clearly established by the Supreme Court at the time his conviction became final. *See Williams v. Taylor*, 529 U.S. 362, 390 (2000). 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." *Id.* at 412. Furthermore,

> clearly established law consists of Supreme Court holdings in cases where the facts are at least closely-related or similar to the case *sub judice*. Although the legal rule at issue need not have had its genesis in the closely-related or similar factual context, the Supreme Court must have expressly extended the legal rule to that context.

House v. Hatch, 527 F.3d 1010, 1016 (10th Cir. 2008). If there is no clearly established federal law, that is the end of the Court's inquiry under § 2254(d)(1). *See id.* at 1018.

If a clearly established rule of federal law is implicated, the Court must determine whether the state court's decision was contrary to or an unreasonable application of that clearly established rule of federal law. *See Williams*, 529 U.S. at 404-05.

> A state-court decision is contrary to clearly established federal law if: (a) "the state court applies a rule that contradicts the governing law set forth in Supreme Court cases"; or (b) "the state court confronts a set of facts that are materially indistinguishable from a decision of the Supreme Court and nevertheless arrives at a result different from [that] precedent." *Maynard* [*v. Boone*], 468 F.3d [665,] 669 [(10th Cir. 2006)] (internal quotation marks and brackets omitted)

> (quoting *Williams*, 529 U.S. at 405). "The word 'contrary' is commonly understood to mean 'diametrically different,' 'opposite in character or nature,' or 'mutually opposed.'" *Williams*, 529 U.S. at 405 (citation omitted).
>
> 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.* at 407-08.

House, 527 F.3d at 1018.

The Court's inquiry pursuant to the "unreasonable application" clause is an objective inquiry. *See Williams*, 529 U.S. at 409-10. "[A] federal habeas court may not issue the writ simply because that court concludes in its independent judgment that the relevant state-court decision applied clearly established federal law erroneously or incorrectly. Rather that application must also be unreasonable." *Id.* at 411. "[A] decision is 'objectively unreasonable' when most reasonable jurists exercising their independent judgment would conclude the state court misapplied Supreme Court law." *Maynard*, 468 F.3d at 671. Furthermore,

> evaluating 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). 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. In addition, "review under § 2254(d)(1) is limited to the record that was before the state court that adjudicated the claim on the merits." *Cullen v. Pinholster*, 563 U.S. 170, 181 (2011).

Under this standard, "only the most serious misapplications of Supreme Court precedent will be a basis for relief under § 2254." *Maynard*, 468 F.3d at 671; *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.

The Court reviews claims of factual errors pursuant to 28 U.S.C. § 2254(d)(2). *See Romano v. Gibson*, 278 F.3d 1145, 1154 n.4 (10th Cir. 2002). 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. Pursuant to § 2254(e)(1), the Court must presume that the state court's factual determinations are correct and Mr. Smith bears the burden of rebutting the presumption by clear and convincing evidence. "The standard is demanding but not insatiable . . . [because] '[d]eference does not by definition preclude relief.'" *Miller-El v. Dretke*, 545 U.S. 231, 240 (2005) (quoting *Miller-El v. Cockrell*, 537 U.S. 322, 340 (2003)).

If a claim was not adjudicated on the merits in state court, and if the claim also is not procedurally barred, the Court must review the claim *de novo* and the deferential standards of § 2254(d) do not apply. *See Gipson v. Jordan*, 376 F.3d 1193, 1196 (10th Cir. 2004).

Finally, the Court's analysis is not complete "[e]ven if the state court decision was contrary to, or involved an unreasonable application of, clearly established federal law." *Bland v. Sirmons*, 459 F.3d 999, 1009 (10th Cir. 2006). "Unless the error is a structural defect in the trial that defies harmless-error analysis, [the Court] must apply the harmless error standard of *Brecht v. Abrahamson*, 507 U.S. 619 (1993) . . . ." *Id.*; *see also Fry v. Pliler*, 551 U.S. 112, 121-22 (2007) (providing that a federal court must conduct harmless error analysis under *Brecht* anytime it finds constitutional error in a state court proceeding regardless of whether the state court found error or conducted harmless error review). Under *Brecht*, a constitutional error does not warrant habeas relief unless the Court concludes it "had substantial and injurious effect" on the jury's verdict. *Brecht*, 507 U.S. at 637. "A 'substantial and injurious effect' exists when the court finds itself in 'grave doubt' about the effect of the error on the jury's verdict." *Bland*, 459 F.3d at 1009 (citing *O'Neal v. McAninch*, 513 U.S. 432, 435 (1995)). "Grave doubt" exists when "the matter is so evenly balanced that [the Court is] in virtual equipoise as to the harmlessness of the error." *O'Neal*, 513 U.S. at 435. The Court makes this harmless error determination based upon a review of the entire state court record. *See Herrera v. Lemaster*, 225 F.3d 1176, 1179 (10th Cir. 2000).

III. MERITS OF APPLICANT'S REMAINING CLAIMS

A. Claim One

Mr. Smith's first claim is: "Whether or not Custodial Interrogation Took Place." (ECF No. 1 at 5). Liberally construing this claim, Mr. Smith contends that the police obtained his statements in violation of *Miranda v. Arizona*, 384 U.S. 436 (1966). (ECF No. 1 at 5). "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). Thus,

> the accused's statement during a custodial interrogation is inadmissible at trial unless the prosecution can establish that the accused in fact knowingly and voluntarily waived [*Miranda*] rights when making the statement. 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.

Id. at 382-83 (internal quotation marks omitted, alteration in original).

In determining whether a police encounter was "custodial," a court considers whether, under all of the circumstances, a "reasonable person [would] have felt he or she was at liberty to terminate the interrogation and leave." *J.D.B. v. North Carolina*, 564 U.S. 261, 270 (2011) (quoting *Thompson v. Keohane*, 516 U.S. 99, 112 (1995)).

The CCA rejected Mr. Smith's *Miranda* claim as follows:

> Smith contends that the court should have suppressed statements that he made to police. We disagree.
>
> A. Pertinent Events
>
> The morning after the stabbing, two Arvada police officers

came to Smith's home. They were admitted by Smith's girlfriend. The officers woke Smith and told him that he was a potential witness to a crime in Denver.

Officer Kristin Harris noticed that Smith had a large cut on his hand. She asked about the injury, and Smith replied that he had received it the previous day. Harris then reported the injury to the Denver Police Department and was informed that Smith was a suspect.

The officers did not initiate further conversation with Smith. However, Smith spontaneously asked whether Patterson was okay, and he changed his story about the cut, saying that it had happened several days earlier.

A short time later, Denver police officers arrived and took Smith to the police station. Smith received a *Miranda* advisement and was questioned about the murder. During the interview, Smith said that he had been at Patterson's apartment, but he denied stabbing anyone.

Smith filed a pretrial motion to suppress the statements that he made to police. As pertinent here, he asserted two arguments: (1) the statements that he made to the Arvada police, while at home, were the product of custodial interrogation that occurred in violation of *Miranda v. Arizona*, 384 U.S. 436 (1966); and (2) all his statements to police – both at the house and at the Denver police station – were involuntary.

After hearing evidence and argument, the trial court entered detailed findings of fact. On the basis of those findings, the court rejected Smith's assertions.

B. Custodial Interrogation

Smith argues that the court erred in failing to suppress the statements that he made at home. We see no error.

Police place a suspect in custody when they curtail his freedom of action to a degree associated with formal arrest. *People v. Elmarr*, 181 P.3d 1157, 1162 (Colo. 2008). Police interrogate a suspect when, by their words or actions, they have done something that is likely to elicit an incriminating response. *Rhode Island v. Innis*, 446 U.S. 291, 301 (1980).

> "[A]n on-the-scene investigation, or questioning which enables an officer to determine what has happened and who has been injured, is not an interrogation under *Miranda* and its progeny." *People v. Denison*, 918 P.2d 1114, 1116 (Colo. 1996). Similarly, volunteered statements are not the product of interrogation. *People v. Madrid*, 179 P.3d 1010, 1015 (Colo. 2008).
>
> Here, the trial court found the following: the Arvada police officers were allowed into the home and were never asked to leave; they did not restrict Smith's movement; they spoke to him in a conversational tone; when Officer Harris asked about Smith's injury, she was not interrogating Smith; and Smith's remaining statements were volunteered. On the basis of those findings, the court ruled that Smith's statements to Arvada police were not the result of custodial interrogation.
>
> The trial court's findings are supported by evidence in the record. We therefore defer to those findings. *People v. Davis*, 187 P.3d 562, 563 (Colo. 2008). And on the basis of those findings, we agree with the trial court's conclusions: (1) Smith was not in custody until the Denver police arrived; and (2) his statements to Arvada police were not the product of interrogation.

(ECF No. 14-4 at 3-6 (footnote omitted)).

According to Mr. Smith, he was passed out in bed and woke up when the police turned on a bright ceiling light and began questioning him about a homicide. The police officers told him not to light a cigarette. Mr. Smith also maintains that he could not move about the house or get dressed without being blocked and surrounded by police and detectives. Police never told him that he was free to leave. However, such allegations do not demonstrate that he was subject to a custodial interrogation.

Therefore, Mr. Smith fails to demonstrate that the state court's determination with respect to claim one was contrary to or an unreasonable application of clearly established federal law. The state court correctly identified and applied the clearly

established federal law of *Miranda*. Further, Mr. Smith 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. Mr. Smith also fails to demonstrate that the state court's rejection of claim one was based on an unreasonable determination of the facts in light of the evidence presented under § 2254(d)(2).

Ultimately, the Court finds that Mr. Smith is not entitled to habeas relief with respect to claim one because he fails to demonstrate the state court 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. Therefore, claim one will be dismissed.

C. Claim Five (g) and (h)

In sub-claims five (g) and (h), Mr. Smith alleges he received ineffective assistance of counsel because his counsel failed to find or present available witnesses, including expert witnesses, and his counsel used a very vague line of questioning and presented few substantial objections for key prosecution witnesses. (ECF No. 1 at 16-17). The clearly established federal law regarding ineffective assistance of counsel is *Strickland v. Washington*, 466 U.S. 668, 687-88 (1984). To prevail on an ineffective assistance of counsel claim, pursuant to *Strickland*, Applicant must show that: (1) counsel's legal representation fell below an objective standard of reasonableness; and (2) "the deficient performance prejudiced the defense." *Id. at* 687-88. Judicial scrutiny of counsel's performance is highly deferential. *Id.* at 689. Counsel's decisions are presumed to represent "sound trial strategy;" "[f]or counsel's performance to be

constitutionally ineffective, it must have been completely unreasonable, not merely wrong." *Boyd v. Ward*, 179 F.3d 904, 914 (10th Cir. 1999) (internal quotations omitted). Under the AEDPA standard of review, "the question is not whether counsel's actions were reasonable. The question is whether there is any reasonable argument that counsel satisfied *Strickland*'s deferential standard." *Richter*, 131 S.Ct. at 788.

Prejudice exists when there is a reasonable probability that, but for counsel's defective representation, the result of the proceeding would have been different. *Strickland*, 466 U.S. at 693. The likelihood of a different result must be substantial, not just conceivable. *Id.* The Court need not address both prongs of the *Strickland* inquiry if Applicant's claim fails on one. *Id.* at 697.

The CCA rejected Mr. Smith's ineffective assistance of counsel claims as vague and conclusory in nature. (ECF No. 14-9 at 10). The CCA explained:

> Smith did not provide any further argument or point to any specific facts supporting these vague and/or conclusory assertions. Thus, they are insufficient to entitle him to relief. *See Osorio*, 170 P.3d at 799 (claims that are vague, conclusory, or lacking in detail are properly denied).

(ECF No. 14-9 at 10).

Mr. Smith 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, he fails to demonstrate the state court's decision with respect to this ineffective assistance of counsel claim is contrary to *Strickland*.

Further, Mr. Smith failed to demonstrate that any witness or expert – or any questioning or objections related to key prosecution witnesses -- would have made any

difference in the outcome of the proceeding. In his Application, Mr. Smith contends that his neighbor could have testified as to the time he got home that night. Further, Mr. Smith alleges that Mr. Patterson's friend, Mark, could have testified that Mr. Crane would come to Mark's house if Mr. Patterson beat him up or threw him out. Mark could have testified that Mr. Patterson and Mr. Crane fought a lot and that Mr. Patterson blamed Mr. Crane for having his dog get run over. Although these witnesses might have helped bolster Mr. Smith's defense, Mr. Smith has failed to establish that the testimony would have changed the outcome of the case. There was substantial evidence of Mr. Smith's guilt presented to the jury. The testimony of these witnesses as to the time Mr. Smith arrived home and/or the relationship problems between Mr. Patterson and Mr. Crane would not negate the substantial evidence of Mr. Smith's guilt, including blood, DNA, and statements made by Mr. Smith to his girlfriend. Further, Mr. Smith's speculation about testimony that could have been provided by hypothetical expert witnesses and unspecified questions or objections that could have been used by counsel are purely conclusory. Mr. Smith's allegations in claim five (g) and (h) are not sufficient to demonstrate the state court 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. Therefore, he is not entitled to relief with respect to claims five (g) and (h).

D. Claims Four and Five (a) – (f) and (i) – (p):

Claims four and five (a) – (f) and (i) –(p) are procedurally defaulted and cannot be considered unless Mr. Smith demonstrates cause and prejudice for the default. (*See* ECF No. 29 at 16). In his Application, Mr. Smith alluded to the fact that he was

proceeding *pro se* during his post-conviction proceedings and, therefore, he was unable to adequately assert some of his claims. Thus, because Mr. Smith was not appointed counsel in his initial state post-conviction proceedings, the Court must address whether the procedural default of his ineffective assistance of trial counsel claims implicate the holding in *Martinez v. Ryan*, 566 U.S. 1, 132 S. Ct. 1309 (2012). *Martinez* held that:

> [w]here, under state law, claims of ineffective assistance of trial counsel must be raised in an initial-review collateral proceeding, a procedural default will not bar a federal habeas court from hearing a substantial claim of ineffective assistance at trial if, in the initial-review collateral proceeding, there was no counsel or counsel in that proceeding was ineffective.

Id. at 13-14. In order to excuse the procedural default pursuant to *Martinez*, Mr. Smith must demonstrate the following four requirements: (1) the underlying claim of ineffective assistance of counsel must be a "substantial" claim; (2) the "cause" for the procedural default consists of there being "no counsel" or only "ineffective" counsel during the state collateral review proceeding; (3) the state collateral review proceeding was the "initial" collateral review proceeding where the ineffective assistance of trial counsel claim could have been brought; and (4) state law requires that an ineffective assistance of counsel claim be raised in an initial-review collateral proceeding, or by "design and operation" such claims must be raised that way, rather than on direct appeal. *Trevino v. Thaler*, 133 Ct. 1911, 1918, 1921 (2013).

In a previous Order, the Court deferred ruling on the applicability of *Martinez*, pending review of the state court record, in order to determine whether the procedurally defaulted ineffective assistance of counsel claims were "substantial." (ECF No. 29 at

16). For the reasons discussed below, the Court finds the procedural default of the claims is not excused pursuant to *Martinez.*

Claim Four

In claim four, Applicant asserts that he did not receive effective assistance of trial counsel during the plea negotiation stage. First, Respondents argue that *Martinez* is only applicable to claims of ineffective assistance of counsel during trial, not to claims based on ineffective assistance of counsel during plea negotiations. (ECF No. at 30-31). Respondents provide no caselaw to support their position and instead attempt to characterize the claim as similar to an ineffective assistance of appellate counsel claim. The Court is not convinced by Respondents argument that an ineffective assistance of counsel claim based on plea negotiations is somehow treated differently than an ineffective assistance of trial counsel claim. Generally, the term "trial counsel" is used to refer to the counsel representing a defendant during pre-trial and trial proceedings. The term is used to differentiate between "appellate counsel," which is counsel representing a defendant after a conviction, or "postconviction counsel," which is counsel representing a defendant during postconviction collateral proceedings.

To support claim four, Mr. Smith alleges that he:

> asked his Public Defender twice in the presence of the District Attorney what he should do, if he should take the plea of 16 to 32 years, which is a very generous offer on a first degree murder charge (I found out later by other inmates while in prison) or go to trial. The Applicant's Public Defender told him both times "I can't tell you what to do, you have to figure that out yourself."

(ECF No. 1 at 15).

The *Strickland* standard applies to claims of ineffective assistance of counsel in

the plea bargain context. *See Hill v. Lockhart*, 474 U.S. 52, 57-58, 59 (1985) ("The . . . 'prejudice,' requirement . . . focuses on whether counsel's constitutionally ineffective performance affected the outcome of the plea process"); *see also Missouri v. Frye*, 566 U.S. 133, 132 S.Ct. 1399 (2012) (holding that a defendant must show the outcome of the plea process would have been different with competent advice). The Sixth Amendment right to counsel is violated when a defendant receives a harsher sentence as a result of his attorney's constitutionally deficient advice to reject a plea bargain. *Lafler v. Cooper*, 566 U.S. 156, 162, 132 S.Ct. 1376, 1390-91 (2012). Thus, "effective assistance of counsel includes counsel's informed opinion as to what pleas should be entered." *United States v. Carter*, 130 F.3d 1432, 1442 (10th Cir. 1997). To establish a Sixth Amendment violation,

> a defendant must show that but for the ineffective advice of counsel there is a reasonable probability that the plea offer would have been presented to the court (i.e., that the defendant would have accepted the plea and the prosecution would not have withdrawn it in light of intervening circumstances), that the court would have accepted its terms, and that the conviction or sentence, or both, under the offer's terms would have been less severe than under the judgment and sentence that in fact were imposed.

Lafler, 566 U.S. at 164.

Respondents next argue that Applicant's allegations are not supported by the record. According to Respondents, the only reference to any plea offer is a notation by the prosecutor referencing an offer of 25 to 35 years – and stating that the upper limit was subject to *increase* because Applicant had preceeded to preliminary hearing. (ECF No. 37 at 39 (citing ECF No. 37-11 (5/28/08)). The Court has reviewed the state court record provided and has failed to find any other additional reference to a plea offer.

Further, Respondents argue that there is nothing in the record to demonstrate that Applicant would have accepted any plea offer, even if counsel had explained it differently. Therefore, Respondents maintain that Mr. Smith cannot establish prejudice.

In the Traverse, Mr. Smith adds the following factual information:

> About a month or so before trial I Applicant, Ray Anthony Smith was summoned to go to an attorney visit while at Denver County Jail.
>
> When I got there my attorney Willfredo Rios and District Attorney Cajardo Lindsey were waiting for me in one of the visiting rooms used for attorney visits.
>
> D.A. Lindsey started the conversation after introductions and told me and I quote, "I'm a nigga from Cincinnati, and I don't know why I do this, why I chose this profession, I have family members in jail and on drugs, but I'm not trying to be against blacks or working for the white man, I just do this[.]"
>
> He went [on] to say, "I know that I can get first degree because he knew Brenda (my common law wife) would tell on me because she's scared, but you would have to fight to get the 16 but you would probably get 32[.]"
>
> With that I asked D.A. Lindsey "if he could cap it at 16" (since I was 49 at the time) and he said "the judge wouldn't go for that" and that's when I asked my Public Defender Willfredo Rios "what do you think?" His reply was "I can't tell you that, you have to figure that out for yourself[.]" [A]t that point he should have started advising me about what my chances are if I go to trial, and what kind of evidence the state had against me, but he said nothing else, he just stared at me along with the D.A., so I said to the District Attorney, "you know I'm already 49 yrs old." [H]e didn't say anything so that's when I asked my Public Defender the second time "should I take it?" [H]is reply was again "I can't tell you that you have to decide for yourself," at that the District Attorney said "you have 24 hrs," and he got up and left, and my attorney left right behind him without another word, I did not here [sic] from my Attorney again until trial. That was the whole conversation and I will take a lie detector test to prove it, I am not lying, that is how it went. . . .

> Logic only dictates that had Applicant/Smith been advised by counsel as to lack of evidence in his favor (meaning none) and the 100% probability that he would be found guilty at trial and be sentenced to life imprisonment without the chance for parole, he would have accepted state's offer.

(ECF No. 42 at 11-16 (emphasis in original)).

Even assuming Mr. Smith's counsel's performance was deficient with regards to the alleged plea offer, he fails to allege sufficient facts to demonstrate prejudice. Mr. Smith alleges he wanted to "cap" the plea agreement at 16 years but that the prosecutor wouldn't agree to such a cap because he did not think the trial court would accept such a low sentence. Mr. Smith states numerous times that he was 49 years old at the time the plea offer was made and, therefore, he was reluctant to accept an offer that would probably result in 32 years. He presents nothing, other than his conclusory assertion that "logic only dictates," that he would have accepted the prosecution's offer if he had been properly advised by counsel. *See United States v. Morris*, 106 F. App'x 656, 659 (10th Cir. 2004) (defendant's "subjective and self-serving statements are insufficient to show a reasonable probability that, but for alleged counsel's errors, he would have pled guilty"); *United States v. Quiroz*, 228 F. Supp.2d 1259, 1265 (D. Kan. 2002) (prejudice in the rejection of a plea offer requires objective evidence, not defendant's mere assertion that he would have accepted an alleged offer). Thus, Mr. Smith has not demonstrated that he would have accepted a plea deal within the sentencing range that the state and trial court would have been willing to accept. *Frye*, 132 S. Ct. at 1409; *Jones v. Wood*, 114 F.3d 1002, 1012 (9th Cir. 1997).

As such, the Court finds that Mr. Smith's claim that he did not receive effective assistance of trial counsel during the plea negotiation stage is not "substantial" under *Martinez v. Ryan*. Therefore, he has not established cause pursuant to *Martinez* to excuse his procedural default. Accordingly, Applicant is not entitled to habeas corpus relief on claim four as it is procedurally defaulted.

Five (a) – (f) and (i) – (p)

In sub-claims five (a) – (f) and (i) – (p), Applicant asserts that he received ineffective defense counsel based on trial counsel's: (a) failure to have key evidence tested for fingerprints or DNA; (b) failure to subpoena two critical witnesses for Mr. Smith; (c) failure to obtain video tape from lobby of apartment building; (d) failure to get video tape from two city buses that Mr. Smith rode home; (e) failure to have Mr. Smith's BAC tested and the BAC of a witness tested; (f) failure to keep two African-American ladies on the jury that Mr. Smith wanted; (i) failure to confirm time-lines of crucial elements and events; (j) failure to present any adversarial challenge by resting without providing a defense as promised in opening statement; (k) failure to raise the defense of intoxication; (l) failure to object to the prosecutor's insistence that Mr. Smith demonstrate the events surrounding the crime; (m) failure to highlight discrepancies in the evidence tending to disprove the prosecution's theory of racial prejudice and jealousy; (n) failure to present an alibi defense; (o) failure to present a defense strategy, which compelled Mr. Smith to testify to try to defend himself; and (p) failure to object to the jury handling evidence during deliberation that was not admitted into evidence. (ECF No. 1 at 15-20).

Respondent argues that *Martinez* does not apply to the majority of the sub-claims in claim five (claims 5(b), (d), (e), (f), (i), (j), (k), (m), (n), and (o)) because the sub-claims were raised and rejected on the merits in the state district court initial postconviction proceeding, and were defaulted only on postconviction appeal. As to the sub-claims that were not raised in the state district court initial postconviction proceeding (claims 5(a), 5(c), 5 (l), and 5(p)), Respondent argues they are not "substantial" under *Martinez*.

Five (b), (d), (e), (f), (i), (j), (k), (m), (n), & (o)

According to Respondent, sub-claims (b), (d), (e), (f), (i), (j), (k), (m), (n), and (o) were raised by Mr. Smith in his initial-review postconviction motion (ECF No. 37-6) and the sub-claims were rejected on the merits by the district court (ECF No. 37-1). Thus, Respondents argue that the holding in *Martinez* is not applicable to these sub-claims because they were procedurally defaulted during the postconviction appeal, not the initial postconviction proceeding.

The Court agrees. Prior to *Martinez*, the Supreme Court held that errors on appeal from an initial-review collateral proceeding do not qualify as cause for a procedural default, *see Coleman v. Thompson*, 501 U.S. 722, 757 (1991), and the Supreme Court in *Martinez* reaffirmed that holding:

> The rule of *Coleman* governs in all but the limited circumstances recognized here. The holding in this case does not concern attorney errors in other kinds of proceedings, including appeals from initial-review collateral proceedings, second or successive collateral proceedings, and petitions for discretionary review in a State' s appellate courts. It does not extend to attorney errors in any proceeding beyond the first occasion the State allows a prisoner to raise a claim of ineffective assistance at trial,

> even though that initial-review collateral proceeding may be deficient for other reasons.

Martinez, 132 S. Ct. at 1320 (emphasis added, citation omitted). Sub-claims (b), (d), (e), (f), (i), (j), (k), (m), (n), and (o) were raised and rejected during the initial postconviction proceedings. (ECF Nos. 37-6 at 30 & 45 (sub-claim (b) raised), No. 37-1 at 12 & 14 (sub-claim (b) rejected), No. 37-6 at 41 (sub-claim (d) raised), No. 37-1 at 11 & 16 (sub-claim (d) rejected), No. 37-6 at 30 & 47 (sub-claim (e) raised), No. 37-1 at 11 & 16 (sub-claim (e) rejected), No. 37-6 at 44-45 (sub-claim (f) raised), No. 37-1 at 12 & 13 (sub-claim (f) rejected), No. 37-6 at 40-43 (sub-claim (i) raised), No. 37-1 at 11 & 16 (sub-claim (i) rejected), No. 37-6 at 43 & 47 (sub-claim (j) raised), No. 37-1 at 12 & 16 (sub-claim (j) rejected), No. 37-6 at 30 & 47 (sub-claim (k) raised), No. 37-1 at 11 & 16 (sub-claim (k) rejected), No. 37-6 at 31, 39, 42 & 43 (sub-claim (m) raised), No. 37-1 at 12 & 16 (sub-claim (m) rejected), No. 37-6 at 40-41 (sub-claim (n) raised), No. 37-1 at 11 & 16 (sub-claim (n) rejected), No. 37-6 at 47 (sub-claim (o) raised), No. 37-1 at 12 & 16 (sub-claim (o) rejected).

Therefore, the procedural default of these claims occurred at the postconviction appeal stage. As a result, Mr. Smith cannot rely on *Martinez* to demonstrate cause for his procedural default of these unexhausted ineffective assistance of counsel sub-claims. They will be dismissed as procedurally defaulted.

Five (a), (c), (l), and (p)

For sub-claims five (a), (c), (l), and (p), Respondent argues that the procedural default of these sub-claims is not excused pursuant to *Martinez* because they are not "substantial."

Five (a)

In sub-claim five (a), Applicant argues that his trial counsel failed to have key evidence tested for fingerprints or DNA, such as:

1. house keys found in victims [sic] jacket pocket that were said to have been stolen and used by applicant to gain entry to apartment hours after applicant had left) [sic];

2. steak knife not tested for prints or DNA or even admitted into evidence;

3. allowed the withholding of steak knife evidence from jury when defendant testified that it was weapon he was stabbed with in self defense by the deceased.

(ECF No. 1 at 15).

Mr. Smith fails to explain or specify what he means by allowing "the withholding of steak knife evidence." The Court will liberally construe this allegation to mean not having the steak knife tested for fingerprints or DNA. Mr. Smith fails to demonstrate that counsel's failure to test DNA and fingerprints on house keys and the steak knife was objectively unreasonable or that he suffered prejudice from such failure. Applicant cannot show that trial counsel's decision to not test the fingerprints and DNA of certain items was not the product of a reasonable strategic choice. *See Bullock v. Carver*, 297 F.3d 1036, 1047 (10th Cir. 2002). There was substantial evidence of Mr. Smith's involvement in the stabbing. Therefore, it was not unreasonable for his counsel to conclude that fingerprint and/ or DNA evidence might produce damaging evidence against Mr. Smith. See *United States v. Roberts*, 417 F. App'x 812, 823 (10th Cir. 2011) (counsel was not deficient when he made an informed, strategic decision that further DNA testing posed more of a risk); *see also Cummings v. Sirmons*, 506 F.3d

Explain what would have been discovered Find Const. law

If thats the case why did he himself present the box with the steak knife in it to the jury in closing arguments as suspicious as to why it was not shown during trial.

1211, 1233 (10th Cir. 2007) (holding that a petitioner's ineffective assistance claim failed to satisfy *Strickland*'s first prong because nothing demonstrated the content of a potential expert's testimony).

Additionally, Mr. Smith has not demonstrated that he was prejudiced by his counsel's failure to test for fingerprints or DNA. There is no indication that DNA or fingerprint testing would produce favorable evidence for Mr. Smith. Moreover, even if someone else's DNA or fingerprints were found on the house keys or steak knife, such evidence would not necessarily change the outcome of the case. There was substantial evidence presented at trial of Mr. Smith's guilt. Although another person's DNA or fingerprints on the house keys or steak knife would have helped the defense's theory that another person was stabbed the victim, such evidence would not have conclusively demonstrated Mr. Smith's innocence nor would it have negated all of the other substantial evidence of his guilt. *See United States v. Roberts*, 417 F. App'x 812, 823 (10th Cir. 2011) (another person's DNA on the gun would have "bolstered" defendant's theory of the case, but it would not have ruled out his guilt).

As such, the Court determines that Mr. Smith's claim five (a) is not substantial under *Martinez v. Ryan*. Therefore, he has not established cause pursuant to *Martinez* to excuse his procedural default. Accordingly, Applicant is not entitled to habeas corpus relief on claim five (a) as it is procedurally defaulted.

Five (c)

In sub-claim five (c), Mr. Smith argues he received ineffective assistance of trial counsel because his counsel failed to obtain video tape from the lobby of his apartment building, which would have shown him coming back to the apartment at a certain time

and that he never left again. Respondents argue that Mr. Smith fails to demonstrate prejudice based on his counsel's failure to obtain video tape from the lobby of his apartment building.

The Court agrees with Respondents. First, it is not clear that such video footage existed from his apartment lobby existed. Further, even if such video footage existed, Mr. Smith fails to demonstrate that such evidence would have changed the outcome of the trial. Even if there was video evidence that he returned to his apartment at a specific time, there was overwhelming evidence of his guilt presented at trial, including that the victim's blood was found on Mr. Smith's shirt (Tr. Trans. 4/28/2009 at 79), Mr. Smith's DNA was found on the murder weapon and the victim (*id.* at 50), and Mr. Smith's blood was found at the scene of the murder (*id.* at 60-61). Additionally, Mr. Smith's girlfriend told police that when Mr. Smith came home the night of the murder he said that he had stabbed the victim numerous times and that he might be going to prison. (Tr. Trans. 4/27/2009 at 210-211). Also, while in jail, he made numerous phone calls implicating himself. (Tr. Trans. 4/21/2009 at 46-62 & People's Exhibits 16-28). Therefore, even if Mr. Smith's counsel was ineffective for failing to retrieve video from his apartment lobby, Mr. Smith has not demonstrated prejudice from such error.

As such, the Court determines that Mr. Smith's sub-claim five (c) is not substantial under *Martinez*. Therefore, he has not established cause pursuant to *Martinez* to excuse his procedural default. Accordingly, Applicant is not entitled to habeas corpus relief on sub-claim five (c) as it is procedurally defaulted.

Five (l)

In sub-claim five (l), Mr. Smith argues that he received ineffective assistance of counsel because his counsel failed to object to the prosecutor's insistence that Mr. Smith demonstrate the events surrounding the crime. Respondents argue that Applicant fails to provide "specifics or any real explanation for what he means or how he was prejudiced." (ECF No. 37 at 45). Further, Respondents argue that nothing in the trial record corresponds to Plaintiff's claims.

The specific claim included in Mr. Smith's application is:

> [t]he Public Defender's Office allowed the violation of Petitioner's Fifth Amendment right against self incrimination by not objecting to the prosecutor's insistence of petitioner demonstrating the events that took place more than a year ago in order to prove his own testimony.

(ECF No. 1 at 17). Mr. Smith failed to comment specifically on this sub-claim in his Traverse. The Court has reviewed the trial transcript. At one point during the cross-examination of Mr. Smith, the prosecutor had Mr. Smith help him arrange furniture so that it resembled Mr. Patterson's apartment, and then had Mr. Smith step down from the stand and demonstrate how he allegedly grabbed and pushed the victim. (See Tr. Trans. 4/28/2009 at 219- 230).

Mr. Smith's contention that he received ineffective assistance of counsel because his counsel failed to object to this demonstration is contradicted by the record. In fact, his counsel did object. After the prosecutor had Mr. Smith tell him where all the furniture was, and the prosecutor arranged things, the prosecutor asked Mr. Smith to step down from the witness stand, and Mr. Smith's counsel objected. (*See id.* at 219). The objection was overruled. (*Id.*) Therefore, Mr. Smith's sub-claim five (l) is not

Judge Violated 5th Amendment right

substantial under *Martinez* because his counsel did object to the demonstration. Additionally, he fails to establish that he was prejudiced by having to demonstrate the events. As such, the sub-claim is procedurally defaulted.

Five (p)

Finally, in sub-claim five (p), Mr. Smith argues that he received ineffective assistance of counsel because his counsel failed to object to the jury handling evidence during deliberation that was not admitted into evidence. Although Mr. Smith did not specifically identify what evidence the jury was allowed to handle, he cited to the trial transcript where the court and counsel discussed a question from the jury. (Tr. Trans. 4/29/2009 at 102). The jury question was: "Can we open the evidence box holding the small knife?" (*Id.* and ECF No. 37-9 at 2). The Court stated to counsel, "I think the small knife was admitted. I think they can open it if they want to." (*Id.*) Neither the prosecutor nor Mr. Smith's counsel objected. Mr. Smith's argument is apparently that the small knife was not admitted into evidence and, therefore, his attorney should have objected to allowing the jury to handle it.

Mr. Smith is mistaken. The small knife was admitted into evidence. (See Tr. Trans. 4/23/2009 at 226, ECF No. 37-10 at 3). Therefore, he fails to demonstrate that there was a valid basis for his counsel to object to the jury handling the evidence. *See Lafler,* 566 U.S. at 167 ("Because the objection upon which his ineffective-assistance-of-counsel claim was premised was meritless, [petitioner] could not demonstrate an error entitling him to relief."); *Ryder v. Warrior,* 810 F.3d 724, 747 (10th Cir. 2016) ("If the omitted issue is meritless, then counsel's failure to raise it does not amount to constitutionally ineffective assistance." (quoting *Hawkins v. Hannigan,* 185 F.3d 1146,

refer to trial counsel's closing arguments

1152 (10th Cir. 1999)). Additionally, he fails to argue how he was prejudiced by the jury handling the small knife. As such, he has failed to demonstrate that sub-claim five (p) is "substantial" under *Martinez* and, therefore, it is procedurally defaulted.

IV. CONCLUSION

In summary, the Court finds that Mr. Smith is not entitled to relief on any of his remaining claims. 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). It is

FURTHER ORDERED that any pending motions are denied as moot.

DATED: August 23, 2018.

BY THE COURT:

R. BROOKE JACKSON
United States District Judge

FILED
United States Court of Appeals
Tenth Circuit

July 16, 2019

Elisabeth A. Shumaker
Clerk of Court

UNITED STATES COURT OF APPE

FOR THE TENTH CIRCUIT

RAY A. SMITH,

Petitioner - Appellant,

v.

JOHN CHAPDELAINE, et al.,

Respondents - Appellees.

No. 18-1362

ORDER

Before **BRISCOE**, **McKAY**, and **LUCERO**, Circuit Judges.

Appellant's petition for rehearing is denied.

Entered for the Court

Elisabeth A. Shumaker

ELISABETH A. SHUMAKER, Clerk