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APPENDIX A

(Court of Appeals' Order Denying Certificate of Appealability)

FILED
United States Court of Appeals
Tenth Circuit

February 19, 2019

Elisabeth A. Shumaker
Clerk of Court

UNITED STATES COURT OF APPEALS

TENTH CIRCUIT

SHERMAN ALEXANDER LYNCH,

Petitioner - Appellant,

v.

SHANE NELSON,

Respondent - Appellee.

No. 18-4174
(D.C. No. 2:17-CV-00477-DS)
(D. Utah)

ORDER DENYING CERTIFICATE OF APPEALABILITY

Before **CARSON**, **BALDOCK**, and **MURPHY**, Circuit Judges.

This matter is before the court on Sherman Alexander Lynch's pro se request for a certificate of appealability ("COA"). Lynch seeks a COA so he can appeal the district court's dismissal of his 28 U.S.C. § 2254 petition. *See* 28 U.S.C. § 2253(c)(1)(A) (providing no appeal may be taken from "a final order in a habeas corpus proceeding in which the detention complained of arises out of process issued by a State court" without first obtaining a COA). Because Lynch has not "made a substantial showing of the denial of a constitutional right," *id.* § 2253(c)(2), this court **denies** his request for a COA and **dismisses** this appeal.

Following a jury trial in Utah state court, Lynch was convicted of murdering his wife, *see* Utah Code Ann. § 76-5-203, and obstruction of justice, *see id.* § 76-8-306. *State v. Lynch*, 246 P.3d 525, 525 (Utah Ct. App. 2011). The Utah Court of Appeals affirmed Lynch's convictions on direct review. *Id.* at 530. Lynch did not seek review in the Utah Supreme Court. Instead, he filed a petition for relief under the Utah Post-Conviction Remedies Act. *See Lynch v. State*, 400 P.3d 1047, 1050 (Utah Ct. App. 2017). That state court petition raised twenty-eight claims of ineffective assistance of counsel and one claim of newly discovered evidence. *See id.* at 1052. The trial court denied Lynch's motion, concluding some of the claims of ineffective assistance were procedurally barred and the remaining claims failed on the merits. In a lengthy opinion, the Utah Court of Appeals affirmed. *Id.* at 1053-65. The Utah Court of Appeals likewise affirmed the trial court's conclusion that Lynch's claim of newly discovered evidence failed because the new evidence was insufficient to demonstrate no reasonable jury could have found him guilty of the charged offenses. *Id.* at 1065-69. The Utah Supreme Court denied certiorari review. While these proceedings were ongoing, Lynch filed a second petition under Utah's Post-Conviction Remedies Act. This petition raised eighteen claims centered around allegations of police and prosecutorial misconduct. The trial court concluded all the claims raised in this second petition were procedurally barred; the Utah Court of Appeals summarily affirmed in an unpublished order.

Lynch then filed the instant § 2254 habeas petition raising multiple claims of police/prosecutorial misconduct and ineffective assistance of counsel. In a thorough order, the district court concluded several of Lynch's claims were subject to a procedural default; it also concluded Lynch's default was not excused by cause and prejudice or by new, reliable evidence of actual innocence. As to Lynch's properly exhausted claims of ineffective assistance of counsel, the district court concluded the Utah courts' rejection of these claims was neither "contrary to," nor did it involve "an unreasonable application of, clearly established Federal law." 28 U.S.C. § 2254(d)(1).

Lynch seeks a COA so he can appeal the district court's dismissal of his habeas petition. The granting of a COA is a jurisdictional prerequisite to an appeal from the dismissal of his § 2254 petition. *Miller-El v. Cockrell*, 537 U.S. 322, 336 (2003). To be entitled to a COA, Lynch must make "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). To make the requisite showing, he must demonstrate "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." *Miller-El*, 537 U.S. at 336 (quotations omitted). When a district court dismisses a § 2254 motion on procedural grounds, a petitioner is entitled to a COA only if he shows both that reasonable jurists would find it debatable whether he had stated a valid constitutional claim and

debatable whether the district court's procedural ruling was correct. *Slack v. McDaniel*, 529 U.S. 473, 484-85 (2000). In evaluating whether Lynch has satisfied his burden, this court undertakes "a preliminary, though not definitive, consideration of the [legal] framework" applicable to each of his claims. *Miller-El*, 537 U.S. at 338. Although Lynch need not demonstrate his appeal will succeed to be entitled to a COA, he must "prove something more than the absence of frivolity or the existence of mere good faith." *Id.*

Having undertaken a review of Lynch's appellate filings, the district court's thorough order, and the entire record before this court pursuant to the framework set out by the Supreme Court in *Miller-El* and *Slack*, we conclude Lynch is not entitled to a COA. The district court's resolution of Lynch's § 2254 petition is not reasonably subject to debate and the issues he seeks to raise on appeal are not adequate to deserve further proceedings. Furthermore, it cannot be reasonably argued the district court abused its discretion when it denied Lynch's requests for appointed counsel, provision of a law library, ability to purchase a computer, and the ability to block his transfer to another facility. In so ruling, this court concludes it is unnecessary to recapitulate the district court's careful analysis. *Cf. Buck v. Davis*, 137 S. Ct. 759, 773 (2017) (holding that the straight-forward process of deciding whether a petitioner is entitled to a COA should not be treated

by the Courts of Appeals as tantamount to a merits determination). Accordingly, this court **DENIES** Lynch's request for a COA and **DISMISSES** this appeal.

ENTERED FOR THE COURT

Michael R. Murphy
Circuit Judge

APPENDIX B

(District Court's Order Granting Motion to Dismiss Habeas Corpus Petition)

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF UTAH

SHERMAN ALEXANDER LYNCH, Petitioner, v. SHANE NELSON, Respondent.	Case No. 2:17-CV-00477-DS **ORDER GRANTING MOTION TO DISMISS HABEAS CORPUS PETITION** District Judge David Sam

In this federal habeas action, Petitioner Sherman Alexander Lynch challenges his Utah state convictions. 28 U.S.C.S. § 2254 (2018). The Court denies relief.

BACKGROUND

On October 3, 2007, Petitioner's wife was struck by a vehicle and died. As a result of her death, Petitioner was charged with and convicted of one count each of murder and obstruction of justice. Petitioner unsuccessfully moved for a new trial.

Petitioner's conviction was affirmed on direct appeal. *State v. Lynch*, 246 P.3d 525 (Utah Ct. App. 2011). He did not seek certiorari review.

In 2012, Petitioner hired two private investigators, Terry Steed and Benjamin Warren, to examine his truck and provide affidavits of observations on the truck's condition and interactions with police about the truck.

In 2013, Petitioner filed his first petition under the Utah Post-Conviction Remedies Act (PCRA) in which he raised twenty-eight ineffective-assistance-of-counsel claims and one claim of newly discovered evidence. *Lynch v. State*, 400 P.3d 1047, 1052 (Utah Ct. App. 2017), *cert. denied*, 400 P.3d 1047 (Utah 2017). The post-conviction court denied some of Petitioner's

ineffective-assistance claims as procedurally barred and determined the remaining claims lacked merit. *Id.*

In January 2015, Petitioner filed a second PCRA petition raising eighteen claims of, either police officers planting or tampering with evidence to inculpate him, or prosecutors failing to disclose such false evidence at trial. (Pet., *Lynch v. State*, No. 150900245 (Utah 3rd Dist. Ct., filed Jan. 13, 2015), ECF No. 1.) These claims were all found to be defaulted under PCRA's bar against claims that had already been raised in prior proceedings or that could have been, but were not, raised in prior proceedings. (Order of Summary Affirmance, No. 20160334-CA (Utah Ct. App. Aug. 17, 2016), *cert. denied*, 387 P.3d 511 (Utah 2016).)

PETITIONER'S CLAIMS

Petitioner filed this habeas action on May 25, 2017. His petition sets forth several claims of police and prosecutorial misconduct and of ineffective assistance of counsel.

Petitioner's **claims of police and prosecutorial misconduct** include the following:

(1) Police replaced the victim's pants with different pants containing doctored evidence and the prosecution knowingly put on false testimony about the pants. (Pet., claims 1-2.)

(2) Prosecutors knowingly allowed police witnesses to lie about a tow hook on Petitioner's truck. (Pet., claims 3-4.)

(3) Prosecutors knowingly allowed police to lie about zip-ties being used to secure the hood of the truck. (Pet., claim 5.)

(4) Prosecutors knowingly presented false testimony about the height of the victim's back injuries. (Pet., claim 6.)

(5) Police and prosecutors knowingly replaced the medical examiner's autopsy diagram with an inaccurate, doctored diagram. (Pet., claim 6.)

(6) Police and prosecutors knowingly presented false testimony about the truck-hood damage's consistency with the victim's impact. (Pet., claims 8-10.)

(7) Police and prosecutors knowingly presented false testimony about the paint analyst's "final report." (Pet., claim 11.)

Petitioner's **claims of ineffective assistance of counsel** include the following deficiency allegations:

(1) Trial counsel did not examine the truck to identify possible exculpatory evidence, and appellate counsel did not bring this claim on direct appeal.

(2) Trial counsel did not seek paint testing on the zip-ties found at the scene, and appellate counsel did not bring this claim on direct appeal.

(3) Trial counsel did not hire an expert witness to investigate the paint smears and fragments found on the victim's pants.

(4) Trial counsel did not seek possible witnesses--i.e., Maxwell and Ashe.

ANALYSIS

A. Procedural Default

Petitioner's claims of police and prosecutorial misconduct and several of his claims of ineffective assistance of counsel are denied as procedurally defaulted. *White v. Medina*, 464 F. App'x 715, 720 (10th Cir. 2012) (unpublished) ("[D]istrict courts are permitted to raise issues of procedural bar sua sponte.") (citing *Hardiman v. Reynolds*, 971 F.2d 500, 502 (10th Cir. 1992)). The procedural default rule precludes federal review when (1) a state court clearly dismisses an issue on a state procedural ground that is both independent of federal law and adequate to support the judgment, or (2) the petitioner fails to exhaust available state remedies and would be

procedurally barred from presenting the issue in state court. *Coleman v. Thompson*, 501 U.S. 722, 729-32, 735 n.1 (1991).

Petitioner's claims of misconduct (listed above under "a. Petitioner's Claims") were procedurally barred in state court under Utah Code Ann. § 78B-9-106 (2018), as they could have been--but were not--brought in his first PCRA petition. (Order of Summary Affirmance, Doc. No. 32-7,at 1-2.) Petitioner's first and second ineffective-assistance-of-trial-counsel claims (regarding examining truck for exculpatory evidence and testing zip-ties) were appropriately procedurally barred in response to his first PCRA petition for not being brought on direct appeal. *Lynch*, 400 P.3d at 1060-61. Finally, Petitioner's third ineffective-assistance claim (failure to hire expert to test paint residue) and fourth ineffective-assistance claim (regarding only potential witness Ashe) were procedurally barred because they were previously raised in his new trial motion, but never presented to the Utah Supreme Court. *Lynch*, 400 P.3d at 1055-56 (paint); 400 P.3d at 1058 (Ashe); *see Parkhurst v. Shillinger*, 128 F.3d 1366, 1370 (10th Cir. 1997) ("Where the reason a petitioner has exhausted his state remedies is because he has failed to comply with a state procedural requirement for bringing the claim, there is a further and separate bar to federal review, namely procedural default.")

Exceptions to Procedural Default

Procedurally defaulted claims may be reviewed only if "the petitioner can demonstrate cause and prejudice or a fundamental miscarriage of justice." *Thomas v. Gibson*, 218 F.3d 1213, 1221 (10th Cir. 2000) (alteration omitted) (citation omitted). Petitioner does not meet his burden of showing his entitlement to either exception on any of his claims.

1. Cause and Prejudice. Petitioner has asserted ineffective assistance of appellate counsel as cause to overcome the procedural default of his first and second ineffective-

assistance-of-trial-counsel claims. Because his ineffective-assistance-of-appellate-counsel claims are not meritorious (as addressed under 'Application of Standard of Review' below), the first and second claims regarding trial counsel remain procedurally defaulted.

2. Actual Innocence. Petitioner asserts actual innocence under the miscarriage-of-justice exception as the means to overcoming the procedural default of his remaining claims. An actual-innocence claim must be grounded on reliable evidence not adduced at trial and the petitioner must show that "it is more likely than not that no reasonable juror would have convicted him in light of the new evidence." *Calderon v. Thompson*, 523 U.S. 538, 559 (1998) (quoting *Schlup v. Delo*, 513 U.S. 298, 327 (1995)); *Johnson v. Medina*, 547 F. App'x 880, 885 (10th Cir. 2013) (requiring new evidence for showing of actual innocence).

Petitioner's assertions of actual innocence fail because they have not been supported by new, reliable evidence. Petitioner points to a number of sources of "new evidence" to support this claim, including: (1) testimony and exhibit evidence on the victim's pants; (2) private investigators' testimony of a conversation with Detectives Anderson and Ipson about the zip-ties' origins; (3) evidence of the location of the victim's back injuries; (4) private investigators' testimony about the truck damage; (5) evidence about the grill of the truck vis-a-vis the location of the victim's injuries; (6) private-investigator testimony about truck oxidation; (7) evidence that potential witness Maxwell saw a red truck in the area of the accident (8) evidence that potential witness Ashe overheard a conversation about a hit and run; (9) testimony that the DNA evidence on the truck did not match the victim; (10) evidence about paint and paint analysis. However, the evidence presented in 1, 3, 7, 8, 9, and 10 is not new, but was presented and considered at trial.

Petitioner's evidence in 2, 4, 5, and 6 involve evidence of Detective Anderson's notes made during the victim's autopsy which were not presented during trial and testimony of private investigators Warren and Steed--hired by Petitioner--during a hearing in a state post-conviction proceeding about the condition of the truck and the origins of the zip-ties.

As noted by the Utah Court of Appeals, there is no apparent conflict between the notes made by Detective Anderson and the truck's grille. *Lynch*, 400 P.3d at 1061.

Regarding Steed and Warren's testimony, the court of appeals aptly noted the significant contrary evidence presented at trial and the contradictions within Steed's testimony itself. *Id.*at 1065-68. While Steed testified that he saw "no physical evidence suggesting that the front grille had sustained any damage," Detective Anderson testified that the damage to the truck was "exactly the kind of damage" expected in such a collision. Additionally, Petitioner had not tried to show that the truck was kept in the same condition from 2007 to 2012. Steed and Warren also testified that in February 2012, Detective Anderson stated that no zip-ties were on the scene of the collision when he arrived. However, on cross-examination, Steed also stated that he could not be completely certain "without any reservation" that it was Detective Anderson who stated there were no zip-ties at the scene.

While some of the evidence presented by Detective Anderson's notes and by the testimonies of Warren and Steed is certainly favorable to Petitioner, due to the somewhat contradictory nature of the Steed's testimony and the weight of other evidence provided against Petitioner at trial, this new evidence alone is insufficient to determine that "it is more likely than not that *no reasonable juror* would have convicted [Lynch] in light of [this] new evidence." *Calderon*, 523 U.S. at 559 (emphasis added). As such, this Court does not reach the merits of the procedurally defaulted claims.

B. Merits

1. Standard of Review

The standard of review to be applied in federal habeas cases is found in § 2254, of the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), under which this habeas petition is filed:

> (d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim--
> (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.S. § 2254(d) (2018).

The Court's inquiry centers on whether the Utah Court of Appeals's rejection of Petitioner's claims "was contrary to, or involved an unreasonable application of, clearly established Federal law." 28 U.S.C.S. § 2254(d)(1) (2018). This "highly deferential standard," *Cullen v. Pinholster*, 131 S. Ct. 1388, 1398 (2011) (citations omitted); *see also Littlejohn v. Trammell*, 704 F.3d 817, 824 (10th Cir. 2013), is "'difficult to meet,' because the purpose of AEDPA is to ensure that federal habeas relief functions as a 'guard against extreme malfunctions in the state criminal justice systems,' and not as a means of error correction." *Greene v. Fisher*, 132 S. Ct. 38, 43-44 (2011) (quoting *Harrington v. Richter*, 131 S. Ct. 770, 786 (2011) (quoting *Jackson v. Virginia*, 443 U.S. 307, 332 n.5 (1979) (Stevens, J., concurring in judgment)). The Court is not to determine whether the court of appeals's decision was correct or whether this

Court may have reached a different outcome. *See Lockyer v. Andrade*, 538 U.S. 63, 75-76 (2003). "The role of federal habeas proceedings, while important in assuring that constitutional rights are observed, is secondary and limited." *Barefoot v. Estelle*, 463 U.S. 880, 887 (1983). And, "[t]he petitioner carries the burden of proof." *Cullen*, 131 S. Ct. at 1398.

Under *Carey v. Musladin*, 549 U.S. 70 (2006), the first step is determining whether clearly established federal law exists relevant to Petitioner's claims. *House*, 527 F.3d at 1017-18; *see also Littlejohn*, 704 F.3d at 825. Only after answering yes to that "threshold question" may the Court go on to "ask whether the state court decision is either contrary to or an unreasonable application of such law." *Id.* at 1018.

> [C]learly established [federal] 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.

Id. at 1016.

Further, "in ascertaining the contours of clearly established law, we must look to the *holdings* as opposed to the dicta, of [the Supreme] Court's decisions as of the time of the relevant state-court decision." *Littlejohn*, 704 F.3d at 825 (quoting *Yarborough v. Alvarado*, 541 U.S. 652, 660-61 (2004) (emphasis added) (citations omitted)). And, in deciding whether relevant clearly established federal law exists, this Court is not restricted by the state court's analysis. *See Bell v. Cone*, 543 U.S. 447, 455 (2005) ("[F]ederal courts are not free to presume that a state court did not comply with constitutional dictates on the basis of nothing more than a lack of citation.").

If this threshold is overcome, this Court may grant habeas relief only when the state court has "unreasonably applied the governing legal principle to the facts of the petitioner's

case." *Walker v. Gibson*, 228 F.3d 1217, 1225 (10th Cir. 2000) (citing *Williams v. Taylor*, 529 U.S. 362, 412-13 (2000)). This deferential standard does not let a federal habeas court issue a writ merely because it determines on its own that the state-court decision erroneously applied clearly established federal law "[r]ather that application must also be unreasonable." *Id.* (quoting *Williams*, 529 U.S. at 411). This highly demanding standard was meant to pose a sizable obstacle to the habeas petitioner. *Harrington*, 131 S. Ct. at 786. To prevail in 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 fair minded disagreement." *Id.* at 786-87. It is against this backdrop that this Court now applies the standard of review to the circumstances of this case.

2. Application of Standard of Review

Three ineffective-assistance-of-counsel claims remain in this case. The first two claims of ineffective assistance of trial counsel are procedurally barred *unless* the Utah Court of Appeals unreasonably held petitioner's appellate counsel was not deficient for not bringing them on appeal (as mentioned briefly above under "Procedural Default.") The third remaining claim of ineffective assistance of counsel relates to trial counsel's choice to not follow up with possible witness Maxwell.

a. Ineffective Assistance of Appellate Counsel. Petitioner asserts that his appellate counsel was deficient for not bringing claims of ineffective assistance against trial counsel for (i) not examining the truck and (ii) for not obtaining paint testing on the white substance found in the zip-ties at the scene. In addressing the actions of petitioner's appellate counsel, the Utah Court of Appeals correctly selected and applied the familiar two-pronged standard of *Strickland v. Washington*, 466 U.S. 668 (1984): (1) deficient performance by counsel, measured by a

"court must indulge a 'strong presumption' that counsel's conduct falls within the wide range of reasonable professional assistance") (citations omitted).

ii. Paint Testing of Zip-ties. In evaluating this issue under Supreme Court precedent, the Utah Court of Appeals stated:

> Lynch argues that appellate counsel should have raised a claim that trial counsel were ineffective for failing to "have the zip ties tested for the presence of paint."
>
> Even if we assume appellate counsel performed deficiently in failing to raise this claim, Lynch has not shown that he was prejudiced by appellate counsel's performance, because he has not shown that raising this claim "probably would have resulted in reversal on appeal." *See Kell v. State*, 194 P.3d 913 (citation and internal quotation marks omitted [but ultimately citing back to *Strickland* standard]). Indeed, Lynch has not even asserted that reversal on appeal was likely if appellate counsel had raised this claim, let alone explained why. And as the State correctly points out, Lynch has "proffered nothing that showed that if the zip tie had been tested, the test would have shown that the white substance was not paint that matched the paint on his truck." (Emphasis in original.) Consequently, Lynch has failed to carry his burden of establishing that appellate counsel was ineffective for failing to raise this claim. *See Ross v. State*, 293 P.3d 345 (explaining that a petitioner bears the burden of establishing ineffective assistance of appellate counsel).

Lynch, 400 P.3d at 1061-62.

Under the standard of review, Petitioner must show that the Utah Court of Appeals unreasonably applied the Supreme Court's *Strickland* precedent in this case, but, again, Petitioner does not address the court's analysis. He still has not offered any evidence to show that a test of the white substance on the zip-ties would have helped his case, or that such a claim would have been likely to result in reversal on appeal. Most importantly, again, Petitioner does not suggest any United States Supreme Court on-point case law exists that is at odds with the court of appeals's result. And, this Court's review of Supreme-Court case law reveals none. *See, e.g., Bell v. Cone*, 535 U.S. 685, 702 (2002) (stating the "court must indulge a 'strong

presumption' that counsel's conduct falls within the wide range of reasonable professional assistance") (citations omitted).

As Petitioner's claims of ineffective assistance of appellate counsel do not pass muster under the federal habeas standard of review, this Court is prevented from reaching a merits review of the underlying claims of ineffective assistance of trial counsel (listed above in the first and second ineffective-assistance claims under "Procedural Default").

b. Ineffective Assistance of Trial Counsel. The final remaining claim of ineffective assistance of counsel regards trial counsel's choice to not follow up with possible witness Maxwell. Again, the court of appeals correctly selected and applied the familiar two-pronged *Strickland* standard: (1) deficient performance by counsel, measured by a standard of "reasonableness under prevailing professional norms"; and, (2) prejudice to the defense caused by counsel's deficient performance. 466 U.S. at 687-88. The prejudice element requires errors so severe as to rob the Petitioner of a fair proceeding, with a reliable, just result. *Id.*

And, again, the Court must now analyze whether the Utah Court of Appeals's application of *Strickland* to trial counsel's actions was reasonable. In evaluating this issue under Supreme Court precedent, the court of appeals stated:

> The record indicates that trial counsel cross-examined both Detectives Anderson and Adamson about Maxwell and the red truck. And during opening statement and closing argument, trial counsel highlighted the State's failure to investigate other potential leads, including the red truck observed by Maxwell. For example, during opening statement, trial counsel stated:
>
> > At this same time there are witnesses that hear a loud bump. However, there are also witnesses who witnessed trucks—a red truck, a diesel truck, a white truck with lettering on it and a phone number—all kinds of different things.
> >
> > What you're not going to hear is

> Lastly, Lynch asserts that trial "counsel's investigation would have [revealed] exculpatory evidence in the form of an undamaged grille with different dimensions than the marks on [Victim's] body." Again, we conclude that this issue would not have been obvious from the trial record. Specifically, during closing argument, trial counsel highlighted that there was no evidence that the truck's grille was damaged...
>
> ...Given that the trial record, including Lynch's own testimony, indicates that trial counsel had specifically alerted the jury to the fact that there was no evidence of damage to the truck's grille, an ineffective-assistance claim on this point would not have been obvious to appellate counsel, nor would raising it likely have resulted in reversal on appeal. *See Kell*, 194 P.3d 913. And with regard to Lynch's claim about the dimensions of the grille as compared to the marks on Victim's body, Lynch cites, without further explanation, to Steed's affidavit, an accompanying picture of the truck's grille, and to notes made by Detective Anderson during Victim's autopsy. There is, however, no apparent conflict between Detective Anderson's notes and the 2012 picture of the truck's grille...
>
> We conclude, with regard to the truck examination claims, that Lynch has not demonstrated that appellate counsel missed an obvious issue from the trial record that probably would have resulted in reversal on appeal. *See id.* As a result, Lynch has not demonstrated that appellate counsel was ineffective for omitting these claims on direct appeal. *See id.*

Lynch, 400 P.3d at 1060-61.

Under the standard of review, Petitioner must show that the Utah Court of Appeals unreasonably applied the Supreme Court's *Strickland* precedent in this case, but Petitioner does not address any of the analysis by the court of appeals to his case. He does not address the court's reliance on facts such as the contradictory testimony highlighted by the court, the concessions made by Petitioner throughout the record, or the statements made by trial counsel relating to the very issues Petitioner says were not addressed due to lack of investigation of the truck. Most importantly, Petitioner does not suggest any United States Supreme Court on-point case law exists that is at odds with the court of appeals's result. And, this Court's review of Supreme-Court case law reveals none. *See, e.g., Bell v. Cone*, 535 U.S. 685, 702 (2002) (stating

> what the officers did to follow up on those. You're going to hear evidence about people who did come forward and said, we saw a white truck, two males in it, they looked like two Hispanic males. There are a lot of landscaping trucks in this area. They go back and forth, look for one where these men match this description. Again, no follow-up.

Although trial counsel likely could have further investigated Maxwell or called him to testify at trial, trial counsel may well have made a reasonable tactical choice not to do so. ... "[S]trategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation." *Strickland*, 466 U.S. at 690–91... In this case, trial counsel, with their limited time and resources, could reasonably have seen little value in tracking down a witness who did not actually observe the incident, but who only saw a red truck in the vicinity. Instead, trial counsel could have reasonably chosen to highlight the fact that investigators had not pursued certain leads, including Maxwell's lead about the red truck, and to use that information to suggest that the State's investigation was incomplete. We conclude that this strategy was not objectively unreasonable and that trial counsel did not perform deficiently by refraining from further investigating Maxwell or calling him to testify at trial.

We also note that beyond Lynch's bare assertion that "counsel's further investigation into different explanations of the events might well have borne fruit," Lynch has not provided a description as to what Maxwell would have testified to at trial or explained how that testimony "probably would have resulted in reversal on appeal." *See Kell*, 194 P.3d 913 (citation and internal quotation marks omitted). Indeed, we agree with the State that "Lynch's claim about [Maxwell] is ultimately speculative."... At its core, Lynch's argument is essentially that, notwithstanding all of the evidence linking him and his truck to the collision with Victim, a jury would have acquitted Lynch if it had simply heard that someone in the area heard "a loud noise like [a] ... truck ... had hit a speed bump or a pothole" and saw "a large red truck driving by" around the time of the collision. We are not persuaded, nor is it probable that the jury would have been.

Because a claim that trial counsel were ineffective in this

> regard would not have likely resulted in reversal on appeal, Lynch was not prejudiced by appellate counsel's failure to raise it. *See Kell*, 194 P.3d 913.

Lynch, 400 P.3d at 1063–64.

Once more, Petitioner does not argue that the Utah Court of Appeals unreasonably applied the standard of *Strickland*, but simply restates his belief that trial counsel's choice to not follow up with Maxwell was inherently a deficient performance. He does not address the court of appeals's determination that it is not "probable that the jury would have been" persuaded by direct testimony that a large red truck was seen driving in the area, and this Court is not persuaded that such a determination was unreasonable. Most importantly, Petitioner does not suggest any United States Supreme Court on-point case law exists that is at odds with the court of appeals's result. And, this Court's review of Supreme-Court case law reveals none.

Based on this court's reading of Supreme Court precedent, the Utah Court of Appeals reasonably determined (i) that appellate counsel's failure to bring ineffective-assistance-of-trial-counsel claims did not constitute deficient performance and (ii) that trial counsel's choice to not follow up with possible witness Maxwell did not constitute deficient performance. This Court denies habeas relief of the basis of ineffective assistance of counsel.

CONCLUSION

Petitioner's claims are either procedurally defaulted or do not pass muster under the federal habeas standard of review.

IT IS THEREFORE ORDERED that Respondent's motion to dismiss is GRANTED. (Doc. No. 32.) The petition for writ of habeas corpus is DENIED and this action is DISMISSED WITH PREJUDICE.

IT IS FURTHER ORDERED that a certificate of appealability is DENIED.

IT IS FINALLY ORDERED that Petitioner's Motion to Order Respondent to Provide Law Library or Legal Assistance is DENIED. (Doc. No. 58.) A legal-access claim such as the one Petitioner suggests is not appropriate in this habeas-corpus case but would be more properly addressed in a civil-rights complaint regarding conditions of confinement.

This action is CLOSED.

DATED this 21st day of November, 2018.

BY THE COURT:

David Sam

DAVID SAM
Senior Judge
United States District Court

APPENDIX C

(Court of Appeals' Order Denying Petition For Rehearing of Order Denying COA)

FILED
United States Court of Appeals
Tenth Circuit

March 25, 2019

Elisabeth A. Shumaker
Clerk of Court

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

SHERMAN ALEXANDER LYNCH,

Petitioner - Appellant,

v.

SHANE NELSON,

Respondent - Appellee.

No. 18-4174

ORDER

Before **CARSON**, **BALDOCK**, and **MURPHY**, Circuit Judges.

This matter is before the court on Appellant's *Motion to Submit Out of Time Petition for Rehearing of Order Denying Application for Certificate of Appealability* and his *Petition for Rehearing of Order Denying Certificate of Appealability*. The motion to submit the petition out of time is granted. The Clerk shall file the petition as of the date it was received.

Appellant's petition for rehearing is denied.

Entered for the Court

Elisabeth A. Shumaker

ELISABETH A. SHUMAKER, Clerk