

**UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT**

JOHN R. PINDER,
Petitioner-Appellant,
v.
SCOTT CROWTHER,
Respondent-Appellee.

No. 19-4039
(D.C. No. 2:16-CV-
00189-DN)
(D. Utah)

**ORDER DENYING CERTIFICATE
OF APPEALABILITY***

(Filed Feb. 11, 2020)

Before **HARTZ, HOLMES**, and **MORITZ**, Circuit
Judges.

John R. Pinder, a Utah state prisoner, seeks a certificate of appealability (COA) to challenge the district court's denial of four grounds for relief set forth in his 28 U.S.C. § 2254 habeas petition. We deny a COA and dismiss this matter.

* This order is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel.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

I. Background

We take the following factual recitation from the opinion of the Utah Supreme Court (USC) affirming the denial of Mr. Pinder’s petition for post-conviction relief, which, as the USC noted, “is presented in a light favorable to the prosecution, and consistent with the judgment of conviction,” *Pinder v. State*, 367 P.3d 968, 969 n.1 (Utah 2015) (*Pinder II*):

John Pinder owned a sprawling ostrich ranch in Duchesne County. He and his ranch-hand, Filomeno Ruiz, were accused (and ultimately convicted) of murdering June Flood and Rex Tanner. Flood and Tanner also worked on Pinder’s ranch.

According to the evidence at trial, Ruiz staged a fight with his girlfriend, Mandy Harris, on the day of the alleged murder^[1]. The purpose of the staged fight was to get Harris away from the ranch. Ruiz called 911 during this staged altercation. Harris left after the police showed up. And the 911 call was recorded by the local dispatch.

That evening, Pinder, his girlfriend Barbara DeHart, Ruiz, and Pinder’s employees Joe Wallen and David Brunyer (along with Brunyer’s wife) gathered around a campfire to drink. At some point the conversation turned

¹ Whether the murders were committed on Saturday, October 24, 1998, or Sunday, October 25, 1998, is at issue in one of the grounds on which Mr. Pinder seeks a COA.

to the “shrunk heads” that Pinder and DeHart had seen at a curiosity shop in Seattle. Eventually Pinder spoke of his hopes to someday acquire one. Pinder said to Ruiz, “let’s go get some heads.” Ruiz responded with a question: “four or two?” Pinder replied, “two.”

After grabbing a baseball bat, Pinder and Ruiz drove to the home where Flood and Tanner resided. Pinder violently assaulted Flood and Tanner, kidnapped them, and then shot them both with a 10 mm pistol. Pinder and Ruiz then left the murder scene and later returned with ammonium nitrate and dynamite, packed the bodies with the explosives, and set them off.

Pinder later got others to help him hide the remains. Following a day of bulldozing the blast site, Pinder and Ruiz dropped several black garbage bags of body parts into a barrel and set them ablaze. Pinder, DeHart, and Ruiz then met with the Brunyers for dinner, after which Pinder and Ruiz returned to the lake to collect more parts for burning.

Tuesday morning, at Pinder’s behest, Ruiz and Brunyer went to the Flood home armed with a bottle of alcohol and some rags to remove fingerprints and tidy up. After returning, Brunyer complained about the smell of the Flood residence, to which Pinder quipped, “That’s because Tanner shit his pants when I shot him.” Pinder, Ruiz, and Brunyer then spent the day bulldozing and

gathering more body parts for disposal. After coming across Tanner's wrist watch, Pinder callously joked that it must have been a Timex, because "it was still ticking." Eventually the bulldozer ran out of gas. And when they went to get more, Brunyer asked Pinder why he killed Flood and Tanner, to which Pinder replied, "They were liars, thieves and maggots, and now they're vaporized no one will miss them anyway." Upon arriving home that evening, Brunyer's daughter could see he was upset. He recounted the gruesome tale to his daughter. She took notes and then taped them to the inside of her dresser drawer after having Brunyer read over and approve them.

By Thursday, October 29th, Pinder and DeHart had left the state, eventually arriving in Cataldo, Idaho. That Sunday, DeHart contacted her daughter Melissa Cowles and told her that over the last couple of days Pinder "had admitted to killing some people on the ranch"; that they had been "cleaning up the evidence"; that she had found "a bag of what looked like bloody hair and scalp" in Pinder's truck, which she then threw away; and that they had "thrown the murder weapon off a bridge and into the river." DeHart had said they were "like Bonnie and Clyde, always on the run." That same day DeHart called her father, Bernie Knapp, and told him "she helped clean blood and mess out of John Pinder's truck," that "they had some bloody clothing and items in bags that they had tossed in dumpsters in little towns on the way up on their trip," and that they "either had gotten

rid of a gun or were in the process of getting rid of a gun.”

Meanwhile, back at the ranch, an investigation was underway. One of Flood’s friends reported her missing, and police officers searched the Flood residence. Police discovered the home in utter disarray, with blood on the bed sheets and the backrest of a chair in the living room. They also found a pair of excrement-stained pants in the bathroom. After leaving the home, the investigating officer saw and approached Brunyer, who was standing nearby. Brunyer appeared “very agitated, very nervous, and scared to death,” but handed the officer the letter his daughter had written and the bottle of alcohol with which he had assisted in cleaning up the home.

Pinder and DeHart arrived back in Salt Lake on November 4th. On that day they decided to appear on KSL News for a television interview about the murders. Shortly thereafter, Pinder, Ruiz, and DeHart were all arrested. Investigators later searched Pinder’s ranch and found a gruesome assortment of the victims’ remains strewn about the area, stuck in bushes, and hanging from trees. They also searched Pinder’s truck and found a 10 mm shell casing, one of the victim’s thumbprints on the inside of a window, and some bloodstains (one identified as Pinder’s, the other unidentified). Police also determined that the rear windows had been wiped down and cleaned, as well as the mid-section of the door jam.

Ruiz pled guilty to two counts of murder. He denied being the shooter, accusing Pinder instead. DeHart was charged with and later convicted of obstruction of justice. *State v. DeHart*, 2001 UT App 12, 17 P.3d 1171. And Pinder was charged with two counts of aggravated murder, two counts of aggravated kidnapping, two counts of tampering with evidence, one count of burglary of a dwelling, one count of possession of explosives, and two counts of desecration of a body.

While being held in the Summit County Jail before his preliminary hearing, Pinder met an inmate named Newly [sic²] Welch. Pinder bragged to Welch about killing Tanner and Flood and blowing up their bodies. He told Welch that the day of the murders, he and Ruiz staged a fight with Ruiz's girlfriend to get her off of the ranch. Welch then asked Pinder what it was like to kill someone. And in response, Pinder put his hand on Welch's shoulder and said, "There's no bigger rush, especially when you know you're going to get away with it." Pinder was convicted on all counts and sentenced to life with the possibility of parole on the aggravated murder charges, and to consecutive statutory terms on the other counts.

Pinder II, 367 P.3d at 969-71 (paragraph numbers, footnote, brackets, and ellipses omitted).

² At trial, Mr. Welch spelled his first name "Newley."

After his convictions, Mr. Pinder filed a motion for a new trial. The trial court denied the motion, and the USC affirmed, *see State v. Pinder*, 114 P.3d 551 (Utah 2005) (*Pinder I*). As noted, the USC later affirmed the denial of Mr. Pinder’s petition for post-conviction relief (PPCR).

Mr. Pinder then filed a petition for habeas corpus in federal district court pursuant to 28 U.S.C. § 2254. The district court denied relief on all seven grounds and denied a COA. In this court, Mr. Pinder has filed a Combined Opening Brief and Application for a Certificate of Appealability (COA Application), seeking a COA on four grounds, some of which the district court denied for procedural reasons and others the court denied on the merits.

II. Standard of review

To appeal the denial of a § 2254 petition, a petitioner must first obtain a COA. *See* 28 U.S.C. § 2253(c)(1)(A). To obtain a COA on claims the district court denied on the merits, a petitioner must make “a substantial showing of the denial of a constitutional right,” § 2253(c)(2), such “that reasonable jurists could debate whether . . . the petition should have been resolved in a different manner or that the issues presented were adequate to deserve encouragement to proceed further,” *Slack v. McDaniel*, 529 U.S. 473, 484 (2000) (internal quotation marks omitted). For claims the district court denied on a procedural ground without reaching the merits, the petitioner must show “that

jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right and . . . whether the district court was correct in its procedural ruling.” *Id.* “Each component of [this] showing is part of a threshold inquiry.” *Id.* at 485. Thus, if a petitioner cannot make a showing on the procedural issue, we need not address the constitutional component. *See id.* “The COA inquiry . . . is not coextensive with a merits analysis,” *Buck v. Davis*, 137 S. Ct. 759, 773 (2017), and is limited to “an overview of the claims in the habeas petition and a general assessment of their merits,” *Miller-El v. Cockrell*, 537 U.S. 322, 336 (2003).

Because Mr. Pinder filed his § 2254 petition after the effective date of the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), it is governed by AEDPA’s provisions. *See Wallace v. Ward*, 191 F.3d 1235, 1240 (10th Cir. 1999). Under AEDPA, our consideration of Mr. Pinder’s request for a COA must incorporate “AEDPA’s deferential treatment of state court decisions.” *Dockins v. Hines*, 374 F.3d 935, 938 (10th Cir. 2004). We therefore “look to the District Court’s application of AEDPA to [Mr. Pinder’s] constitutional claims and ask whether that resolution was debatable among jurists of reason.” *Miller-El*, 537 U.S. at 336. To that end, we must keep in mind that when a state court has adjudicated the merits of a claim, a federal court may grant habeas relief only if that state court decision “was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States,” 28 U.S.C.

§ 2254(d)(1), or “was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding,” § 2254(d)(2). But AEDPA’s deferential standards of review do not apply if a “state court employed the wrong legal standard in deciding the merits of [a] federal issue.” *Cargle v. Mullin*, 317 F.3d 1196, 1202 (10th Cir. 2003). In that case, rather than deferring to the state court’s resolution of the issue, a federal court reviews the issue de novo to determine whether habeas relief is warranted. *Milton v. Miller*, 744 F.3d 660, 670-71 (10th Cir. 2014).

III. Discussion

A. Grounds one and two

Grounds one and two of Mr. Pinder’s § 2254 petition concern due-process claims he advanced in his PPCR. In ground one, Mr. Pinder claimed the State used doctored 911 tapes of the calls regarding the fight between Mr. Ruiz and his girlfriend that changed the date of the calls from October 24 to October 25, 1998. The State did not introduce the audio from the tape at trial, but the log of the 911 calls established a baseline date of October 25 for the fight and the murders.³ Various witnesses, including Mr. Pinder and his girlfriend, Ms. DeHart—who had earlier testified in her

³ Mr. Pinder’s record citation for this point shows that his own trial attorney, not the State, presented the logs when cross-examining Ms. DeHart. *See* Trial R., R1780 Jury Trial Vol. 13 at 129-31. The state-court records were filed in this court on a compact disc. Our references to those records are to the names of the folders and files as set forth on that disc.

obstruction trial that the fight occurred on October 24—then keyed their testimony to that baseline date. Mr. Pinder claimed the date mattered because he had an alibi for October 24—he was at home on the ranch with Ms. DeHart. He presented affidavits from experts that the 911 recordings were not pristine but, prior to his trial, had been tampered with and altered by exporting and editing data, which was then recorded back onto the tape. The experts stopped short of concluding the date of the 911 calls had been changed to October 25.

In ground two of his § 2254 petition, Mr. Pinder claimed the State presented false testimony at trial from Newley Welch that while he and Mr. Pinder were incarcerated together, Mr. Pinder confessed he had shot the victims and blew up their bodies. Mr. Pinder provided the post-trial court an affidavit from a private investigator who interviewed Mr. Welch in 2002 and reported that, contrary to his trial testimony, Mr. Welch stated that “John Pinder did not tell him that Pinder had shot or beaten Rex Tanner and June Flood.” Post-Conviction Record (PCR), R269-1 at 39. The investigator also reported that Mr. Welch said “he would not testify in court regarding his admissions that he lied on the stand during John Pinder’s trial . . . [until] he was released from probation.” *Id.* at 38-39.

1. State court rulings

In affirming the denial of post-conviction relief on these claims, the USC relied solely on procedural

default, reasoning that the claims could have been but were not raised “at trial or on appeal,” as required by Utah Code Ann. § 78B-9-106(1)(c). *Pinder II*, 367 P.3d at 976 (quoting § 78B-9-106(1)(c)). The court rejected Mr. Pinder’s argument that the statutory term “at trial” did not include claims that could only have been brought in a post-trial motion prior to an appeal. *Id.* at 976-77. The court instead construed the term “at trial” as “encompass[ing] all claims that could have been raised *in the trial court*,” including a post-trial motion. *Id.* at 976-77.

The USC next rejected Mr. Pinder’s argument that he could not have brought these claims at trial or in his new-trial motion “because they came to light too late.” *Id.* at 977. The USC reasoned that Pinder knew of the grounds for asserting these claims “*at the time of trial*, and accordingly [they] could have been brought *then or* in his post-trial motion.” *Id.* at 977 (emphasis added) (internal quotation marks omitted). “At most,” the court said, Mr. Pinder had belatedly identified only “additional evidence supporting [the claims],” which was “insufficient to avoid the procedural bar.” *Id.* In a concluding statement, the court summarized its holding: “Pinder could have asserted his due process claims [regarding the 911 tapes and Welch’s alleged perjury] *at trial (or on a post-trial motion)*.” *Id.* at 980 (emphasis added).

2. District court ruling

In his § 2254 proceedings, Mr. Pinder argued that to the extent the USC concluded that § 78B-9-106(c)(1)'s term "at trial" extended beyond the actual trial period, the procedural rule was novel and therefore inadequate to bar presentation of these claims in his new-trial motion. *See Walker v. Martin*, 562 U.S. 307, 316 (2011) ("To qualify as an 'adequate' procedural ground, a state rule must be firmly established and regularly followed." (internal quotation marks omitted)). In the alternative, Mr. Pinder asked the district court to excuse the procedural default based on the cause-and-prejudice and fundamental-miscarriage-of-justice exceptions.

The district court enforced the procedural default. The court explained that despite interpreting the term "at trial" to include post-trial motions, the USC found that the 911-tape and Welch-perjury claims could have been raised "during the actual trial." Aplt. App. at 240. Accordingly, the district court did not address Mr. Pinder's novelty argument.

The district court also declined to excuse the procedural default. The court characterized Mr. Pinder's excuse arguments as "hinging on 'newly discovered evidence,' so the exception [to procedural default] Pinder relies on is essentially that of fundamental miscarriage of justice or actual innocence." *Id.* The court determined that none of Pinder's evidence was new (which is a requirement for a showing of actual innocence, *see House v. Bell*, 547 U.S. 518, 536-37 (2006)),

because he merely rehashed all the evidence and alleged civil-rights violations that formed “every claim that he brought before the Utah Supreme Court and in this petition, [and] re-argued [them] as grounds for a finding of actual innocence.” Aplt. App. at 241. The court did not separately address Pinder’s cause-and-prejudice arguments.

3. COA analysis

In his COA Application, Mr. Pinder repeats his novelty argument but fails to address the district court’s explanation that the USC’s application of procedural default rested independently on the view that he could have brought these claims at his actual criminal trial (as opposed to in his new-trial motion). But reasonable jurists could not debate the district court’s analysis, and the issue does not deserve encouragement to proceed further. Even if it was novel for the USC to interpret the statutory term “at trial” as including new-trial motions, the USC also based its procedural-default determination on the non-novel portion of the statute—that Mr. Pinder could have raised his claims during the actual criminal trial. The two bases were independent, and Mr. Pinder has not argued that the non-novel portion of the statute was inadequate.

Mr. Pinder attempts to overcome his procedural default of grounds one and two through a showing of cause and prejudice.⁴ See *Fairchild v. Workman*, 579

⁴ Mr. Pinder does not raise a fundamental-miscarriage-of-justice argument in his COA Application.

F.3d 1134, 1141 (10th Cir. 2009). We will address each ground separately. But before doing so, we note that in his § 2254 petition, Mr. Pinder failed to specify the precise constitutional basis for grounds one and two, asserting them as due process claims generally, but citing no case law. In ground one, he alleged the State “provided the defense with false and perjured evidence,” namely, an altered 911 tape. Aplt. App. at 25. And in ground two, he alleged the State presented “false, perjured testimony of [a] jailhouse informant, Newly [sic] Welch.” *Id.* at 33. When discussing these grounds in his reply to the State’s response to his petition, Mr. Pinder referred numerous times to both *Napue v. Illinois*, 360 U.S. 264, 269-70 (1959), which requires the prosecution to correct a witness’s statement they know is false, and *Brady v. Maryland*, 373 U.S. 83, 87 (1963), which requires the prosecution to disclose material exculpatory evidence.

His framing of these claims in his state-court filings was also mixed. For its part, the USC apparently treated them as *Napue* claims. *See Pinder II*, 367 P.3d at 977 (“Pinder asserts that Welch perjured himself at trial and that the State *knowingly* presented that perjured testimony.” (emphasis added)); *id.* at 978 (“Pinder’s second due process claim . . . is rooted in the allegation that the State *knowingly* presented doctored 911 tapes[.]” (emphasis added)).

We need not definitively resolve whether these are *Brady* or *Napue* claims (or both), because Mr. Pinder has not established his entitlement to a COA on them

under either construct. With this understanding, we proceed with our analysis.

a. 911 tape

“Cause for a procedural default can exist when some objective factor external to the defense impeded counsel’s efforts to comply with the State’s procedural rule.” *Scott v. Mullin*, 303 F.3d 1222, 1228 (10th Cir. 2002) (internal quotation marks omitted). One such “objective factor external to the defense” is a “State’s failure to disclose . . . information.” *Id.* at 1230. Mr. Pinder alleges that is the case here—the State failed to disclose that the 911 tapes had been altered.⁵

No reasonable jurist could agree with Mr. Pinder. The USC’s discussion of why Mr. Pinder could have presented the 911-tape claim at his criminal trial is instructive. The USC stated that Mr. Pinder failed to identify any “clear ground for his assertion that [the 911-tape] claim could not have been presented at trial or on a post-trial motion.” *Pinder II*, 367 P.3d at 979. The court noted that his only argument why he could not have presented this claim at trial or in a post-trial motion was that “at some point [the defense team] decided that the only way to have a valid claim was to see if there was an alteration of the tapes.” *Id.* (brackets, ellipsis, and internal quotation marks omitted). The court considered this as nothing more than an assertion that counsel did not decide to investigate the

⁵ For purposes of argument, we may assume the tapes were altered and the prosecution knew or should have known about it.

matter until the post-conviction phase and reasoned that “[t]he same basis for the investigation by post-conviction counsel was as readily available to trial counsel.” *Id.* The court further observed that “Pinder had ample grounds for pursuing an investigation into the date of the staged fight and subsequent 911 recording *at the time of trial*,” specifically, conflicting testimony Ms. DeHart gave at her obstruction trial (October 24) and at Mr. Pinder’s trial (October 25). *Id.* (emphasis added). Moreover, Mr. Pinder “had every motivation and opportunity to [pursue an investigation] at the time of trial.” *Id.* Although trial counsel “did not have the results of the expert analysis during the trial and post-trial proceedings,” the USC said “they had everything else, and the additional evidence provided by the expert[s]’ nebulous conclusions is insufficient in this context to undermine the conclusion that this claim ‘could have’ been brought earlier.” *Id.* (footnote omitted). The “nebulous” quality of the experts’ conclusions the court referred to was the fact the experts did not assert “that *the date* was altered in the 911 tapes” but “only that the recordings on both days had been altered in some fashion.” *Id.* at 979 n.17.

We agree with this line of reasoning as it relates to cause for procedural default. Any failure by the State to disclose that the tapes had been altered did not prevent Mr. Pinder from raising this claim at trial given that (1) he knew Ms. DeHart previously identified, at her obstruction trial, the date of the fight as October 24; (2) the date was of extreme importance to Mr. Pinder because he claimed he had an alibi for the

24th; and (3) trial counsel had the same basis for investigating the tapes as post-conviction counsel. During his criminal trial, therefore, Mr. Pinder could have raised an issue about the date established by the tape logs even without the experts' analyses of the tapes. Accordingly, he fails to establish the cause prong of the cause-and-prejudice exception to procedural default. That alone is sufficient to enforce the procedural default. *See Klein v. Neal*, 45 F.3d 1395, 1400 (10th Cir. 1995) ("The 'cause and prejudice' exception is conjunctive, requiring proof of both cause *and* prejudice."). We therefore deny a COA on ground one.

b. Welch perjury

Mr. Pinder questions the USC's determination that he could have raised his Welch-perjury claim at trial or in a post-trial motion. According to Mr. Pinder, he could not have raised this claim earlier because he did not know about the claim's factual basis, which he characterizes as Mr. Welch's admission to the private investigator that he lied about Mr. Pinder's confession to the murders, until well after he filed his new-trial motion. He argues that prior to obtaining evidence that Mr. Welch perjured himself, he only had a "*belief* that [Mr. Welch was] not telling the truth" and that was insufficient "to formally allege that [Mr. Welch] committed perjury." COA Appl. at 33-34.

Whether Mr. Pinder could have made a plausible, formal allegation of perjury at trial is not the issue; his claim arises under either *Napue* or *Brady*. We begin

with *Napue* and assume, for purposes of argument, that Mr. Pinder could not have brought a *Napue* claim at trial or in his new-trial motion. But he still fails to show that the refusal to consider this claim on the ground of procedural default would result in prejudice. The investigator’s affidavit says nothing about the State’s knowledge of Mr. Welch’s alleged perjury. And actual knowledge is an element of a *Napue* claim. See *United States v. Garcia*, 793 F.3d 1194, 1207 (10th Cir. 2015) (“A *Napue* violation occurs when (1) a government witness committed perjury, (2) the prosecution *knew* the testimony to be false, and (3) the testimony was material.” (emphasis added)).⁶ The USC pointed this out when it enforced the procedural default. See *Pinder II*, 367 P.3d at 978 (explaining that the investigator’s affidavit said “nothing about the key element of the State’s *knowledge* of Welch’s alleged perjury at the time of trial—as there is no indication that the State was aware of the contents of the [investigator’s] affidavit at the time it presented the Welch testimony at trial”). Thus, had the USC actually entertained the merits of this claim, it is clear Mr. Pinder would not

⁶ Relying on *Garcia*, Mr. Pinder contends that in this circuit, to prove a *Napue* claim, “a petitioner must prove the prosecutor knew or should have known of the falsity.” COA Appl. at 37 (emphasis added). This contention rests on a clear misreading of *Garcia* and conflates *Napue* and *Brady*. Indeed, we have recently (and again) rejected the approach Mr. Pinder suggests, where a *Napue* claim would lie even when “the government unwittingly elicits false testimony.” *Farrar v. Raemisch*, 924 F.3d 1126, 1132 (10th Cir. 2019). We have instead hewed to the approach detailed in *Garcia* and numerous earlier Tenth Circuit cases. See *id.* at 1132 & nn.7 & 8.

have prevailed under a *Napue* theory.⁷ And although the state post-conviction court never ruled on a motion for discovery Mr. Pinder filed to, as he now puts it, “find out exactly what law enforcement knew,” COA Appl. at 30 n.6, Mr. Pinder develops no argument that the post-conviction court constitutionally erred in doing so or that the USC committed constitutional error in finding no abuse of discretion in the effective denial of the discovery motion, *see Pinder II*, 367 P.3d at 980-81. For these reasons, we deny a COA on ground two to the extent it is based on *Napue*.

Construed as a *Brady* claim, Mr. Pinder fares no better, as he cannot establish cause for his failure to bring a *Brady* claim at trial or in his new-trial motion. A *Brady* claim has three components: (1) “evidence . . . favorable to the accused”; (2) “suppress[ion] by the State, either willfully or inadvertently”; and (3) ensuing “prejudice.” *Strickler v. Greene*, 527 U.S. 263, 281-82 (1999). Suppression of relevant evidence is tantamount to cause for procedural default of a *Brady* claim. *See id.* at 282 (explaining that cause can “parallel” the suppression component).

Mr. Pinder has not identified any relevant evidence the State suppressed. The evidence on which he bases his claim is the investigator’s affidavit, which the State could not have suppressed because Mr. Pinder’s own investigator developed it for Mr. Pinder’s use.

⁷ To the extent the USC’s statement could be construed as a ruling on the merits, we would conclude that reasonable jurists could not debate that the USC reasonably applied *Napue*.

Moreover, Mr. Pinder’s argument that the State should have known of the perjury and, presumably, disclosed that “fact” to Mr. Pinder at trial rests *only* on the many grounds the USC identified as trial evidence that Mr. Welch was lying, *see Pinder II*, 367 P.3d at 978 n.15. Because those same grounds were equally evident to Mr. Pinder at trial, there was no suppression. *See United States v. Erickson*, 561 F.3d 1150, 1163 (10th Cir. 2009) (explaining that under *Brady*, “a defendant is not denied due process by the government’s nondisclosure of evidence if the defendant knew of the evidence anyway.”). Even more fundamentally, Mr. Pinder knew better than anyone whether Mr. Welch was lying because the testimony concerned a matter squarely within Mr. Pinder’s knowledge—his confession to Mr. Welch. For these reasons, there was no suppression and therefore no cause for the procedural default. Accordingly, we deny a COA on ground two to the extent it is based on *Brady*.

B. Ground three and Ruiz portion of ground four

Ground three of Mr. Pinder’s § 2254 petition involved a *Brady* claim he raised in his motion for a new trial, asserting the State suppressed material evidence concerning Mr. Ruiz’s (1) alleged involvement in the prior, unrelated kidnapping and murder of Todd Skidmore and (2) alleged drug-dealing membership in the Mexican Mafia. Ground four concerned two separate *Brady* issues: The State failed to disclose exculpatory

evidence regarding plea agreements with Mr. Ruiz and Mr. Brunyer.

Like the district court, we address the Ruiz portion of ground four together with ground three, and discuss the Brunyer portion of ground four separately. The trial court denied relief on the merits of these claims. The USC affirmed, also on the merits. *See Pinder I*, 114 P.3d at 558-60.

In ruling on ground three of the § 2254 petition and the Ruiz portion of ground four, the district court began by noting that “Pinder’s arguments are fatally flawed by their cursory nature and failure to analyze issues under the federal habeas standard of review” and by his failure to “refer to any caselaw at all, let alone the controlling case, *Brady*. For each issue, Pinder merely lists evidence with his spin on it.” Apl’t. App. at 244. The court concluded that nonetheless, the USC “selected the correct governing legal principle with which to analyze these alleged evidentiary suppression issues: *Brady* and its progeny.” *Id.* at 244-45 (citation omitted). The district court noted that, unlike Mr. Pinder, it had “thoroughly evaluated whether the Utah Supreme Court reasonably applied *Brady* as to Ruiz’s involvement in the Skidmore murder” and concluded that “[t]he Utah Supreme Court reasonably applied *Brady*, particularly lacking any substantive argument by Pinder to the contrary. Pinder has utterly failed to meet his burden under the federal standard of review here.” *Id.* at 246.

Mr. Pinder finds “odd” the district court’s observation that he failed to analyze this issue under the AEDPA standard, and he notes that in reply to the State’s assertion of AEDPA “*as a defense*” in its Response, he responded [in his § 2254 reply] with a 37-page legal argument explaining why that standard did not apply.” COA Appl. at 52 n.10 (emphasis added). However, we read the district court’s decision as declining to consider the substantive arguments in Mr. Pinder’s § 2254 reply because they came too late. *See Sierra Club v. Okla. Gas & Elec. Co.*, 816 F.3d 666, 676 n.9 (10th Cir. 2016) (“We generally do not consider arguments raised for the first time in a reply brief.”). And contrary to Mr. Pinder’s argument, “AEDPA’s standard of review is not a procedural defense, but a standard of general applicability for all petitions filed by state prisoners after the statute’s effective date presenting claims that have been adjudicated on the merits by a state court.” *Gardner v. Galetka*, 568 F.3d 862, 879 (10th Cir. 2009) (ellipsis and internal quotation marks omitted). It was therefore Mr. Pinder’s obligation to explain to the district court in his § 2254 petition why AEDPA did not apply. Waiting until his § 2254 reply was too late. And the failure to “raise [an] issue at the appropriate time” in the district court “waive[s] appellate review.” *Impact Energy Res., LLC v. Salazar*, 693 F.3d 1239, 1246 n.3 (10th Cir. 2012).

Accordingly, we will not consider any of the arguments in the COA Application regarding the USC’s rulings on the merits of these grounds because they were all first broached in the § 2254 reply. And nothing in

the USC's analysis strikes us as being an unreasonable application of *Brady*. Consequently, reasonable jurists could not debate that it was within the district court's discretion to deny relief on ground three and the Ruiz portion of ground four without consideration of the specific arguments Mr. Pinder raised in his § 2254 reply, and the issue does not deserve encouragement to proceed further. We therefore deny a COA on ground three and the Ruiz portion of ground four.

C. Brunyer portion of ground four

Mr. Pinder attempted to raise the Brunyer portion of ground four in a motion to amend the PPCR. He alleged the State failed to disclose the full terms of its agreement with Mr. Brunyer to obtain his testimony at Mr. Pinder's trial, specifically "that Brunyer received promises including an offer of probation in exchange for his testimony." PCR, R629-270 at 622. The only "good cause" he identified for allowing the amendment was that he had discovered the basis of the claim only after the State filed its response to his PPCR. *Id.* The post-conviction court denied the motion without explanation, and the USC affirmed. The USC ruled that, despite the lack of explanation, the trial court did not abuse its discretion in denying the motion to amend because the reason was evident: Mr. Pinder filed the motion four years after he had filed his PPCR and a full year after the State had filed a motion for summary judgment in the post-conviction proceeding. *Pinder II*, 367 P.3d at 980. The USC reasoned that

“Pinder had plenty of time to discover the facts purportedly meriting an amendment.” *Id.*

In his § 2254 petition, Mr. Pinder summarily argued that the state courts denied his Brunyer claim on “a new rule of procedural default,” and therefore the district court owed no AEDPA deference in ruling on the merits. Aplt. App. at 45. He then discussed the merits, relying on the affidavit of Melissa Cowles that she believed the prosecution offered Mr. Brunyer a plea deal in exchange for his testimony. Mr. Pinder claimed the existence of a plea deal with Mr. Brunyer and “the offer of payment of monies to him in exchange for his testimony” was not disclosed to the defense, and had the jury heard of these things, it is reasonably probable it would not have convicted Mr. Pinder. *Id.* In response, the State argued that Mr. Pinder failed to acknowledge the procedural problem with this claim and failed to offer any excuse for his delay in raising it in the post-conviction proceeding. Mr. Pinder replied that § 2254(d) did not bar review because the state courts never adjudicated the claim on the merits. In the alternative, he summarily asserted that his default could be excused by either the cause-and-prejudice or fundamental-miscarriage-of-justice exceptions, although he developed no argument on either exception.

In a footnote, the district court concluded that “[p]rocedural default also applies to Pinder’s argument that information about Brunyer’s potential plea deal was suppressed à la *Brady*. See *Pinder [II]*, [367 P.3d at 980] ¶ 61.” Aplt. App. at 249 n.3.

In his COA Application, Mr. Pinder makes no argument that the state court applied a new rule of procedural default, but argues only that cause and prejudice excuses any default:

The state court's application of the procedural bar should be excused because the state did not disclose its offer to Brunyer, and thus, there is cause and prejudice for any default. See, pgs. 25-27, above [where, in relevant part, he argued that the failure to disclose the allegedly altered 911 tapes constituted cause].

Brunyer provided the sole testimony corroborating Ruiz's version of the cleanup and the failure to disclose the prosecution agreement with Brunyer warrants relief under the de novo standard of review.

COA Appl. at 57.

These conclusory arguments are unconvincing. First, Mr. Pinder does not even allege that Mr. Brunyer accepted any offer that may have been made in Ms. Cowles's presence. And Ms. Cowles's affidavit does not establish that the State entered into an agreement with Mr. Brunyer. Ms. Cowles said that while she was waiting to testify, she was in a room with Mr. Brunyer, the prosecutor, and others. She continued: "One of the men handed Brunyer a document that was about 3 pages long. I heard them say the word 'testimony' and also heard them talking with Brunyer about 'probation,' but I can't recall the exact conversation or words. I believed then, and believe now, that Brunyer was

being offered a deal for hi[s] testimony.” PCR R629-270 at 619-20 (some internal quotation marks omitted).

This falls far short of demonstrating that Mr. Brunyer accepted a deal in exchange for his testimony. Lacking that, there was nothing for the State to disclose to Mr. Pinder under *Brady*, so Mr. Pinder cannot establish cause for his delay in broaching the claim in the post-conviction proceeding. Furthermore, Mr. Pinder fails to establish a debatable argument that if Ms. Cowles’s testimony had been presented at trial, there is a reasonable probability that Mr. Pinder would not have been convicted of the murders. *See Banks v. Dretke*, 540 U.S. 668, 691 (2004) (reiterating rule that prejudice in the context of a defaulted *Brady* claim “exists when the suppressed evidence is material for *Brady* purposes” (internal quotation marks omitted)); *Garcia*, 793 F.3d at 1207 (explaining that materiality under *Brady* requires showing “a reasonable probability that the result of the proceeding would have been different had the evidence been disclosed” (internal quotation marks omitted)). Accordingly, Mr. Pinder has not met his burden to show that reasonable jurists could debate whether the Brunyer portion of ground four should have been considered on the merits by the state court or the federal district court, or that the issue deserves encouragement to proceed further. We therefore deny a COA on the Brunyer portion of ground four.

IV. Conclusion

For the foregoing reasons, we deny Mr. Pinder's COA Application and dismiss this matter.

Entered for the Court
Jerome A. Holmes
Circuit Judge

**IN THE UNITED STATES DISTRICT COURT
DISTRICT OF UTAH**

JOHN R. PINDER,
Petitioner,
v.
SCOTT CROWTHER,
Respondent.

**MEMORANDUM
DECISION & ORDER
DENYING HABEAS-
CORPUS PETITION**

(Filed March 6, 2019)

Case No. 2:16-CV-189-DN

District Judge
David Nuffer

In this federal habeas-corpus case, inmate John R. Pinder, attacks his state conviction. 28 U.S.C.S. § 2254 (2018). Having carefully considered all relevant documents and law, the Court concludes that three of Pinder's claims are procedurally defaulted. And, on the remaining claims, Pinder does not overcome the federal habeas standard of review. The Court therefore denies the petition with prejudice.

BACKGROUND

A portion of the background is quoted from a Utah Supreme Court opinion:

Pinder owned a sprawling ostrich ranch in Duchesne County. He and his ranch-hand, Filomeno Ruiz, were accused (and ultimately convicted) of murdering June Flood and Rex

Tanner. Flood and Tanner also worked on Pinder's ranch.

According to the evidence at trial, Ruiz staged a fight with his girlfriend, Mandy Harris, on the day of the alleged murder. The purpose of the staged fight was to get Harris away from the ranch. Ruiz called 911 during this staged altercation. Harris left after the police showed up. And the 911 call was recorded by the local dispatch.

That evening, Pinder, his girlfriend Barbara DeHart, Ruiz, and Pinder's employees Joe Wallen and David Brunyer (along with Brunyer's wife) gathered around a campfire to drink. At some point the conversation turned to the "shrunk heads" that Pinder and DeHart had seen at a curiosity shop in Seattle. Eventually Pinder spoke of his hopes to someday acquire one. Pinder said to Ruiz, "let's go get some heads." Ruiz responded with a question: "four or two?" Pinder replied, "two."

After grabbing a baseball bat, Pinder and Ruiz drove to the home where Flood and Tanner resided. Pinder violently assaulted Flood and Tanner, kidnapped them, and then shot them both with a 10 mm pistol. Pinder and Ruiz then left the murder scene and later returned with ammonium nitrate and dynamite, packed the bodies with the explosives, and set them off.

Pinder later got others to help him hide the remains. Following a day of bulldozing the

blast site, Pinder and Ruiz dropped several black garbage bags of body parts into a barrel and set them ablaze. Pinder, DeHart, and Ruiz then met with the Brunyers for dinner, after which Pinder and Ruiz returned to the lake to collect more parts for burning.

Tuesday morning, at Pinder's behest, Ruiz and Brunyer went to the Flood home armed with a bottle of alcohol and some rags to remove fingerprints and tidy up. After returning, Brunyer complained about the smell of the Flood residence, to which Pinder quipped, "[T]hat's because [Tanner] shit his pants when I shot him." Pinder, Ruiz, and Brunyer then spent the day bulldozing and gathering more body parts for disposal. . . .

By Thursday, October 29th, Pinder and DeHart had left the state, eventually arriving in Cataldo, Idaho. . . .

Meanwhile, back at the ranch, an investigation was underway. One of Flood's friends reported her missing, and police officers searched the Flood residence. Police discovered the home in utter disarray, with blood on the bed sheets and the backrest of a chair in the living room. They also found a pair of excrement-stained pants in the bathroom. After leaving the home, the investigating officer saw and approached Brunyer, who was standing nearby. Brunyer appeared "[v]ery agitated, very nervous, [and] scared to death." . . .

Pinder and DeHart arrived back in Salt Lake on November 4th. On that day they decided to

appear on KSL News for a television interview about the murders. Shortly thereafter, Pinder, Ruiz, and DeHart were all arrested. Investigators later searched Pinder's ranch and found a gruesome assortment of the victims' remains strewn about the area, stuck in bushes, and hanging from trees. They also searched Pinder's truck and found a 10 mm shell casing, one of the victim's thumbprints on the inside of a window, and some bloodstains (one identified as Pinder's, the other unidentified). Police also determined that the rear windows had been wiped down and cleaned, as well as the mid-section of the door jam.

Ruiz pled guilty to two counts of murder. He denied being the shooter, accusing Pinder instead. DeHart was charged with and later convicted of obstruction of justice. *State v. DeHart*, 2001 UT App 12. And Pinder was charged with two counts of aggravated murder, two counts of aggravated kidnapping, two counts of tampering with evidence, one count of burglary of a dwelling, one count of possession of explosives, and two counts of desecration of a body.

While being held in the Summit County Jail before his preliminary hearing, Pinder met an inmate named Newly Welch. Pinder bragged to Welch about killing Tanner and Flood and blowing up their bodies. He told Welch that the day of the murders, he and Ruiz staged a fight with Ruiz's girlfriend to get her off of the ranch. Welch then asked Pinder what it was

like to kill someone. And in response, Pinder put his hand on Welch's shoulder and said, "[T]here's no bigger rush[,] especially when you know you're going to get away with it." Pinder was convicted on all counts and sentenced to life with the possibility of parole on the aggravated murder charges, and to consecutive statutory terms on the other counts.

Pinder filed a motion for a new trial. For various reasons, the motion took two years to resolve. During the eventual evidentiary hearing on the new trial motion, Pinder presented several newly discovered witnesses – Joey Silva (an inmate who allegedly spent time with Ruiz), Robert Brunyer (David Brunyer's brother), and Kristy Barnes. Each of these witnesses testified, in one way or another, that Ruiz and David Brunyer were actually the killers. The district court found none of the new witnesses credible; indeed, the court expressly found each of them to be seriously lacking in trustworthiness and accordingly denied the motion. Pinder appealed, and we unanimously affirmed his conviction. *State v. Pinder*, 2005 UT 15.

Pinder filed this petition for post-conviction relief in 2006. He presented two main theories of relief. First, he claimed that newly discovered evidence would exonerate him. Pinder brought affidavits from two more inmates who had spent time with Ruiz while incarcerated: Beau Heaps and Danny Alvarez. The Alvarez affidavit stated that while in the Duchesne County Jail, Ruiz told Alvarez that

he and a “gavacho” committed the murders but that Pinder had “nothing to do with it.” The Heaps affidavit stated that Heaps met Ruiz at the Utah State Prison and that Ruiz similarly told him that Ruiz and another man – not Pinder – were the murderers.

Pinder’s second claim was based on the allegation that the State had violated his due process rights by knowingly presenting perjured testimony from Welch and by falsifying evidence concerning the 911 recording of the fight between Ruiz and Harris. To support his claims regarding Welch, Pinder provided an affidavit from a defense investigator who claimed that Welch admitted to lying on the stand but that he would not testify regarding his own perjury until “he was released from probation.” With respect to the 911 tapes, Pinder submitted lengthy expert analyses of the 911 recordings of the Ruiz/Harris “fight.” This analysis concluded that the 911 call recordings from the days of October the 24th and 25th were “not pristine,” had in some way been “altered” and “tampered with by exporting and editing,” and that these files could not “be deemed reliable.” Based on these expert reports, Pinder concluded that: (1) the police had altered the recordings of the 911 call to make the Ruiz/Harris fight appear to have happened on Sunday the 25th rather than on Saturday the 24th; and (2) the State then used this fabricated date as a “baseline” in order to coax witnesses at trial to believe that all the events happened on Sunday rather than Saturday.

Discovery lasted three years, largely because of a drawn out battle over disqualification of the district court judge. During this time, both Ruiz and Alvarez were deposed. In 2009, at the close of discovery, the State moved for summary judgment on several grounds. The State first addressed the newly discovered evidence claims, arguing that they “could . . . have been discovered through the exercise of reasonable diligence,” Utah Code Ann. § 78B-9-104(1)(e)(i) (2018), were merely cumulative of other evidence, were merely for impeachment, and in any event would not have changed the outcome of trial. Turning to the due process claims, the State first invoked the procedural bar limitations in the PCRA. *Id.* § 78B-9-106(1)(c). It argued that the due process claims “could have been but [were] not raised at trial or on appeal,” or during Pinder’s new trial motion. *Id.* Next, the State argued that Pinder failed to establish that the State “knew or had reason to believe Welch’s testimony was false.” Over a year later, Pinder filed a response, a motion to amend the petition, and a motion for additional discovery.

The district court granted summary judgment [for] the State. It first held, with respect to new evidence, (1) Pinder failed to show that the Heaps and Alvarez testimony could not have been discovered by the exercise of reasonable diligence, (2) the evidence was merely cumulative and merely for impeachment, and (3) even if the evidence were considered, it did not establish that the newly discovered evidence would make it impossible for a

reasonable jury to render a guilty verdict. Turning to the due process claims, the court dismissed them both as procedurally barred because they could have been brought “during Pinder’s motion for a new trial or on appeal.” The court also ruled on the merits of both the Welch claim and the 911 claim, holding that Pinder had failed to shoulder his burden of showing that the State knew or should have known that both the Welch testimony and the 911 tapes were false. The court never expressly addressed Pinder’s motion for additional discovery. But it effectively denied the motion by granting the State’s motion for summary judgment. As for the motion to amend, the court denied it in its order granting summary judgment, but without explaining its reasons for doing so.

Pinder v. State, 2015 UT 56, ¶¶ 4-19.

Pinder timely appealed, asserting two sets of claims for relief: (1) He presented newly discovered evidence of witnesses Alvarez and Heaps, apparently to show Pinder’s innocence. *Id.* ¶ 2. (2) He asserted that the State violated his due-process rights by knowingly adducing at trial perjured testimony and fabricated evidence. *Id.* The supreme court rejected the first claim on the merits and the second set of claims as procedurally defaulted.

**PINDER’S ASSERTED GROUNDS
FOR FEDERAL-HABEAS RELIEF**

Pinder asserts several grounds for federal habeas relief:

- (I) The State violated Pinder’s due-process rights by (A) falsifying 911 recordings to show the murder occurred on October 25, not October 24, 1998; and (B) presenting Newly Welch’s perjured false testimony.
- (II) The State violated *Brady v Maryland*, 373 U.S. 83 (1963), by not disclosing exculpatory evidence regarding (A) main prosecution witness Ruiz; (B) Ruiz and Brunyer’s plea deals; and (C) patterns of police misconduct.
- (III) Newly discovered evidence was not properly considered as to (A) Ruiz admissions (i.e., potential witnesses Alvarez, Heaps, and witness Silva); (B) Brunyer admissions (i.e., witnesses Barnes, Robert Brunyer, and potential witnesses, James and Leann Hill, and Moellmer).
- (IV) Cumulative error.

ANALYSIS

I. PROCEDURAL DEFAULT BARS SOME GROUNDS FOR RELIEF

Grounds (I)(A) and (B) are procedurally defaulted.

“[I]f Petitioner failed to comply with a state procedural requirement for bringing . . . claim[s], there is a

. . . bar to federal review, namely procedural default.” *Parkhurst v. Shillinger*, 128 F.3d 1366, 1370 (10th Cir. 1997); *see also Coleman v. Thompson*, 501 U.S. 722, 750 (1991) (holding, when federal claim defaulted in state court on independent and adequate state procedural basis, federal review of claim barred unless cause for default and actual prejudice shown). Because Pinder could have but did not raise his claims regarding the 911 recording and Welch’s testimony “at trial or on appeal,” *Pinder*, 2015 UT 56, ¶ 38 (quoting Utah Code Ann. § 78B-9-106(1)(c) (2018)), the Utah Supreme Court deemed those issues procedurally defaulted and declined to analyze them on their merits. *Id.*

Pinder argues that the procedural default in state court was not based on an independent and adequate state rule. “To be independent, the procedural ground must be based solely on state law.” *Thacker v. Workman*, 678 F.3d 820, 835 (10th Cir. 2012). “To be adequate, the procedural ground ‘must be strictly or regularly followed and applied evenhandedly to all similar claims.’” *Id.* (quoting *Sherrill v. Hargett*, 184 F.3d 1172, 1174 (10th Cir. 1999)).

In concluding that these two of Pinder’s claims were procedurally defaulted, the Utah Supreme Court explicitly discussed and applied the provisions of Utah’s Post-Conviction Remedies Act, Utah Code Ann. § 17B-9-101 through -405 (2018), and its strict limitations on post-conviction-relief petitions by inmates who could have raised their issues earlier but did not. *See id.* § 78B-9-106(1)(c) (“A person is not eligible for relief under this chapter upon any ground that . . .

could have been but was not raised at trial or on appeal. . . .”); *Thacker*, 678 F.3d at 835. “Thus, there is simply no doubt that the [Utah Supreme Court’s] ruling rested exclusively on [Utah] state law.” *Thacker*, 678 F.3d at 835.

Pinder also contends that the state procedural ground upon which the Utah Supreme Court relied was inadequate because it was a “new” procedural ground and therefore could not have been regularly and evenly applied in the past. However, the procedural ground that the Utah Supreme Court relied upon was the time-tested and well-worn ground that an applicant for post-conviction relief is ineligible for relief upon any ground that was not raised at trial or on appeal. *Ross v. State*, 2012 UT 93, ¶ 25; *Johnson v. State*, 2011 UT 59, ¶¶ 6, 9; *Schwenke v. State*, 2012 UT App 18, ¶ 5; *Rynhart v. State*, 2011 UT App 6, ¶¶ 2-5; *Pedockie v. State*, No. 20100372-CA, 2010 Utah App. LEXIS 299, at *1 (Utah Ct. App. Oct. 28, 2010) (per curiam); *Underwood v. State*, 2010 UT App 129, ¶¶ 3-5 (per curiam); *Kissell v. State*, 2010 UT App 123, ¶¶ 2-3; *Zampedri v. State*, 2009 UT App 302, ¶ 4 (per curiam); *Meinhard v. Turley*, 2009 UT App 150, ¶ 3 (per curiam); *Fleming v. State*, 2008 UT App 407, ¶¶ 2-3 (per curiam). In fact, the Court could not find a case – and Pinder has not pointed toward any case – in which this ground has not been applied when relevant in the Utah appellate courts.

The part of the Utah Supreme Court’s analysis that Pinder contends is “new” (and therefore not regularly and evenly applied in the past) is the idea that

“raised at trial” includes a post-trial motion in the trial court. But that was not even necessarily what the court was relying on in concluding the procedural bar applied. The court apparently believed that Pinder had enough information about these two claims to assert them during his actual trial. As to Welch’s testimony, the court said, “[T]he defense had plenty of grounds for this assertion [that Welch perjured himself] at trial.” *Pinder*, 2015 UT 56, ¶ 48. And when it said “at trial,” in this context, it meant when Welch testified, not in the post-trial period before appeal. *See id.* Meanwhile, as to the assertedly doctored-911 tapes, the Court noted, “Pinder offers no clear ground for his assertion that this claim could not have been presented at trial. . . .” *Id.* ¶ 53. Again, “at trial” meant the time when the murder date was being discussed in trial proceedings, not in the post-trial period before appeal. *See id.* And the Court need not address the alleged newness of this adequate state procedural basis for default.

The procedural bar here hinged on an independent and adequate state ground.

B. Actual-Innocence Exception

Pinder may overcome procedural default, but only by showing “cause for the default and actual prejudice as a result of the alleged violation of federal law, or . . . that failure to consider the claims will result in a fundamental miscarriage of justice.” *Coleman*, 501 U.S. at 750. His arguments appear to hinge on “newly

discovered evidence,” so the exception Pinder relies on is essentially that of fundamental miscarriage of justice or actual innocence. Pinder’s arguments under this heading re-argue for the most part every one of his claims in this petition – all having been rejected by the Utah Supreme Court. *Pinder*, 2015 UT 56; *State v. Pinder*, 2005 UT 15. Evidence of actual innocence proffered must meet all three criteria: (1) new, (2) reliable, and (3) so probative and compelling that no reasonable juror could find guilt. *See Schlup v. Delo*, 513 U.S. 298, 324-29 (1995). Requirement one is not met here. All the newly discovered evidence Pinder raises is essentially every claim that he brought before the Utah Supreme Court and in this petition, re-argued as grounds for a finding of actual innocence here.

There is no new evidence. Petitioner’s mere re-hashing of evidence and alleged civil-rights violations do not show that the exception applies. Indeed, the kernel of the analysis of actual innocence is not whether Petitioner urgently believes errors existed – or whether error indeed existed – in state proceedings, but whether Petitioner is factually innocent. Actual innocence must also be supported by new evidence, which Petitioner has not provided.

The first two grounds in the petition – the prosecution’s violation of Pinder’s due-process rights through falsified 911 recordings and introduction of Welch’s perjured, falsified testimony – are denied because of procedural default.

II. MERITS ANALYSIS

Pinder argues that the prosecution violated his constitutional rights under *Brady* by not disclosing exculpatory evidence. He also contends that the Utah courts did not properly consider “new evidence” argued in his defense after his trial. These claims are denied on their merits.

A. Standard of Review

The standard of review to be applied in federal habeas cases is found in § 2254, under which this habeas petition is filed. It states:

(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). Subsection (d)(1) governs claims of legal error while subsection (d)(2) governs claims of factual error.” *House v Hatch*, 527 F.3d 1010, 1015 (10th Cir. 2008).

The inquiry includes whether Utah Supreme Court’s rejection of Pinder’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*, 563 U.S. 170, 181 (2011) (citation omitted); *see Littlejohn v. Trammell*, 704 F.3d 817, 824 (10th Cir. 2013), is “‘difficult to meet,’ because [the statute’s] purpose 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*, 565 U.S. 34, 38 (2011) (quoting *Harrington v. Richter*, 562 U.S. 86, 102-103 (2011) (citation omitted)). This court is not to determine whether the Utah Supreme Court’s decisions were correct or whether a different outcome might have been reached. *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*, 563 U.S. at 181.

Under *Carey v. Musladin*, 549 U.S. 70 (2006), the first step is determining whether clearly established federal law exists relevant to Pinder’s claims. *House*, 527 F.3d at 1017-18; *see also Littlejohn*, 704 F.3d at 825. Only after answering that “threshold question” affirmatively does the issue arise “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 U.S. 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, a court deciding a federal habeas claim is not restricted by the state court’s analysis when deciding whether relevant clearly established federal law exists. *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.”); *Mitchell v. Esparza*, 540 U.S. 12, 16 (2003) (“[A] state court need not even be aware of our precedents, ‘so long as neither the reasoning nor the result of the state-court decision contradicts them.’”) (citation omitted).

If that threshold is overcome, habeas relief may be granted 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 court issue a writ of habeas corpus merely because it determines on its own that the state-court decision erroneously applied clearly established federal law. *See id.* “‘Rather that application must also be unreasonable.’” *Id.* (quoting *Williams*, 529 U.S. at 411). Indeed, “‘an *unreasonable* application of federal law is different from an *incorrect* application of federal law.’” *Harrington*, 562 U.S. at 100 (emphasis in original) (quoting *Williams*, 529 U.S. at 410).

This highly demanding standard means to pose a sizable obstacle to habeas petitioners. *Id.* at 786. Section 2254(d) “stops short of imposing a complete bar on federal court relitigation of claims already rejected in state proceedings.” *Id.* It maintains power to issue the writ when *no possibility exists* that “fairminded jurists could disagree that the state court’s decision conflicts with th[e Supreme] Court’s precedents. It goes no farther.” *Id.* 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 fairminded disagreement.” *Id.* at 786-87. It is against this backdrop that the standard of review will be applied to this case’s circumstances.

B. *Brady* Violations

Pinder’s arguments about the prosecution’s alleged failure to disclose exculpatory evidence to his defense are based on: (1) Ruiz’s involvement in the “Skidmore murder,” drug dealing, and “Mexican Mafia”; (2) Ruiz and Brunyer’s¹ plea-deal terms; and (3) extensive police misconduct in Uintah Basin. Pinder’s arguments are fatally flawed by their cursory nature and failure to analyze issues under the federal habeas standard of review. Beneath each heading to the three categories of “exculpatory evidence,” Pinder merely states, “The state court’s denial of this claim was contrary to and an unreasonable application of clearly established federal law, 28 U.S.C. § 2254(d)(1), and an unreasonable determination of the facts. 28 U.S.C. § 2254(d)(2).” (Pet., Doc. No. 1, at 41, 44, 47.) Most damaging to his cause, Pinder’s arguments do not refer to any caselaw at all, let alone the controlling case, *Brady*. For each issue, Pinder merely lists evidence with his spin on it. This does not even begin to meet his burden to show that the Utah Supreme Court applied the wrong United States Supreme Court precedent and/or unreasonably applied that precedent.

Remembering that review is tightly restricted by the federal habeas standard of review, this Court observes that Utah Supreme Court selected the correct governing legal principle with which to analyze these alleged evidentiary suppression issues: *Brady*, 373 U.S. 83 and its progeny. *Pinder*, 2005 UT 15, ¶ 22. Unlike

¹ Addressed later in footnote three.

Pinder, the supreme court took care to set forth *Brady*'s requirements in several paragraphs:

In *Brady*, the United States Supreme Court held "that the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or punishment, irrespective of the good faith or bad faith of the prosecution." *Id.* at 87. The Supreme Court later expanded this principle by placing a duty on the prosecution to disclose material evidence favorable to a defendant even in the absence of a request by the accused. *United States v. Agurs*, 427 U.S. 97, 107 (1976). The duty to disclose applies to substantive as well as impeachment evidence. *United States v. Bagley*, 473 U.S. 667, 676 (1985).

When claiming that the prosecution's failure to disclose evidence requires a new trial, the Supreme Court has stated that a defendant must show the following: "The evidence at issue must be favorable to the accused, either because it is exculpatory, or because it is impeaching; that evidence must have been suppressed by the State, either willfully or inadvertently; and prejudice must have ensued." *Strickler v. Greene*, 527 U.S. 263, 281-82 (1999). Consistent with this standard, we have declared that a *Brady* violation "occurs only where the state suppresses information that (1) remains unknown to the defense both before and throughout trial and (2) is material and exculpatory, meaning its disclosure would have created a 'reasonable probability' that

‘the result of the proceeding would have been different.’” *State v. Bisner*, 2001 UT 99, ¶ 33 (quoting *Bagley*, 473 U.S. at 682).

Explaining the *Brady* inquiry announced in *Bisner*, we noted that “courts universally refuse to overturn convictions where the evidence at issue is known to the defense prior to or during trial, where the defendant reasonably should have known of the evidence, or where the defense had the opportunity to use the evidence to its advantage during trial but failed to do so.” *Id.*; see also *United States v. Aichele*, 941 F.2d 761, 764 (9th Cir. 1991) (“When . . . a defendant has enough information to be able to ascertain the supposed [*Brady*] material on his own, there is no suppression by the government.”); *United States v. Pandozzi*, 878 F.2d 1526, 1529 (1st Cir. 1989) (concluding that *Brady* is not violated when the defense could have obtained the information “with any reasonable diligence” (internal quotation omitted)); *United States v. Davis*, 787 F.2d 1501, 1505 (11th Cir. 1986) (the *Brady* “rule does not apply if the evidence in question is available to the defendant from other sources”).

Further, as the second component of the *Bisner* test makes clear, the evidence in question must be material, such that a different result on retrial is reasonably probable. 2001 UT 99 at ¶ 33. It is important to note, however, that the *Brady* materiality standard is not identical to a sufficiency of evidence review. See *Kyles v. Whitley*, 514 U.S. 419, 434 (1995)

(explaining that the *Brady* materiality analysis “is not a sufficiency of evidence test”). Rather, a reviewing court must look at the suppressed evidence and determine whether, taken cumulatively, the absence of the suppressed evidence at trial undermines confidence in the fairness of the proceeding. *See id.* at 434-35. As a result, “the question is not whether the defendant would more likely than not have received a different verdict with the evidence, but whether in its absence he received a fair trial, understood as a trial resulting in a verdict worthy of confidence.” *Id.* at 434.

Id. ¶¶ 23-26. The Court’s review of *Brady* and its progeny reveals that the Utah Supreme Court accurately set forth the law here.

As required by the standard of review – which Pinder ignored by providing no analysis – this opinion has thoroughly evaluated whether Utah Supreme Court reasonably applied *Brady* as to Ruiz’s involvement in the Skidmore murder, *id.* ¶¶ 28-33; Ruiz’s plea negotiations, *id.* ¶¶ 38-42; and police corruption in the Uintah Basin, *id.* ¶¶ 34-37. Within several paragraphs under each heading, the Utah Supreme Court set forth *Brady*’s requirements and carefully applied them to the type of evidence allegedly not disclosed. The Utah Supreme Court reasonably applied *Brady*, particularly lacking any substantive argument by Pinder to the contrary. Pinder has utterly failed to meet his burden under the federal standard of review here.

C. “New Evidence”

Pinder contends that specific testimony should have been – but was not – accepted as new evidence warranting a new trial, including testimony offered by Silva, Robert Brunyer, Moellmer, Barnes, and the Hills (assessed on direct appeal) and Alvarez and Heaps (assessed on appeal from post-conviction application). *Pinder*, 2015 UT 56, ¶¶ 25-36; *Pinder*, 2005 UT 15, ¶¶ 64-90. He attacks the Utah Supreme Court’s rejection of this “new evidence” as

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 . . . 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). But Pinder gives mere lip service to the federal habeas standard of review, stating it but providing no analysis using it.

First, the state *Pinder* opinions did not analyze the new-evidence issues under the Federal Constitution, but under state-law standards. It is well-settled that a federal court may grant habeas relief only for violations of the Constitution or laws of the United States. *Estelle v. McGuire*, 502 U.S. 62, 68 (1991); *Rose v. Hodges*, 423 U.S. 19, 21 (1975). Errors of state law are not a basis for relief. *Estelle*, 502 U.S. at 67; *Lewis v. Jeffers*, 497 U.S. 764, 780 (1990). Petitioner thus has no valid argument here.

Second, to the degree that Pinder challenges the state courts' factual findings, he overlooks the controlling statute's further guidance as to state-court factual findings:

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

28 U.S.C.S. § 2254(e)(1) (2018).

Under the statute, the the correctness of all state-court factual findings about purportedly new evidence is presumed. This includes state court findings that the Hills' offered testimony "was available or known to Pinder before the conclusion of trial," *Pinder*, 2005 UT 15, ¶ 72; Moellmer's offered testimony could have been uncovered by trial's end by "a reasonably diligent search," *id.* ¶ 740; as witnesses, Robert Brunyer's and Barnes's "credibility was highly suspect and not entitled to any significant weight" that could have had "a strong enough impact on a jury to make a different result on retrial probable," *id.* ¶ 78; "it is difficult to conceive of a less trustworthy witness' than Silva," *id.* ¶ 86; and, while the Heaps-and-Alvarez-offered testimony "adds something to Pinder's theory that Ruiz was the one who shot Flood and Tanner, a reasonable jury would still be well within its prerogative to convict Pinder based on the evidence it had before it" and thus

it did not trigger a new trial,² *Pinder*, 2015 UT 56, ¶ 36. Pinder’s mere repetition of all his past arguments does not meet the “clear and convincing evidence” threshold the standard of review requires. “In light of the record as a whole, [the Court] conclude[s] that [Pinder’s] argument on this point doesn’t entitle him to relief under § 2254(d)(2)’s ‘daunting standard.’” *Vreeland v. Zupan*, 906 F.3d 866, 881 (10th Cir. 2018) (citations omitted).

D. Cumulative Error

“In the federal habeas context, a cumulative-error analysis aggregates all constitutional errors found to be harmless and analyzes whether their cumulative effect on the outcome of the trial is such that collectively they can no longer be determined to be harmless.” *Cole v. Trammell*, 755 F.3d 1142, 1177 (10th Cir. 2014) (quoting *Alverson v. Workman*, 595 F.3d 1142, 1162 (10th Cir. 2010)). “The cumulative-error analysis applies where there are two or more actual errors. It does not apply, however, to the cumulative effect of non-errors.” *Smith*, 824 F.3d at 1255 (quoting *United States v. Franklin-El*, 555 F.3d 1115, 1128 (10th Cir. 2009)). There are not errors here, so the cumulative-error doctrine does not apply.

² This last “finding” could be termed a legal conclusion; however, as a legal conclusion it would fall under the category of a state-law determination that this Court will not review. See *Estelle*, 502 U.S. at 67

CONCLUSION

Pinder's claims are either procedurally defaulted³ or do not pass muster under the federal habeas standard of review.

IT IS THEREFORE ORDERED that the petition for writ of habeas corpus is DENIED and the action DISMISSED WITH PREJUDICE.

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

This action is CLOSED.

BY THE COURT

/s/ David Nuffer

JUDGE DAVID NUFFER
United States District Court

³ Procedural default also applies to Pinder's argument that information about Brunyer's potential plea deal was suppressed à la *Brady*. See *Pinder*, 2015 UT 56, ¶ 61.

IN THE UNITED STATES DISTRICT COURT
DISTRICT OF UTAH

JOHN R. PINDER, Petitioner, v. SCOTT CROWTHER, Respondent.	JUDGEMENT IN A CIVIL CASE Case No. 2:16-CV-189-DN District Judge David Nuffer
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IT IS ORDERED AND ADJUDGED

that Petitioner's action is dismissed with prejudice
because it fails to state a claim upon which relief may
be granted.

DATED this 6th day of March, 2019.

BY THE COURT

/s/ David Nuffer
JUDGE DAVID NUFFER
United States District Court

**UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT**

JOHN R. PINDER,	No. 19-4039
Petitioner – Appellant,	(D.C. No. 2:16-CV-
v.	00189-DN)
SCOTT CROWTHER,	(D. Utah)
Respondent – Appellee.	

ORDER

(Filed Apr. 6, 2020)

Before **HARTZ, HOLMES**, and **MORITZ**, Circuit Judges.

Appellant’s petition for rehearing is denied.

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

Entered for the Court

/s/ [Illegible]

CHRISTOPHER M. WOLPERT, Clerk
