NO. 21-5817 ORIGINAL

IN THE SUPREME COURT OF THE UNITED STATES

JAMES E. PEARSON,)

Petitioner,)

vs.)

THE STATE OF WYOMING,)

Respondent.)

ON PETITION FOR WRIT OF CERTIORARI TO

THE 10th CIRCUIT COURT OF APPEALS

PETITION FOR WRIT OF CERTIORARI

JAMES E. PEARSON (Pro-se)

WYOMING MEDIUM CORRECTIONAL INSTITUTION

7076 ROAD 55F

TORRINGTON, WYOMING 82240

QUESTION PRESENTED

1. Does the reasoning within *Malloy v Hogan*, 378 US 1, 10, 12 LEd2d 653, 84 SCt 1489 (1964) require specifically apply to claims of insufficiency or ineffective counsel, and were the federal habeas reviewing courts in error, under 28 USCS § 2254 (d)(1), including the application of state facts under (d)(2), when state court standards were incompatible with this Court's standards?

2. What level of deference, or depth of "look-through presumption", via *Wilson v Sellers*, 584 US ___, 200 LEd2d 530, 138 SCt 1188 (2018), must a federal habeas court resort to in order to properly dismiss a state-conviction-based federal habeas petition under 28 USCS 2254 (d)(1) or (d)(2) or must a federal habeas court require briefing and/or hearings on potential denials prior to dismissal via 2254 (d)(1) or (d)(2) under Miller-El v Cockrell, 537 US 322, 336-337, 123 SCt 1029, 154 LEd2d 931 (2003)?

3. Does a presumption of correctness or "in the light most favorable to the prosecution" found in *Jackson v Virginia*, 443 US 307, 61 LEd2d 560 (1979) change the requirement that each inference or presumption require its own supporting fact(s) in *Blumenthal v US*, 332 US 539, 52 LEd 154, 68 SCt 248 (1947)(citing *US v Ross*, 92 US 281, 282, 23 Led 707, 708(1876)): or may an inference be supported by another inference which is supported by fact(s)?

4. Was Pearson's conviction in violation of the federal constitution?

LIST OF PARTIES

All parties appear in the caption of the case on the cover page.

TABLE OF CONTENTS

Contents

INDEX TO APPENDICES

TABLE OF AUTHORITIES

Cases

IN THE SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

Federal Courts

The opinion of the United States Court of Appeals for the 10th Circuit, decided May 18, 2021, appears at Appendix A and is reported at _____F3d ____

The opinion of the United States District Court, decided August 28, 2020, appears at Appendix B and is reported at _____ F Supp _____

State Courts

The opinion of the highest state court to review the merits of petitioner's Post-Conviction Writ of Review appears at Appendix C

The opinion of the Wyoming state 6th Judicial District Court reviewing petitioner's Post-Conviction Petition appears at Appendix D

The opinion of the highest state court to review the merits of petitioner's Petition for Writ of Certiorari appears at Appendix E

The opinion of the highest state court to review the merits of petitioner's direct appeal appears at Appendix F

JURISDICTION

The date on which the United States Court of Appeals decided my case was May 18, 2021.

No petition for rehearing was filed in this matter.

The jurisdiction of this Court is invoked under 28 USC § 1254 and 2241 under this Court's original jurisdiction

CONSTITUIONAL AND STATUTORY PROVISIONS INVOLVED

28 USCS § 2254

(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.

Statement of the Case

Petitioner, a state prisoner, was convicted and sentenced for aggravated arson and attempted murder, via the arson, of one Autumn Evans. Pearson has consistently asserted his actual innocence against both charges. The state's theory was that Pearson gave Evans drugs which she ran away with. Pearson then drove to a gas station, filled a standard five gallon can with gas, drove it to the Rodeway Inn Motel and used it to set fire to the hallway outside Evan's room (315) on the third floor and then fled the city. .

A. Event

On September 6, 2014 James Pearson went to Gillette, Wyoming, to meet with Autumn Evans, with whom he had an intimate relationship. Before dark, Pearson arrived at the Rodeway Inn, went to room 315 and met Autumn Evans. He walked her out to his car with her belongings. Pearson's car was a white 2007 Chrysler 300. It had a unique Bentley grill on the front. After Pearson entered the car, Jolene Boos testified she spoke with Evans briefly, at the back of the car, while Evans put her stuff the car's trunk. Boos testified she didn't see Pearson at that time and did not see the front of the vehicle. Both Evans and Pearson left the Rodeway Inn for the Super 8 Motel.

Alice Bitterman, a clerk at the Super 8, testified Pearson and Evans arrived and got a room together where Evans moved loads of belongings into the Super 8 room. Bitterman testified to seeing Pearson's in a full length off-white jumpsuit, black

rimmed fedora hat and orthopedic gloves[1], plus his eyeglasses. Later in the evening, before midnight, Pearson drove Evans back to the Rodeway Inn, specifically to the bar next door, where both businesses share a parking lot/ entrance. Evans was intending to meet some people at the bar and according to Cameron Means (of room 315) testimony, Pearson gave Evans a some meth - presumably for this meeting. Evidently, Evans didn't show up as expected wherein Pearson went looking for her.

Pearson went back to room 315, of the Rodeway Inn, where Cameron Means answered the door. The government asked Means if Pearson was angry, and Means testified Pearson was not, however, on being pressed, Means agreed Pearson was agitated. At approximately 12:11 am, Pearson was videotaped exiting the Rodeway Inn through the lobby wearing a full length grey jumpsuit, black Fedora hat, eyeglasses, orthopedic gloves, and mustache. Bitterman (Super 8 Motel), Corporal Stroup, and investigator Hannigan[2] all testified this was Pearson and his outfit.

Prior to midnight, Evans received a phone call from Christopher Phillips telling her that he was going to kill Cameron Means (of room 315). This information was in the police reports, but not included at trial. Means did testify that Phillips previously had beat Means' and excessively. Defense counsel asked about Means' drug use and

---

1 These items were post-surgery supports – black nylon covering the entire hand, secured by Velcro.

2 State's evidence #11, the lobby photos (2) showing Pearson in the full length grey jumpsuit etc., had investigator's timeline notes suggesting the two photos were from two different points: 1) 12:11 am and 1:29 am "moments before fire – same looking guy"

probed into other people in the room, a stolen wallet and Chris Phillips having a beef with Means - beating him up and stalking him.

When Evans left the bar, she returned to room 315, where she told Means about Pearson giving her drugs, and told Means to tell anyone looking for her that she was not there. When Pearson came to room 315 asking for Evans, Cameron Means told Pearson that Evans was at the bar, and just minutes later, at 12:21, she texted Pearson telling him she was at the bar. The text was not entered into evidence by defense counsel, but was in police reports.

Pearson received the text, evidently gave up looking at the bar, and returned to the Super 8. Bitterman stated it was after midnight. At the Super 8, Pearson asked Bitterman if she had seen Evans and looked agitated.

At 1:09 am, Pearson and his car were videotaped at the Shell gas station where receipts showed Pearson paid $30 for gas. This station is in-between the Rodeway Inn and Hwy 59 (toward Wright, Wyoming). The photos showed portions of the car, and Pearson, but never of Pearson pouring gas, nor of any can or any container. The government's theory is that Pearson filled a 5 gallon gas can at this station and time.

At 1:21 am - Corporal Stroup testified he was watching for traffic violations while parked next to a Kwik Shop convenience store on Highway 59 and Second Street. He spotted and videotaped a white Chrysler 300 and followed it for an unknown time. He noted the car was consistent with Pearson's but he did not see the front grill, was not questioned about running the license plates, nor on how long or far he followed the

Chrysler. This car proceeded south on highway 59 - toward Wright, Wyoming. At 2:05 am, Pearson's phone received a call pinging a cell tower outside Wright, Wyoming which is about 40 miles south of Gillette - and the fire. This would equate to about 60 mph on a dark two-lane stretch of country road.

At 1:24 am, - 3 minutes and several miles away - a surveillance camera at the Rodeway Inn caught a light colored vehicle, headlights into the camera, driving through or toward the front entry of the Rodeway Inn. The camera's view is distant. You can see the roofline to infer the vehicle is a car, and light colored, but the headlights shining directly into the camera bar any consideration of the type, model or style of car. The government and courts presume these two cars are both Pearson's and headed toward the fire, even though several miles (and over 5 minutes) apart at approximately the same time.[3]

At the Rodeway Inn, Jolene Boos testified she and her boyfriend returned from drinking at the bar and went outside to smoke: possibly somewhere between 7 and 9 pm. The government presumes Boos timeline is simply in error. She saw a pearl/ white car, similar to Pearson's backing into the last spot in the Rodeway Inn lot.

She did not identify the car's unique grill, but stated she thought it was similar to the car in Cpl. Stoup's video, which never showed the front. According to Boos, Pearson got out and walked right by her carrying an unidentified object. As he passed,

---

[3] For this to be true, Pearson would have to have sped past Cpl. Stroup as he was responding to the fire, after having videotaped a known Chrysler 300 on its way to Wright, Wyoming.

he allegedly asked if Autumn [Evans] was home. Defense counsel questioned this as police reports initially had the individual asking "someone home." She stated she was unsure. She testified she saw 6' -8" Pearson walk right by her wearing basketball shoes, jeans, t-shirt and ball cap over bandana. She was very adamant about the ball cap.

She said Pearson left the car and walked from the car without stopping, while carrying something she couldn't identify, orangish- or reddish in color. Counsel asked no questions regarding this object's shape, size, or apparent weight by counsel, nor were there are reports of additional investigation regarding what she may have seen. On passing, Boos stated Pearson entered the back stairwell and moments later, stood looking out the window between the 2nd and 3rd floors at her and her boyfriend. Boos stated she and her boyfriend returned to her room to relax and later, possibly half an hour, she discovered the fire was taking place and exited the building – eventually giving her description to police.

At 1:37 am, Cpl. Stroup was called to assist the fire in the third floor of the Rodeway Inn. Defense counsel did not investigate if he was still following the Chrysler 300 at that time. Cpl. Stroup went to the motel and retrieved video from the 2nd floor hallway and the motel entrance. The motel entrance video clearly shows Pearson exiting at 12:11 am, while the 2nd floor camera is highly debatable. It covered the full length of the hallway. The government believes this is Pearson, but the image is extremely blurry and shows a person certainly wearing a lighter colored top with a very possible darker colored bottom. The timeline is consistent with prior to the fire

and, if with a darker bottom, is consistent with Boos' description of a person with jeans and t-shirt, but far too blurry and distant to see details regarding any headgear etc.

After the fire, during conversations with motel occupants, Task Force Officer Algers talked to Evans (alleged victim) who mentioned Pearson because she believed Pearson and Chris Phillips had been in prison together and thus presumed to know each other. She told Algers Chris Phillips had threatened to kill Cameron Means (living in room 315) that night, during a phone conversation, hours before the fire, because Means owed Phillips money. Evans never testified because she died from unassociated causes before trial so the only potential evidence for this threat against Means, was Phillips. Phillips threats were not presented at the trial nor are there records of any investigation of them by the defense or the state, who initially added Phillips to the witness list.

The third floor was badly damaged. Means stated Evans was uninjured, but her boyfriend hurt his arm jumping out a window. Fire investigators testified the fire was started with an accelerant and its origin was somewhere between rooms 315 and 318. Investigators Siwick and Rutherford stated they found a standard 5 gallon can lying in the burnt area, but they could not confirm if it was a gas can, or if it held gas. At the Gillette Police Department, Fire Investigator Acton opened the can and removed a dark powered substance from it. No testing was ever requested for the material.

A couple days after the fire, police investigators, on Evans statements, arrested Pearson and collected evidence including his clothing and car. Investigators tested these with an RAE systems 3000 – a specialized system for these materials. The

equipment found no traces of accelerant or fire on Pearson's clothing or in the car. The police then used a specially trained dog and the dog also found nothing. This information was included in the police reports of collected evidence, but not presented to the jury by defense counsel.

B. Trial

Prior to the trial, the defense decided Pearson would not testify due to Pearson's past history with drugs and incarceration, and both sides agreed to not bring in Evans statements due to hearsay concerns. Defense counsel filed a 404(b) evidence request. The prosecution is required, in Wyoming, to notify the court of 404(b) material and the court is required to have a *Gleason Hearing*[4] to determine if the 404(b) material is allowed: the Wyoming Supreme Court has mandated prosecutorial notice and the hearing. The hearing never occurred and counsel didn't request it.

Chris Phillips was initially placed on the state's witness list, but removed shortly before the trial. No records indicate counsel investigated Phillips or his connections to the event. He was simply added, and dropped, from witness rolls by the state, without comment.

During voire dire, jury members were asked about drugs and their beliefs. Mr. Bennet, was excused after saying he couldn't be fair when drugs are involved. Others held strong beliefs and comments related to community harm, etc., but stated they could remain fair even though drugs were involved.

---

[4] *Gleason v State*, 2002 WY 161,] 17, 57 P3d [332, 340 (Wyo 2002)

At the beginning of trial, Pearson was advised of his right *not* to testify. However, defense counsel told the jury Pearson had previously done time for involvement with drugs. Drug use, especially Pearson's drug activity with Evans , was a consistent theme, especially by the state as a reason for his allegedly trying to kill her by setting the fire outside room 315.

Evidence was presented from fire and police investigators, from Jolene Boos and clerks from both motels. During the trial, a 5 gallon gas can sat next to the state's table. Boos never noted it as being anything like the item she saw the alleged Pearson carry past her. This was missed by counsel. As the trial progressed, in addition to the above information, a dozen fully uniformed fire fighters showed up to watch the proceedings. Defense counsel objected to their presence as a fair trial issue. The court noted they had a right to be present and asked what counsel wanted the court to do. Defense counsel responded with "do something." The court dismissed the objection and moved on.

At closing, defense counsel moved to dismiss for insufficient evidence. The court denied the request. Defense counsel then told the jury, twice, the state had *not* tested Pearson's clothing or car for accelerants or fire residue even though they had tested these items - which tested clean. He asserted Boos' testimony (t-shirt, jeans, ball cap) was not credible because she was intoxicated and couldn't get here timelines right, and relied heavily on Means being intoxicated on the night of the fire even though Means was the greatest asset for showing Pearson was unaware of Evan's being at room 315.

C. State Post-Conviction History

Pearson has consistently asserted his actual innocence against all charges. On direct appeal, *Pearson v. State*, 2017 WY 19, 389 P3d 794 (Wyo 2017), appellate counsel claimed there was insufficient evidence to prove the element of intent to kill. He didn't challenge the underlying arson charge which thereby required the appellate court to presume Pearson set the fire, along with all the government's facts and inferences. *Pearson,* 389 P3d 799, ¶ 24. Immediately after the direct appeal, Pearson requested a Writ of Certiorari against the direct appeal, asserting appellate counsel and the reviewing Court violated his rights by failing to review *all* of the evidence in determining whether the elements were proven beyond a reasonable doubt as defined by *Jackson v Virginia,* below, and more specifically, *Lockhart v Nelson,* below. Pearson asserted *Malloy v Hogan*, 378 US 1, 10-11, ,84 SCt 1489, 12 LEd2d 653 (1964) (see also *McDonald v Chicago*, 561 US 742, 177 LEd2d 894, 912-914, 120 SCt 3020 (2010)) requiring federal claims must be heard utilizing federal standards.) The Certiorari request was denied without review.

Pearson filed a Petition for Post-Conviction Relief (Wyo Stat 7-14-101) to the trial court. Wyoming only authorizes the claim of ineffective appellate counsel and applies this as a portal through which other errors must be brought. Pearson re-asserted the Certiorari claims, above, along with claims of ineffective appellate and trial counsel, due process related to 404(b) evidence and firefighters affecting the jury, failure to call Phillips or investigate his involvement, and double jeopardy based on Wyoming statutory elements. Many pages were devoted to asserting proper standards.

. The Post-Conviction Petition and its Summary Judgment were denied. Thereafter, Pearson filed a Writ of Review with the Wyoming Supreme Court challenging the denials. The Writ of Review was summarily denied without explanation.

D. Federal Habeas and Applied Standard s (§ 2254 (d)(1))

Thereafter, Pearson filed for a habeas writ in federal district (habeas) court with copies of state petitions and motions: herein Appendix G-J. The federal district court, wrote Wyoming's standard was proper, employed by federal courts in similar cases (citing *US v Sharp*, 749 F3d 1267,1275 (10th Cir); *Harden v Norman*, 919 F3d 1097, 1101 (8th Cir); and *US v Bates*, 960 F3d 1278, 1292 (11th Cir). The habeas court did not decide on state standards for ineffectiveness claims or sub-claims, but followed strongly to the state's direct appeal factfinding.

The 10th Circuit affirmed the habeas court's decision. The 10th Circuit *looked-through* to the state post-conviction decision and denied a COA, without *Lockhart*. It approved the habeas court's insufficiency decision on state standards and facts for trial and direct appeal, and reviewed ineffectiveness claims against appellate and trial counsel, plus due process/ fair trial claims. It made no finding on state ineffectiveness standards while finding the habeas court's decision was not unreasonable.

Insufficiency Standards

The Wyoming standard <u>for insufficiency claims</u> says "In reviewing the denial of a motion for judgment of acquittal, we examine and accept as true the evidence of the prosecution together with all logical and reasonable inferences to be drawn therefrom,

leaving out entirely the evidence of the defendant in conflict therewith." *Pearson,* 389 P3d 796, ¶ 10.[emphasis added] Wyoming has also held it will not consider "whether or not the evidence was sufficient to establish guilt beyond a reasonable doubt." *Hill v State*, 2016 WY 27, ¶ 13, 371 P3d 553, 558 (Wyo 2016).

This Court's interpretation is very different under *Jackson v Virginia*, 443 US 307, 61 LEd2d 560 (1979), and *Lockhart v Nelson*, 488 US 33, 102 LEd2d 265 (1988). *Lockhart*, 488 US at 39, held a reviewing/ appellate court violates a defendant's right to due process when it fails to consider *all* of the evidence at trial, even erroneously admitted evidence, because an appellate ruling on evidence insufficiency is equivalent to a judgment of acquittal in a trial court. See also *McDaniel v Brown*, 558 US 120, 131, 175 LEd2d 582, 590 (2010). *Jackson,* 443 US at 319, requires evidence sufficient to fairly support a conclusion that every element of the crime has been established beyond a reasonable doubt, also holding a reviewing court must defer to the government when evidence on an issue is conflicted.

Insufficiency Standards - Discussion

The federal habeas court, without *Lockhart,* determined Wyoming's standard, for insufficiency claims, was the correct standard of review.[5] This Wyoming no-conflicting-evidence standard was applied by all reviewing courts even though Pearson challenged it three times citing *Lockhart* and *Jackson.* The 10th Circuit wrote:

---

[5] The habeas court wrote a ration trier of fact could have found the essential elements, but asserted no evidence of Pearson setting the fire, merely that Pearson had both gas and a fire was set outside of Evan's room. Habeas Petition denied, pg 6. The conclusion was insufficient at best.

> "The [US] district court found no unreasonable application of *Jackson* and observed that Pearson merely offered his own account of the events at issue, while complaining that the Wyoming Supreme Court credited the prosecution's evidence." Pg 5

The 10th did not consider *Lockhart* nor state ineffectiveness standards at all. It denied based on Wyoming Supreme Court's direct appeal factfinding - which found only enough facts and inferences to support the convictions while ignoring Pearson's resort to the transcripts and police reports. The 10th Circuit denied, writing:

> "a federal habeas corpus 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." *Jackson*, 443 U.S. at 326.

The 10th Circuit extended deference to presumptions and inferences, even when there was evidence to the contrary: such as the intent to kill or arson insufficiency claims.

Jackson should not stand for the proposition that reviewing courts, should defer to presumptive evidence or inferences since the reviewing court is considering the reasonableness of a jury which is supposed to presume innocence. A reviewing court should simply stick to the evidence to see if that evidence is sufficient, on its face, in order to preserve the most basic right of holding the government to proving its case.

The 10th Circuit, on *look-through*, noted a police report detailing Phillips' phone call to Evans threatening to kill Means in room 315. It contained a note where Evans believed she'd heard Pearson during a call to Phillips and thought the two were conspiring –the two men were not together in prison, etc. These pieces of evidence

were never brought before the jury, but were highly effective against Pearson at the 10th Circuit.

The 10th Circuit noted "Although Pearson contends he "knew (or believed)" Evans was not in her room when he set the fire, he identifies no evidence from which the jury could have reached that conclusion." The court assumed setting the fire, and in applying the Wyoming standard, the 10th Circuit wrote:

> "But the facts identified by the Wyoming Supreme Court - which he has not shown were unreasonably determined in light of the evidence - were sufficient for a ... rational jury to determine he set the fire." 10th Circuit denial pp 7-8

The 10th Circuit wrote this even knowing of the claim against the Wyoming Supreme Court's insufficiency standard, noting Pearson complained about the state standards and over-reliance on state fact finding in violation of *Lockhart*. The 10th gave no heed to facts showing Pearson (1) been told Evans was not there by Means, 2) that the alleged victim texted Pearson herself stating she was at a bar next to the motel[6], and 3) Pearson had moved Evans to another motel earlier. These uncontested facts were disregarded by reviewing courts, herein Appendix G - J.

The record and facts were there, maybe not neatly and plainly presented as if by a trained experienced lawyer, but the record was there. The state post-conviction, federal habeas and 10th Circuit courts fully accepted the Wyoming standards of review, in direct conflict with *Lockhart*, and *Strickland*, and *Malloy*.

---

[6] This detail is in the same police report pages as that which 10th cited regarding Phillips and a phone call

The state courts, unreasonably applied the wrong standards of review and these failed standards directly affected Pearson's direct appeal and post-conviction review. Habeas courts failed to properly address this under 2254 (d)(1). The state courts also unreasonably made their determinations of law and fact, especially with failed standards, and considerations of counsel's reasonableness. The federal habeas courts failed in redressing this under 2254 (d)(2).

Ineffective Counsel Standards

The Wyoming standard of review for federal 6th Amendment claims is *Schreibvogel v. State*, 2010 WY 45, 47, 228 P3d 874, 889 (Wyo. 2010) from *Cutbirth v State*, 751 P2d 1257, 1266-67 (Wyo 1988). Here, the state court's re-interpreted *Strickland* as a 4-part harmless error test – used in Pearson's post-conviction reviews."

> "At the first step, the Pearson must show from the record what occurred at trial, and identify a violation of a clear rule of law that occurred in an obvious way... At the second step, when reviewed for plain error, the petition must show a likelihood of acquittal in the absence of the error..." Order On Summary Judgment...[denying post-conviction relief]

The *Strickland* Court specifically denied such an idea in favor of deference to "a wide range of professionally competent assistance." Pearson's (Post-Conviction) Motion for Summary judgment explained:

> "17. The requirement for claiming a specific previously-declared violation of law - clear and unequivocal - is hostile to the correct standard announced by *Strickland v Washington*, 466 US 668, 694, 80 L Ed 2d 674 (1984). In fact, that Court held:
>
> > "No particular set of detailed rules for counsel's conduct can satisfactorily take account of the variety of circumstances faced by defense counsel or the range of legitimate decisions regarding how best to represent a criminal defendant. Any such set of rules would interfere with the

constitutionally protected independence of counsel and restrict the wide latitude counsel must have in making tactical decisions. See *United States v Decoster*, 199 US App DC, at 371, 624 F.2d, at 208.

Indeed, the existence of detailed guidelines for representation could distract counsel from the overriding mission of vigorous advocacy of the defendant's cause. Moreover, the purpose of the effective assistance guarantee of the Sixth Amendment is not to improve the quality of legal representation, although that is a goal of considerable importance to the legal system. [but] simply to ensure that criminal defendants receive a fair trial." *Strickland*, 466, US as 689." [Emphasis Added].

18. Claiming a specific violation "in a clear and obvious, not merely arguable way" offends for the same reasoning, in that viable claims, such as ineffective trial counsel, cannot be neatly pressed into a specific violation as a declared set of rules would completely undermine the wide latitude and presumption granted to counsel especially when the claim's elements include reasonable performance and prejudice components which rely on reasoned judicial review well beyond *arguable*."

Further, Pearson argued harmless error analysis specifity and Wyoming re-interpretations aimed specifically at the finding of guilt (vs a fair trial were nowhere to be found in Strickland, writing:

19. The specifity offends the federal mandate for a determination based on totality of the circumstances. *Strickland v Washington*, 466 US 668, at 690, 694 ("whether, in light of all the circumstances, the identified acts or omissions were outside the wide range of professionally competent assistance); *Keats v State*, 2005 WY 81, ¶10, 115 P3d 1110, 1114 ¶10 (Wyo 2005).*Luftig v State*, 2010 WY 43, ¶17, 228 P3d 857, 864 ¶17 (Wyo. 2010).

20. The correct standard is the standard outlined in *Strickland*, and it only has two elements, whether the review is of trial or appellate counsel. *Evitts v Lucy*, 469 US 387, 396, 83 Led2d 821 (1985). *Strickland* is about the *adversarial process* and cannot attach to issues of guilt, *Id.*, 466 US at 686.

"[H]ere the question is not [just] the fairness or reliability of the trial but the fairness and regularity of the processes that preceded it", [*Lafler v Cooper*, 566 US 156, 182 LEd2d 398], 410 [2012] , or created its conclusion. Consequently, [the United States Supreme Court] decline[s] to hold either that the guarantee of effective assistance of counsel belongs solely to the innocent or that it attaches only to matters affecting the determination of

actual guilt." *Kimmelman v Morrison*, 477 US 365, 380, 91 LEd2d 305 (1986).[Emphasis added]

21. Finally, *Cutbirth/ Schreibvogel* is concerned with guilt: A direct conflict with *Strickland.* See *Kimmelman*, 477 US at 380, below, and *Johnson v State*, 592 P2d 285, 286 (Wyo 1979) (post-conviction relief limited to grounds authorized by the statute, and not granted except in "extraordinary circumstances where there is a likelihood that without it the defendant would not have been found guilty.")

22. *Cutbirth/ Schreibvogel* improperly edited *Strickland*, incorporating unauthorized additional elements the *Strickland* Court specifically disavowed while federal standards are not available for editing. *Malloy v Hogan*, 378 US 1, 10-11, 12 LEd2d 653 (1964); *Leatherman v Tarrant County NICU*, 507 US 163, 122 LEd2d 517 (1993); and *Swierkiewicz v Sorema N. A.*, 534 US 506, 152 LEd2d 1 (2002).

Ineffective Counsel Standards Discussion

The federal habeas court made no determination regarding the Wyoming standards for reviewing ineffective counsel claims via 2254 (d)(1). Neither state, nor federal court considered the entirety of the case in order to determine if counsel or state courts were reasonable via (2254 (d)(2)) and whether a habeas writ should issue. The 10th Circuit gave no credence to Pearson's claims, even though supported and in its record (maybe because the state courts never addressed a complete review of the facts or evidence appearing at trial). It wrote:

"The district court apparently rejected this claim for the same reason it rejected his sufficiency-of-the-evidence challenge to his attempted-murder conviction—it was based on his own factual narrative"

" But the facts identified by the Wyoming Supreme Court —which he has not shown were unreasonably determined in light of the evidence ... rational jury to determine he set the fire." 10th Circuit pg 7.

The failure of federal courts to properly review the petition for habeas, based on 2254 (d)(1) requires reversal and proper review of the entirety of the case.

Insufficient Evidence

The state's arson case is highly inferential. It presumes Pearson had a gas can, presumes he filled it with gas, assumes his car transported it, shows (assuming its him) he walked by Jolene Boos carrying what the state presumes is a gas can, from inside his car and walks upstairs to a window where the state presumes he went to the 3rd floor. Finally, it presumes he set fire outside room 315. He is then shown at Wright, Wyoming down Hwy 59. Under *Jackson*, the state had to *show* Pearson actually set the fire. They did not.

At every point, reviewing courts have relied on the Wyoming Supreme Court's direct appeal facts – facts/ presumptions which are specifically limited to finding guilt. That Court found Pearson set the fire only because there was no challenge to the arson charge: not because there was evidence to prove it.

In reviewing the arson insufficiency claim, the 10th Circuit wrote:

> But the facts identified by the Wyoming Supreme Court—which he has not shown were unreasonably determined in light of the evidence—were sufficient for a rational jury to determine he set the fire.
>
> Specifically, when he was unable to obtain payment for the methamphetamine he had given Evans, he purchased gasoline and returned to the Rodeway Inn carrying an object consistent with a gas container. According to Boos, he was looking for Evans and went to the third floor. Soon thereafter, a gasoline-fueled fire erupted outside Evans' room, with Pearson fleeing town right before the fire was reported.

The 10th Circuit used the Wyoming Supreme Court's fact finding/ presumptions to deny Pearson's insufficiency claim. As seen above, that standard violates Due Process where it fails to consider *all* of the evidence as mandated by *Lockhart.*

Boos 3rd Floor

The 10th Circuit wrote Boos testified Pearson went upstairs to the third floor which is where the fire occurred. This isn't true. She saw this person enter the stairwell and then look out at her from a window, on a landing, between the second and third floors. She never said she saw him go to the third floor. She couldn't see such a thing. After the person stopped and looked at Boos from the window, Boos and her boyfriend went inside. The fire didn't start for another half hour or more which is a large time gap, in addition to a second or third way of entering the third floor. Either way, it does not prove Pearson went to the third floor at the time the fire started.

Boos - Gas Can

The state assumed Pearson set the fire. The 10th Circuit wrote Pearson was seen with an object consistent with a gas container and returned to the Rodeway Inn, from the gas station, with gas. There was no proof of this.

Boos didn't testify Pearson had a gas can. She testified that he walked by her carrying *something.* Even in the light most favorable to the government, we cannot

create facts. She never testified it was a gas container[7] or even like one. She stated she didn't know what it was and didn't even offer to describe the size or shape of the container, nor was she asked to. There is not a single piece of evidence placing a gas can in his possession. This court has previously held each inference must be supported by a fact and not another inference, in *Blumenthal v US*, 332 US 539, 52 LEd 154, 156 (1947)(citing *US v Ross*, 92 US 281, 282, 23 Led 707, 708(1876)):

> "...inference cannot be based upon inference nor presumption upon presumption. An inference must be based upon a fact established by direct evidence and such fact, as the predicate for an inference, cannot be either inferred or presumed."

The only proof that a *gas* can ever existed is that there was a can found at the fire itself, yet there is no proof it was used. The state proved Pearson went to the gas station and bought gas. No evidence of a can. They proved Pearson was at Wright, Wyoming about 40 miles and thirty minutes after the fire started. The only evidence the state presents to suggest Pearson was even in the area of the fire, and able to deliver and use gas is Boos and car videos from before the fire.

Boos Identification

Boos' testimony was that she saw Pearson with something from the car. Reviewing courts used photo evidence of car(s) similar to or consistent with Pearson's

---

[7] The actual 5 gallon container, found at the fire, sat right in front of Boos the entire time and she never once pointed it out or suggested it was like what was being carried.

car to corroborate Boos' stating the car she saw was similar to Pearson's. It was only these items that could suggest Pearson was even at or near the scene of the fire.

There is nothing rational about Boos' testimony as it applied to Pearson. She gave a description of a completely different person and she confirmed that description at trial saying the person she saw wore jeans, t-shirt, and ball cap. She was adamant the person she saw wore ball cap.

She failed to describe his critically necessary eyeglasses, orthopedic gloves, age, or mustache - in addition to the jumpsuit and fedora hat. These are not even close. Other courts have considered eyewitness identification and Wyoming had approved of one where "[b]oth witnesses gave detailed descriptions of the suspect within hours of the crime. The description was close enough to appellant to allow two police officers to pick him out as the possible robber while he was walking down the street." *Taul v State*, 862 P2d 649 (1993). There is no possible way an officer would have found Pearson with Boos' descriptions. Reliability of witness identification includes description and opportunity. *Neil v Biggers*, 409 US 188, 199-200, 34 LEd2d 401, 93 SCt 375 (1972).

Witness credibility determinations are typically the province of the jury, *Kansas v Ventris*, 556 US. 586, 594, 173 LEd2d 801, 129 SCt 1841, (2009), but only where the jury acts within reason. (See Fed. Rule Civ. Proc. 52(a) ("Findings of fact, whether based on oral or documentary evidence, shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses"); *Anderson v Bessemer City*, 470 US 564, 574, 84 LEd2d

518, 105 SCt 1504 (1985). Completely describing another person is clearly erroneous and utter deference to clearly erroneous testimony is unreasonable.

Photos and Pearson's car

In addition to her personal description, Boos testified a car similar to Pearson's backed into a spot but she didn't identify the unique front grill. Reviewing courts focused, instead, on two videos of cars as being Pearson's, one at the Rodeway and the other caught by Cpl Stroup as he followed an actual Chrysler 300 at or onto Hwy 59.

The courts found *both videos* showed Pearson drove to the Rodeway Inn, after getting gas. This is unreasonable. The state showed one video, at 1:21 am, of a light colored car at or near the entrance to the Rodeway Inn Parking lot – an entrance shared with the bar. No one can say what kind of car this is because the headlights are aimed right into the camera Courts found this supported proof of Pearson at the scene and as support for Boos' testimony, even though labeling it as similar to Pearson's car. The state's second video, used by the court's to support the first, and Boos, completely upends a presumption that the 1:21 am photo is of Pearson heading to set the fire.

At 1:24 Cpl Stroup saw and followed an actual Chrylser 300, several miles away. His recording was the second video. Rather than supporting the court's conclusion of proof against Pearson, this actually supports reasonable doubt. Corporal Stroup testified he was watching for traffic violations while parked at Highway 59 and Second Street. He spotted, followed, and videotaped a white Chrysler 300. He followed for an

unknown time: testifying it was consistent with Pearson's car, but was never questioned as to whether he ran the car's plates or ownership.

This car turned south on highway 59 - toward Wright, Wyoming. At 2:05 am, Pearson's phone received a call pinging a cell tower outside Wright, Wyoming which is about 40 miles south of Gillette - and the fire. This would equate to about 60 mph on a dark two-lane stretch of country road. The government and courts presume these two cars are both Pearson's headed to the fire, even though several miles (and over 5 minutes) apart at approximately the same time. To be guilty, Pearson would have needed to speed past Cpl. Stroup as Stroup was responding to the fire *and* after having videotaped a known Chrysler 300 on its way to Wright, Wyoming.

2nd Floor Camera

Finally, the Rodeway Inn 2nd floor camera caught someone on video traversing the 2nd floor landing at the back stairwell. The photo, heavily blurred suggests someone matching Boos' description with a dark colored bottom - nowhere near that seen and photographed on Pearson. At some point, deference to state fact finding must give way to evidence as it did once in Wyoming, in *Fisher v State*, 811 P2d 5, 8 (Wyo 1991) (holding motive and location are not enough).

Pearson Knowing Evans Location

Reviewing courts presume Pearson knew Evans was at room 315 when un-conflicted trial evidence proves that he didn't know she was there. Trial evidence only

proved Pearson was told she was not there and that he had moved her out of that room (315) to another motel entirely: where he went looking for Evans.

Thus, not only must reviewing courts pile inferences, they still have no evidence directly connecting Pearson to setting the fire, regardless how angry he may have been. The reviewing courts failed to properly consider lower court standards, applied inappropriate factual reasoning by the Wyoming Supreme Court, and failed to consider the entirety of the case in order to consider counsel's actions.

Ineffective Counsel

Appellate counsel's failure to assert the correct standards to the appellate court infected the direct appeal and every review afterward. This was magnified by failing to assert an insufficiency claim to the arson charge thus forcing an appellate conclusion Pearson actually set the fire. Records do not show appellate counsel investigated the claim even though trial counsel argued insufficient evidence at the end of trial.

Intent to Kill - Knowledge

The appellate court, applying its unique standard and presuming Pearson started the fire, affirmed the attempted murder conviction based on inference and Pearson being angry. That court only considered parts of evidence. Appellate counsel claimed insufficient evidence to show intent to kill, but did not present *Lockhart* as a defining standard and we must surely we presume the court would have followed this Court's directions had the issue been briefed as an advocate is expected. Failure to present the issue, a baseline decision affecting the court's standard of review, certainly

is not the advocacy expected, especially when the Wyoming Supreme Court had followed their own standard somewhat consistently.

Factually, the testimony from Cameron Means, of telling Pearson that Evans was not at room 315, along with evidence Pearson had moved her to another motel was not disputed and neither trial nor appellate counsel presented the alleged victim's (Evans) text message to Pearson stating she was at the bar — right after Cameron Means told Pearson she was there.

Federal courts justified the state's insufficiency decision based on non-trial evidence where Evans told police investigators she thought Pearson was in cahoots with another individual who had called her and threatened to kill Means the night of the fire.

Certainly both counsel should have presented Evans' text message. It is hard to reason such a message, from the victim herself, corroborating Means testimony, would be sound strategy when the charge is attempted murder. Inattention is not the same thing as reasoned judgment. *Rompilla v Beard*, 545 US 374, 396, 162 Led2d 360, 125 SCt 2456 (2005)(Justice *O'Connor* concurring). If Pearson had truly believed she was there, he would not have traveled to the Super 8 Motel looking for her.

Testing for Car and clothes for accelerant

The federal habeas court wrote:

> The post-conviction court found no deficient performance because trial counsel had in fact shown that no test "results . . . show[ed] petroleum products in the trunk . . . [o]r in the vehicle." *Id.*, Vol. III at 550 (cross-examination of police investigator); *see also id.* at 677 (closing argument).

However, what the state court actually wrote was that "[t]he lack of testing for accelerants in Pearson's truck was elicited at trial". Defense counsel lied to the jury about the testing.

Both appellate and trial counsel had police reports of Pearson's belongings being tested for accelerants. The police tested Pearson's car, and clothing, and found no traces of accelerant. Ironically, trial counsel told the jury there was no testing of the car or clothing and reviewing courts accepted this as an acceptable strategy. The state post-conviction court wrote that counsel had argued there was no testing and this was to elicit a reasonable doubt. The habeas court supported this by inverting it, finding that trial counsel had shown that no test results showed petroleum products in the car.

This mischaracterization of the trial fails to grasp counsel's failure to vigorously defend his client. Is it objectively unreasonable to mislead the jury about facts – especially facts which tend toward reasonable doubt and touch the very foundation of the state's case – transportation and possession of the gas/ gas can. This simply cannot be justified as strategic or reasonable.

Boos-

The federal habeas court wrote "[t]he post conviction court determined that trial counsel did not perform deficiently because he "questioned her description [of the arsonist] to police.," Boos testified to a description which would not have supported an arrest of Pearson at the time as it was completely incompatible with the Pearson's appearance that night. This base Wyoming idea was not presented to the jury. The

simple fact that he asked her to re-confirm her description did nothing to point to the jury that Boos was missing obvious descriptive points.

Defense counsel never drew attention to Boos' lack of seeing Pearson's eyeglasses, orthopedic gloves, mustache or age even though Pearson allegedly passed right next to her. It seems he hoped the jury would found these on their own from photos and other testimony.

Counsel didn't emphasize the lack of description regarding what court's have assumed is a gas can being carried. He never investigated what Boos may have seen prior to trial. Counsel didn't look try to understand what she saw thus he was unable to properly question her regarding the size, size or apparent weight of the presumed can. A five gallon can is not small and her inability to identify the actual can, or even its size and shape lends to a rational conclusion that she saw nothing like it that night.

Finally, counsel didn't point out the critical distinction between the window and the actual third floor, in addition to the expanse of time between Boos viewing and the start of the fire. Since Boos was so critical to the state's case, it would have been reasonable to investigate and challenge her far more intensely on her

Drugs

Prior to trial, defense counsel had every opportunity to at least attempt to prevent the inclusion of prejudicial evidence regarding drugs, drug transactions and drug use. He filed a 404(b) request whereupon state rules require the government to produce their evidence and notify the court; which is then required to hold a hearing on admissibility called a *Gleason hearing*. This was never done. Due Process, following a

mandatory rule for determining and excluding irrelevant and/or prejudicial material, should have been important enough for counsel to pursue.

Drug use and trade was used as the motive underpinning the government's case against Pearson. The *look-through* post-conviction court only summarily touched the issue, intending to focus primarily on the first half of the claim, regarding legitimate strategy, writing:

> "Pearson alleged trial counsel was ineffective for presenting evidence of prior incarceration, drug involvement and other negative stereotypes. Pearson's argument is that counsel should not have presented the jury with evidence of prior drug incarceration, which was elicited during the voire dire process. There is a legitimate strategy of defense in bringing to light negative information before the prosecution can frame and elicit the information." Order Denying Post Conviction, pg 11

Reviewing courts relied on *Smith v Spizak*, 558 US 139, 161, 175 LEd2d 595, 130 S Ct 676 (2010) to affirm state court determinations of strategy – following Justice Stevens (specially concurring) who agreed conceding the weakness of one's own case can be justifiable, but not in every case. *Smith* dealt with a defendant who testified to committing several murders, violent horrific thoughts on potential racial or ethnic victim's, and asserted he would commit more crimes if given the opportunity. Counsel in that case, admitted he had a tough case. None of that is relevant to the Pearson's situation where the evidence is almost entirely inferential.

The state and Pearson argued the full matter extensively (at Summary Judgment pp 20-23), but the court focused on counsel telling the jury Pearson did time for drugs. That court's finding of strategy conflicts with Pearson's absolute personal

right to testify or not to testify. *Harris v New York*, 401 US 222, 230, 28 LEd2d 1 (1971) ("Every criminal defendant is privileged to testify in his own defense, or to refuse to do so.").

It is not strategic to usurp and violate a client's rights. The reviewing courts were objectively unreasonable not only here, but also in sidestepping the issue of counsel and the trial court allowing irrelevant and/or unduly prejudicial information drug use or transactions information into the trial. The Gleason hearing is a mandatory process because it serves to protect the ultimate fairness of trial.

The government relied heavily on the prejudice within members of the community regarding drugs: movies, TV, & the news rarely portray characters as conscientious empathetic figures – rather they use these characters as arch enemies of society & law enforcement. They are seen as swindling thieves & rapists in homeless attire with no conscience.

Pearson was not a good person by being involved with this, but 404(b) is specifically designed to prevent a person from being convicted because they are a bad person or of low character. Counsel should have argued to prevent the inclusion of drug information entirely from the trial. The idea of drugs is highly offensive to many and it was not necessary to prove the charges, nor is motive an element of the charge. Whether or not there were drugs, was not at issue in the trial and not intrinsic to the arson. The state could have been limited to *property*.

There is nothing here requiring the jury to know about drugs. The idea of property simply does not have the prejudicial sting associated with drugs, and the state could have offered that Pearson sought to kill Evans because she stole his property.

If the jury, already prejudiced against drugs, is required to consider a potential homicidal maniac, they are far more likely to bend toward the government when that statement finishes with "seeking his drug money", rather than a statement of "seeking his property." The only real difference is the deep prejudice attached to the idea of drugs & those who use or sell them. Consequently, alerting the jury to Pearson's criminal drug related past was neither reasoned nor rational. The same holds true for the uncontested allowance and support for drug information before the jury.

Firefighters

During the trial, a dozen fully uniformed firefighters entered the public viewing area to watch the trial and counsel rightly objected. The court properly recognized people, including the firefighters, have a right to an open trial and when asked what it should do, counsel simply said, "Do something." This was not objectively reasonable.

Reviewing courts relied on *Holbrook v Flynn,* 475 US 560, 89 LEd2d 525 (1986) to suggest the issue was appropriate, whereas Pearson argued"

> 74. While there is a right to an open trial, *Gannett v DePasquale*, 443 US 368, 380, 61 LEd2d 608 (1979), there is also a right to a fair trial. *Cones v Bell*, 556 US 449, 173 Led2d 701, (2009); *US v Agurs*, 427 US 97, 111 49 Led2d 342 (1976). The US Supreme Court has required that when a defendant's right to a fair trial is under question, the trial court will do the least amount of restriction possible. In this case, petitioner certainly cannot argue for a closed trial, but he can absolutely argue for a fair un-infected trial.

75. There are times when there is "an essential state policy" or compelling state interest in securing a courtroom in order to ensure a fair and disturbance-free trial. In such instances, the US Supreme Court has allowed additional police without a finding of prejudice when the situation's facts evidence no potential prejudice,: as compared to shackling, prison garb or other acts "with an unmistakable mark of guilt." In *Holbrook v Flynn*, 475 US 560, 89 LEd2d 525 (1986)(quoting *Estelle v Williams*, 425 US 501, 503-504, 48 LEd2d 126 (1976); *Illinois v Allen*, 397 US 337, 25 LEd2d 353 (1970), the Court noted there were five defendants, all held without bail, while the local police were already overtaxed. The Court could see no problem with four uniformed police sitting quietly in the front row as opposed to hovering over the defendants or some other form of noticeable activity.

76. However, petitioner's faced an *arson* trial with one defendant and uniformed firemen were not necessary for enhanced security. The *Holbrook* Court, 475 US at 570, (quoting *Williams*, 425 US, at 505) wrote:

> "Whenever a courtroom arrangement is challenged as inherently prejudicial, therefore, the question must be not whether jurors actually articulated a consciousness of some prejudicial effect, but rather whether "an unacceptable risk is presented of impermissible factors coming into play,"

77. It is a question of potential and unacceptable risk. There was no reasonable risk of fire at the trial. Firemen, as well as petitioner, have a dedicated right to an open and fair trial: but not one of those fireman had any right to wear their uniform to the courtroom, unless they were to testify, in which case they would or should have been sequestered and unseen except for their testimony.

This Court has previously determined practices involving uniformed officials must further an essential state interest. The comparison of a felony trial with uniformed security is apples to oranges when looking at an arson trial being watched by government personnel in their official uniforms. The inclusion of uniformed firefighters could only have been seen by the jury as official support whereas, had the same personnel appeared in private clothing, no such bias could been presumed. Simply, put, all counsel had to do was ask the court to remove the firemen unless and until they returned in private non-government attire.

Christopher Phillips was added to the state's witness list and then removed. There are no reports or records of Phillips being investigated by counsel, or the state, in any records released to Pearson. Evans told police Phillips threatened to kill Cameron Means the night of the fire. Counsel seems to never have investigated this threat but rather suggested to the jury "that there were other people who had a motive to accomplish this crime," and tried to suggest bad blood between Means and Phillips while cross-examining Means. Reviewing courts relied on these vague references to "others" in order to justify counsel's failure to investigate or call Phillips.

The federal court wrote:

> "Evidently, Evans told police that Phillips had threatened to kill Means and had purchased some of Pearson's methamphetamine while in her room at the Roadway Inn before the fire. After Phillips left her room, he telephoned Evans and she overheard a voice she thought was Pearson's saying, "tell her to come downstairs."
>
> In particular, trial counsel pursued an alternative-suspects theory, telling the jury in his opening statements "that there were other people who had motive to accomplish this crime," including Phillips, ... and cross-examining Means about the "bad blood" with Phillips and Evans scamming other people.
>
> At the same time, trial counsel avoided any potential testimony from Phillips showing Pearson's awareness that Evans was in the room before the fire. Thus, there is a reasonable argument that appellate counsel did not perform deficiently."

This is not quite the same thing as a specific death threat on the night of serious fire where the threat was focused. Reviewing courts decided trial counsel's strategy was reasonable in that he likely sought to avoid potential negative testimony from Phillips showing Pearson knew Evans was in room 315.

Even if the court was correct in presuming counsel's strategy, his failure to investigate Phillips' timeline in order to prevent such potential damage while bringing a clear eye on the threat was not reasonable. Failure to act must be based on an investigation *Wiggins v Smith*, 539 US 510, 521, 156 Led2d 471, 123 SCt 2527 (2003), especially when dealing with a first degree murder charge.

During post-conviction proceedings, a motion to compel was filed and the state argued they had no investigation or information regarding Phillips, his phone, or text messages; nor was anything presented regarding Evans' texts or calls. This seems odd considering the seriousness of the evening in question, while presentation of a specific death threat certainly suggests a reasonable doubt far more persuasively than simply suggesting others were angry at Evans. The state post-conviction court wrote:

> "[t]he undisputed facts show that the state had initially considered calling him as a witness and he was in communication with the victim on the night of the charged incident. The parties do not dispute that Phillips did not witness any actions by Pearson. In fact, the two did not know each other. Pearson alleged Phillips should have been called to show a possible alternative perpetrator. There is nothing about the strategic decision not t call Phillips as a witness that could be considered a clear violation of law. Moreover, there are not facts regarding the proposed testimony of Phillips that indicate it would have been favorable to Pearson."

This determination by the state court used an its own re-write of *Strickland* and seems to ignore the seriousness of the threat allegedly put forth by Phillips, against Cameron Means, who resided in the room where the fire occurred, within hours of the threat, while a verified Chrysler 300 (matching Pearson's) was seen leaving town toward Wright, Wyoming where Pearson was location minutes later.

Certainly counsel should have considered the matter more fully. Had the courts considered the entirety of the case, as required under Strickland and Due Process, they could have noted the numerous instances where counsel failed to adequately and vigorously defend his client, Mr. Pearson.

He usurped Pearson's right not to testify; failed to even attempt to prevent highly prejudicial drug information from the trial, including the missing of a mandatory hearing; mislead the jury about defendant-positive testing of Pearson's car and clothing; failed to investigate Boos' view of the night and therefore was unable to question her understanding of the size or shape of the item carried into the stairwell; failed to question Boos regarding facts of Pearson's description that she did not see (e.g., mustache, glasses or gloves, etc); failed to adequately address the firefighters assembling at trial; failed to point out the dark bottoms on the 2nd floor video of the motel; failed to point out the near simultaneous timing of the two car photos/ videos which could prove Pearson innocent, nor did he challenge Cpl. Stroup on the Chrysler's license plates as it headed toward Wright, Wyoming.

When looking at the entirety of the case, especially the reliance on inferences and lack of overwhelming evidence of guilt, it is highly likely counsel's failures directly affected the jury and lead to a fundamentally unfair trial.

REASONS FOR GRANTING THE WRIT

This Court is presented with the opportunity to re-affirm the force of the Federal Constitution, including specifically extending *Malloy's* federal standards mandate to insufficiency and 6th amendment ineffective counsel claims in state courts by declaring *Malloy*'s reasoning is just as valid for insufficiency and ineffectiveness claims as it did for self-incrimination claims.

The Court is also presented with an opportunity to more fully develop its constitutional/ statutory understanding of the look-through presumption developed relatively recently in Wilson v Sellers. Here, the habeas courts simply agreed with state court decisions, applying state *factual* determinations without examination even though they contained very little hard facts and none of which made any real connection between Pearson and the crimes. How much deference is too much?

Habeas courts are presented with thousands of state prisoner petitions each year. For most, these are presented by untrained individuals without the specific knowledge of what is required to properly present a claim. Oftentimes, facts may be overlooked that are important. Many courts are placed in the untenable position of having to glean claims and facts from jumbled petitions with little, if any, organization. Allowing this type of summary dismissal without providing some sense of development evades serious review and complicates appellate scrutiny.

The Court has the opportunity to determine the depth of deference reviewing courts should take in considering claims against state court judgments, especially involving unequal levels of evidence related to elements, and it can consider the application of a policy requiring habeas courts to more diligently review matters of intended dismissal only after a thorough briefing on the specific issue. Such a move preserves specifics for appellate review and breaks down cases before courts to more manageable chunks.

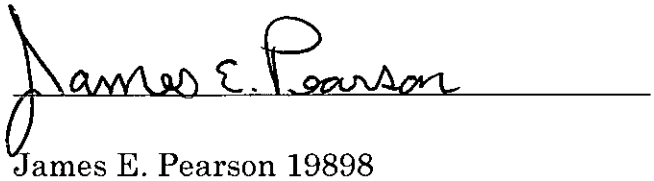
Finally, this Court can correct an egregious manifest injustice in the conviction of one who is actually innocent of the charged crimes. It can do so while ensuring lower courts are reminded that, while reasonable inferences may be drawn from facts, inferences cannot be used to support other inferences, even when those inferences are themselves supported by facts, and the government must be held to its burden of presenting a nexus between a charged crime, its elements, and a defendant.

CONCLUSION

Pearson is innocent. Wyoming courts have created standards review for insufficiency and ineffectiveness conflicting with this Court's decisions and federal habeas review did not act to correct this error. Inferences were improperly stacked to serve as facts and these hand-picked *facts* were used to deny relief and review in federal and state courts in violation of the Federal Constitution and law.

Based on the foregoing, the writ of certiorari should be granted.

Respectfully submitted,



James E. Pearson 19898