FILED
United States Court of Appeals
Tenth Circuit

July 15, 2019

Elisabeth A. Shumaker
Clerk of Court

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

BYRON GAY,

Petitioner - Appellant,

v.

SCOTT DAFFENBACH, Warden, Fremont Correctional Facility; THE ATTORNEY GENERAL OF THE STATE OF COLORADO,

Respondents - Appellees.

No. 18-1435
(D.C. No. 1:18-CV-00188-RBJ)
(D. Colo.)

ORDER DENYING CERTIFICATE OF APPEALABILITY*

Before **HOLMES**, **BACHARACH**, and **McHUGH**, Circuit Judges.

Mr. Byron Gay was convicted in Colorado district court. After unsuccessfully appealing and collaterally challenging the conviction in state court, Mr. Gay sought habeas relief in federal district court. That court denied relief, and Mr. Gay wants to appeal. To do so, he requests a certificate of appealability and leave to proceed in forma pauperis.

* Our order does not constitute binding precedent except under the doctrines of law of the case, res judicata, and collateral estoppel. But the order may be cited for its persuasive value if otherwise appropriate. *See* Fed. R. App. P. 32.1(a) and 10th Cir. R. 32.1(A).

Certificate of Appealability

We deny the request for a certificate of appealability.

1. Mr. Gay is convicted based on a DNA match.

The conviction grew out of a burglary in Colorado. The homeowners and two guests returned home, and the burglar fled through a bedroom window. The police quickly arrived to investigate, and the guests described the burglar as a white male. The police later tested the DNA samples from an imprint on a kitchen window and matched the DNA to Mr. Gay, who is African-American. The trial court convicted Mr. Gay of second-degree burglary, theft, and criminal mischief.

2. Mr. Gay is not entitled to a certificate of appealability on the claims involving actual innocence, insufficiency of the evidence, and unreliability of the evidence.

In part, Mr. Gay sought habeas relief based on actual innocence, insufficiency of the evidence, and unreliability of the evidence. The district court rejected these claims on the merits, and Mr. Gay wants to appeal these rulings. To do so, he needs a certificate of appealability. *See* 28 U.S.C. § 2253(c) (requiring a certificate of appealability for an appeal). We can issue the certificate on these claims only if reasonable jurists would regard the district court's rulings as debatable or wrong on the merits. *Slack v. McDaniel*, 529 U.S. 473, 484 (2000). Mr. Gay cannot satisfy this standard.

In our circuit, "actual innocence does not constitute a freestanding basis for habeas relief." *Farrar v. Raemisch*, 924 F.3d 1126, 1131 (10th Cir. 2019). Thus, no reasonable jurist would regard the district court's ruling on Mr. Gay's claim of actual innocence as debatable or wrong.

Nor could reasonable jurists debate Mr. Gay's claim involving insufficiency of the evidence. For this claim, the underlying test is whether a rational fact-finder could have found the essential elements of guilt. *Jackson v. Virginia*, 443 U.S. 307, 319 (1979). In applying this test, we view the evidence in the light most favorable to the prosecution. *Id.* And viewing the DNA evidence favorably to the prosecution, a fact-finder could reasonably have found guilt.

Mr. Gay contends that some of the DNA evidence should have been excluded. But when the petitioner challenges the sufficiency of the evidence, we consider all of the evidence even if some of it should have been excluded. *McDaniel v. Brown*, 558 U.S. 120, 130-31 (2010) (per curiam). Thus, Mr. Gay's contention does not render the ruling debatable or wrong.

Mr. Gay also disputes the way that the state appellate court considered the DNA evidence. That court concluded that the defense had essentially conceded the existence of a DNA match by admitting that Mr. Gay's partial DNA profile had been found on the kitchen window. Mr. Gay argues that the state appellate court should not have relied on

defense counsel's concession. To prevail on habeas relief, however, Mr. Gay must show that the state appellate court's rationale was contrary to or an unreasonable application of clearly established federal law as determined by the Supreme Court. 28 U.S.C. § 2254(d)(1). And Mr. Gay has not identified any Supreme Court case law restricting state courts from deeming defense counsel's concessions as binding on the client. So no reasonable jurist would regard this ruling as contrary to, or an unreasonable application of, Supreme Court precedent. We thus deny a certificate of appealability on this claim.

3. Mr. Gay is not entitled to a certificate of appealability on his procedurally barred habeas claim involving ineffective assistance of counsel.

In district court, Mr. Gay also claimed that his trial counsel had been ineffective in failing to hire a DNA expert. The district court deemed this claim procedurally barred. To obtain a certificate of appealability on this issue, Mr. Gay must show that the district court's procedural ruling was at least reasonably debatable. *Slack v. McDaniel*, 529 U.S. 473, 484 (2000). Mr. Gay cannot clear this hurdle.

He brought this claim when appealing the denial of his collateral challenge in state court. The state appellate court declined to consider the claim, reasoning that Mr. Gay had to present the claim in state district court. Given this procedural defect, the federal district court deemed the claim procedurally barred unless Mr. Gay could show cause and prejudice.

Mr. Gay argued that cause and prejudice existed based on a lack of counsel in state district court. The federal district court rejected this argument, and we conclude that this ruling is not reasonably debatable.

Mr. Gay has not presented any evidence that a DNA expert would have provided favorable testimony. Given the absence of such evidence, we conclude that Mr. Gay failed to present a reasonably debatable theory of prejudice.[1] In the absence of prejudice, the claim of ineffective assistance is clearly procedurally barred. We thus deny a certificate of appealability on this claim. *See Boyle v. McKune*, 544 F.3d 1132, 1138 (10th Cir. 2008) (holding that the petitioner had not shown prejudice from counsel's failure to call expert witnesses when the petitioner had not identified helpful testimony that the witnesses would have provided).

* * *

Given the absence of a reasonably debatable ruling in district court, we decline to issue a certificate of appealability. The lack of a certificate requires us to dismiss the appeal.

Leave to Proceed In Forma Pauperis

Though we dismiss the appeal, we must address Mr. Gay's motions for leave to proceed in forma pauperis. *See Clark v. Oklahoma*, 468 F.3d

---

[1] Given the absence of prejudice, we need not decide whether Mr. Gay has shown cause.

711, 715 (10th Cir. 2006) (stating that a petitioner remains obligated to pay the filing fee after denial of a certificate of appealability). To obtain leave to proceed in forma pauperis, Mr. Gay must show that he

- lacks the money to prepay the filing fee and
- brings the appeal in good faith.

28 U.S.C. § 1915(a)(1), (a)(3).

He satisfies both requirements, for he has no assets and we have no reason to question Mr. Gay's good faith even though the rulings are not reasonably debatable. *See Moore v. Pemberton*, 110 F.3d 22, 24 (7th Cir. 1997) (per curiam) (stating that the petitioner's burden for a certificate of appealability "is considerably higher" than the burden of "good faith" for leave to proceed in forma pauperis). As a result, we grant leave to proceed in forma pauperis. *See Watkins v. Leyba*, 543 F.3d 624, 627 (10th Cir. 2008) (granting leave to proceed in forma pauperis notwithstanding the denial of a certificate of appealability); *Yang v. Archuleta*, 525 F.3d 925, 931 & n.10 (10th Cir. 2008) (same).

NO PREPAY-MENT OR docket FEE Required on 2254

Entered for the Court

Robert E. Bacharach
Circuit Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Case No. 18-cv-00188-RBJ

BYRON GAY,

Petitioner,

v.

SCOTT DAFFENBACH, Warden, Fremont Correctional Facility, and
THE ATTORNEY GENERAL OF THE STATE OF COLORADO,

Respondents.

FINAL JUDGMENT

PURSUANT to and in accordance with Fed. R. Civ. P. 58(a) and the Order on Application for Writ of Habeas Corpus entered by the Honorable R. Brooke Jackson on October 11, 2018, and incorporated herein by reference as if fully set forth, it is

ORDERED that the Application for a Writ of Habeas Corpus Pursuant to 28 U.S.C. § 2254 is DENIED. It is

FURTHER ORDERED that this action is DISMISSED WITH PREJUDICE. It is

FURTHER ORDERED that final judgment is hereby entered in favor of Respondents Scott Daffenbach and The Attorney General of the State of Colorado and against Petitioner Byron Gay. It is

FURTHER ORDERED that no certificate of appealability shall issue because Applicant has not made a substantial showing of the denial of a constitutional right. 28 U.S.C. § 2253(c)(2); Fed. R. Governing Section 2254 Cases 11(a); *Slack v. McDaniel*, 529 U.S. 473, 483-85 (2000).

DATED at Denver, Colorado this 11th day of October, 2018.

FOR THE COURT:

JEFFREY P. COLWELL, CLERK

By: s/E. Buchanan
E. Buchanan, Deputy Clerk

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

Civil Action No. 18-cv-00188-RBJ

BYRON GAY,

Applicant,

v.

SCOTT DAFFENBACH, Warden, Fremont Correctional Facility, and
THE ATTORNEY GENERAL OF THE STATE OF COLORADO,

Respondents.

ORDER ON APPLICATION FOR WRIT OF HABEAS CORPUS

Applicant, Byron Gay, has filed *pro se* an Application for a Writ of Habeas Corpus Pursuant to 28 U.S.C. § 2254 (Docket No. 1) challenging the validity of his criminal conviction in the District Court of Arapahoe County, Colorado. Having considered the Respondents' Answer (Docket No. 22), the Applicant's two-part Reply (Docket Nos. 32, 33), and the state court record, the Court will deny the Application.

I. Factual and Procedural Background

In July 2010, Applicant was convicted by a jury in Arapahoe County District Court Case No. 09CR959 of second-degree burglary, theft, criminal mischief, and five habitual criminal counts. (Docket No. 13-1 at 8). The Colorado Court of Appeals summarized the evidence at Applicant's trial as follows:

> The victims returned home a few hours after having gone out to dinner and saw signs of a burglary in the house. When they walked further inside, a person ran by them and jumped out a bedroom window. Later,

they described him as a white male. They did not see anyone else in or around the house.

Police officers arrived within a few minutes but could not locate any suspects in the house or in the surrounding neighborhood. Their investigation revealed that the bedroom window and a kitchen window had been pried open. A screen from the kitchen window had been removed and was on the floor. The inside of the inner pane of the kitchen window bore a large smudge that appeared to have been caused by a forearm having been pressed against the glass.

A technician swabbed the smudge to collect material for DNA analysis. An expert in DNA analysis (DNA expert), using polymerous chain reaction (PCR) testing, developed a partial DNA profile from this material, obtaining results from ten of fourteen locations on the DNA. This partial DNA profile had a "possible match" to defendant in the DNA database.

An investigator contacted defendant, an African-American male, and obtained saliva for DNA testing. Defendant's full DNA profile developed from the saliva matched, at the ten locations, the partial DNA profile developed from the smudge on the window.

Then an investigator showed the victims a photograph of defendant to determine if they had ever invited defendant into their home, to possibly explain the presence of his DNA in their home. The victims did not recognize him.

One of the victims testified that the smudge had not been on the window when the victims had left the house to go to dinner. An investigator testified that based on the location of the smudge—high up on the window about the kitchen sink—the smudge had probably been left by the burglar. The DNA expert testified that the probability of selecting a person randomly from the population having the same partial DNA profile would be approximately 1 in 25 billion African-Americans, 1 in 520 billion Caucasians, and 1 in 33 trillion Southwestern Hispanics (random match probability statistics).

The trial court denied defendant's motion for judgment of acquittal for insufficient evidence. After the jury found defendant guilty, the court adjudicated him a habitual criminal.

People v. Byron Kyle Gay, No. 11CA0404 (Colo. App. Aug. 21, 2014) unpublished) (*Gay I*) (Docket No. 11-5 at 3-5). Applicant was sentenced to an aggregate

48-year prison term. (Docket No. 13-1 at 6). The Colorado Court of Appeals affirmed Applicant's convictions. (*Gay I*, Docket No. 11-5). Applicant's petition for certiorari review was denied by the Colorado Supreme Court on June 22, 2015. (Docket No. 13-7). Applicant did not seek certiorari review in the United States Supreme Court.

Applicant filed a motion for post-conviction relief on March 25, 2016, which the state district court denied on May 19, 2016. (Docket No. 13-1 at 3, 4). The Colorado Court of Appeals affirmed in *People v. Byron Kyle Gay*, No. 16CA1090 (Colo. App. Oct. 12, 2017) (unpublished) (*Gay II*). (Docket No. 13-11). Applicant did not file a petition for certiorari review in the Colorado Supreme Court.

Applicant initiated this § 2254 proceeding on January 24, 2018. He asserts the following claims for relief in the Application:

(1) The evidence was insufficient to establish that Applicant was the perpetrator of the charged offenses, and, therefore, his conviction violated due process.

(2) The Colorado Court of Appeals rejected Applicant's argument re: the reliability of the DNA evidence based on an erroneous finding that defense counsel's closing argument constituted a judicial admission, "thereby conceding [Applicant's] guilt."

(3) Trial counsel was constitutionally ineffective in: (a) failing to have biased jurors removed from the jury panel during voir dire; (b) failing to obtain a DNA expert; and (c) erroneously conceding Applicant's guilt.

(4) Applicant is actually innocent.

(Docket No. 1 at 5-7).

Respondents conceded in a pre-answer response that the Application is timely under the one-year limitation period set forth in 28 U.S.C. § 2244(d), and that Applicant exhausted state court remedies for claims 1 and 2. (Docket No. 11 at 3-6, 11-12).

Respondents argued, however, that all three sub-claims in claim 3 were procedurally defaulted in the state courts (*id.* at 12-15), and that claim 4 does not present a constitutional claim cognizable on federal habeas review (*id.* at 16-17).

In an April 20, 2018 Order, the Court dismissed claim 4 of the Application because the Supreme Court has never recognized a free-standing constitutional claim of actual innocence in a non-capital case. (Docket No. 16). Sub-claim 3(c) was dismissed as procedurally barred. (*Id.*). The Court directed Respondents to file an Answer that fully addressed the merits of Applicant's properly exhausted claims 1 and 2, as well as whether the procedurally defaulted ineffective assistance of counsel allegations in sub-claims 3(a) and 3(b) have substantial merit under *Martinez v. Ryan*, 566 U.S. 19 (2012).

The Court addresses claims 1, 2 and sub-claims 3(a) and 3(b) below.

II. Applicable Legal Standards

A. 28 U.S.C. § 2254

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). The applicant 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 the applicant seeks to apply a rule of law that was clearly established by the Supreme Court at the time of the relevant state court decision. *See Greene v. Fisher*, 565 U.S. 34 (2011). Clearly established federal law "refers to the holdings, as opposed to the dicta, of [the Supreme] Court's decisions as of the time of the relevant state-court decision. *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 pursuant to § 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. Additionally, we have recognized that an unreasonable application may occur if the state court either unreasonably extends, or unreasonably refuses to extend, a legal principle from Supreme Court precedent to a new context where it should apply.

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. In addition,

> 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, 562 U.S. at 101 (internal quotation marks 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.*

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 Harrington*, 562 U.S. at 88 (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.

Harrington, 562 U.S. at 102.

"[R]eview under § 2254(d)(1) is limited to the record that was before the state court that adjudicated the claim on the merits." *Cullen v. Pinholster*, 563 U.S. 170, 181 (2011).

The court reviews claims asserting 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 federal 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 the petitioner 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)).

The federal habeas court applies a *de novo* standard of review to constitutional claims that were not reviewed on the merits by the state courts. *See Mitchell v. Gibson*, 262 F.3d 1036, 1045 (10th Cir. 2001).

B. *Pro Se* Litigant

Applicant is proceeding *pro se*. The court, therefore, "review[s] his pleadings and other papers liberally and hold[s] them to a less stringent standard than those drafted by attorneys." *Trackwell v. United States*, 472 F.3d 1242, 1243 (10th Cir. 2007) (citations omitted); *see also Haines v. Kerner*, 404 U.S. 519, 520-21 (1972). However, a *pro se* litigant's "conclusory allegations without supporting factual averments are insufficient to state a claim on which relief can be based." *Hall v. Bellmon*, 935 F.2d 1106, 1110 (10th Cir. 1991). A court may not assume that an applicant can prove facts that have not been alleged, or that a respondent has violated laws in ways that an applicant has not alleged. *Associated Gen. Contractors of Cal., Inc. v. Cal. State Council of Carpenters*, 459 U.S. 519, 526 (1983). *Pro se* status does not entitle an applicant to an application of different rules. *See Montoya v. Chao*, 296 F.3d 952, 957 (10th Cir. 2002).

III. Analysis of Claims

A. Claims 1 and 2

For his first claim, Applicant asserts that the evidence was insufficient to establish that he was the perpetrator of the charged offenses, and, therefore, his convictions violated due process. (Docket No. 1 at 5). In claim 2, he maintains that the Colorado Court of Appeals erred in rejecting his argument concerning the reliability of the DNA

evidence based on the findings that defense counsel's statements in closing argument constituted a judicial admission, "thereby conceding [Applicant's] guilt." (*Id.* at 6).

Claims 1 and 2 challenge the sufficiency of the evidence to support Applicant's convictions.

1. controlling federal law

A constitutional challenge to the sufficiency of the evidence is governed by *Jackson v. Virginia*, 443 U.S. 307 (1979). Evidence is sufficient to support a conviction as a matter of due process if, "after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Coleman v. Johnson*, 566 U.S. 650, 654 (2012) (quoting *Jackson*, 443 U.S. at 319) (emphasis in the original). The court looks at both direct and circumstantial evidence in determining the sufficiency of the evidence. *See Lucero v. Kerby,* 133 F.3d 1299, 1312 (10th Cir. 1998); *see also Desert Palace, Inc. v. Costa*, 539 U.S. 90, 100 (2003) ("[W]e have never questioned the sufficiency of circumstantial evidence in support of a criminal conviction, even though proof beyond a reasonable doubt is required.").

A federal habeas court's review under *Jackson* is "sharply limited, and a court faced with a record of historical facts that supports conflicting inferences must presume-even if it does not affirmatively appear in the record-that the trier of fact resolved any such conflicts in favor of the prosecution, and must defer to that resolution." *Turrentine v. Mullin*, 390 F.3d 1181, 1197 (10th Cir. 2004) (quotations and alterations omitted). *See also Messer v. Roberts*, 74 F.3d 1009, 1013 (10th Cir. 1996) (in reviewing

the sufficiency of the evidence, the federal habeas court "may not weigh conflicting evidence nor consider the credibility of witnesses," but must "'accept the jury's resolution of the evidence as long as it is within the bounds of reason.'") (quoting *Grubbs v. Hannigan*, 982 F.2d 1483, 1487 (10th Cir. 1993)). Moreover, in considering a sufficiency of the evidence claim on habeas review, a federal court must consider all of the evidence before the jury "regardless whether that evidence was admitted erroneously." *McDaniel v. Brown*, 558 U.S. 120, 131 (2010).

"[F]ederal courts must look to state law for 'the substantive elements of the criminal offense,' but the minimum amount of evidence that the Due Process Clause requires to prove the offense is purely a matter of federal law." *Johnson*, 566 U.S. at 655.

"[A] federal court may not overturn a state court decision rejecting a sufficiency of the evidence challenge simply because the federal court disagrees with the state court. The federal court instead may do so only if the state court decision was 'objectively unreasonable.'" *Johnson,* 566 U.S. at 651 (quoting *Cavazos v. Smith*, 565 U.S. 1, 2 (2010) (other internal citation omitted).

2. state court proceedings

The Colorado Court of Appeals reviewed Applicant's claim under a state law standard similar to the *Jackson* standard. *See Gay I*, Docket No. 13-5 at 5-6. The state appellate court rejected Applicant's challenge to the sufficiency of the evidence on the following grounds:

> Initially, we address defendant's challenge to the reliability the DNA evidence. For example, he emphasized that a relatively small amount of DNA was present in the material swabbed from the kitchen window; the

DNA expert could only develop a partial DNA profile; and DNA can degrade over time from exposure to environmental conditions.

We reject this argument because defense counsel conceded during closing argument that defendant's DNA was on the window, stating,

> The DNA in this case provides nothing more than the fact that Mr. Gay's partial DNA profile was found on a window in the home. End of story. That's what [the prosecution has] established in this trial . . . . They haven't proven when, why, or how it got there. And that's their obligation, to prove to you when, why, and how it got there. . . . The DNA that was collected off this window could have been there for any amount of time. There has been absolutely no testimony to suggest when Mr. Gay's DNA got on that window.

See People v. Rivers, 727 P.2d 394, 400 (Colo. App. 1986) (the defendant's concession during closing argument of his identity as the person who killed the victim rendered harmless any error in the admission of similar transaction evidence); *see also Gordon v. Benson*, 925 P.2d 775, 781 (Colo. 1996) (Counsel's statement during closing argument constitutes a judicial admission or concession if it is "a deliberate declaration for the purpose of dispensing with proof of a formal matter about which there was no dispute.").

Still, defendant argues that his DNA may have already been present on the window when the smudge was placed on it. That theory is speculative and unsupported by any evidence. *See Clark* [*v. People*], 232 P.3d [1287], 1292 [(Colo. 2010)] (The rule that the prosecution need not exclude every reasonable hypothesis other than that of guilt does not improperly shift the burden of proof to the defendant, and "once the prosecution has established its case, 'the defendant remains quiet at his peril.") (quoting *Holland v. United States*, 348 U.S. 121, 138-39 (1954)).

Defendant also points to testimony from the DNA expert regarding secondary transfer of DNA, implying that the burglar (not defendant) may have had defendant's DNA on his forearm when he pressed his forearm against the window. This theory, also, was speculative and unsupported by any specific evidence. *See id.* And it is undercut by the DNA expert's testimony that only one person's DNA was found in the material swabbed from the kitchen window.

The evidence, viewed in the light most favorable to the prosecution, proved the following:

- the smudge was caused by someone pressing his forearm against the window;
- the forearm imprint was made on the window during the burglary;
- the smudge included only defendant's DNA.

Thus, the evidence, viewed in the light most favorable to the prosecution, afforded a sufficient basis for a reasonable jury to have concluded that defendant had pressed his forearm against the inside of the kitchen window during the burglary.

In so concluding, the jury would have had to also conclude that either defendant had been in the house along with the burglar whom the victims accurately described or that defendant had been the sole intruder and their description was inaccurate. No evidence other than the smudge supports the former conclusion. However, we cannot discount the possibility that the jury came to the latter conclusion. *See Bernal v. People*, 44 P.3d 194, 190 (Colo. 2002) (quoting a publicly available study concluding that "eyewitness identification evidence is among the least reliable forms of evidence.").

To be sure, this is a close case because only the DNA evidence linked defendant to the burglary. He argues that cases such as *Clark* and *People v. Harland*, 251 P.3d 515 (Colo. App. 2010), which upheld convictions based on DNA evidence, are inapposite because they included other evidence of guilt supporting the jury's verdicts. *See Clark*, 232 P.3d at 1294; *Harland*, 251 P.3d at 518-19. But we decline his invitation to hold that DNA evidence alone, even in the face of some exculpatory evidence, cannot, as a matter of law, constitute sufficient evidence of guilt.

Courts have long held that evidence of a fingerprint inside a burglarized location, along with evidence indicating that the fingerprint was impressed during the burglary, is sufficient to sustain a burglary conviction. *See People v. Hannaman*, 181 Colo. 82, 84, 507 P.2d 466, 467 (1973); *People v. Angel*, 701 P.2d 149, 151 (Colo. App. 1985); *cf. People v. Ray*, 626 P.2d 167, 171 (Colo. 1982) (the presence of the defendant's fingerprints on the outer surface of the inside door of the victim's milk chute, without any evidence of when the fingerprint was imprinted, was insufficient

to establish that the defendant committed the burglary of the victims' home). Here, the evidence that an intruder pressed his forearm against the inside of the victims' pried-open kitchen window during the burglary, coupled with the DNA match, is analogous to these fingerprint cases.

The judgment is affirmed.

Id. at 6-10.

3. analysis

Applicant does not challenge the sufficiency of the prosecution's evidence to prove that the charged offenses were committed. Rather, he claims that the evidence was insufficient to establish beyond a reasonable doubt that he was the perpetrator. Undisputedly, the only evidence presented at trial to link the Applicant to the crimes was the DNA swabbed from a smudge on the interior pane of the kitchen window in the victims' home.

As an initial matter, the Court finds that the state court record supports the Colorado Court of Appeals' determination that defense counsel conceded during closing argument that Applicant's DNA was on the window. Defense counsel stated: "The DNA in this case proves nothing more than the fact that Mr. Gay's partial DNA profile was found on a window in the home."[1] However, the Court disagrees with Applicant's characterization of defense counsel's statement as an admission of Applicant's guilt. Counsel argued that the DNA evidence did not prove Applicant's guilt because: the prosecution's expert testified that DNA evidence can "live on, for a very long time, on its own, until it's disturbed or removed"; there was no evidence as to when Applicant's DNA

1 State Court Record ("R."), 6/29/10 Trial Tr., at 157 (defense closing argument).

"got on that window"; and, the victims had lived at the house for only a few months.[2]

Even if defense counsel had not conceded in closing argument that the DNA found on the victims' window belonged to Applicant, the DNA evidence presented at trial was independent proof of this fact. The prosecution's DNA expert testified that she obtained a partial DNA profile from the DNA analysis she conducted on a swab taken from the interior pane of the victims' kitchen window.[3] The expert later compared the partial DNA profile obtained from the kitchen window swab to a full DNA profile obtained from Applicant.[4] The state court record reflects the following colloquy between the prosecutor and the State's expert during Applicant's trial:

> Q. Now, what do you do with that?
>
> A. That [full] DNA profile [obtained from Applicant] was then compared to the previously developed partial DNA profile from the kitchen window.
>
> Q. And when you do comparisons of DNA and of profiles, how do you express results?
>
> A. When we do -- or when we report out our results, we first of all say whether or not the DNA profile from the known individual matches or doesn't match the DNA profile from the questioned sample. And then we provide a statistical analysis to allow you to know approximately the number of people that I would need to test in order to find someone who randomly also matched that particular questioned profile.
>
> Q. Now, did the profile you developed from the kitchen window swabs and the profile you developed from the cheek swabs, the buccal swabs, did those match?
>
> A. They did match at the locations in which I obtained results from the kitchen window. So as I said earlier, I only obtained a partial DNA profile from the kitchen window. But in all [ten] of those locations that I obtained a

2 R., 6/29/10 Trial Tr. at 158.
3 *Id.* at 100.
4 *Id.* at 104-07.

result they matched the DNA profile from Mr. Gay at those same locations.

Q. So the person who left DNA on the kitchen window, that -- at those ten places, it matched Byron Gay's DNA?

A. Yes, they do.

Q. Now, you mentioned that you expressed the odds of picking someone at random who matches those. What are the odds of selecting someone at random who has those same genetic indicators at those same ten places?

A. The probability of selecting an unrelated individual at random from the population having this same profile, the same partial profile, is approximately 1 in 520 billion Caucasians, 1 in 25 billion African-Americans, and 1 in 33 trillion Southwestern Hispanics.[5]

In his Reply, Applicant contends that the prosecution failed to establish "when the biological substance was deposited on the window" and that the deposit could have occurred through a secondary transfer. (Docket No. 32 at 8). He also contends that the amount of DNA obtained from the kitchen window swab was too small to produce reliable test results. (*Id.* at 9). However, the victim's testimony was sufficient to establish that the substance was placed on the kitchen window during the burglary. Further, the state court record supports the Colorado Court of Appeals' determination that the second transfer argument was speculative. There was no evidence presented at trial to refute the DNA evidence or to undermine its reliability.

Applicant also maintains in his Reply that the prosecution's calculation of the "random match probability numbers" was used to mislead the jury into "equat[ing] random match probability with the probability that I was not the burglar." (Docket No. 32, at 10). Applicant emphasizes that in *McDaniel v. Brown*, 558 U.S. 120 (2010), the United States

5 R., 6/29/10 Trial Tr. at 107-09.

Supreme Court recognized that random match probability is not the same as the probability that the defendant was not the source of the DNA sample. (*Id.*).

In *McDaniel*, the Supreme Court addressed, *inter alia*, whether the standard in *Jackson v. Virginia* applied to the respondent's claim that the totality of the evidence admitted against him at trial was constitutionally insufficient if the allegedly unreliable DNA evidence was excluded from the *Jackson* analysis." *McDaniel*, 558 U.S. at 126. The state post-conviction court had denied the respondent's claim that trial counsel was ineffective in failing to object to the admission of DNA evidence. *Id.* at 125-26. The federal habeas court thereafter permitted the record to be supplemented with a report concerning DNA testimony at trial ("the Mueller Report"), which had not been submitted in the state court proceeding. *Id.* at 126. The Mueller Report opined that the prosecutor had committed the so-called "prosecutor's fallacy," which the Supreme Court described as follows:

> The prosecutor's fallacy is the assumption that the random match probability is the same as the probability that the defendant was not the source of the DNA sample. . . . In other words, if a juror is told the probability a member of the general population would share the same DNA is 1 in 10,000 (random match probability), and he takes that to mean there is only a 1 in 10,000 chance that someone other than the defendant is the source of the DNA found at the crime scene (source probability), then he has succumbed to the prosecutor's fallacy. It is further error to equate source probability with probability of guilt, unless there is no explanation other than guilt for a person to be the source of crime-scene DNA. This faulty reasoning may result in an erroneous statement that, based on a random match probability of 1 in 10,000, there is a 0.01% chance the defendant is innocent or a 99.99% chance the defendant is guilty.

Id. at 128. Relying on the Mueller Report, the federal district court "set aside the 'unreliable DNA testimony' and held that without the DNA evidence a reasonable doubt

would exist in the mind of any rational trier of fact." *Id.* at 126 (internal citation omitted). The district court granted habeas relief, and the Ninth Circuit affirmed. *Id.* at 126-27. The Supreme Court reversed, concluding that "ample DNA and non-DNA evidence in the record adduced at trial supported the jury's guilty verdict under *Jackson,*" *id.* at 136, and rejected the respondent's "last minute attempt to recast his claim" as a due process violation based on unnecessarily suggestive and unreliable identification testimony. *Id.*

In *McDaniel*, the Supreme Court determined that the federal district court had improperly considered the Mueller Report because a *Jackson* claim limits the court to review of the evidence presented at trial. 558 U.S. at 131. Similarly, this Court may not consider the potential applicability of the "prosecutor's fallacy" for the first time on federal habeas review. In any event, the Supreme Court further concluded in *McDaniel* that, even if the Ninth Circuit Court of Appeals could have considered the Mueller Report, it provided no basis for entirely excluding the DNA evidence or the prosecution expert's testimony from the court's consideration of the sufficiency of the evidence. *Id.* at 132. The Court stated: "The Report did not contest that the DNA evidence matched Troy. That DNA evidence remains powerful inculpatory evidence even though the State concedes [the expert] overstated its probative value by failing to dispel the prosecutor's fallacy." *Id.* In the present case the State's expert testified that the DNA evidence obtained from the crime scene matched Applicant. The DNA evidence, therefore, was competent evidence of Applicant's guilt.

The Court finds that the jury properly relied on the DNA evidence in reaching a guilty verdict. The jury credited the DNA evidence over conflicting witness identification

TRIAL Court Considered DNA Statistics at TRIAL? Allowed these to be PRESENTED to JURY.

Also Direct Appeal and Post-conviction ARGUED issue;

testimony,[6] which was reasonable and within the jury's prerogative. In addition, the victim's testimony that the smudge on the window had not been present when she and her husband left the house to go to dinner that evening, but was there after they returned home, during which absence the burglary occurred,[7] together with the police investigator's testimony that the smudge appeared to have been made by a forearm and was high enough on the window that the person would "have to actually be in the sink to get it up in that position,"[8] supports a reasonable inference that the smudge on the window was made by a burglar, and, therefore, that the DNA sample taken from the smudge belonged to the burglar. And, the prosecution's DNA expert testified that Applicant's DNA was the only DNA present in the swab taken from the smudge on the kitchen window.

The Court finds and concludes that the Colorado Court of Appeals' decision was neither contrary to, or an unreasonable application of the *Jackson* standard. The United States Supreme Court has not held, based on a set of facts materially indistinguishable from the present case, that DNA evidence was insufficient to support a conviction under the *Jackson* standard. *See Williams*, 529 U.S. at 405. *See also Woods v. Donald*, 135 S.Ct. 1372, 1377 (2015) ("Because none of our cases confront 'the specific question presented by this case,' the state court's decision could not be 'contrary to' any holding

---

6 The victims' grandchildren, who returned to the victims' home on the night of the burglary, described the perpetrator in their written witness statements as a 5'9" white male. (R., 6/28/10 Trial Tr. at 190-91, Richard Sheets testimony; 6/29/10 Trial Tr. at 57, 60-61, Sheets testimony). Applicant is an African-American male. (*Id.*, 6/29/10 Trial Tr. at 61, Sheets testimony). The grandchildren, who lived outside of Colorado, did not testify at trial. (*Id.*). The victims testified that they did not get a good look at the perpetrator who they saw only fleetingly before he ran away. (R., 6/28/10 Trial Tr. at 132-33, 154-55, Janith Bowman testimony; *id.* at 163, 174, Victor Bowman testimony).

7 R., 6/28/10 Trial Tr., at 142-43, Janith Bowman testimony.

8 R., 6/29/10 Trial Tr., at 12-13, Diane Cloyd testimony.

from this Court.") (quoting *Lopez v. Smith*, 135 S. Ct. 1, 4 (2014)). Further, this Court cannot say that the Colorado Court of Appeals' determination of Applicant's claims challenging the sufficiency of the evidence "was so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fair-minded disagreement." *Harrington*, 562 U.S. at 102.

In addition, to the extent Applicant challenges the Colorado Court of Appeals' factual findings, the Court finds and concludes that the factual findings were reasonable in light of the evidence presented in Applicant's state criminal proceeding.

Claims 1 and 2 are dismissed.

B. Sub-claims 3(a) and 3(b)

In claim 3, Applicant asserts that counsel was constitutionally ineffective in: (a) failing to have biased jurors removed from the jury panel during voir dire; and, (b) failing to obtain a DNA expert. (Docket No. 1 at 6-7).

Applicant presented sub-claims 3(a) and 3(b) to the Colorado Court of Appeals in his opening brief on appeal in the state post-conviction proceeding. (Docket No. 13-8 at 23-34). In *Gay II*, the state appellate court declined to address the claims on the procedural ground that they had not been raised in the state district court. (Docket No. 13-11 at 5-6). In the Order to Dismiss in Part, the Court concluded that sub-claims 3(a) and 3(b) had been procedurally defaulted in the state courts, but deferred ruling on whether Applicant could meet the cause and prejudice standard to excuse the procedural default because Applicant was not appointed counsel in his initial state post-conviction proceeding. (Docket No. 16 at 6-7).

In *Martinez v. Ryan*, the Supreme Court held:

> Where, 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.

566 U.S. at 17. To excuse the procedural default, Applicant must show that the procedurally defaulted ineffective assistance claims are substantial— i.e., have some merit. *Id.* at 16. A claim that is "wholly without factual support" is not substantial. *Id.*

1. applicable federal law

The Sixth Amendment generally requires that defense counsel's assistance to the criminal defendant be effective. *See Strickland v. Washington*, 466 U.S. 668, 685-86 (1984). To prevail on a claim of ineffective assistance of counsel, a habeas petitioner must show both that (1) his counsel's performance was deficient (i.e., that identified acts and omissions were outside the wide range of professionally competent assistance), and (2) he was prejudiced by the deficient performance (i.e., that there is a reasonable probability that but for counsel's unprofessional errors the result would have been different). *Id.*

"A court considering a claim of ineffective assistance must apply a 'strong presumption' that counsel's representation was within the 'wide range' of reasonable professional assistance." *Harrington*, 562 U.S. at 104 (quoting *Strickland*, 466 U.S. at 689). *See also Wiggins v. Smith*, 539 U.S. 510, 521 (2003). In other words, there is a rebuttable presumption that "an attorney acted in an objectively reasonable manner and that an attorney's challenged conduct might have been part of a sound trial strategy."

Bullock v. Carver, 297 F.3d 1036, 1046 (10th Cir. 2002) (emphasis omitted). "There are countless ways to provide effective assistance in any given case," and "[e]ven the best criminal defense attorneys would not defend a particular client in the same way." *Strickland*, 466 U.S. at 689.

"With respect to prejudice, . . . '[a] reasonable probability is a probability sufficient to undermine confidence in the outcome.'" *Strickland*, 466 U.S. at 694. "The likelihood of a different result must be substantial, not just conceivable." *Id.* at 693. *See also U.S. v. Boone*, 62 F.3d 323, 327 (10th Cir.1995) (speculation does not satisfy petitioner's obligation to demonstrate a reasonable probability that the outcome would have been different).

2. analysis

a. sub-claim 3(a)

In sub-claim 3(a), Applicant asserts that defense counsel was constitutionally ineffective in failing to have biased jurors removed from the jury panel during voir dire. Specifically, Applicant contends that the "[j]ury panel remained prejudice[d] against defendant from inception and trial judge and defense counsel failed to seek impa[ne]lment of unbiased jurors." (Docket No. 1 at 6).

In his opening brief to the Colorado Court of Appeals in the state post-conviction proceeding, Applicant argued that several potential jurors stated during voir dire that they would have trouble "follow[ing] the law" and affording Applicant the "presumption of

innocence." (Docket No. 13-8 at 24[9]). Other jurors indicated that if Applicant did not testify, they would conclude he was guilty. (*Id.*). Applicant maintained that the mindset of the jurors was that "'if the system took the time to bring this certain individual into court, then this person (regardless of race) must have committed a crime, and if they don't testify, they must be hiding something.'" (Docket No. 13-8 at 25, quoting *Irvin v. Dowd*, 366 U.S. 717 (1961)).

i. state court voir dire proceeding

The state court record reflects that the jurors who were selected to serve on Applicant's jury were juror numbers 1, 3, 12, 17, 18, 27, 29, 30, 31, 35, 37, 38, and 39.[10] Eleven of the thirteen jurors indicated unequivocally that they would apply the presumption of innocence.[11]

Juror 35 made the following remarks during voir dire: "There has to be something for the situation to go this far, but to me, gentleman, the [defendant is] innocent until the prosecution shows me and really shows me that he is guilty."[12]

Juror 39 made no comments on the presumption of innocence. Instead, she told the court that members of her family were police officers and that she would "definitely give more respect to their opinion."[13] The following colloquy between the prosecutor and Juror 39 ensued:

---

9 *See also* R., 6/28/10 Trial Tr. at pp. 89-91.
10 *Id.* at 114.
11 *Id.* at 102 (Juror 1); 86 (Juror 3); 85 (Juror 12); 97 (Juror 17); 93 (Juror 18); 98 (Juror 27); 85 (Juror 29); 92-93 (Juror 30); 93-94 (Juror 31); 101 (Juror 37); and, 101-02 (Juror 38).
12 *Id.* at 85.
13 *Id.* at 39.

Q: Juror Number 39, . . . [w]ould you agree that there's good police officers and bad police officers?

A: I would agree with that statement.

Q: Would you agree that just by the fact someone is wearing a uniform doesn't mean they are less truthful or more truthful?

A: Yes, but I would definitely hold them to a higher standard to be truthful considering the background they have and the training and rigor that they do go through.

Q: When you say hold them to a higher standard, more critical of them if, in fact, they do mess up somehow?

A: Not necessarily. I would assume they would put forth to be legally correct more of the time than trying to be biased or -- so I would assume they would be more impartial due to how they have been trained.

Q: And if evidence came out that showed you they were, in fact, not impartial, would you be able to consider that?

A: Yes.

Q: So, ma'am, if the Judge instructs you and the Judge says you don't get to consider someone's occupation necessarily bearing on credibility, would you be able to follow that instruction?

A: I believe so.[14]

Defense counsel later attempted to remove Juror 39 for cause because of her comments regarding police officers, but the trial court found that she had been rehabilitated and "would actually be okay on that."[15]

ii. merit of claim

A defendant is entitled to an unbiased jury. *Morgan v. Illinois*, 504 U.S. 719, 727 (1992) ("[T]he jury must stand impartial and indifferent to the extent commanded by the

14 R., 6/28/10 Trial Tr. at 54-55.
15 *Id.* at 109.

Sixth Amendment.") (citing *Turner v. Louisiana*, 379 U.S. 466, 471 (1965)). To demonstrate ineffective assistance for failure to strike a juror, a habeas applicant must show the juror was actually biased against the applicant. *See Hale v. Gibson*, 227 F.3d 1298, 1319-22 (10th Cir. 2000) (rejecting ineffective-assistance-of-counsel claim because challenged jurors all said, either explicitly or implicitly, that they could "put aside their opinions and judge the case impartially on the evidence"; and recognizing that to demonstrate juror bias, an applicant must show more than the juror's "preconceived notion of guilt;" he must show that the juror "had such a fixed opinion that he or she could not judge impartially") (citing *Patton v. Yount*, 467 U.S. 1025, 1035 (1984)). The question is whether a juror who acknowledges a bias can set it aside and decide the case on the evidence and whether protestations of impartiality should be believed. *Patton*, 467 U.S. at 1036.

The state court record demonstrates that Juror 35 understood the presumption of innocence and intended to follow it. Therefore, the only juror who was potentially biased against Applicant was Juror 39. Defense counsel attempted to remove Juror 39 for cause, but the trial court denied the motion based on the court's finding that the juror had been sufficiently rehabilitated by the prosecutor's follow up questions. Further, Juror 39 indicated that she could set aside her potential bias in favor of police officers and render an impartial verdict. There is nothing in the state court record to suggest that the juror's statements to the trial court concerning impartiality should not be believed. More importantly, Juror 39 was designated as the alternate juror and did not participate in the

jury deliberations.[16] In short, the state court record refutes Applicant's claim that defense counsel's performance was deficient or, alternatively, that Applicant suffered any prejudice as a result of counsel's failure to have Juror 39 removed.

The Court finds and concludes that Applicant's ineffective assistance claim based on counsel's failure to remove biased jurors lacks merit and, therefore, is not substantial under *Martinez v Ryan*. Sub-claim 3(a) is dismissed as procedurally barred.

b. sub-claim 3(b)

In sub-claim 3(b), Applicant contends that defense counsel was ineffective in failing to obtain a DNA expert. Applicant asserts that the DNA testing procedures employed in his case were "not an approved method of CODIS." (Docket No. 1 at 7).

In his Reply, Applicant states that defense counsel requested a trial continuance so that he could consult with a DNA expert,[17] but did not thereafter inform Applicant about the results of the consultation. (Docket No. 33 at 5-6). Applicant contends that defense counsel's decision not to call a DNA expert at trial to challenge the reliability of the DNA evidence constituted ineffective assistance because the prosecution presented no evidence to prove when the substance containing Applicant's partial DNA profile was placed on the kitchen window of the victims' home, and, since the victims had lived in the house only three months prior to the burglary, the DNA could have been placed on the window by someone else, through a secondary transfer. (Docket No. 33 at 5-6).

---

16 R., 6/29/10 Trial Tr. at 178-182.

17 Defense counsel told the trial court that he was requesting a continuance because "DNA is the single issue in this case, and quite frankly a lot of what is provided is almost a foreign language to me." R. 3/19/10 Hrg. Tr. at 2.

Applicant further maintains in his Reply that a defense DNA expert would have testified to the "pitfalls of partial DNA profiles" such as amplification, re-amplification, degraded samples, PCR (polymerase chain reaction) testing, LCN (low count number) testing, and, consumptive testing, any of which can result in false positives and false test results. (*Id.* at 7-10). Applicant also asserts that defense counsel's cross examination of the prosecution's DNA expert did not negate the need for a defense expert because counsel lacked the requisite knowledge to effectively question the prosecution's expert about the reliability of the DNA testing. (*Id.*at 12-13).

Finally, Applicant represents in his Reply that during the past eight years, he has contacted seven different persons or entities concerning the issue of the unreliability of the DNA evidence in his case. (*Id.* at 13, 18-19). According to Applicant, the persons contacted responded by stating that the partial DNA profile obtained from the window in the victims' home was unreliable and should have been "cautiously presented" to the jury. (*Id.* at 14).

As an initial matter, Applicant's contention that the prosecution did not present any evidence at trial to explain the presence of a small amount of his DNA in the material swabbed from the victims' kitchen window is refuted by the state court record. *See* discussion in Section III.A.3, *supra*.

Without more, defense counsel's decision not to endorse a DNA expert for trial is insufficient to overcome the strong presumption that counsel acted in an objectively reasonable manner and that counsel's decision was a strategic one. *See Bullock*, 297 F.3d at 1046. The state court record reflects that defense counsel effectively

cross-examined the prosecution's DNA expert as to the issue of when Applicant's DNA was placed on the victims' kitchen window. The expert acknowledged that DNA could be present on a piece of evidence for a long time, until it is degraded in some way; and, that secondary transfer of DNA occurs when one person transfers his or her DNA to an object, and then another person touches the object and the first person's DNA is transferred to the second person.[18] Counsel then argued in closing argument that there was no evidence as to when the Applicant's DNA was placed on the victims' kitchen window, and, therefore, did not establish that he was the burglar.[19]

Admittedly, defense counsel did not challenge the reliability of the DNA expert's testimony before or during trial. Applicant asserts that a defense-endorsed DNA expert would have testified that partial DNA profiles are unreliable generally, and would have explained to the jury why the DNA evidence in his case was unreliable. Notably, however, Applicant does not provide the Court with an affidavit or report from a proposed DNA expert. Instead, Applicant relies on his own summarization of the proposed expert testimony.

In *Martinez v. Tafoya*, No. 00-2445, 13 F. App'x 873 (10th Cir. July 17, 2001) (unpublished), the Tenth Circuit rejected a habeas petitioner's claim that defense counsel was ineffective in failing to call a DNA expert on the following grounds:

> . . . Martinez offers no evidence-here or below-to undermine our confidence in the DNA evidence presented at trial. The most he can say is that defense counsel did not seek an expert to highlight "the various deficiencies of DNA

18 R., 6/29/10 Trial Tr. at 114-117.
19 *Id.* at 154-159.

ARGUE: Petitioner presented all of info Martinez Court said was missing!!!

> analysis generally and the deficiencies of the particular lab involved in the case." Appellant Br. at 17. This vague, conclusory allegation is inadequate. At a minimum, Martinez must identify the specific "deficiencies"-of DNA evidence in general and the lab in particular-to which he alludes. Equally, he must tell us how these alleged deficiencies are relevant to this case and, critically, how they would have made a difference in the outcome of the trial.
>
> When an ineffective assistance claim centers on a failure to investigate and elicit testimony from witnesses, the petitioner must "demonstrate, with some precision, the content of the testimony they would have given at trial." *Lawrence v. Armontrout*, 900 F.2d 127, 130 (8th Cir.1990) (quotation omitted). The lack of a specific, affirmative showing of any exculpatory evidence leaves Martinez's claim well short of the prejudice required by *Strickland*. *See Patel v. United States*, 19 F.3d 1231, 1237 (7th Cir.1994) (holding no prejudice to petitioner who failed to make specific, affirmative showing that absent witness's testimony would have affected outcome of trial); *see also Foster v. Ward*, 182 F.3d 1177, 1185 (10th Cir.1999) (concluding that defense counsel's failure to contact or investigate alibi witnesses insufficient to establish prejudice), cert. denied, 529 U.S. 1027, 120 S.Ct. 1438, 146 L.Ed.2d 326 (2000). In light of our conclusion that Martinez has not established prejudice, we end our *Strickland* analysis. *See id.* at 1184.

*Id.*at 877. *See also Boyle v. McKune*, 544 F.3d 1132, 1138 (10th Cir. 2008) (rejecting ineffective assistance claim based on failure to retain expert where defendant "failed to show . . . that medical experts could have reached a conclusion . . . contrary to the conclusions reached" by the prosecution's witnesses).

Applicant's statements summarizing the proposed expert testimony fall short of the "specific affirmative showing" required to demonstrate that defense counsel acted unreasonably in failing to call an expert witness to challenge the reliability of the DNA evidence. In addition, Applicant has failed to establish specifically how defense expert testimony concerning the DNA evidence would have undermined the testimony of the prosecution's DNA expert, so that likelihood of an acquittal was substantial, not just conceivable.

The Court finds and concludes that Applicant's ineffective assistance claim based on defense counsel's failure to retain a DNA expert to testify at trial lacks merit, and, therefore, is not substantial under *Martinez v. Ryan*. Sub-claim 3(b) is dismissed as procedurally barred.

IV. ORDERS

For the reasons discussed above, it is

ORDERED that the Application for a Writ of Habeas Corpus Pursuant to 28 U.S.C. § 2254 (Docket No. 1), filed, *pro se*, by Applicant, Byron Gay, on January 24, 2018, is DENIED and this action is DISMISSED WITH PREJUDICE. It is

FURTHER ORDERED that no certificate of appealability shall issue because Applicant has not made a substantial showing of the denial of a constitutional right. 28 U.S.C. § 2253(c)(2); Fed. R. Governing Section 2254 Cases 11(a); *Slack v. McDaniel*, 529 U.S. 473, 483-85 (2000).

DATED October 11, 2018.

BY THE COURT:

R. BROOKE JACKSON
United States District Judge