FILED
United States Court of Appeals
Tenth Circuit

May 18, 2021

Christopher M. Wolpert
Clerk of Court

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

JAMES E. PEARSON,

Petitioner - Appellant,

v.

WYOMING ATTORNEY GENERAL,

Respondent - Appellee.

No. 20-8051
(D.C. No. 1:19-CV-00168-ABJ)
(D. Wyo.)

ORDER DENYING CERTIFICATE OF APPEALABILITY*

Before **MORITZ**, **BALDOCK**, and **KELLY**, Circuit Judges.

Pro se prisoner James E. Pearson is serving a life sentence for aggravated arson and attempted first-degree murder. He seeks a certificate of appealability (COA) to appeal from the district court's order denying his 28 U.S.C. § 2254 habeas petition. As explained below, we deny a COA and dismiss this matter.

BACKGROUND

On September 6, 2014, Pearson drove to Gillette, Wyoming in "an uncommon automobile" to see Autumn Evans, a woman with whom he had a relationship. *Pearson*

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* This order is not binding precedent except under the doctrines of law of the case, res judicata, and collateral estoppel.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

v. State, 389 P.3d 794, 795 (Wyo. 2017). He picked her up from her third-floor room at the Rodeway Inn, took her to another motel, and gave her some methamphetamine to sell.

Later, when Pearson could not find Evans, he went to her room at the Rodeway Inn. Evans was in the room, but she hid behind the bed and "instructed a man who was in the room with her, Cameron Means, to tell . . . Pearson that she was not there." *Id.* When Means answered the door, Pearson said he was looking for Evans "because she needed to pay for the methamphetamine." *Id.* at 796. According to Means, Pearson seemed "agitated and tried to look . . . into the room." *Id.* at 800. Means said Evans was not there.

Shortly after 1:00 a.m. on September 7, Pearson bought gasoline. About fifteen minutes later, video cameras captured a car resembling Pearson's car near the Rodeway Inn.

Jolene Boos was outside the Rodeway Inn when Pearson drove up in his car and got out. She recognized him in part because of his above-average height. He was carrying a "reddish orange object" and looking for Evans. *Id.* at 800 (internal quotation marks omitted). Pearson went inside. Boos saw him look down at her from the third-floor stairwell window. Not long afterward, a fire erupted, badly damaging the third floor and injuring some of the motel's occupants.

Investigators "recovered a burnt metal fuel can from the hallway outside of . . . Evans' room," *id.*, and they "determined that the fire had been set deliberately outside of [her room] using gasoline as an accelerant," *id.* at 796. "A patrol car video camera and cell phone location records indicated that . . . Pearson left town just before the fire was

reported." *Id.* When interviewed by police, Pearson said "he was angry because . . . Evans had stolen methamphetamine from him." *Id.* at 800.

Prosecutors charged Pearson with aggravated arson and attempted first-degree murder (of Evans). At trial, Means testified for the State, describing his encounter with Pearson in Evans' doorway. On cross-examination, defense counsel pursued a theory of alternative suspects by eliciting from Means that Evans had "scamm[ed]" other people for drugs or money, not just Pearson, *id.* at 802, and that a man named Christopher Phillips was at the motel the night of the fire and had been angry at Means. Pearson did not testify.[1] A jury found Pearson guilty as charged.

Pearson appealed to the Wyoming Supreme Court, arguing (1) there was insufficient evidence that he intended to kill Evans; and (2) the prosecutor failed to timely disclose immunity and plea agreements with Means. The court rejected his arguments and affirmed his convictions.

Pearson then sought postconviction relief, claiming that appellate counsel was ineffective for not arguing that (1) insufficient evidence supported his arson conviction; (2) the trial court's directive to stand violated the Fifth Amendment; and (3) trial counsel was ineffective. The postconviction court denied relief and the Wyoming Supreme Court summarily denied review.

[1] Evans died of unrelated causes before Pearson's trial.

Next, Pearson filed the instant habeas petition, advancing many of the claims he brought in state court. The federal district court determined that Pearson's habeas claims lacked merit and it dismissed his petition. The court declined to issue a COA.

DISCUSSION

I. Standards of Review

To appeal the denial of a § 2254 petition, Pearson must obtain a COA by "showing 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). Our consideration of a COA request incorporates the Antiterrorism and Effective Death Penalty Act's (AEDPA's) "deferential treatment of state court decisions." *Dockins v. Hines*, 374 F.3d 935, 938 (10th Cir. 2004).

Under AEDPA, 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," 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," *id.* § 2254(d)(2).

Because Pearson is pro se, we liberally construe his habeas petition, *see Hall v. Bellmon*, 935 F.2d 1106, 1110 (10th Cir. 1991), but to the extent he seeks a COA on claims not present in that petition, those claims are waived, *see Owens v. Trammell*, 792 F.3d 1234, 1246 (10th Cir. 2015).

II. Sufficiency of the Evidence

In resolving a sufficiency-of-the-evidence claim, a court asks "whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Jackson v. Virginia*, 443 U.S. 307, 319 (1979). In other words, "[a] reviewing court may set aside the jury's verdict on the ground of insufficient evidence only if no rational trier of fact could have agreed with the jury." *Cavazos v. Smith*, 565 U.S. 1, 2 (2011).

On direct appeal, the Wyoming Supreme Court "conclude[d] that the trial evidence, when viewed in the light most favorable to the jury's verdict, establishe[d] that Mr. Pearson intended to kill . . . Evans when he set the fire." *Pearson*, 389 P.3d at 800.[2] The court explained that "Pearson was looking for . . . Evans right before the fire started," "[h]e set the fire with an accelerant in the middle of the night directly outside of her third floor motel room, from which she had no clear means of escape," and "he was angry at [her] and left town immediately after starting the fire." *Id.* at 801.

The 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.

We conclude that the district court's determination is not debatable. "[A] federal court may not overturn a state court decision rejecting a sufficiency of the evidence challenge" unless the "decision was objectively unreasonable." *Cavazos*, 565 U.S. at 2

[2] On direct appeal, Pearson did "not challenge the jury's conclusion that he set the fire." *Pearson*, 389 P.3d at 799.

(internal quotation marks omitted). The Wyoming Supreme Court's decision was not objectively unreasonable in regard to the intent-to-kill element, as it cited evidence that Pearson was angry at Evans over a drug debt and that he set a fire using a gasoline accelerant outside her third-floor room. *See Johnson v. State*, 356 P.3d 767, 773 (Wyo. 2015) (stating that an attempt to commit first-degree murder requires that the defendant "purposely and with premeditated malice took action strongly corroborative of the intent to kill a human being").

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. Combined Opening Br. and Appl. for COA at 17. Moreover, "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.

We conclude a COA is not warranted regarding sufficiency of the evidence of attempted murder.

III. Ineffective Assistance of Appellate Counsel

A. Sufficiency of the Evidence as to the Arsonist's Identity

In the state postconviction proceedings, Pearson complained that appellate counsel should have argued he was not the arsonist. Although the postconviction court denied Pearson's petition without commenting on the claim, "we presume the court reached a decision on the merits." *Simpson v. Carpenter*, 912 F.3d 542, 583 (10th Cir. 2018)

(brackets and internal quotation marks omitted). 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.

"To succeed on an [ineffective-assistance] claim premised on the failure to raise an issue on appeal, a petitioner must show both that (1) appellate counsel performed deficiently in failing to raise the particular issue on appeal and (2) but for appellate counsel's deficient performance, there exists a reasonable probability the petitioner would have prevailed on appeal." *Davis v. Sharp*, 943 F.3d 1290, 1299 (10th Cir. 2019), *cert. denied*, 141 S. Ct. 452 (2020); *see also Strickland v. Washington*, 466 U.S. 668, 687 (1984) (formulating the deficient-performance/prejudice test for ineffective-assistance claims). "[I]n evaluating an argument that appellate counsel performed deficiently in failing to raise an issue on appeal, this court typically examines the merits of the omitted issue," and "[i]f the omitted issue is meritless, its omission will not constitute deficient performance." *Davis*, 943 F.3d at 1299 (brackets and internal quotation marks omitted).

In his request for a COA, Pearson argues that the state's case against him was an "evidentiary pyramid scheme" built by "piling inference upon inference" with "no evidentiary connection between [him] and the fire." Combined Opening Br. and Appl. for COA at 8. But the facts identified by the Wyoming Supreme Court—which he has not shown were unreasonably determined in light of the evidence[3]—were sufficient for a

[3] *See Smith v. Sharp*, 935 F.3d 1064, 1074 (10th Cir. 2019) (noting that a sufficiency-of-the-evidence challenge in a habeas petition implicates both the unreasonable application of federal law under § 2254(d)(1) and the unreasonable determination of facts under § 2254(d)(2)), *cert. denied*, 141 S. Ct. 186 (2020).

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.

Given that the evidence implicated Pearson as the arsonist, appellate counsel reasonably could have decided to omit a sufficiency-of-the-evidence claim regarding the arsonist's identity and instead present a sufficiency-of-the-evidence claim on the intent element of attempted murder. *See Davis*, 943 F.3d at 1299 (noting that "appellate attorneys frequently winnow out weaker claims in order to focus effectively on those more likely to prevail" (internal quotation marks omitted)). Because "there is a[ ] reasonable argument that [appellate] counsel satisfied *Strickland*'s deferential standard," *id.*, we deny a COA.

B. Self-Incrimination

Pearson claimed appellate counsel should have argued his Fifth Amendment privilege against self-incrimination was violated when he was ordered at trial to stand up after a witness identified him as having above-average height. The postconviction court rejected the claim, stating that the order to stand did not compel incriminating evidence of a testimonial or communicative nature. *See Gilbert v. California*, 388 U.S. 263, 266 (1967) (holding that "[t]he taking of [handwriting] exemplars did not violate petitioner's

Fifth Amendment privilege against self-incrimination"). The federal district court acknowledged the claim but did not analyze it.

No "fairminded jurist[ ] would agree that the [postconviction] court got [this ineffective-assistance-of-appellate-counsel claim] wrong." *Davis*, 943 F.3d at 1299 (internal quotation marks omitted). *See Peoples v. United States*, 365 F.2d 284, 285 (10th Cir. 1966) ("Requiring a defendant to stand in court for purposes of identification is not a violation of the Fifth Amendment."); *accord Mikus v. United States*, 433 F.2d 719, 726 (2d Cir. 1970) ("[I]t is well established that a defendant may be compelled to stand up during trial for purposes of identification and comparison, and that such compulsion results in non-testimonial or non-communicative evidence given by a defendant which is not protected by the Fifth Amendment privilege against self-incrimination" (citation omitted)). Thus, a COA is not warranted.

C. Ineffective Assistance of Trial Counsel

In the postconviction proceedings, Pearson identified five claims of ineffective assistance of trial counsel he believed appellate counsel should have raised. The postconviction court found no deficient performance by trial counsel and therefore no deficient performance by appellate counsel. The federal district court summarily concluded the claims lacked merit.

1. Voir Dire & Opening Statements

Pearson complained in the postconviction proceedings that trial counsel informed the jury during voir dire and opening statements that he "was involved with drugs" and had "done time before for involvement with drugs." R., Vol. III at 901, 954. The

postconviction court determined that counsel did not perform deficiently because he was attempting to ascertain bias in prospective jurors and was utilizing "a legitimate strategy of defense in bringing to light negative information before the prosecution c[ould] frame and elicit the information." *Id.*, Vol. I at 227.

Indeed, identifying anti-drug biases in a case involving a drug transaction and lessening the sting of a prior conviction in the event the defendant testifies are legitimate trial strategies. *See Smith v. Spisak*, 558 U.S. 139, 161 (2010) (Stevens J., concurring in part and concurring in the judgment) (stating that it "is generally a reasonable" trial strategy "to draw the sting out of the prosecution's argument and gain credibility with the jury by conceding the weaknesses of [counsel's] own case"). Because Pearson's trial counsel pursued a legitimate defense strategy, the postconviction court did not unreasonably apply *Strickland* in rejecting this claim of ineffective assistance of appellate counsel. A COA is not warranted.[4]

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[4] Pearson, who is African-American, also argued his attorney was ineffective during voir dire by "identif[ying]" with 1970's television character Archie Bunker. R., Vol. III at 887-88. The postconviction court recognized this claim generally and rejected it.

The trial transcript shows defense counsel was attempting to uncover potential racial bias in the jury pool by referencing a familiar racist figure. While defense counsel could have pursued a less racially inflammatory strategy, it is clear he was attempting to encourage potential jurors to reveal racial bias. "The question [for ineffective-assistance analysis] is whether an attorney's representation amounted to incompetence under prevailing professional norms, not whether it deviated from best practices or most common custom." *Harrington v. Richter*, 562 U.S. 86, 105 (2011) (internal quotation marks omitted). Because there is a reasonable argument that appellate counsel satisfied *Strickland*'s deferential standard by omitting a meritless ineffective-assistance-of-trial-counsel claim, we deny a COA on this issue.

2. Vehicle Testing

Pearson complained that trial counsel failed to "[bring] to the court's attention [that] a search of [his] vehicle using both a trained arson K9 and testing equipment . . . failed to disclose any evidence of gasoline/accelerant within [his] car." R., Vol. II at 132. The postconviction 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).

In his request for a COA, Pearson argues the postconviction court erred because the test results "cleared" him. Combined Opening Br. and Appl. for COA at 11. But the tests did not confirm the *absence* of gasoline—they only failed to detect its presence. A COA is not warranted.

3. Cross-examination of Boos

Pearson argued that trial counsel ineffectively cross-examined Boos about her testimony identifying him at the Roadway Inn with an orange-reddish object before the fire. The postconviction court determined that trial counsel did not perform deficiently because he "questioned her description [of the arsonist] to police, . . . used screen shot images from lobby security footage to contradict the description," and "elicited testimony that . . . a number of similar looking persons [passed] through the lobby that night." R., Vol. I at 226.

In his request for a COA, Pearson does not dispute the postconviction court's description of defense counsel's cross-examination. Nor does he explain how that

cross-examination was so deficient that it prejudiced his defense and should have been included as an argument on appeal. Accordingly, we deny a COA as to this claim.

4. The Presence of Uniformed Firefighters in the Courtroom

Pearson argued that appellate counsel should have raised trial counsel's failure to exclude about a dozen uniformed firefighters from observing the final day of trial. Trial counsel had objected to the firefighters' presence in the audience as "highly prejudicial," and he moved to exclude them. *Id.*, Vol. III at 525. But the trial court overruled the objection, stating it would "monitor the situation" and enter "an appropriate order" if their presence distracted the jury. *Id.* at 530.

The postconviction court addressed the claim in the context of due process, ruling that the firefighters' presence had not prejudiced Pearson's right to a fair trial. *See Holbrook v. Flynn*, 475 U.S. 560, 571 (1986) (finding no "unacceptable risk of prejudice in the spectacle of four [uniformed and armed police] officers quietly sitting in the first row of a courtroom's spectator section").

In his request for a COA, Pearson contends the firefighters "were there solely to intimidate the jurors." Combined Opening Br. and Appl. for COA at 10. But he offers no support for that contention. Nor does he address the trial court's determination that the prosecution did not orchestrate the firefighters' attendance. In short, Pearson has not shown that the postconviction court's rejection of this claim was contrary to, or involved an unreasonable application of, clearly established federal law, or was based on an unreasonable factual determination. We thus deny a COA.

5. Alternative Suspect

Pearson complained that appellate counsel should have raised trial counsel's failure to present Phillips as a trial witness. 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." R., Vol. I at 208 (internal quotation marks omitted). A few minutes later, Pearson knocked on her door and spoke with Means while Evans hid inside. Based on these events, Pearson surmised that "he stumbled" upon a sting operation targeting Evans or Means that may "have recorded Phillips[']s threat to kill . . . Means as well as whomever walked by Ms. Boos immediately before the fire." *Id.*, Vol. II at 129, 130.

The postconviction court concluded that trial counsel made a strategic decision to not present Phillips as a witness because there was no indication his testimony would have been helpful. Consequently, the court found that appellate counsel did not perform deficiently by omitting the matter on appeal.[5]

In his COA request, Pearson repeats his suspicion that he uncovered a sting operation that might have evidence of Phillips' threat against Means and the identity of

[5] The postconviction court also determined that appellate counsel was not ineffective for omitting a claim that the government withheld exculpatory evidence concerning Phillips' communications with Evans. The court explained there was no indication the State had withheld any such evidence. Pearson has not explained how that decision contravenes or unreasonably applies federal law.

the individual who walked past Boos and into the motel. But Pearson has not shown that "all fairminded jurists would agree that the state court got [this ineffective-assistance-of-appellate-counsel claim] wrong." *Davis*, 943 F.3d at 1299 (internal quotation marks omitted). 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, R., Vol. III at 955, and cross-examining Means about the "bad blood" with Phillips and Evans scamming other people, *id.* at 331. 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 by omitting this ineffective-assistance-of-trial-counsel claim.

CONCLUSION

We deny a COA and dismiss this matter.

Entered for the Court

Paul J. Kelly, Jr.
Circuit Judge

Appendix B

US District Court

Petition for Habeas Corpus Denied

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF WYOMING

JAMES E. PEARSON,

Petitioner,

VS.

WYOMING ATTORNEY GENERAL,

Respondent.

Case No. 19-cv-168-ABJ

ORDER GRANTING RESPONDENT'S MOTION FOR SUMMARY JUDGMENT AND DISMISSING PETITION FOR WRIT OF HABEAS CORPUS

This matter comes before the Court on the *Petition for Writ of Habeas Corpus* filed pro se by James E. Pearson (ECF No. 1) and the Respondent's *Motion for Summary Judgment* (ECF No. 21). Having considered the filings, applicable law, and being otherwise fully advised, the Court finds the motion for summary judgment should be **GRANTED** and the petition **DISMISSED with prejudice.**

BACKGROUND

The Wyoming Supreme Court, upon review of Mr. Pearson's appeal, described the facts of this case as follows:

> On September 6, 2014, Mr. Pearson traveled from Casper to Gillette, Wyoming to see Autumn Evans, with whom he had a sexual relationship. He picked her up from Room 315 at the Rodeway Inn and rented a room at the Super 8 Motel. Mr. Pearson drove an uncommon automobile, a pearl colored Chrysler 300 with a distinctive grill and rims. This unique vehicle was later identified at significant times and places around Gillette.
>
> Mr. Pearson gave Ms. Evans some methamphetamine and she was supposed to sell it to someone at a bar. She did not return from the bar, so Mr. Pearson went in

looking for her and was told that she had not been there. He then attempted to locate her at the Super 8 and Rodeway Inn but did not find her. Ms. Evans was actually in Room 315 of the Rodeway Inn when he came to the door looking for her, but she instructed a man who was in the room with her, Cameron Means, to tell Mr. Pearson that she was not there. She hid on the floor behind the bed while Mr. Means spoke to Mr. Pearson. Mr. Pearson told Mr. Means he was looking for Ms. Evans because she needed to pay for the methamphetamine.

At approximately 1:09 a.m. on September 7, 2014, Mr. Pearson purchased gasoline. A car consistent with his was seen on video surveillance cameras near the Rodeway Inn at approximately 1:24 a.m. Jolene Boos testified that she was outside the motel smoking when Mr. Pearson pulled up in his car and got out. He was carrying an object that she could not see very well and asked if "Autumn was home." Ms. Boos did not respond to his question. Mr. Pearson entered the motel, and shortly thereafter, she saw him look down at her from the third floor stairwell window. Ms. Boos testified that she could not remember the exact time she saw Mr. Pearson, but within half an hour after seeing him, she heard "some commotion." She looked out and saw that someone had jumped out of a window and landed on top of a vehicle. She then realized the motel was on fire. The fire was reported at approximately 1:38 a.m.

The third floor of the motel was badly damaged. Ms. Evans was not injured in the fire, but her boyfriend, Jeremy Duncan, suffered very serious injuries when he fell or jumped from the third floor. Other occupants of the motel were also injured in the fire. Fire investigators determined that the fire had been set deliberately outside of Room 315 using gasoline as an accelerant. A patrol car video camera and cell phone location records indicated that Mr. Pearson left town just before the fire was reported.

The State charged Mr. Pearson with one count of aggravated arson and one count of attempted first-degree murder of Ms. Evans. His jury trial began on Monday, August 17, 2015, and ended on August 20, 2015. The Friday before trial, the State entered into an agreement with Cameron Means giving him immunity from prosecution for any narcotics-related crimes he would reveal during his testimony. At 6:30 a.m. on the first day of trial, the prosecutor notified defense counsel of the immunity agreement and a plea agreement with Mr. Means in a different case. Defense counsel objected, claiming that, under *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963) and *Giglio v. United States*, 405 U.S. 150, 154, 92 S.Ct. 763, 766, 31 L.Ed.2d 104 (1972), the State should be prohibited from calling Mr. Means to testify because it had violated Mr. Pearson's right to due process by not disclosing the agreements sooner.

The district court expressed concern over the late notification, but ultimately allowed Mr. Means to testify. It determined that the State had not violated Brady and Giglio because the defense would have the opportunity to use the information about Mr. Means' agreements with the State at trial. The jury returned guilty

> verdicts on both counts, and the district court sentenced Mr. Pearson to serve twenty-four to twenty-eight years in prison on the aggravated arson conviction and life without the possibility of parole on the attempted first degree murder conviction. He filed a timely notice of appeal.

Pearson v. State, 2017 WY 19, ¶¶ 4–9, 389 P.3d 794, 795–96 (Wyo. 2017). Mr. Pearson argued on appeal before the Wyoming Supreme Court that the trial court erred because (1) there was no evidence of a specific intent to kill Ms. Evans and (2) because it should have excluded Mr. Mean's testimony at trial due to the late disclosure of his plea agreements and immunity. *Id.* at 795. On February 28, 2017, the Court affirmed Mr. Pearson's conviction. *Id.* at 803.

Mr. Pearson then petitioned the Wyoming Supreme Court for a writ of certiorari, which the Court denied on August 29, 2017. ECF No. 1 at 3. In that petition, he argued the Court's sufficiency of the evidence standard of review did not comply with due process requirements established under precedent caselaw. ECF No. 15 at 5. He additionally petitioned for post-conviction relief June 20, 2019, arguing ineffective assistance of counsel. *Id.* Notably, Mr. Pearson brings many similar claims in his petition before this Court. The district court dismissed his petition, finding Mr. Pearson's arguments of ineffective assistance of counsel unpersuasive. *Id.* at 6. Following the district court's dismissal, he filed for a writ of review of that decision with the Wyoming Supreme Court, which the Court denied on July 16, 2019.

Now, Mr. Pearson brings his claims under a 28 U.S.C. § 2254. ECF No. 1. The Government's summary judgment motion urges the court to dismiss his petition with prejudice. ECF No. 20. It summarizes the claims raised in his petition as follows:

1. The Wyoming Supreme Court erroneously determined there was sufficient evidence to support Pearson's conviction for attempted first-degree murder.
2. The evidence did not support Pearson's arson conviction.
3. Pearson's Fifth Amendment right against self-incrimination was violated when he was ordered to stand during his trial after Boos testified that Pearson is unusually tall.

4. Trial counsel was ineffective when he informed the jury about Pearson's history of drugs and incarceration.
5. Trial counsel was ineffective for not testing Pearson's car in order to show the car had not carried gasoline.
6. Trial counsel was ineffective when cross-examining Ms. Boos.
7. Trial counsel failed to protect Pearson's right to a fair trial because uniformed firefighters attended the trial.
8. Trial counsel was ineffective when he did not call Mr. Phillips as a witness at trial.

ECF No. 21 at 4–5.

STANDARD OF REVIEW

Mr. Pearson's petition for federal habeas corpus relief from a state conviction is governed by the Antiterrorism and Effective Death Penalty Act of 1996, 28 U.S.C. § 2254, which provides, in pertinent part:

> (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. § 2254(d). This standard for review of state-court rulings is "difficult to meet" and "highly deferential." *Cullen v. Pinholster*, 131 S. Ct. 1388, 1398 (2011). The petitioner bears the burden of proof. *Id.* Moreover, a determination of a factual issue made by a State court shall be presumed to be correct, and the petitioner has the burden of rebutting the presumption of correctness by clear and convincing evidence. 28 U.S.C. § 2254(e)(1).

Federal statutory law does not address the standard for summary judgment in habeas proceedings. Thus, the Federal Rules of Civil Procedure govern the Respondent's motion. *See* Fed. R. Civ. P. 91(a)(4)(A). The applicable rule is Fed. R. Civ. P. 56. Under this rule, summary

judgment is appropriate where "there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a).

DISCUSSION

I. Government's Arguments

a. Mr. Pearson's convictions were supported by evidence, and the court's decision was not contrary to or an unreasonable application of federal law.

Mr. Pearson contends the Wyoming Supreme Court misapplied the standard of review, improperly disregarding evidence. ECF No. 21 at 9. (citing *Pearson*, 389 P.3d at 797 ("[o]ur duty is to determine whether a quorum of reasonable and rational individuals would, or even could, have come to the same result as the jury actually did"). Upon review, the Wyoming Supreme Court accepted as true all the prosecution's evidence and drew all reasonable inferences from that evidence. *Id.* This is the correct standard of review, similar to the standard employed by federal courts in similar cases. *Id.* at 9–10. (citing *U.S. v. Sharp*, 749 F.3d 1267, 1275 (10th Cir. 2014); *Harden v. Norman*, 919 F.3d 1097, 1101 (8th Cir. 2019); *United States v. Bates*, 960 F.3d 1278, 1292 (11th Cir. 2020)).

The evidence presented by the State at trial was sufficient for the jury to conclude Mr. Pearson had maliciously started the fire at the Rodeway Inn, demonstrating a reckless disregard for human life. *Id.* at 10. Mr. Pearson's conviction relied on the following evidence: the Fire Marshall's conclusion that the fire was located outside of the room Ms. Evans was staying in; Mr. Pearson's presence at the scene of the fire; witness testimony regarding Mr. Pearson's demeanor and interest in finding Ms. Evans; witness observations of Mr. Pearson the night of the fire, including methamphetamine exchanges and Mr. Pearson holding a "reddish orange object; video footage of an individual with similar appearances to Mr. Pearson coming down the stairs

shortly before the fire began, as well as a car identical to Mr. Pearson's; and that Mr. Pearson purchased gasoline immediately prior to the fire. *Id.* at 11 (citing Attach. A–C).

A rational trier of fact could have found the essential elements of aggravated arson were established beyond a reasonable doubt based on the evidence that (1) a fire was intentionally started outside of an occupied hotel, injuring the occupants, (2) Mr. Pearson and Ms. Evans were in the midst of a drug dispute, and he knew where she was staying, (3) he purchased gasoline before the fire, and (4) the fire started outside of Ms. Evans' room. *Id.* at 12. The Court should find Mr. Pearson's claim that there was insufficient evidence to support his conviction fails as a matter of law. *Id.*

b. The district court's order requiring Mr. Pearson to stand at trial was not contrary to or an unreasonable application of federal law.

The argument that requiring Mr. Pearson to stand at trial for identification similarly fails. The Government asserts that this Court should review the state district court's decision, since the Wyoming Supreme Court denied Mr. Pearson's writ without analysis. *Id.* at 12. In doing so, the Court should find in accordance with the Tenth Circuit's explicit holding that requiring a defendant to stand during trial for identification purposes does not violate his due process rights. *Id.* at 13 (citing *Peoples v. U.S.*, 365 F.2d 284, 285 (10th Cir. 1966).

c. The district court's decision that Pearson did not receive ineffective assistance of trial counsel is not contrary to, or an unreasonable application of, clearly established federal law.

As to Mr. Pearson's last arguments of ineffective assistance of counsel, the Government argues the district court did not err in its conclusions under the *Strickland* test. *Id.* at 13 (citing *Strickland v. Washington,* 466 U.S. 668, 687 (1984)). The five deficiencies Mr. Pearson relies on for his claim of ineffective assistance of counsel are: "(1) [t]rial counsel improperly informed the jury about Pearson's history of drugs and incarceration, (2) [t]rial counsel failed to test

Pearson's car to show that it had not carried gasoline, (3) [t]rial counsel was ineffective when cross-examining Boos, (4) [t]rial counsel did not prevent uniformed firefighters from attending trial, (5) [t]rial counsel failed to call Phillips to testify as a witness. *Id.* at 14–15. The Government contends these were based on a reasonable trial strategy and did not result in an unfair trial. *Id.* at 15. Nonetheless, the Government addresses each argument.

First, the district court did not err in finding that counsel's decision to reference Mr. Pearson's history of drugs and incarceration was a legitimate defense strategy. *Id.* Citing *Smith v. Spisak*, the Government argues this Court should find as the district court did, that counsel's decision to concede this weakness in Mr. Pearson's case was a common and reasonable strategy. 558 U.S. 139, 161 (2010). Further, because of the role drugs played in the State's case, "trial counsel was likely aware of the fact that Pearson's drug connections would be raised at trial and was attempting to mitigate the harm by revealing Pearson's history in opening arguments and framing it as an insignificant part of Pearson's life." *Id.* Counsel also tempered this information by introducing Mr. Pearson's positive qualities. *Id.* This was a reasonable trial strategy falling within the wide range of professional competency that did not prejudice Mr. Pearson's right to a fair trial. *Id.* at 16. The district court decided the issue correctly. *Id.*

Second, counsel's decision not to test Mr. Pearson's car for gasoline did not prejudice Mr. Pearson because it was not a complete failure to test the prosecutor's case. *Id* at 17 (citing *Bell v. Cone*, 535 U.S. 685, 697 (2002) ("Complete failure occurs when 'counsel entirely fails to subject the prosecution's case to meaningful adversarial testing'")). Instead of affirmatively testing Mr. Pearson's car, counsel instead used the lack of testing as a method to inject reasonable doubt into the State's case. *Id.* The district court did not err in finding this did not constitute ineffective assistance of counsel. *Id.*

Third, contrary to Mr. Pearson's assertion that counsel should have spent more time examining Jolene Boos, the Government argues counsel thoroughly challenged his testimony. *Id.* at 18. Cross-examination is another matter of trial strategy, and the district court correctly presumed counsel acted reasonably in its examination of Jolene Boos, even if counsel did not ask every question Mr. Pearson desired. *Id.* (citing *Long v. Roberts*, 277 Fed. Appx. 801, 804 (10th Cir. 2008) (unpublished).

Fourth, the presence of uniformed firefighters did not deprive Mr. Pearson of his right to a fair trial. *Id.* At the outset, the Government notes counsel objected and was overruled twice on this matter and the district court dismissed this claim because the mere presence of uniformed firefighters did not prejudice Mr. Pearson. *Id.* In *Holbrook v. Flynn*, the Supreme Court held the defendant's right to a fair trial was not prejudiced by the presence of uniformed officers in the front row of the courtroom. *Id.* (citing 475 U.S. 560, 570–71 (1986)).

Fifth, Mr. Pearson alleges counsel should have investigated or called Christopher Phillips as a witness because he was a potential alternative suspect. *Id.* at 19–20. However, the district court found there were no facts in Phillips' proposed testimony that would have been favorable to Mr. Pearson's case, nor was it an unreasonable strategic decision not to call him. *Id.* at 20. Similarly, the Government argues that counsel was not constitutionally obligated to call Phillips, and this Court should give discretion to counsel's trial strategy. *Id.* at 20–21. Phillips testimony, according to the Government, "could have helped and harmed Pearson in equal measure." *Id.* Even if it was potentially helpful, the Tenth Circuit has rejected similar claims of ineffective assistance for failing to call a witness. *Id.* at 20 (citing *Minner v. Kerby*, 30 F.3d 1311, 1317 (10th Cir. 1994)). The Court should find the district court did not err in finding these strategic trial decisions did not constitute ineffective assistance of counsel. *Id.*

For the reasons above, the Court should grant summary judgment and dismiss Mr. Pearson's petition. *Id.* at 23.

II. Mr. Pearson's Response

Mr. Pearson argues there was not sufficient evidence to support his conviction. ECF No. 22 at 2. His response is largely a recitation of his own version of events. However, he fails to clearly articulate how the district court erred in upholding his conviction or rebut the determination of facts with clear and convincing evidence. He asserts that "the time does not fit the crime because I was a hundred miles away from Gillette at the time of the fire." *Id.* Because Ms. Evans' statements were unreliable and Mr. Pearson's version of events contradicts the evidence put on by the State, the Court should find the district court erred in upholding his conviction. *Id.* A conviction cannot be upheld based on inference or a mere suspicion of guilt. *Id.* at 4 (citing *U.S. v. Rahseparian*, 231 F.3d 1267, 1271 (10th Cir. 2000)).

Next, Mr. Pearson takes issue with Ms. Boos' testimony. *Id.* Drawing on the perceived inconsistencies in her testimony, he contends her statements identifying Mr. Pearson and his car were insufficient evidence to support his conviction. *Id.* at 4–6. Again, he argues Mr. Phillips and Tyler Blue should be investigated. *Id.* at 7. He also attacks the testimony by the Fire Marshall, arguing his findings did not support the conclusion that the fire was set in front of Room 315 or that it was started with gasoline. *Id.* at 8. Mr. Pearson then asks the Court to review a list of 65 different factual issues. *Id.* at 10–17. In summary, he states the State relied only upon inferences that Mr. Pearson started the fire. *Id.* He argues the State's theory that "an angry drug dealer set fire to the motel hallway trying to kill a woman who ran off with his drugs" violated his rights to a fair trial. *Id.* at 17. Finally, he broadly states that no rational trier of fact could have found he

committed all of the elements at issue, and his ineffective assistance of counsel prejudiced his right to a fair trial. *Id.*

III. Court's Analysis

Contrary to Mr. Pearson's request, this Court's role pursuant to 28 U.S.C. § 2254(d) is not to retry his case. Under 28 U.S.C. § 2254(d), the Court can review the State court's decisions to determine (1) whether they were contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or (2) that they resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding. 28 U.S.C. § 2254(d).

Simply stated, Mr. Pearson cannot meet this burden. It is a heavy burden, especially where this Court is required to give great deference to the State court's decisions. *Cullen* at 1398. Many of the issues raised by Mr. Pearson in his response are fact-specific, but determinations of factual issues made by State courts are presumed to be correct. 28 U.S.C. § 2254(e)(1). In order to succeed on his claims, Mr. Pearson would have to rebut this presumption of correctness by clear and convincing evidence. *Id.* The Court finds he has not done so. Mr. Pearson's response to this is a retelling of his own account of the events at issue, but he provides no evidence or foundation to rebut the facts he seeks this Court to review in his petition. Despite the various grounds for relief raised in his petition, it is apparent from Mr. Pearson's response that he seeks to rewrite the facts of the incident through this petition. Absent clear and convincing evidence, this Court defers to the findings of the district court.

The Wyoming Supreme Court did not apply an incorrect standard of review when it evaluated the case, accepting as true all the prosecution's evidence and drawing all reasonable

inferences from that evidence. This is the correct standard, and as the Government points out, is similar to that which federal courts utilize in similar cases. ECF No. 21 at 10.

His ineffective assistance of counsel claims also fail as a matter of law. Each point of representation challenged by Mr. Pearson demonstrated a reasonable trial strategy falling within the ride range of professionally competent assistance. *Strickland*, 466 U.S. at 668. Further, his petition fails to include evidence or convincing argument that his right to a fair trial was prejudiced by his counsel's choices. Mr. Pearson cannot meet the test under *Strickland* to show that but for his counsel's errors, the outcome of his case would have been different. *Id.* at 670.

CONCLUSION

For the foregoing reasons, the Court finds Mr. Pearson's § 2254 petition is not sufficient to sustain any habeas corpus relief. A certificate of appealability may issue only if petitioner has made a substantial showing of the denial of a constitutional right. 28 U.S.C. § 2253(c)(2). To make such a showing, a petitioner must show reasonable jurists could debate whether the petition should have been resolved in a different manner, or the issues presented were adequate to deserve encouragement to proceed further. *Slack v. McDaniel*, 529 U.S. 473, 484 (2000). For the reasons previously stated herein, the Court shall not issue a certificate of appealability.

IT IS THEREFORE HEREBY ORDERED the *Motion for Summary Judgment* (ECF No. 21) is **GRANTED**, and the Petition for Writ of Habeas Corpus is **DISMISSED with prejudice.**

It is **FURTHER ORDERED** all other pending motions, if any, are **DENIED** as **MOOT**.

It is **FINALLY ORDERED** a certificate of appealability shall not issue.

Dated this 28th day of August, 2020.

ALAN B. JOHNSON
UNITED STATES DISTRICT JUDGE