SCOTUS

APPENDIX

A.

Prior Court Opinion

No. _____,

_____

IN THE
SUPREME COURT OF THE UNITED STATES OF AMERICA
PETITION FOR WRIT OF CERTIORARI

Timothy D. Leners; Pro-Se / In Propria Persona Petitioner
vs.
State of Wyoming; Wyoming Attorney General, Respondent

ON PETITION FOR A WRIT OF CERTIORARI TO:
United States Court Of Appeals – 10th Circuit

ECF# 11143610

FILED
United States Court of Appeals
Tenth Circuit

December 12, 2024

Christopher M. Wolpert
Clerk of Court

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

TIMOTHY D. LENERS,

Petitioner - Appellant,

v.

WYOMING ATTORNEY GENERAL; STATE OF WYOMING; WYOMING STATE PENITENTIARY WARDEN,*

Respondents - Appellees.

No. 24-8008
(D.C. No. 1:23-CV-00121-SWS)
(D. Wyo.)

ORDER DENYING CERTIFICATE OF APPEALABILITY**

Before **HARTZ**, **KELLY**, and **EID**, Circuit Judges.

Timothy D. Leners, a Wyoming state prisoner proceeding pro se, seeks a certificate of appealability (COA) to appeal the district court's denial of his 28 U.S.C. § 2254 habeas application. We deny his request for a COA and dismiss the matter.

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* The Wyoming State Penitentiary Warden is substituted as a Respondent due to Mr. Leners' transfer from the Wyoming Medium Correctional Institution to the Wyoming State Penitentiary.

** This order is not binding precedent except under the doctrines of law of the case, res judicata, and collateral estoppel.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.

Appendix A

I. Background

For eight months in 2017, Mr. Leners lived with Joyce Trout and her daughter in Nebraska. When Mrs. Trout ended her relationship with Mr. Leners in early December, she and her daughter returned to live with her husband, Chris Trout, in an apartment in Cheyenne, Wyoming. Mr. Leners remained in Nebraska with his wife and four children. But on December 23, upon Mrs. Trout's invitation, Mr. Leners packed his belongings and drove to her apartment in Cheyenne. Mr. Leners

> planned to oust Mr. Trout from the apartment, move in, and begin life anew with Mrs. Trout. The reunion did not go as planned. By the end of the day, Mr. Leners had shot Mr. Trout in the center of his chest. Mr. Leners, charged with attempted second-degree murder, claimed he shot in self-defense.

Leners v. State, 486 P.3d 1013, 1015 & n.2 (Wyo. 2021).

At trial, the jury heard Mr. Leners' and Mr. Trout's conflicting versions of the circumstances of the shooting through videos of Mr. Leners' police interviews and Mr. Trout's trial testimony. In addition to physical evidence from the scene of the shooting, the trial evidence included an audio recording from Mr. Leners' cell phone of his interactions with the Trouts beginning shortly after he arrived at the apartment in Cheyenne and continuing through the shooting. The jury found Mr. Leners guilty of attempted second-degree murder, rejecting his self-defense claim.

After the trial court denied Mr. Leners' motion for a new trial, the Wyoming Supreme Court (WSC) affirmed his conviction, holding that "[t]he evidence at trial devastated Mr. Leners' justification of self-defense." *Id.* at 1020. The WSC concluded the audio recording of the shooting "tracks Mr. Trout's testimony but does not comport

with any of Mr. Leners' differing accounts of what occurred." *Id.* at 1019-20. It held Mr. Trout's testimony was also corroborated by the lack of "physical signs that an altercation occurred," the "pool of blood in the snow," and "an impact mark from a bullet in the location where Mr. Trout said he fell and lay on his back." *Id.* at 1020 (internal quotation marks omitted).

After the WSC also affirmed the trial court's denial of Mr. Leners' motion for a sentence reduction, he filed a pro se petition for post-conviction relief asserting eight claims of ineffective assistance of counsel. The trial court held all claims were procedurally barred, and the WSC denied review.

Mr. Leners filed a pro se § 2254 petition raising his post-conviction claims plus one additional claim. The district court granted the Respondents' motion to dismiss or for summary judgment, holding that (1) Mr. Leners did not satisfy § 2254(d) as to claims the state court decided on the merits, (2) portions of his claims were not cognizable in habeas, and (3) he failed to overcome the state-court procedural default of his claims by showing cause and prejudice or a fundamental miscarriage of justice.

II. Discussion

Where the district court denied Mr. Leners' claims on the merits, to obtain a COA he "must demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000). As to claims denied on procedural grounds, he must show "that jurists of reason would find it debatable" "whether the district court was correct in its procedural ruling" and "whether the petition states a valid claim of the denial of a constitutional right." *Id.*

Although we liberally construe Mr. Leners' pro se COA Application, we do not act as his advocate. *See Hall v. Bellmon*, 935 F.2d 1106, 1110 (10th Cir. 1991).

A. Claims Decided on the Merits in State Court

Among other contentions, Claim Five asserted ineffective assistance of counsel related to the admission of evidence and prosecutorial misconduct. Claim Six alleged the trial court was biased in denying Mr. Leners' new-trial motion. Concluding the WSC adjudicated these claims on the merits, the district court held he did not demonstrate that either adjudication "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." § 2254(d)(1).

We deny a COA because Mr. Leners fails to show that reasonable jurists would debate the district court's assessment of these claims. First, he misunderstands the meaning of "adjudicated on the merits" in § 2254(d), and he ignores the WSC's rejection of his bias claim in affirming the denial of his sentence-reduction motion. Moreover, Mr. Leners cannot rely on evidence that was not before the state court to show error in the WSC's no-prejudice holding. *See Grant v. Royal*, 886 F.3d 874, 929 (10th Cir. 2018). He also cites no holding by the Supreme Court that the WSC either contradicted or unreasonably applied in adjudicating these claims, as required by § 2254(d)(1). And to the extent he challenges state-court factual determinations, he fails to demonstrate "an unreasonable determination" under § 2254(d)(2), and he does not overcome the presumption of correctness in § 2254(e)(1) with clear and convincing evidence.

B. Claim Not Cognizable in Habeas

Citing *Sellers v. Ward*, 135 F.3d 1333, 1339 (10th Cir. 1998), the district court held that Claim Nine, asserting trial-court bias in the state post-conviction proceedings, was not cognizable in habeas. We deny a COA because this ruling is not reasonably debatable. Contrary to Mr. Leners' assertion, § 2254(b)(1)(B) does not define the scope of habeas review. It provides exceptions to the exhaustion requirement in § 2254(b)(1)(A).

C. Insufficiently Briefed Claims

Claims Two, Four, and Five alleged ineffective assistance of counsel related to (1) Mr. Leners' theory that the Trouts lured him to Wyoming to rob and kill him, (2) insufficient and unconstitutional jury instructions, and (3) violations of *Brady v. Maryland*, 373 U.S. 83 (1963), involving gunshot residue lab reports and evidence from his cell phone. Claim Seven challenged his exclusion from attending the oral argument on his direct appeal. Rather than addressing the district court's reasoning in ruling on these claims, Mr. Leners simply repeats his previous contentions of error. We deny a COA because he cannot show the rulings are reasonably debatable when he fails "to explain what was wrong with the reasoning that the district court relied on in reaching its decision." *Nixon v. City & Cnty. of Denver*, 784 F.3d 1364, 1366 (10th Cir. 2015).

D. Procedurally Defaulted Claims

Claims One, Three, and Five alleged ineffective assistance of counsel related to (1) false statements in the affidavit of probable cause, (2) denial of Mr. Leners' rights to bear arms and to self-defense, (3) prosecutorial misconduct, and (4) *Brady* violations

involving photographs of powder burns and the Trouts' criminal records. Claim Eight asserted appellate counsel was ineffective in failing to argue that trial counsel was ineffective. The trial court concluded these claims were procedurally barred, and the WSC denied review. The district court held Mr. Leners failed to overcome his procedural default by showing cause and prejudice or a miscarriage of justice.

We deny a COA because Mr. Leners does not show that the district court's rulings on these claims are reasonably debatable. First, there is no debate that these claims were procedurally defaulted in state court. Mr. Leners' contention regarding § 2254(b) confuses exhaustion with procedural default. And although he points to his unsuccessful motion to file a pro se appeal brief raising these claims, we are bound by the state courts' interpretation of state procedural requirements. *See Bradshaw v. Richey*, 546 U.S. 74, 76 (2005). Next, Mr. Leners cannot obtain a COA on his contention that the state procedural ground was not independent when he failed to make that argument in the district court. *See United States v. Viera*, 674 F.3d 1214, 1220 (10th Cir. 2012). Finally, as to his failure to overcome the procedural default, Mr. Leners offers no clear and convincing evidence rebutting the presumption that the WSC's factual determinations based on the trial record are correct. And reasonable jurists would not debate the district court's holding that he failed to demonstrate cause based on ineffective assistance of appellate counsel or a fundamental miscarriage of justice based on factual innocence.

E. Pending Motions

We deny Mr. Leners' seven pending motions. Regarding the contents of the record on appeal and Mr. Leners' COA Application: (1) the court has advised him that

our review is limited to the record that was before the district court; (2) the word limit for opening briefs applies to all parties, and the court permitted him to exceed that limit by 1,000 words; and (3) the court followed its local rules in receiving but not filing his other submissions. Mr. Leners' motions regarding current prison conditions are unrelated to our consideration of his COA Application. And although we do not condone prison officials' violation of Federal Rule of Appellate Procedure 23(a), Mr. Leners fails to show his transfer to a different facility prejudiced his ability to seek a COA. *See Hammer v. Meachum*, 691 F.2d 958, 961 (10th Cir. 1982).

III. Conclusion

We deny a COA and dismiss this matter.

Entered for the Court

Paul J. Kelly, Jr.
Circuit Judge

SCOTUS

APPENDIX

B.

Prior Court Opinion

No. _____,

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IN THE
SUPREME COURT OF THE UNITED STATES OF AMERICA
PETITION FOR WRIT OF CERTIORARI

Timothy D. Leners; Pro-Se / In Propria Persona Petitioner
vs.
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ON PETITION FOR A WRIT OF CERTIORARI TO:
United States Court Of Appeals – 10th Circuit

TIM'S ORIGINAL HAND WRITTEN "JAIL NOTES" TO COUNSEL *(used in appeals instructing his attorneys to assert various structural errors)*, WERE REMOVED TO PLEASE THE COURT

(some small lines could not be removed because they were between sentences and prison refused 'white-out')

SCOTUS

APPENDIX

B.

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IN THE
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Appendix B

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF WYOMING

TIMOTHY D. LENERS,

Petitioner,

VS.

WYOMING ATTORNEY GENERAL,

STATE OF WYOMING,

WYOMING DEPARTMENT OF CORRECTIONS MEDIUM CORRECTIONAL INSTITUTION WARDEN,

Respondents.

Case No. 23-CV-00121-SWS

FINAL JUDGMENT

This action came before the Court on Petitioner's Petition for Writ of Habeas Corpus under 28 U.S.C. § 2254, Honorable Scott W. Skavdahl, District Judge, presiding. The Court entered an Order Granting Respondents' Combined Motion to Dismiss and Motion for Summary Judgment and denied Mr. Leners' Petition. Accordingly, it is therefore **ORDERED, ADJUDGED, AND DECREED** that this matter is **DISMISSED WITH PREJUDICE.**

Dated this 1st day of February, 2024.

Scott W. Skavdahl
United States District Judge

Appendix B

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF WYOMING

TIMOTHY D. LENERS,

Petitioner,

VS.

WYOMING ATTORNEY GENERAL,

STATE OF WYOMING,

WYOMING DEPARTMENT OF CORRECTIONS MEDIUM CORRECTIONAL INSTITUTION WARDEN,

Respondents.

Case No. 23-CV-00121-SWS

ORDER GRANTING COMBINED MOTION TO DISMISS AND MOTION FOR SUMMARY JUDGMENT [ECF 24]

This matter is before the Court on a petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254 filed by *pro se* Petitioner, Timothy Leners, [ECF 1] and Respondents' Combined Motion to Dismiss and Motion for Summary Judgment [ECF 24]. The Court, having considered the petition, Respondents' motion, Mr. Leners' response, and being otherwise fully advised, finds Respondents' motion should be granted and the petition dismissed.

APPendix B-

BACKGROUND

A Wyoming jury convicted Mr. Leners of attempted second-degree murder. *Leners v. State of Wyoming*, 486 P.3d 1013, 1015 (Wyo. 2021) (*Leners I*). The Wyoming Supreme Court summarized the facts underlying Mr. Leners' conviction as follows:

> On December 23, 2017, Timothy Leners packed his belongings in Walmart bags, left his wife and four children, and drove from Fremont, Nebraska, to Cheyenne, Wyoming. In the early morning hours that day, his "soulmate," Joyce Trout, invited him to the apartment where she lived with her husband, Chris Trout, and her nine-year-old daughter.
>
> Mr. Leners arrived in Cheyenne in the late afternoon. He planned to oust Mr. Trout from the apartment, move in, and begin life anew with Mrs. Trout. The reunion did not go as planned. By the end of the day, Mr. Leners had shot Mr. Trout in the center of his chest. Mr. Leners, charged with attempted second-degree murder, claimed he shot in self-defense.
>
> . . .
>
> Mr. Leners' four-day trial began on May 7, 2019. The State presented the testimony of ten witnesses and an abundance of physical evidence. The evidence included the complete videotaped interview of Mr. Leners, conducted by Detectives Hickerson and Peterson, and the complete audio recording from Mr. Leners' cell phone which he had set to record shortly after he arrived at the Trouts' apartment. It continued to record through the shooting and the arrival of the police.
>
> The evidence leading up to the shooting was largely uncontroverted. Mr. Leners showed up on the doorstep of the Trouts' apartment around 5:00 p.m. He knew that Mr. Trout was not receptive to his arrival because he had spoken with Mr. Trout by cell phone on his way to Cheyenne. Mr. Leners, . Trout, and Mr. Trout sat down at the kitchen table to talk r the situation. After lengthy discussion, Mr. Trout left the rtment to run some errands. While he was gone, Mr. ers began to move his belongings into the apartment. out this time, Mr. Trout's adult daughter, Kyla, who lived

across a driveway, came to the apartment. Kyla confronted Mr. Leners about his moving into the apartment occupied by her father and Mrs. Trout, who were still married. After Kyla left, Mr. Leners complained to Mrs. Trout about what he perceived to be Kyla's disrespect. When Mrs. Trout defended Kyla, the two of them engaged in a heated argument. In the meantime, Kyla returned to her apartment and called Mr. Trout. She told him that Mr. Leners was moving in and he needed to come home right away. Then, she called the police to report that a suspicious person was in the Trouts' apartment.

At this point, Mr. Trout's testimony and Mr. Leners' version of events (as given to the police) diverge. According to Mr. Trout, he immediately returned home to find the doors locked. As he inserted his key, he could hear Mr. Leners and Mrs. Trout yelling at each other. As he entered the apartment, Mr. Trout joined the argument, repeatedly commanding Mr. Leners to leave. Mr. Trout recounted:

> Then we got into a little pushing match. And I opened the door and took some of his stuff and put it outside. ... It was dark, and it was snowing. To the best of my knowledge, he took his stuff and went back to his pickup....
>
> I go back in the house and grab up some of his stuff and was setting it outside.... Then he came back from his pickup with a gun and was holding the gun out .... I started backing away....
>
> I slipped on the ice and fell on my back. Next thing I know, he's got the gun pointed down ... onto my chest. I luckily somehow got the clip out of it. I had a hold of the slide ... hard enough that the shell never ejected out of the weapon. ... [Mr. Leners] had one leg on either side of [me] ... [as] I was laying with my head up against the brick wall ... [and with] [m]y back ... on the concrete .... [Mr. Leners] was trying to get [the gun] away from me.... All I heard was the gun going off and [the bullet] going through my chest.

In the police interview, Mr. Leners told Detective Hickerson that while he was arguing with Mrs. Trout, suddenly "the [front] door flew open and [Mr. Trout] was ON me like THAT." Mr. Trout was "hitting," "jabbing," and

"picked this big chair up" to throw it at Mr. Leners' head. (Later in the interview, Mr. Leners said Mr. Trout picked up his duffel bag to throw at him.) Mr. Leners said he tried to get out the door, but Mr. Trout would not let him out. During this time, Mr. Trout was "pounding" on him and "beating the crap out" of him. The front door was open and "somehow" Mr. Trout and Mr. Leners ended up outside. (Later in the interview, he said they fell out the door when Mr. Trout jumped him.) Mr. Leners said he hit the ground face down and they began "rolling around" while Mr. Trout hit and punched him.

Mr. Leners said that Mrs. Trout had told him that Mr. Trout always carried at least three firearms. Given that knowledge and Mr. Trout's threats during the earlier conversation between Mr. Leners, Mr. Trout, and Mrs. Trout, Mr. Leners said he believed that his life was in danger and pulled out his gun. According to Mr. Leners, Mr. Trout grabbed for the gun and as the two men struggled for the weapon, Mr. Leners saw the gun was pointed at Mr. Trout's shoulder and he pulled the trigger. Mr. Leners said, "When I got him in the shoulder," we were "on the pavement" and his shoulder "was against the wall." He said, "I couldn't get the gun away from him." "I never got on top of him." (Emphasis added.) (At this point in the interview, Mr. Leners had not been told that both Mr. Trout and Mrs. Trout had independently told the police that Mr. Leners was on top of Mr. Trout when he shot down, hitting Mr. Trout in the chest.)

Other evidence presented to the jury revealed that Mrs. Trout, who had witnessed the shooting, called 911 before going into the apartment and returning with her gun. She pointed the gun at Mr. Leners, who had remained at the front of the apartment to retrieve his things. She ordered him to get away. Mr. Leners went to his truck and placed his gun on the rail.

In Mr. Leners' cell phone recording, Mr. Leners can be heard working his breathing from calm to labored as he called 911. Breathlessly, Mr. Leners reported, "I had to use my handgun to get a guy to quit beating the shit out of me."

After the police arrived, Mr. Leners was taken to the Cheyenne Police Department where the videotaped interview was conducted. At the end of the interview, Mr. Leners was placed in custody and was later charged with attempted second-degree murder.

> On the third day of trial, the State produced Exhibit 50—an audio recording with excerpts of several calls Mr. Leners had recorded on his cell phone prior to arriving in Cheyenne. The calls comprising the exhibit were contained in a late-received supplemental report prepared by Detective Hickerson. The exhibit itself was created by Detective Hickerson the night before it was introduced at trial. The excerpts included recordings where Mr. Leners called Mr. Trout a troll, rapist, and pig. In two of the calls, he expressed a desire to kill Mr. Trout and a willingness to kill anyone who got in the way of his happiness with Mrs. Trout. The phone calls were detailed and graphic
>
> The jury rejected Mr. Leners' claim of self-defense and convicted him of attempted second-degree murder. He was sentenced to between twenty-five and thirty-five years in prison.

Leners v. State, 2021 WY 67, ¶¶ 3-4, 486 P.3d 1013, 1015-17 (Wyo. 2021), cert. denied, 142 S. Ct. 410, 211 L. Ed. 2d 220 (2021) (internal references omitted) (*Leners I*).

After his conviction, Mr Leners filed a motion for a new trial under Wyoming Rule of Appellate Procedure 21. *Id.* at 1017. He argued his attorney was ineffective for failing to properly object to discovery violations and the submission of one of the state's exhibits at trial. *Id* at 1017. The trial court denied the motion for a new trial, "finding that Mr. Leners had not demonstrated that any potential error by counsel rendered the verdict unworthy of confidence or that the result of the trial would have been different." *Id.* Mr. Leners appealed both his conviction and the trial court's denial of his motion for a new trial. *Id.*

On appeal, Mr. Leners argued the trial court erred when it denied Mr. Leners' motion for a new trial. *Id* at 1015. He also argued prosecutorial misconduct denied him a fair trial. *Id.* The Wyoming Supreme Court determined that both Mr. Leners'

ineffective assistance and prosecutorial misconduct claims failed because he could not demonstrate prejudice. It concluded: "The evidence at trial devastated Mr. Leners' justification of self-defense to charges of attempted second-degree murder. The late-produced supplemental report and the introduction of Exhibit 50 without objection did not prejudice the verdict." *Id.* at 420.

Mr. Leners then filed a motion for sentence reduction under Wyoming Rule of Criminal Procedure 35(b). [ECF 21 ex. 12] The trial court denied Mr. Leners' motion and he requested a writ of review from the Wyoming Supreme Court. [ECF 21 ex. 14] The Wyoming Court consolidated Mr. Leners' seven grounds for reversal into two: 1) whether the district court's denial of his motion for sentence reduction violated Mr. Leners' Fourteenth Amendment Due Process rights, and 2) whether the district court abused its discretion when it denied Mr. Leners' motion for sentence reduction. *Leners v. State*, 518 P.3d 686, 689 (Wyo. 2022) (*Leners II*). In support of his Due Process argument, Mr. Leners argued that the judge was biased against him. *Id.* at 692. The Wyoming Supreme Court concluded that Mr. Leners had failed to establish bias. *Id.* at 694. The Wyoming Supreme Court also determined that the trial court did not abuse its discretion in denying his motion for sentence reduction. *Id.* at 698.

Next, Mr. Leners filed a petition for post-conviction relief in the state district court. [ECF 1 ex. 3 p. 3] Mr. Leners raised eight issues. [ECF 1 ex. 3 pp. 5-6] The district court determined that most of Mr. Leners' claims were either not cognizable or procedurally barred. [ECF 1 ex. 3 pp. 9-13] It found that Mr. Leners had not established he received the ineffective assistance of appellate counsel and therefore could not

overcome the procedural bar and dismissed his petition with prejudice. [ECF 1 ex. 3 pp. 9-13] Mr. Leners filed a petition for writ of review with the Wyoming Supreme Court arguing that the district court had incorrectly ruled that his claims were procedurally barred, he received the ineffective assistance of appellate counsel, and that the judge was biased against him. [ECF 1 ex. 3 pp. 15-66] The Wyoming Supreme Court denied his petition. [ECF 1 ex. 3 p. 68] Mr. Leners then filed this petition with the Court.[2]

STANDARD OF REVIEW

Mr. Leners is proceeding *pro se*. We liberally construe the filings of *pro se* litigants and hold them to a less stringent standard than those drafted by attorneys. *United States v. Hald*, 8 F.4th 932, 949, n. 10 (10th Cir. 2021). However, "it is not . . . the 'proper function of the district court to assume the role of advocate for the pro se litigant.'" *Rigler v. Lampert*, 248 F.Supp.3d 1224, 1232 (D. Wyo. 2017) (quoting *Hall*, 935 F. 2d at 1110).

I. § 2254 habeas relief

To obtain habeas relief, Mr. Leners must affirmatively prove that he is "in custody in violation of the Constitution or laws or treaties of the United States." 28 U.S.C. § 2254(a). He must demonstrate the state court proceedings "resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established federal law," or "resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented." 28 U.S.C. § 2254(d)(1) & (2). Where a state

court has adjudicated constitutional issues on the merits, this Court gives significant deference to that decision. *Johnson v. Martin*, 3 F.4th 1210, 1218 (10th Cir. 2021). Courts do not give the same deference when there has been no decision on the merits. *Hale v. Gibson*, 227 F.3d 1298, 1309 (10th Cir. 2000).

The "clearly established federal law" referred to by the habeas statute "is determined by the United States Supreme Court, and refers to the Court's holdings, as opposed to the dicta.'" *Hawes v. Pacheco*, 7 F.4th 1252, 1263 (10th Cir. 2021) (quoting *Lockett v. Trammell*, 711 F.3d 1218, 1231 (10th Cir. 2013)). "A state court decision is 'contrary to' clearly established federal law 'if the state court applies a rule different from the governing law set forth in [Supreme Court] cases, or if it decides a case differently than [the Supreme Court has] done on a set of materially indistinguishable facts.'" *Id.* (alterations in original) (quoting *Bell v. Cone*, 535 U.S. 685, 694 (2002)). "A 'decision is an "unreasonable application" of clearly established federal law if it identifies the correct governing legal principle . . . but unreasonably applies that principle to the facts of petitioner's case.'" *Id.* (quoting *Underwood v. Royal*, 894 F.3d 1154, 1162 (10th Cir. 2018)) (alteration in original). The Court can grant habeas relief only if the state court's decision was objectively unreasonable and "if 'there is *no possibility* fairminded jurists could disagree that the state court's decision conflicts with the Supreme Court's precedents.'" *Id.* (emphasis in original) (quoting *Coddington v. Sharp*, 959 F.3d 947, 953 (10th Cir. 2020)).

II. Federal Rules of Civil Procedure

Respondents moved to dismiss this petition under Rule 12(b)(6) and for summary judgment under Rule 56 of the Federal Rules of Civil Procedure. The Federal Rules of Civil Procedure apply to § 2254 cases to the extent that they "are not inconsistent with any statutory provisions or" the Rules Governing Section 2254 Cases. Rule 12, Rules Governing Section 2254 Cases in the United States District Courts.

Under rule 12(b)(6) the Court evaluates whether the petition "states a claim to relief that is plausible on its face.'" *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). A claim is plausible on its face when it includes "factual content that allows the court to draw the reasonable inference that the defendant is liable for the alleged misconduct." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). "[C]onclusory allegations without supporting factual averments are insufficient to state a claim on upon which relief can be based." *Hall v. Bellmon*, 935 F. 2d 1106, 1110 (10th Cir. 1991).

Federal statutes do not address the standard for summary judgment in habeas proceedings. Therefore, the Federal Rules of Civil Procedure apply. See Fed. R. Civ. P. 81(a)(4)(A). Summary judgment is appropriate when "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

Mr. Leners asserts nine claims for relief in his petition. For each claim, Mr. Leners generally argues his attorneys were ineffective, either for not raising the issue at trial or for not raising it on appeal. [ECF 1 ex. 1] Further, he generally argues he has a Second

Amendment right to bear arms which seems to relate to his claim that he shot the victim in self-defense. In claim one, Mr. Leners argues false statements in the affidavit of probable cause resulted in an illegal arrest and search. He also contends his attorney was ineffective for failing to raise this issue. [ECF 1 ex. 1 pp. 4-7] In claim two, Mr. Leners argues his appellate counsel was ineffective for failing to introduce evidence of a "murder plot" by the victim and his wife and that his appellate attorney was ineffective for not raising this issue on appeal. [ECF 1 ex. 1 pp. 7-9; ECF 1 ex. 4 p. 22] In his third claim, Mr. Leners argues denial of his right to bear arms and right to self-defense. [ECF 1 ex. 1 pp. 8-11] In claim four, Mr. Leners argues that the jury instructions were unconstitutional and insufficient, and that he was entitled to a lesser included offense instruction. [ECF 1 ex. 1 pp. 12-17] In claim five, Mr. Leners argues the prosecutor illegally withheld a portion of a recorded phone call and that his attorney was ineffective when he did not object to the call being played at trial. [ECF 1 ex. 1 pp. 19-23] In claim six, Mr. Leners argues he was denied due process during the proceedings for his motion for a new trial because the trial judge was biased against him. [ECF 1 ex. 1 pp. 25-28] In claim seven, Mr. Leners generally argues his appellate attorney was constitutionally ineffective and illustrates this point by arguing his constitutional rights were violated when he was denied permission to attend the oral argument for his direct appeal. [ECF 1 ex. 1 pp. 30-32] In his eighth claim, Mr. Leners argues his trial counsel was so ineffective that he was constructively denied counsel. [ECF 1 ex. 1 pp. 32-35] In his ninth claim, Mr. Leners contends his due process rights were violated because of judicial bias during post-conviction relief proceedings. [ECF 1 ex. 1 pp. 37-40]

Respondents argue Mr. Leners' claims for relief broadly fall into three categories: claims that are not cognizable under § 2254, claims properly raised and decided on the merits by the Wyoming Supreme Court, and claims denied on procedural grounds by the state courts that are procedurally barred in this Court. [ECF 25 pp. 8-9] The Court agrees and discusses each claim accordingly. In response, Mr. Leners tells his version events leading up to and including the shooting of Chris Trout. Mr. Leners generally contends he is the victim of a plot by the victim and his wife to steal his disability benefits from the Department of Veterans Affairs and later murder him. [ECF 29] Mr. Leners spills much ink presenting the Court with "evidence" not heard by the jury that would have supported his version of events and that he claims demonstrates his "actual innocence." [ECF 29 & 34]

I. Non-Cognizable Claims

A. Claim One

Mr. Leners' first claim argues that false statements in the affidavit of probable cause resulted in an illegal arrest and search. He also contends his attorney was ineffective for failing to raise this issue. [ECF 1 ex. 1 pp. 4-7] Respondents argue his Fourth Amendment claim is not cognizable in a § 2254 petition because he had the opportunity to fairly litigate the issue in state court. Mr. Leners responds that Respondents' arguments are incorrect and "simply dumbfounding." [ECF 34 p. 16]

In *Stone v. Powell*, the Supreme Court held that habeas relief is unavailable for Fourth Amendment violations "where the State has provided an opportunity for full and fair litigation of a Fourth Amendment claim." 428 U.S. 465, 482 (1976). Wyoming Rule

of Criminal Procedure 12(b)(3) provides that defendants can raise suppression issues either orally or in writing prior to trial. W. R. Cr. P. 12(b)(3). Thus, the state court provided the opportunity for the "full and fair litigation of a Fourth Amendment claim," but Mr. Leners did not raise the suppression issue in state court. *Stone*, 428 U.S. at 482. He cannot, therefore, raise it in his § 2254 petition and his stand alone Fourth Amendment claim is dismissed. Whether his attorney was ineffective for failing to raise the suppression issue is a separate question that the Court discusses below. *Hooper v. Mullin*, 314 F.3d 1162, 1175 (10th Cir. 2002) ("Although *Stone v. Powell* generally precludes a federal habeas court from reviewing a state court's resolution of a Fourth Amendment challenge to the lawfulness of a search or seizure, we will consider whether defense counsel was ineffective for failing to assert such a Fourth Amendment challenge in the first place.") (internal citation omitted).

B. Claim Three

In claim three, Mr. Leners argues he has the right to bear arms under the Second Amendment. He contends he acted in self-defense pursuant to Wyoming Statute § 6-2-602. [ECF 1 ex. 1 pp. 11-12] Mr. Leners cites to *District of Columbia v. Heller*, 554 U.S. 570 (2008), and *Widdison v. State*, 410 P.3d 1205 (Wyo. 2018), for the proposition that he has a Second Amendment right to self-defense and no duty to retreat. [ECF 34 p. 37] However, the Second Amendment has no bearing on this case and the cases to which Mr. Leners cites do not support his position. *Heller* held that the Second Amendment protects the right to possess firearms outside of service in a militia and to use them for traditionally lawful purposes—including self-defense. *Heller*, 554 U.S. at 570-594.

Widdison relied on Wyoming state law and focused on the "Castle Doctrine." *Widdison*, 410 P.3d at 1220. It determined that "the question of Ms. Widdison's residence was a factual one, [and] it should have been submitted to the jury." *Id.* While both cases recognized the right to act in self-defense, neither granted individuals the right to shoot people with impunity. Mr. Leners was not punished for possessing a handgun. Rather, he was charged with attempted second-degree murder for shooting Mr. Trout. *Leners*, 486 P.3d at 1015. Mr. Leners was given the opportunity to argue he acted in self-defense at his trial, but the jury was unconvinced and convicted him. *Id.* at 1017. Nothing in Mr. Leners' case implicates the Second Amendment—instead his issue is the jury did not believe his self-defense claim based on Wyoming statutes. [ECF 1 ex. 1 pp. 9-13] Mr. Leners' arguments regarding the alleged misapplication of state self-defense law are not cognizable in a § 2254 petition because "[a] federal court may not issue the writ on the basis of a perceived error of state law." *Pulley v. Harris*, 465 U.S. 37, 41(1984).

Next, Mr. Leners vehemently argues he is actually innocent, and his conviction is a miscarriage of justice because he acted in self-defense. First, the miscarriage of justice/actual innocence exception that Mr. Leners cites is not, itself, a basis for habeas relief. Rather, it is an equitable gateway to consider the merits of otherwise barred constitutional claim. *Taylor v. Powell*, 7 F.4th 920, 926 (10th Cir. 2021), cert. denied, 142 S. Ct. 2819, 213 L. Ed. 2d 1041 (2022). Second, the actual innocence exception "means factual innocence, not mere legal insufficiency." *Bousley v. United States*, 523 U.S. 614, 623 (1998). The Tenth Circuit has held that self-defense claims go towards legal innocence, not factual innocence. *Beavers v. Saffle*, 216 F.3d 918, 923 (10th Cir.

2000); *see also, e.g., Craft v. Jones*, 435 F. App'x 789, 792 (10th Cir. 2011), *Mukes v. Warden of Joseph Harp Corr. Ctr.*, 301 F. App'x 760, 763 (10th Cir. 2008) ("A claim of self defense involves legal innocence rather than factual innocence"). Mr. Lener's third claim is dismissed.

C. Claim Four

In his fourth claim, Mr. Leners argues the jury instructions at his trial were insufficient and unconstitutional. [ECF 1 ex. 5 p. 71] Mr. Leners contends the jury instructions told the jury to infer malice because he carried a firearm and that this amounted to "structural error" because it affected the framework of the trial. [ECF 1 ex. 1 pp. 13-14] Respondents contend that the portion of claim four addressing a lesser included offense instruction is not cognizable in a non-capital federal habeas case. [ECF 25 p. 16]

The Tenth Circuit has long held that there is no federal constitutional right to a lesser included offense instruction in non-capital cases. *Tiger v. Workman*, 445 F.3d 1265, 1268 (10th Cir. 2006). In fact, the Tenth Circuit's precedents "establish a rule of 'automatic non-reviewability' for claims based on a state court's failure, in a non-capital case, to give a lesser included offense instruction." *Dockins v. Hines*, 374 F.3d 935, 938 (10th Cir. 2004). Mr. Leners was not charged or convicted of a capital crime and therefore this Court cannot review his argument that he was entitled to a lesser included offense instruction. Mr. Leners argues that the Tenth Circuit's precedent is unfair -- that the Supreme Court has never said courts cannot consider claims of constitutional error based on the failure to include lesser included offense instructions in non-capital cases.

[ECF 1 ex. 5 p. 78] However, Mr. Leners' argument is the inverse of what §2254(d) requires. 28 U.S.C. § 2254(d)(1). This Court determines whether a conviction violates clearly established law by looking at the holdings of the Supreme Court, not what it has failed to hold. *Hawes*, 7 F.4th at 1263. The portion of claim four dealing with lesser-included offense instructions is dismissed.

D. Claim Nine

In his ninth claim, Mr. Leners argues that the judge who decided his petition for post-conviction relief was biased against him. [ECF 1 ex. 1 pp. 37-40] As Respondents correctly point out, a § 2254 petition must involve the proceedings "which provide[] the basis for [Petitioner's] incarceration." *Sellers v. Ward*, 135 F.3d 1333, 1339 (10th Cir. 1998). Mr. Leners' claim that the judge that decided his state petition for post-conviction relief was biased against him relates only to "alleged errors in the post-conviction proceedings," and, therefore, is not cognizable in a § 2254 petition. *Lopez v. Trani*, 628 F.3d 1228, 1229 (10th Cir. 2010). Mr. Leners' ninth claim is dismissed.

II. Claims decided on the merits.

Mr. Leners raised both the ineffective assistance of trial counsel and prosecutorial misconduct on direct appeal. *Leners*, 486 P.3d at 1018-19. There, he argued his attorney was ineffective for failing to follow up with the State about a supplemental report that the State did not provide to defense counsel until the day before trial. *Id.* at 1017. He also argued his attorney was ineffective for not objecting to Exhibit 50 which included "damning excerpts of the telephone conversations Mr. Leners recorded before the night of the shooting." *Id.* The late-produced supplemental report contained the calls used to

create Exhibit 50. *Id.* He further argued it was prosecutorial misconduct for the State to violate the trial court's discovery order regarding the late-produced supplemental report and that the introduction of Exhibit 50 constituted prosecutorial misconduct. *Id.* at 1018

The Wyoming Supreme Court applied the *Strickland* test to Mr. Leners' ineffective assistance of counsel claim, and a plain error analysis to the prosecutorial misconduct claim. *Id.* It disposed of both issues on the prejudice prong. *Id.* The Wyoming Supreme Court distilled the question down to "whether the State's failure to timely provide the supplemental report of Mr. Leners' telephone conversations and the admission of Exhibit 50, without objection, prejudiced his claim of self-defense. *Id.* at 1019.

The Wyoming Supreme Court concluded that "the physical and recorded evidence defeated any claim of prejudice at trial." *Id.* It determined Mrs. Trout's statement to the responding officer corroborated Mr. Trout's version of events, whereas Mr. Leners' statements were inconsistent. *Id.* The court also found that the cell phone recording of the shooting "tracks Mr. Trout's testimony but does not comport with any of Mr. Leners' differing accounts of what occurred inside the apartment after Mr. Trout arrived home." *Id.* at 1019-20. Further, the Court held that the recording contains no evidence Mr. Leners suffered a severe beating or was involved in a fight for his life but does clearly show that his breathing was normal after he shot Mr. Trout and that he worked to "excite his breathing in preparation for his 911 call." *Id.* at 1020. Finally, the Wyoming Supreme Court concluded that the physical evidence corroborated Mr. Trout's version of events and did not support Mr. Leners'. *Id.* It concluded that "the evidence 'doomed' Mr.

Leners' argument that he acted in justifiable self-defense. While the statements in Exhibit 50 were most certainly not helpful to Mr. Leners' defense, the evidence which preceded this exhibit had already secured the verdict." *Id.* It held there was no prejudice and affirmed the judgment and sentence. *Id.*

Mr. Leners filed a motion for sentence reduction under Wyoming Rule of Criminal Procedure 35(b), which the state district court denied and he appealed to the Wyoming Supreme Court. *Leners v. State*, 518 P.3d 686 (Wyo. 2022) (*Leners II*). In *Leners II*, Mr. Leners argued in pertinent part that the state district court violated his Due Process rights when it denied his motion for sentence reduction. He argued the district court judge was biased against him. *Id.* at 691-694. Mr. Leners raised several instances of alleged bias: first, he asserted the judge did not read his motion because it was decided the same day it was received; second, that the judge's use of a "sinking ship" analogy demonstrated bias; and third, the judge was biased because he did not appoint counsel for Mr. Leners' appeal of his motion for sentence reduction and did not rule on his motion to proceed IFP. *Id.* The Wyoming Supreme Court considered Mr. Leners' arguments that he was denied Due Process by the judge's alleged bias. *Id.* It determined he failed to establish bias. *Id.* at 694.

A. Claim Five

In his fifth claim, Mr. Leners argues the State violated his constitutional rights by committing prosecutorial misconduct, police misconduct, and by suppressing *Brady* evidence. [ECF 1 ex. 5 p. 89] He also argues his trial counsel was ineffective for failing to object to these issues at trial. [ECF 1 ex. 5 p. 89] Mr. Leners' fifth claim includes four

subclaims. First, Mr. Leners argues the state committed prosecutorial misconduct by saying in closing that Mr. Leners was "Dr. Jekyll and Mr. Hyde," stating he was not acting in self-defense by driving 500 miles with two guns, and stating that he worked his breath up before calling 911. [ECF 1 ex. 5 pp. 89-91] Second, he argues the State withheld *Brady* evidence of recorded calls and texts on Mr. Leners' phone with Mr. Trout threatening him. [ECF 1 ex. 5 pp. 91-93] Third, Mr. Leners argues he was denied a fair trial because the prosecutor withheld exonerating exhibits and lab reports from the jury. [ECF 1 ex. 5 pp. 93-96]. Fourth he argues he was denied a fair trial because the prosecutors suppressed evidence of the Trouts' criminal convictions. [ECF 1 ex. 5 pp. 97-99] Some of these allegations, particularly regarding the second argument, were raised on appeal and decided on the merits. The Court discusses that below—the rest are discussed later in the ineffective assistance of appellate counsel analysis.

1. Standard of review

Mr. Leners' ineffective assistance of counsel claim is governed by the well-known two prong test from *Strickland v. Washington*, 466 U.S. 668 (1984). The *Strickland* test requires Mr. Leners prove both that his attorney's performance was deficient, and that the deficiency was prejudicial. *Id.* at 689-94. An attorney's "[p]erformance is deficient when the mistakes are so serious that the attorneys are no longer serving as 'counsel' under the Sixth Amendment. *Menzies v. Powell*, 52 F.4th 1178, 1196 (10th Cir. 2022), cert. denied, No. 22-7482, 2023 WL 6378107 (U.S. Oct. 2, 2023). Courts analyzing whether an attorney was deficient presume that the attorney performed reasonably. *Id.* "To overcome the presumption of reasonableness, a petitioner 'must show that counsel's

representation fell below an objective standard of reasonableness.'" *Id.* (quoting *Strickland*, 466 U.S. at 688). The Court's "inquiry is 'highly deferential' and must be made without 'the distorting effects of hindsight.' Strategic decisions made after a 'thorough investigation' are afforded even greater deference and are 'virtually unchallengeable.'" *Id.* (quoting *Strickland*, 466 U.S. at 690) (internal citations omitted). Petitioners can prove prejudice where "there 'is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.'" *Id.* (quoting *Strickland*, 466 U.S. at 694).

For habeas petitioners raising ineffective assistance of counsel, the Court's review is doubly deferential because it includes deference under both the *Strickland* standard and the AEDPA. *Menzies*, 52 F.4th at 1196 (citing *Knowles v. Mirzayance*, 556 U.S. 111, 123 (2009)). "Under this double deference, we consider 'whether there is *any reasonable argument* that counsel satisfied *Strickland*'s deferential standard.'" *Harris v. Sharp*, 941 F.3d 962, 974 (10th Cir. 2019) (quoting *Ellis v. Raemisch*, 872 F.3d 1064, 1084 (10th Cir. 2017) (emphasis in original).

2. Analysis

To the extent Mr. Leners argues his attorney was ineffective for failing to follow up with the State about the supplemental report until the day before trial, and for not objecting to Exhibit 50, he has not demonstrated he is entitled to habeas relief. The Wyoming Supreme Court applied the correct law to his ineffective assistance of counsel and prosecutorial misconduct claims and determined there was no prejudice. *Leners*, 486 P.3d at 1020. A habeas court can grant relief only if the state court's decision was

objectively unreasonable and "if 'there is *no possibility* fairminded jurists could disagree that the state court's decision conflicts with the Supreme Court's precedents.'" *Hawes*, 7 F.4th at 1263 (quoting *Coddington*, 959 F.3d at 953). The Wyoming Supreme Court issued a thorough and well-analyzed opinion where it concluded Mr. Leners could not demonstrate prejudice. Mr. Leners has not shown that the Wyoming Supreme Court's decision was contrary to or an unreasonable application of federal law—he simply reargued the merits. This is insufficient under the AEDPA. The portion of claim five rearguing the ineffective assistance of counsel and prosecutorial misconduct claims decided on the merits in Mr. Leners' direct appeal is dismissed.

B. Claim Six

In his sixth claim, Mr. Leners argues that he provided evidence in his petition for state post-conviction relief that the trial judge was biased when he ruled on his motion for a new trial. [ECF 1 ex. 5 p. 106] He asserts he was denied the right to a fair and impartial Rule 21 hearing as evidenced by the two page long "denigrating epitaph" in the trial judge's order. [ECF 1 ex. 5pp. 106-07] Mr. Leners specifically complains about the judge's use of a "sinking ship" analogy. [ECF 1 ex. 5p. 107] Next, he argues he was denied the right to a fair and impartial judge because the judge grossly misstated evidence, falsified evidence, and made up his own evidence. [ECF 1 ex. 5 pp. 109-11] Respondents argue Mr. Leners' petition simply reargues the merits of his judicial bias claim and the Wyoming Supreme Court already decided the trial judge was not biased. [ECF 25 p. 17]

1. Standard of review

The Due Process clause establishes a "constitutional floor" regarding judicial bias that "requires a 'fair trial in a fair tribunal,' before a judge with no actual bias against the defendant or interest in the outcome of his particular case." *Bracy v. Gramley*, 520 U.S. 899, 904–05 (1997) (quoting *Withrow v. Larkin*, 421 U.S. 35, 46 (1975)) (internal citations omitted). "Due process guarantees 'an absence of actual bias' on the part of a judge." *Williams v. Pennsylvania*, 579 U.S. 1, 8 (2016) (quoting *In re Murchison*, 349 U.S. 133, 126 (1955)). Because the claim of judicial bias was decided on the merits, it is entitled to AEDPA deference. *Johnson*, 3 F.4th at 1218.

2. Analysis

The Wyoming Supreme Court quoted *Bracy* and applied the appropriate law in the case. *Leners II*, 518 P.3d at 692. The Wyoming Supreme Court addressed Mr. Leners' argument that the trial judge's bias was evidenced by his use of a sinking ship analogy.[3] It concluded that "while Mr. Leners may have been offended, nothing in the decision or

[3] The Wyoming Supreme Court quoted the state district court's "sinking ship" analogy.

> In short, the court can analogize Defendant's self-defense arguments at trial to a doomed and sinking ship. Defendant's self-defense ship sustained heavy damage to both bow and stern long before the State introduced Exhibit 50. The State inflicted serious damage to the ship's hull through the victim's testimony that the jury obviously found more credible than the Defendant's version of events. The ship's propeller had been blown asunder by the physical evidence (e.g., the bullet "strike mark" on the cement) corroborating the victim's testimony that the Defendant was standing over him (with the victim on his back) when the shot was fired. The ship's pump room was severely damaged by the photographs of Defendant, and the recording of the shooting, that did not support Defendant's claim he was attacked and beaten by the victim before the shooting. Defendant's self-defense ship was rapidly taking on water and destined to sink. While the recorded calls [Exhibit 50] may have hastened its ultimate demise, Defendant's self-defense ship was already charted on its inevitable path to the bottom of the ocean long before Exhibit 50 was dropped on its deck.

Leners II, 518 P.3d at 693

the analogy shows 'prejudgment or a leaning of the mind to the extent that the district court's decision was based on grounds other than the evidence before it.'" *Id.* at 693 (quoting *Steiger v. Happy Valley Homeowners Ass'n*, 245 P.3d 269, 279 (Wyo. 2010)). Here, Mr. Leners reargues the merits of the argument—asserting that the words of the analogy demonstrate bias. [ECF 1 ex. 5 pp. 106-108] He has not, however, pointed the Court to any authority that the Wyoming Supreme Court's analysis of this issue was objectively unreasonable, or contrary to controlling law. Therefore, he has not met the AEDPA's requirements. *Hawes*, 7 F.4th at 1263

III. Procedurally defaulted claims

Respondents argue claims one through five, seven, and eight are procedurally defaulted. Mr. Leners contends he can establish cause and prejudice to overcome the procedural default.

A. Cause and prejudice standard

Federal courts "will not review a question of federal law decided by a state court if the decision of that court rests on a state law ground that is independent of the federal question and adequate to support the judgment." *Coleman v. Thompson*, 501 U.S. 722, 729 (1991). The rule applies equally to substantive and procedural state law grounds. *Id.* at 729. "[A] federal claimant's procedural default precludes federal habeas review . . . if the last state court rendering a judgment in the case rests its judgment on the procedural default." *Harris v. Reed*, 489 U.S. 255, 262 (1989); *See also Edwards v. Carpenter*, 529 U.S. 446, 451 (2000) ("The procedural default doctrine and its attendant 'cause and prejudice standard' . . . apply alike whether the default in question occurred at trial, on

appeal, or on state collateral attack."). "Where . . . the last reasoned opinion on the claim explicitly imposes a procedural default, we will presume that a later decision rejecting the claim did not silently disregard that bar and consider the merits." *Ylst v. Nunnemaker*, 501 U.S. 797, 803 (1991).

Petitioners can overcome a procedural default by demonstrating cause and prejudice or a fundamental miscarriage of justice. *Davila v. Davis*, 582 U.S. 521, 528 (2017). "To establish 'cause' . . . the prisoner must 'show that some objective factor external to the defense impeded counsel's efforts to comply with the State's procedural rule.'" *Id.* (quoting *Murray v. Carrier*, 477 U.S. 478, 488 (1986)). Ineffective assistance of appellate counsel can constitute "cause" if the petitioner demonstrates his attorney was constitutionally ineffective. *Id.*

To prove the ineffectiveness of appellate counsel, Mr. Leners must satisfy the two-prong test from *Strickland*. *Cargle v. Mullin*, 317 F.3d 1196, 1202 (10th Cir. 2003). "Thus, the petitioner must show both (1) constitutionally deficient performance, by demonstrating that his appellate counsel's conduct was objectively unreasonable, and (2) resulting prejudice, by demonstrating a reasonable probability that, but for counsel's unprofessional error(s), the result of the proceeding—in this case the appeal—would have been different." *Id.* "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland*, 466 U.S. at 694. Proving a claim of ineffectiveness based on the failure to raise an issue on appeal is difficult because "counsel 'need not (and should not) raise every nonfrivolous claim, but rather may select from among them in order to maximize the likelihood of success on appeal.'" *Cargle*,

317 F.3d at 1202 (quoting *Smith v. Robbins*, 528 U.S. 259, 288 (2000)). Thus, courts analyzing ineffective assistance of appellate counsel claims look to the merits of the omitted issue. *Id.* This is generally done by comparing the omitted issue to the arguments pursued on appeal. *Id.* Where, as here, "a state court analyzes appellate counsel ineffectiveness as an excuse for procedural default" the Court must give AEDPA deference to that analysis. *Ryder ex rel. Ryder v. Warrior*, 810 F.3d 724, 746 (10th Cir. 2016).

B. Analysis

Mr. Leners argues his appellate counsel was ineffective for not raising on appeal the issues he raises in this petition. [ECF 1 ex. 1] Mr. Leners presented the ineffective assistance of appellate counsel claims to the state courts in his petition for post-conviction relief. [ECF 1 ex. 3 pp. 5-6]

1. Claim One

Mr. Leners argues that false statements in the affidavit of probable cause resulted in an illegal arrest and search. He contends his attorney was ineffective for not raising this issue before trial and that his appellate counsel was ineffective for not raising ineffective assistance of counsel for failing to raise this issue. [ECF 1 ex. 2 p. 10] Mr. Leners asserts that the statements in the affidavit of probable cause were false because he told the police he acted in self-defense, showed the police the bruises on his body from the fight with Christ Trout, and played them the audio version of the altercation. [ECF 1 ex.5 pp. 10-28] He contends the affidavit disregarded his statement and the evidence and only contained the Trouts' version of events. [ECF 1 ex. 5 pp. 10-28]

Respondents argue that the standard for an affidavit of probable cause is low. [ECF 25 p. 26] They further argue that Mr. Leners voluntarily agreed to allow the officers to listen to the recording. [ECF 25 p. 27] Further, they contend that even if the jury might later find that someone acted in self-defense, the evidence can be enough to establish probable cause. [ECF 25 p. 26] They argue that even if Mr. Leners' statements had been included in the affidavit in more detail, he cannot prove that the statement would have been insufficient to establish probable cause. [ECF 25 p. 26]

Probable cause is not a precise quantum of evidence it does not, for example, require the suspect to be more likely guilty than not. Instead, the question is whether 'a substantial probability existed that the suspect committed the crime, requiring something more than a bare suspicion.'" *Kapinski v. City of Albuquerque*, 964 F.3d 900, 907 (10th Cir. 2020) (quoting *Kerns v. Bader*, 663 F.3d 1173, 1188 (10th Cir. 2011)). In an analogous § 1983 case for false arrest, the Tenth Circuit explained how to determine whether false statements in an affidavit of probable cause violated the arrested person's constitutional rights. *Grubbs v. Bates*, 445 F.3d 1275, 1278 (10th Cir. 2006). It explained that courts should set aside the false statements and review the remaining information within the affidavit of probable cause. If the complaint is that the officer omitted information from the affidavit of probable cause, courts "determine the existence of probable cause by examining the affidavit as if the omitted information had been included and inquiring if the affidavit would still have given rise to probable cause for the warrant." *Taylor v. Meacham*, 82 F.2d 1556, 1562 (1996). "If hypothetically correcting

the misrepresentation or omission would not alter the determination of probable cause, the misconduct was not of constitutional significance." *Grubbs*, 445 F.3d at 1278.

Here, Mr. Leners' asserts ten of the statements in the affidavit of probable cause are false because they are handpicked to make him look guilty and exclude exculpatory evidence. [ECF 1 ex. 5 pp. 10-24] The statements, as reproduced by Mr. Leners, are:

1. Leners said he and Trout rolled around the front yard area of the apartment. Regarding Leners' claim of self-defense, there was no evidence in the fresh snow outside that he and Trout rolled around outside during a physical disturbance.

2. Leners stated he shot Trout in the right shoulder because Chris attacked him, wailed on him and beat his body everywhere. Leners had no injuries aside from a bruised right wrist.

3. Christopher stated while he and Leners "pushed each other on the chests," he fell on the ice outside the front door and said when he was on the ground he realized Leners had a gun in his hand and shot him.

4. Chris ended up on the ground and Leners "straddled him," pointed the gun at his chest and fired.

5. Trout grabbed the front of the gun as it was fired in attempt to prevent himself from being shot but was unsuccessful.

6. At 1948 hours Cheyenne Police received multiple 911 calls regarding a shooting with injury . . . they (Trout and Leners) continued to scuffle on while Joyce called 911

7. Christopher stated he got into a shoving match with Leners following an argument about Leners pursuing a relationship with Christopher's wife Joyce.

8. During the altercation, Christopher could be heard telling Leners to leave the house while Leners repeatedly stated, 'No let me explain.'

9. Prior to the shooting Joyce said she also told Leners to leave but he wouldn't.

10. The audio recording refutes Leners' claim he tried to leave the residence to avoid the altercation.

[ECF 1 ex. 5 pp. 10-24] (the Court removed emphasis and extra punctuation from the statements but otherwise reproduced them as Mr. Leners wrote them in his filing). He generally argues that the physical and recorded evidence contradicts the officer's statements. As in *Grubbs*, "[a] large part of [Petitioner]'s objection to his arrest is simply his insistence that his contrary version of events should have been credited." 445 F.3d at 1278.

Detective Hickerson's report did not conceal the fact that Mr. Leners' said he acted in self-defense. [ECF 1 ex. 2 p. 24] "[A]s a general matter, a suspect's contradiction of a witness' accusation is not sufficient to vitiate probable cause; otherwise it would be virtually impossible to secure a warrant for anyone but a confessed offender." *Grubbs*, 445 F.3d at 1278. Even if the affidavit included more of Mr. Leners' statement and the audio recording of the event, it would not negate the probable cause. The jury heard Mr. Leners' version of events, saw the physical evidence, and heard the audio recording and determined that Mr. Leners was guilty of attempted second-degree murder and did not act in self-defense. Thus, there is nothing so compelling or exculpatory in the recording that

Detective Hickerson should have given it more weight than the Trouts' statements. *See Grubbs*, 445 F.3d at 1278-79. Because hypothetically correcting the affidavit of probable cause does not alter the determination of probable cause, any error within the affidavit does not rise to a constitutional level and Mr. Leners' appellate attorney was not ineffective for failing to raise the issue on appeal. This claim is procedurally barred.

2. Claim Two

In his second claim for relief, Mr. Leners argues his attorney was ineffective for failing to introduce evidence of a "murder plot" against him by the Trouts.[4] He also contends his appellate attorney was ineffective for failing to raise his trial counsel's ineffectiveness. [ECF 1 ex. 5 p. 29] In particular, he contends Mr. Trout attacked him three weeks prior to the incident in question and the police knew about this prior altercation. [ECF 1 ex. 5 pp. 30-32] He also argues Mrs. Trout threatened to kill him three days prior to the incident, lured him to Cheyenne with the intent to rob and murder him, then later confessed to the plan. [ECF 1 ex. 5 pp. 33-40, pp. 44-49] Finally, Mr. Leners argues Mr. Trout twice stated that he intended to murder him. [ECF 1 ex. 5 pp. 40-43] He argues it was ineffective assistance for his attorney to pursue the restitution claim on appeal rather than an ineffective assistance claim based on the above evidence. [ECF 1 ex. 5 p. 29]

Respondents contend Mr. Leners has not met the AEDPA standard or the *Strickland* standard. They argue Mr. Leners' entire defense was based on his version of

[4] Mr. Leners also raises the "actual innocence" gateway in claim two. However, as already discussed, Mr. Leners is not entitled to relief under the actual innocence gateway because his argument that he acted in self-defense goes towards legal innocence, not factual innocence. *Supra* pp. 13-14.

events—including his argument on appeal. [ECF 25 pp. 21-23] Respondents assert the Wyoming Supreme Court examined the evidence and concluded that it "doomed" Mr. Leners' self-defense claim, and he could not demonstrate prejudice. [ECF 25 p. 22] They[4] argue Mr. Leners does not address the totality of the evidence or weigh the alleged omissions against the evidence elicited at trial and thus he cannot show he was prejudiced. [ECF 25 pp. 22-23]

The post-conviction relief court considered this argument and concluded that Mr. Leners could not demonstrate he received the ineffective assistance of appellate counsel because he could not "show there is a reasonable probability the verdict would have been different had Appendices 1-5 been introduced." [ECF 1 ex. 3 p. 10]

This Court affords AEDPA deference to the PCR court's determination that Mr. Leners' appellate counsel was not ineffective. Mr. Leners cannot demonstrate that his appellate counsel was ineffective or that he was prejudiced. The Wyoming Supreme Court looked at the totality of the evidence when it decided Mr. Leners' appeal. It concluded that the recorded evidence of the altercation and the physical evidence "'doomed' Mr. Leners' argument that he acted in justifiable self-defense." *Leners I*, 486 P.3d at 1019-20. While the evidence Mr. Leners argues his attorney should have introduced may have given context to the scope of the relationship between him and the Trouts, he does not explain how it would have defeated the physical and recorded evidence. Further, Mr. Leners faults his attorney for bringing a restitution claim on appeal. However, he succeeded on his restitution claim. *Id.* at 1015, n. 1 ("Mr. Leners raises a third issue challenging the award of restitution to the victim. The State concedes

this error, and we remand to the district court for the limited purpose of determining the proper amount of restitution.").

Appellate "counsel 'need not (and should not) raise every nonfrivolous claim, but rather may select from among them in order to maximize the likelihood of success on appeal.'" *Cargle*, 317 F.3d at 1202 (quoting *Robbins*, 528 U.S. at 288). Mr. Leners does not and cannot show that his appellate attorney was ineffective for not raising this issue because he does not explain how the additional evidence would have swayed the jury towards acquittal considering the physical and recorded evidence presented. Further, the court weighs the omitted argument against those brought on appeal. Mr. Leners appellate counsel brought a similar, and arguably stronger, ineffective assistance claim and the Wyoming Supreme Court found he could not demonstrate prejudice *Leners I*, 486 P.3d 1019-20. Mr. Leners cannot demonstrate his appellate attorney was ineffective and therefore cannot overcome the procedural default of his second claim. This claim is procedurally barred

3. Claim Three

In claim three, Mr. Leners argues he was denied his Second Amendment rights and that his attorneys were ineffective for not raising this issue. The Court analyzed Mr. Leners' Second Amendment claim above and determined it was not implicated in this case. *Supra* pp. 12-13. Because Mr. Leners' Second Amendment claim is meritless, his attorneys were not ineffective for failing to raise it. This claim is procedurally barred.

4. Claim Four

In his fourth claim, Mr. Leners argues the jury instructions at his trial were insufficient and unconstitutional. [ECF 1 ex. 5 p. 71] He argues his first chair trial counsel was ineffective for allowing the second chair counsel to handle the jury instructions, that the instruction regarding malice was unconstitutional, and that the failure to include lesser-included offenses was unconstitutional. He generally asserts his appellate counsel was ineffective for not raising these issues.

Respondents contend Mr. Leners does not provide cogent argument that the alleged instructional errors rose to the level of a Due Process violation. [ECF 25 p. 29] They argue Mr. Leners disagrees with the trial judge's interpretation of Wyoming law and uses Wyoming statutes and cases to support his argument. [ECF 25 p. 29] Respondents further argue it is not this Court's role to question the state court's interpretation of state law and that Mr. Leners cannot convert a state law claim into a federal constitutional issue by simply asserting a Due Process violation. [ECF 25 p. 29] Respondents also contend the inferred malice instruction told jurors they *could* infer malice—not that they were required to. [ECF 25 p. 30-31] Next, Respondents assert Mr. Leners provides no evidence that a lesser included offense instruction should have been given because he presented no argument at trial that he acted in a "sudden heat of passion"—thus, any lesser included offense instruction would have been contrary to his theory of defense. [ECF 25 p. 32] Finally, Respondents argue Mr. Leners takes statements from the second-chair's affidavit out of context. They assert the affidavit and

trial record show she was not ineffective regarding the jury instructions. [ECF 25 pp. 23-33]

"A habeas petitioner who seeks to overturn his conviction based on a claim of error in the jury instructions faces a significant burden. 'The question in such a collateral proceeding is "whether the ailing instruction by itself so infected the entire trial that the resulting conviction violates due process."' *Ellis v. Hargett*, 302 F.3d 1182, 1186 (10th Cir. 2002) (quoting *Davis v. Maynard*, 869 F.2d 1401, 1405 (10th Cir.1989) *vacated sub nom. Saffle v. Davis*, 494 U.S. 1050, 110 S.Ct. 1516, 108 L.Ed.2d 756 (1990), *rev'd in part on other grounds*, 911 F.2d 415 (10th Cir.1990)). Mr. Leners faces an additional formidable hurdle because his jury instruction claim was procedurally defaulted—therefore he must also prove cause and prejudice.

i. Lesser Included Offense Instruction – Ineffective Assistance of Counsel

The Court already determined Mr. Leners cannot bring a standalone claim based on the failure to provide a lesser included offense instruction. Thus, the Court limits its review to whether it was ineffective for his trial counsel not to request the instruction and for his appellate attorney not to raise the issue on appeal. Mr. Leners seems to argue that a lesser included offense instruction should have been given because he was charged with a very serious crime and the evidence was inconclusive that he committed the crime—thus, in his opinion, a jury would have convicted him of a lesser crime if one had been presented. [ECF 1 ex. 5 pp. 78-81] In Wyoming, a requested lesser-included offense instruction should be given "if there are in dispute factual issues that would permit a jury rationally to find the defendant guilty of the lesser offense and acquit the defendant of the

greater." *Nickels v. State*, 351 P.3d 288, 292 (Wyo. 2015) (quoting *State v. Keffer*, 860 P.2d 1118, 1136 (Wyo. 1993)).

First, the excerpt of the jury instruction conference provided shows that counsel argued for a "sudden heat of passion" instruction, while the State argued against it. [ECF 21 ex. 22 pp. 8:4-11:23] It is not clear whether this was a true lesser included offense request, but either way, the court determined at the initial jury instruction conference that it would let the jury decide whether Mr. Leners had acted in a sudden heat of passion. [ECF 21 ex. 22 p. 11:16-23] At the close of the defense's case, however, the court concluded that there was no question of fact and Mr. Leners had not presented evidence justifying giving a "sudden heat of passion" instruction. It determined the instruction would only serve to confuse the jury. [ECF 21 ex. 22 p. 23:1-10] Thus, Mr. Leners' trial counsel was not ineffective because he did request the "sudden heat of passion" instruction which was declined by the trial court.

If the above requested instruction was not a lesser included offense instruction, trial counsel still was not ineffective for failing to request it. This Court's "inquiry is 'highly deferential' and must be made without 'the distorting effects of hindsight.'" *Menzies*, 52 F.4th at 1196 (quoting *Strickland*, 466 U.S. at 690). The entirety of Mr. Leners' case, from the moment he shot Mr. Trout to now, is that he acted in self-defense. While Mr. Leners' attorney could have requested a lesser-included offense instruction, it would have been contrary to the self-defense theory he advances to this day. Counsel was not ineffective for failing to request an instruction contrary to his theory of defense because raising a sudden heat of passion defense could have further weakened Mr.

Leners' crumbling self-defense theory. *See Thornburg v. Mullin*, 422 F.3d 1113, 1140 (10th Cir. 2005) ("Although the alibi defense turned out to be weak, belatedly raising an inconsistent defense could further weaken what little there was of the defense he had.")

In either case, Mr. Leners appellate counsel was not ineffective for failing to raise this issue on appeal. Comparing the lesser included offense instruction issue to those raised on appeal, the lesser included offense instruction is much weaker. "[C]ounsel 'need not (and should not) raise every nonfrivolous claim, but rather may select from among them in order to maximize the likelihood of success on appeal.'" *Cargle*, 317 F.3d at 1202 (quoting *Smith v. Robbins*, 528 U.S. 259, 288 (2000)). Mr. Leners' attorney presented one successful argument on appeal regarding restitution. He also raised two strong arguments about prosecutorial misconduct and the ineffective assistance of counsel. *Leners I*, 486 P.3d 1013. He was not ineffective for failing to raise the lesser included offense instruction when the lower court, who was initially inclined to let the jury decide whether Mr. Leners acted in a "sudden heat of passion," determined there was not enough evidence to justify giving the instruction. [ECF 21 ex. 22 p. 23:1-10]

ii. Due Process

Next, Mr. Leners argues the instructions given at trial denied him Due Process of law. Specifically, he contends the Court should have instructed the jury on the castle doctrine, how the castle doctrine applies to cohabitants, and that there was no duty to retreat. [ECF 1 ex. 5 pp. 71-73] Mr. Leners cites to *Widdison*, 410 P.3d 1205, and Wyoming statute § 6-2-602, and argues the jury was entitled to decide whether he lived with Mrs. Trout. [ECF 1 ex. 5 pp. 84-86] At the jury instruction conference, Mr. Leners'

attorney argued the court should instruct the jury that he had no duty to retreat based on Wyoming Statute § 6-2-602 which, she asserted, simply codified the common law; the State disagreed. [ECF 21 ex. 22 pp. 18:13-21:7] The court listened to both arguments, cited the statute, and determined the statute was not in effect at the time of the crime, was not retroactive, and constituted a change in the common law. [ECF 21 ex. 22 p. 22:21-25] Mr. Leners disagrees with the trial court's ruling; however "this court's role on collateral review isn't to second-guess state courts about the application of their own laws." *Eizember v. Trammell*, 803 F.3d 1129, 1145 (10th Cir. 2015). Mr. Leners has not provided the Court with any argument to demonstrate the Court's ruling was incorrect, let alone a Due Process violation.

Mr. Leners has also not demonstrated his appellate attorney was ineffective for failing to raise the issue. The statute to which Mr. Leners refers was amended after he shot Mr. Trout. Wyo. Stat. § 6-2-602 (effective July 1, 2018). Thus, the court instructed the jury on the common law "castle doctrine" and the duty to retreat based on settled law at that time. [ECF 21 ex. 22] Mr. Leners has not provided any support that would demonstrate the court's conclusion that Wyoming Statute § 6-2-602 did not apply retroactively was incorrect, or that the jury instructions were incorrect—he simply believes some were omitted. He has not demonstrated his appellate attorney was ineffective, especially considering the issues he did raise on appeal.

Next, Mr. Leners argues the inferred malice instruction violated Due Process. The instruction read: "Instruction Number 17. You are instructed that you may but are not required to infer malice from the use of a deadly weapon. The existence of malice, as

well as each and every element of the charge of attempted second-degree murder, must be proved beyond a reasonable doubt." [ECF 21 ex. 22 p. 24:7-11] First, Mr. Leners argues Instruction 17 conflicts with Instruction 16 which defines malice. Instruction 16 reads: "The terms malice or maliciously mean that the act constituting the events was done without premeditation, was reasonably likely to result in death, was done recklessly under circumstances manifesting extreme indifference to the value of human life and was done without legal justification or excuse." [ECF 21 ex. 22 p. 24:1-6] Mr. Leners contends that Instruction 16 contemplates an act whereas Instruction 17 says the jury can infer malice because he possessed a gun. [ECF 1 ex. 5 p. 15] However, Mr. Leners misunderstands the instruction. Instruction 17 permits, but does not require, the jury to infer malice from the *use* of a deadly weapon. [ECF 21 ex. 22 p. 24:7-11] He next contends that the jurors were free to decide what constituted a deadly weapon based on their own biases. However, Instruction 18 defines deadly weapon and specifically includes a firearm. [ECF 21 ex. 22 p. 24: 12-17]

A "permissive presumption leaves the trier of fact free to credit or reject the inference and does not shift the burden of proof, it affects the application of the 'beyond a reasonable doubt' standard only if, under the facts of the case, there is no rational way the trier could make the connection permitted by the inference." *Cnty. Ct. of Ulster Cnty., N. Y. v. Allen*, 442 U.S. 140, 157 (1979). Here, Mr. Leners has not shown the inferred malice instruction "by itself so infected the entire trial that the resulting conviction violates due process." *Ellis*, 302 F.3d at 1186 (internal citations omitted). Rather, the record shows the jury was told they could, but were not required to infer malice from the

use of a deadly weapon and that a deadly weapon included a firearm. [ECF 21 ex. 22 p. 24] Mr. Leners has not demonstrated the jury instructions violated his right to due process. *See Bilderback v. Abbott*, 107 F. App'x 852, 856 (10th Cir. 2004) (unreported) (finding the Wyoming inferred malice statute was permissive). Mr. Leners' appellate attorney was not ineffective for failing to raise this meritless argument.

iii. Ineffective assistance –second chair counsel

Finally, Mr. Leners argues he received ineffective assistance of counsel because the second-chair counsel handled the jury instruction conference. Mr. Leners cites to counsel's affidavit to prove she was ill-prepared and therefore ineffective. However, his reference to her affidavit is selective. Taken as a whole, counsel's affidavit states that she asked to be assigned certain tasks because she came on to the case close to trial—two and a half months. [ECF 1 ex. 2 p. 94] Because she came on to the case late, counsel was only assigned certain tasks including preparing for a limited number of witnesses and preparing jury instructions. [ECF 1 ex. 2 p. 94] Her affidavit does not support a claim that she was ill-prepared. Further, though she may have been the attorney primarily involved in preparing jury instructions, the transcript demonstrates that primary trial counsel was also present at the jury instruction conference and argued for the inclusion of certain instructions—including a "sudden heat of passion" instruction. [ECF 21 ex. 22 pp. 8:4-11:23] Further, the portion of the transcript provided demonstrates that the secondary counsel was well-prepared. [ECF 21 ex. 22] Mr. Leners cannot show that his trial attorney was ineffective for allowing the secondary attorney to prepare the jury instructions, nor that his appellate attorney was ineffective for failing to raise this issue

on appeal. For the forgoing reasons, Mr. Leners cannot overcome the procedural default of claim four.

5. Claim Five

In claim five, Mr. Leners argues his appellate counsel was ineffective for failing to raise prosecutorial misconduct, police misconduct, and instances of *Brady* violations. [ECF 1 ex. 5 p. 89] He contends it was prosecutorial misconduct for the prosecutor to tell the jury Mr. Leners was "Dr. Jekyll and Mr. Hyde" and for her to tell the jury he was guilty because he traveled from Nebraska to Wyoming with a gun he owned legally. [ECF 1 ex. 5 pp. 89- 91] He further argues the State knowingly suppressed *Brady* evidence when it did not disclose Mr. Trout's criminal record or Mr. Trout's prior attack on Mr. Leners. [ECF 1 ex. 5 pp. 91-93] Mr. Leners contends the State pulled exonerating lab reports and exhibits from the trial before the jury could see them. Specifically, he contends Mr. Trout had contact powder burns on his person that contradicted the State's version of events. [ECF 1 ex. 5 pp. 93-96] Mr. Leners further argues that the Trouts' criminal records were suppressed by the State and should have been introduced at trial. [ECF 1 ex. 5 pp. 97- 99]

Respondents contend Mr. Leners cannot show prejudice and this Court should not excuse his procedural default. Respondents argue that Mr. Leners' appellate counsel carefully considered how to raise both the prosecutorial misconduct and ineffective assistance of counsel claims on appeal and picked the strongest arguments to maximize the chance of success. [ECF 25 p. 24] Respondents assert that Mr. Leners' appeal was unsuccessful because he could not show prejudice based on the overwhelming evidence

against his self-defense argument. They argue Mr. Leners cannot show that an additional claim based on the prosecutor's closing statements would have rendered a different result.

Respondents further argue that Mr. Leners has never shown that the State possessed evidence that it failed to disclose. Rather, Mr. Leners maintains that he provided the State with notice that the evidence existed on his phone. They further argue his attorney stated he received every report regarding the contents of Mr. Leners' phone shortly before trial. [ECF 24 pp. 33-34] Thus, they contend the evidence was not suppressed. They further argue that, even if the evidence was suppressed, Mr. Leners cannot show that the suppression was material because the evidence was cumulative. [ECF 24 pp. 34-35] Respondents further argue that Mr. Leners' argument regarding lab reports and gunpowder residue on Mr. Trout is meritless and contrary to the record because the police investigator testified that the residue kits were never tested. [ECF 24 p. 35]

First, Mr. Leners contends the prosecutor's closing statements vilified him to the jury.[3] Specifically, he alleges the statements: "Leners is both Dr. Jekyll and Mr. Hyde," "It is not self-defense to drive five hundred miles with two guns," and "Leners is falsely working his breath up on his 911 call" constitute prosecutorial misconduct. [ECF 1 ex. 5 p. 89] "Prosecutorial misconduct does not warrant federal habeas relief unless the conduct complained of is so egregious as to render the entire proceedings against the

[3] Mr. Leners repeatedly argues that the prosecutor's subsequent disbarment demonstrates she engaged in prosecutorial misconduct in his case. Regardless of the behavior that led to the prosecutor's disbarment, it is irrelevant to this analysis because Mr. Leners still must prove she engaged in prosecutorial misconduct in his case.

defendant fundamentally unfair." *Smallwood v. Gibson*, 191 F.3d 1257, 1275 (10th Cir. 1999). When courts analyze a prosecutorial misconduct claim, "they must examine alleged misconduct in the context of 'the entire proceeding, including the strength of the evidence against the petitioner.'" *Stouffer v. Trammell*, 738 F.3d 1205, 1221 (10th Cir. 2013) (quoting *Wilson v. Sirmons*, 536 F.3d 1034, 1064 (10th Cir. 2008)).

The Wyoming Supreme Court examined the entire record and determined that "the overwhelming evidence of guilt presented at trial precludes the conclusion that the alleged errors were prejudicial." *Leners I*, 486 P.3d at 1015. Here, Mr. Leners directs the Court to the prosecutor's statements, but he does not include any legal support to demonstrate that they are so egregious that they made the entire proceeding fundamentally unfair. *Smallwood*, 191 F.3d at 1275. Further, Mr. Leners cannot show it was ineffective for his appellate counsel not to raise this claim on appeal. The Court gives deference to Mr. Lener's appellate counsel. *Menzies*, 52 F.4th at 1196. Appellate counsel thoroughly examined the record and determined that his strongest claim was a prosecutorial misconduct claim for the late production of Exhibit 50. *See, Leners I*, 486 P.3d at 1018-19. This is the type of strategic decision the *Strickland* Court discussed and to which this Court gives deference. "[C]ounsel 'need not (and should not) raise every nonfrivolous claim, but rather may select from among them in order to maximize the likelihood of success on appeal.'" *Cargle*, 317 F.3d at 1202 (quoting *Smith v. Robbins*, 528 U.S. 259, 288 (2000)). Mr. Leners cannot show that his appellate counsel was ineffective for failing to raise this issue on appeal.

Mr. Leners next argues that the police engaged in misconduct, that the prosecutor pulled exonerating exhibits and lab reports before the jury could see them, and that State suppressed the Trouts' criminal records. [ECF 1 ex. 5 pp. 88-99] He contends his appellate attorney was ineffective for not raising these issues. First, Mr. Leners points to Detective Hickerson's report to indicate that the investigator noticed powder burns around Mr. Trout's wounds. [ECF 1 ex 5 pp. 94-95] However, at trial, Detective Hickerson testified that the gunshot residue kits collected from the scene were never tested because they had been proven to be unreliable. [ECF 21 ex. 23 pp. 3:7-4:19] Thus, exonerating evidence was not "pulled" from the jury. Mr. Leners' appellate counsel was not ineffective for failing to raise this issue. *Cargle*, 317 F.3d at 1202.

Likewise, Mr. Leners cannot demonstrate that his appellate attorney was ineffective for not raising these issues. The jury heard about the fight between Chris Trout and Mr. Leners and heard Mr. Leners' version of events—it nevertheless convicted him. *See generally Leners I*, 486 P.3d 1013. The Wyoming Supreme Court looked at the evidence in the case and determined that Mr. Leners' self-defense claim was defeated by the overwhelming evidence against him—particularly the physical evidence and Mr. Leners' own recording of the altercation. *Id.* at 1019. Thus, even if the State suppressed the criminal records, Mr. Leners has not demonstrated that their production would have changed the jury's understanding of the physical evidence and the recording of the shooting. Thus, he cannot demonstrate the outcome of his appeal would have been different had his appellate attorney raised this issue. *Cargle*, 317 F.3d at 1202.

Next, Mr. Leners is intensely focused on the alleged *Brady* violations in this case, the fact that his attorney did not raise the issue at trial, and that his appellate counsel did not raise them on appeal. Briefly, in *Brady v. Maryland*, the Supreme Court held that it was unconstitutional for the prosecution to suppress "evidence favorable to an accused." 373 U.S. 83, 87 (1963). "There are three components of a true Brady violation: The evidence at issue must be favorable to the accused, either because it is exculpatory, or because it is impeaching; that evidence must have been suppressed by the State, either willfully or inadvertently; and prejudice must have ensued." *Strickler v. Greene*, 527 U.S. 263, 281–82 (1999).

Mr. Leners asserts that there are portions of his recorded calls that would have proven his innocence. [ECF 1 ex. 5 pp. 91-93] He contends the prosecution suppressed this evidence and only introduced portions of calls and texts that made him look guilty. [ECF 1 ex. 5 pp. 91-93] While the Court understands Mr. Leners' frustration regarding the recorded calls and texts, these do not constitute *Brady* evidence. Under *Brady*, "[e]vidence is 'suppressed by the State, either willfully or inadvertently,' when it is 'known to the [State] but not disclosed to trial counsel.'" *Fontenot v. Crow*, 4 F.4th 982, 1062 (10th Cir. 2021), cert. denied, 142 S. Ct. 2777, 213 L. Ed. 2d 1015 (2022) (quoting *Strickler v. Greene*, 527 U.S. 263, 281-82 (1999)). Here, Mr. Leners' attorney testified at the Rule 21 hearing that, along with receiving the supplemental report shortly before trial, he had received a copy of the contents of Mr. Leners' phone with discovery:

> A. It says—I could read it to you. Something about the contents of Timothy Leners' cellular phone, refer to supplemental report.

. . .

Q. How did you become aware that you did not have the supplemental police report?

A. Like I said, I was reading through this before trial, and I noticed that comment in the report. I think it was the Sunday before trial.

Q. Okay and then what happened?

A. Once I noticed I didn't have that report, I emailed the district attorney's office and asked if they could provide it to me.

. . .

Q. Okay. And that e-mail indicates that the State provided you Detective Hickerson's supplemental report at that time; is that correct?

A. Yeah, the same day, a couple of hours later.

. . .

Q. Let's talk about the content of Mr. Leners' phone—

A. Okay.

Q. – that's contained in that report. Is that information that's—that was important to you in your defense?

A. Yes.

Q. The State had previously provided you the recordings of Mr. Leners' phone; is that correct?

A. That's correct.

Q. Was it a lot of material, to your recollection?

A. Yeah, it was. I don't know, like, as far as like how much data was on it, I don't recall what the amount was. But, yeah, there was a lot of information on there.

Q. Were there—to your recollection were there text messages from your client to·

A. Yes.

Q. –to the victim?

A. Yes. Well, I don't know about—I don't specifically recall to the victim. I do know there was text messages between Mr. Leners and Joyce Trout.

Q. Okay. And were there telephone recordings between Mr. Leners and potential witnesses?

A. Yes.

Q. Did you listen to all of these recordings?

A. I did. I missed the one between Timothy Leners and Joyce Trout's son, who I think is named Justin. For whatever reason, that wasn't listened to.

Q. Okay. I believe—and the record is going to say what the record says. But I believe that Detective Hickerson testified that there was almost 1 gigabyte of information recorded. Did you – are you asserting that you listened to almost all of that then?

A. Um, I don't know, Mr. [appellate counsel]. I know I went through the phone calls that were from Timothy Leners to the phone number to Joyce and Chris Trout.

Q. Okay. How about the text messages? Did you read through all of the text messages?

A. I did.

[ECF 44 ex. 1 pp. 66: 23-70:10]

Mr. Leners' attorney testified he knew of, and reviewed, all the phone recordings and text messages in this case. The evidence was not suppressed, it was simply not introduced at trial. This is not a violation under *Brady*. Mr. Leners' appellate counsel was not ineffective for failing to raise a frivolous claim. Claim five is procedurally barred.

6. Claim Seven

In claim seven, Mr. Leners argues that his constitutional rights were violated when he was not allowed to attend the oral argument for his direct appeal. [ECF 1 ex. 5 pp. 116-20] Mr. Leners presented this claim to the state court in his petition for post-conviction relief and the state court determined that it was not cognizable in a petition for post-conviction relief. [ECF 1 ex. 3 p. 12] Respondents argue this claim is likely procedurally barred, but that it might not be because there is a lack of state process to raise the claim. [ECF 25 pp. 17-18] "[W]here 'the claim may be disposed of in a straightforward fashion on substantive grounds,' this court retains discretion to bypass the procedural bar and reject the claim on the merits." *Smith v. Duckworth*, 824 F.3d 1233, 1242 (10th Cir. 2016). Mr. Leners' seventh claim is easily disposed of on the merits; therefore the Court does not address the procedural bar.

Mr. Leners argues he was constitutionally entitled to attend the oral argument of his direct appeal. He contends his presence was required to contribute to the fairness of the proceeding. [ECF 1 ex. 5 pp. 116-17] He contends his case was "bungled" at trial and appeal and that is why his presence at the appellate oral argument was critical. [ECF 1 ex. 5 p. 117-18] He argues that, had he been allowed to attend oral argument, he could have

objected to the arguments presented by his appellate attorney and let the court know that his attorney was "intentionally destroying his appeal." [ECF 1 ex. 5 p.118]

The Due Process Clause provides that "a criminal defendant has the 'right to be present at a proceeding whenever his presence has a relation, reasonably substantial, to the fullness of his opportunity to defend against the charge.'" *United States v. Beierle*, 810 F.3d 1193, 1198 (10th Cir. 2016). In the Tenth Circuit, the exclusion of a criminal defendant "from the courtroom during argument on a question of law does not violate [a] defendant's constitutional right." *Deschenes v. United States*, 224 F.2d 688, 693 (10th Cir. 1995). "[D]ue process guarantees [the defendant's] presence only when his presence would be helpful at the proceeding he seeks to attend—that is, only 'if his presence would contribute to the fairness of the procedure.'" *Beierle*, 810 F.3d at 1199 (quoting *Kentucky v. Stincer*, 482 U.S. 730, 745 (1987)).

First, the Supreme Court has recognized "a prisoner has no absolute right to argue his own appeal or even to be present at the proceedings in an appellate court." *Price v. Johnston*, 334 U.S. 266 (1948) *abrogated on other grounds by McCleskey v. Zant*, 499 U.S. 467 (1991). Second, while Mr. Leners contends fairness required he be able to attend his appeal to object to his appellate attorney's argument, the Wyoming Rules of Appellate Procedure would not have permitted this. The Wyoming Rules of Appellate Procedure require the criminal appellant to communicate with the court through counsel except in two situations: "the appellant may file a pro se motion to terminate counsel's representation in the appeal and/or the appellant may also file a motion for leave to consider a pro se supplemental brief, i.e., a brief in addition to the one filed by counsel."

WRAP 14.05. Thus, because Mr. Leners was represented by counsel, he could not have communicated his "objection" to the Wyoming Supreme Court at oral argument. Further, Mr. Leners would not have been allowed to sit at counsel table or speak to the Court during oral argument. Rather, he would have been required to sit in the gallery with the rest of the spectators—he could not have assisted his appellate attorney or spoken to the court. Practitioner's Guide to Oral Argument Before the Wyoming Supreme Court, 3. ("Parties attending argument are not allowed to sit at counsel table, but are welcome to sit in the gallery.") Mr. Leners had no constitutional right to attend his appellate oral argument, therefore his seventh claim is procedurally barred.

7. Claim Eight

In his eighth claim, Mr. Leners claims he was constructively denied counsel at trial and his appellate attorney was ineffective for failing to argue this issue on appeal. He argues his primary trial attorney made numerous comments that he did not have time for Mr. Leners' case and that he would not read the evidence Mr. Leners sent him. [ECF 1 ex. 5 p. 123] Mr. Leners contends he wrote the Wyoming Public Defender and asked her to assign him a new attorney, investigate the issue and correct it, or meet with him and she refused. [ECF 1 ex. 5 p. 24] Mr. Leners argues that his attorney had a conflict of interest because he did not want to represent him at trial. [ECF 1 ex. 5 p. 128] He also argues the failure to appoint new counsel resulted in structural error. [ECF 1 ex. 5 pp. 132]

Respondents contend Mr. Leners does not establish there was a conflict of interest. Instead, he complains about his attorney's attitude. [ECF 25 p. 36] They argue he never

asked the court for substitute counsel or asked to represent himself at trial. [ECF 25 p. 36] They further argue his attorney's testimony from the Rule 21 hearing is irrelevant because his attorney did not say there was a conflict of interest—rather the hearing was based on his attorney's failure to object to evidence. [ECF 25 p. 36]

Constructive denial of counsel requires a complete lack of "meaningful adversarial testing." *United States v. Collins*, 430 F.3d 1260, 1265 (10th Cir. 2005). The Tenth Circuit has found a "complete absence of meaningful adversarial testing only where the evidence 'overwhelmingly established that [the] attorney abandoned the required duty of loyalty to his client,' and where counsel 'acted with reckless disregard for his client's best interests and, at times, apparently with the intention to weaken his client's case.'" *Id.* (quoting *Torrentine v. Mullin*, 390 F.3d 1181, 1208 (10th Cir. 2004)).] Where, as here, a petitioner did not object to an alleged conflict of interest at trial, they "must demonstrate that an actual conflict of interest adversely affected his lawyer's performance." *Cuyler v. Sullivan*, 446 U.S. 335, 348, 100 S. Ct. 1708, 1718, 64 L. Ed. 2d 333 (1980). To prove an actual conflict of interest, Mr. Leners must show "counsel was 'forced to make choices advancing ... interests to the detriment of his client.'" *Workman v. Mullin*, 342 F.3d 1100, 1107 (10th Cir. 2003) (quoting *United States v. Alvarez*, 137 F.3d 1249, 1251–52 (10th Cir.1998)). "Furthermore, 'the petitioner must be able to point to specific instances in the record' that suggest his interests were damaged for the benefit of another party." *Id.* (quoting *Alvarez*, 137 F.3d at 1251-52).

Here, Mr. Leners cannot demonstrate he was constructively denied counsel or that his attorney had a conflict of interest. Mr. Leners' attorney may have been busy, but he

tried the case, cross-examined witnesses, put on a self-defense case, and argued at the jury instruction conference. *See generally Leners I*, 486 P.3d 1013; [ECF 21 ex. 22 pp. 8:4-11:23]. Mr. Leners points to his attorney's testimony at the Rule 21 hearing that he had no excuse for failing to object to Exhibit 50, but a single mistake does not mean Mr. Leners was constructively denied counsel. Further, Mr. Leners points to no evidence that shows an actual conflict of interest. While Mr. Leners may have disagreed with his attorney and had complaints about the attention his attorney paid to the information and evidence he provided, he cannot and does not show that his attorney was forced to make choices that benefitted another party to his detriment. *Mullin*, 342 F.3d at 1107. Because Mr. Leners cannot show he was denied the constructive assistance of trial counsel, his appellate attorney was not ineffective for failing to raise this issue on appeal. Mr. Leners' eighth claim is procedurally barred.

CONCLUSION

The Court understands that the heart of this case is Mr. Leners' earnest belief that he acted in self-defense and is, therefore, not guilty of attempted second-degree murder. However, whether someone acts in self-defense is a question of fact under Wyoming law. *Leners*, 486 P.3d at 1017. This means that the factfinder, here the jury, decides if they believe the defendant's version of events—in Mr. Leners' case they did not. *Id.* Mr. Leners, therefore, faced a heavy burden under the AEDPA which he has failed to meet.

28 U.S.C. § 2253(c) and Rule Eleven of the Rules Governing Section 2254 Cases require this Court to "issue or a deny a certificate of appealability when the Court enters a final order adverse to the applicant." Rule Governing Section 2254 Cases in the United

States District Courts, Rule 11. When a court rejects a constitutional claim on the merits, it should issue a COA when "reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong." *Slack v. McDaniel*, 529 U.S. at 484.

> When the district court denies a habeas petition on procedural grounds without reaching the prisoner's underlying constitutional claim, a COA should issue when the prisoner shows, at least, that jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling.

Id. Mr. Leners cannot make either showing and the Court will not issue a certificate of appealability.

NOW, THEREFORE, for the reasons discussed above, Respondents' Combined Motion for Dismissal and Summary Judgment [ECF 24] is **GRANTED** and Mr. Leners' Petition for Writ of Habeas Corpus Pursuant to 28 U.S.C. § 2254 [ECF 1] is **DENIED** and **DISMISSED WITH PREJUDICE.**

IT IS FURTHER ORDERED, the remaining pending motions before the Court are **DENIED AS MOOT.**

IT IS FURTHER ORDERED a Certificate of Appealability **SHALL NOT ISSUE.**

Dated this 1st day of February 2024.

Scott W. Skavdahl
United States District Judge

SCOTUS

APPENDIX C, D, E

Prior Court Opinion

No. _____,

_____

IN THE
SUPREME COURT OF THE UNITED STATES OF AMERICA
PETITION FOR WRIT OF CERTIORARI

Timothy D. Leners; Pro-Se / In Propria Persona Petitioner
vs.
State of Wyoming; Wyoming Attorney General, Respondent

ON PETITION FOR A WRIT OF CERTIORARI TO:
United States Court Of Appeals – 10th Circuit

2-11-25 ECF 11157979- USCA ORDER DENYING EN BANC FOR RE-HEARING after submission to full Panel

FILED
United States Court of Appeals
Tenth Circuit

February 11, 2025

Christopher M. Wolpert
Clerk of Court

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

TIMOTHY D. LENERS,

Petitioner - Appellant,

v.

WYOMING ATTORNEY GENERAL; STATE OF WYOMING; WYOMING DEPARTMENT OF CORRECTIONS MEDIUM CORRECTIONAL INSTITUTION WARDEN,

Respondents - Appellees.

No. 24-8008
(D.C. No. 1:23-CV-00121-SWS)
(D. Wyo.)

ORDER

Before **HARTZ**, **KELLY**, and **EID**, Circuit Judges.

Before the court is Timothy D. Leners' Petition for Rehearing En Banc (Petition), Motion to Reinstate Appeal under Tenth Circuit Rule 42.2, Motion for Leave to Attach Additional Documents under Tenth Circuit Rule 40.2, and Motion Seeking an Order.

The Motion to Reinstate Appeal, construed as a motion to file the Petition out of time, is granted. The Motion for Leave to Attach Additional Documents, construed as a motion seeking reconsideration of the panel's previous denial of leave to attach additional documents, is denied.

Appendix C

The Petition was circulated to all non-recused judges of the court who are in regular active service. As no member of the panel and no judge in regular active service on the court requested that the court be polled, the Petition is denied.

The Motion Seeking an Order is denied as moot.

Entered for the Court

CHRISTOPHER M. WOLPERT, Clerk

SCOTUS "D"
make APX D

IN THE DISTRICT COURT, FIRST JUDICIAL DISTRICT

LARAMIE COUNTY, WYOMING

FILED
APR 18 2023
DIANE SANCHEZ
CLERK OF THE DISTRICT COURT

THE STATE OF WYOMING,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Docket No. 2018-CR-33-779
	)	
TIMOTHY LENERS,	)	
	)	
Defendant.	)	

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER DISMISSING PETITION FOR POST-CONVICTION RELIEF

THIS MATTER came before the court upon the motion of the State of Wyoming (Plaintiff) to dismiss the petition for post-conviction relief filed by Timothy Leners (Defendant). The court, having read the petition, the motion, and the file, and being fully advised in the premises therein, finds, concludes, and orders as follows:

I. Factual and Procedural History.

1. A jury convicted Mr. Leners of the attempted second-degree murder of Christopher Trout. *Leners v. State*, 2021 WY 67, ¶ 1, 486 P.3d 1013, 1015 (Wyo. 2021). Following an altercation with Christopher and Joyce Trout, Mr. Leners shot Mr. Trout. *Id.* ¶¶ 6-10, 486 P.3d at 1015-16. Mr. Leners asserted self-defense at trial, arguing Mr. Trout "was 'pounding' on him and 'beating the crap out' of him," and after a struggle over the firearm, Mr. Leners shot him in the shoulder. *Id.* ¶ 8-9, 486 P.3d at 1016.

2. At trial, the State presented evidence that both Mr. and Ms. Trout had independently told police that Mr. Leners was on top of Mr. Trout when he shot him. *Id.* ¶ 9, 486 P.3d at 1016.

APPendix D

Mr. Leners denied ever being on top of Mr. Trout. *Id.* Testimony was also presented of Mr. Leners's cell phone recording to 911, where he can be heard "working his breathing from calm to labored as he called 911" as well as evidence of a lack of significant injuries on Mr. Leners. *Id.* ¶¶ 10, 32, 486 P.3d at 1016, 1020. The State presented calls from Mr. Leners's phone where he "expressed a desire to kill Mr. Trout and a willingness to kill anyone who got in the way of his happiness with Ms. Trout." *Id.* ¶ 12, 486 P.3d at 1017 (noting the phone calls were "detailed and graphic."). The jury found Mr. Leners guilty of attempted second-degree murder, and he was sentenced to twenty-five to thirty-five years in prison. *Id.* ¶ 13, 486 P.3d at 1017.

3. Mr. Leners raised the following two issues to the Wyoming Supreme Court on appeal:

> 1. Did the district court err in denying Mr. Leners's motion for a new trial due to ineffective assistance of counsel?
> 2. Did prosecutorial misconduct deny Mr. Leners a fair trial?

Id. ¶ 2, 486 P.3d at 1015. Mr. Leners's motion for a new trial pertained to defense counsel's failure to properly object to discovery violations and the submission of Exhibit 50 at trial. *Id.* ¶ 14, 486 P.3d at 1017. Mr. Leners further asserted that "the State's failure to follow the court's discovery and case management order regarding the production of Detective Hickerson's supplemental report and Exhibit 50 constitute prosecutorial misconduct which resulted in prejudicial error." *Id.* ¶ 20, 486 P.3d at 1017-18.

4. The Wyoming Supreme Court affirmed Mr. Leners's conviction, finding that "[w]hile [the Court] [does] not condone the performance of the prosecution or the defense, neither the late production of the supplemental report nor the admission of Exhibit 50 prejudiced Mr. Leners [because] [t]he physical and recorded evidence defeated any claim of prejudice at trial." *Id.* ¶¶ 26, 34 486 P.3d at 1019, 1020.

5. Following his initial appeal, Mr. Leners filed a pro se motion for a sentence reduction under Wyoming Rule of Criminal Procedure 35(b). *Leners v. State*, 2022 WY 127, ¶ 1, 518 P.3d 686, 689 (Wyo. 2022). The district court denied his motion, and Mr. Leners appealed to the Wyoming Supreme Court. *Id.* Mr. Leners proposed seven grounds for reversal, including that the district court judge was personally biased against him. *Id.* ¶¶ 2, 8, 11, 518 P.3d at 689, 690, 691-92. The Court affirmed the district court's decision, and within its decision, concluded Mr. Leners failed to establish bias. *Id.* ¶¶ 1, 22, 38, 518 P.3d at 689, 694, 698.

6. Mr. Leners filed the present petition for post-conviction relief on August 19, 2022, and on September 7, 2022, this court entered an order directing the Wyoming Attorney General's Office to respond within 45 days of the order. (Order Directing State to Respond at 1). The Attorney General's Office moved to dismiss the petition on October 20, 2022. Mr. Leners sought leave to file a response and filed a response on March 16, 2023.

7. Mr. Leners asserts eight grounds for relief in his petition:

> A. Ground One: Ineffective assistance of appellate counsel for failing to assert the following on appeal: claims of false affidavit of probable cause, unconstitutional false arrest, actual innocence, fruit of the poisonous tree, and ineffective assistance of trial counsel on these claims (Pet. Part 2 at 2).
>
> B. Ground Two: Ineffective assistance of appellate and trial counsel for failing to assert factual innocence (*Id.*).
>
> C. Ground Three: Ineffective assistance of appellate and trial counsel for failing to assert his constitutional right to self-defense under state and federal law (*Id.*).
>
> D. Ground Four: Ineffective assistance of appellate and trial counsel for failing to assert the jury instructions were unconstitutional and insufficient (*Id.*).
>
> E. Ground Five: Ineffective assistance of appellate and trial counsel for failing to assert prosecutorial misconduct, police misconduct, and Brady violations (*Id.*).

F. Ground Six: Ineffective assistance of appellate counsel for failing to assert judicial misconduct and bias in the district court's Rule 21 Order Denying Motion for a New Trial (*Id.*).

G. Ground Seven: A violation of Mr. Leners's constitutional rights by denying him the right to attend his direct appeal, and ineffective assistance of appellate counsel for failing to assert this right (*Id.* at 3).

H. Ground Eight: Ineffective assistance of appellate counsel for failing to assert that the Chief Public Defender constructively denied Mr. Leners counsel (*Id.*).

8. In Wyoming, post-conviction relief is a strictly confined statutory remedy; the Federal and Wyoming Constitutions do not require a post-conviction relief process. *Schreibvogel v. State*, 2012 WY 15, ¶ 10, 269 P.3d 1098, 1101 (Wyo. 2012). "There is no constitutional requirement that a state provide any post-conviction relief action; thus, any allowed remedy is strictly limited to the statutory parameters set out by statute or case law." *Harlow v. State*, 2005 WY 12, ¶ 6, 105 P.3d 1049, 1056-57 (Wyo. 2005) (citation omitted). The availability of the extreme remedy of post-conviction relief, which overcomes the barriers of waiver and *res judicata* and potentially overturns a criminal conviction, must be construed strictly and narrowly. *Schreibvogel*, 2012 WY 15, ¶¶ 10, 14, 269 P.3d at 1101, 1104.

9. Wyoming Statutes §§ 7-14-101 through -108 govern post-conviction relief. The Wyoming Legislature has limited post-conviction relief to claims made by persons serving felony sentences in Wyoming penal institutions. Wyo. Stat. Ann. § 7-14-101(b). The petition must set forth specific violations of state or federal constitutional rights that occurred in proceedings resulting in felony convictions or sentences. *Id.* For the purposes of post-conviction relief in Wyoming, "[a] 'claim' is '[t]he aggregate of operative facts giving rise to a right enforceable by a court[.]'" *Rathbun v. State*, 2011 WY 116, ¶ 9, 257 P.3d 29, 33 (Wyo. 2011) (citing *Black's Law Dictionary* 281 (9th ed. 2009)). Because the legislature has limited post-conviction relief to claims

for violations that occurred in the proceedings that resulted in a conviction or sentence, claims arising out of later proceedings, including post-sentence motion practice, appeals, and collateral attacks on a conviction, simply cannot be considered. *See Harlow*, 2005 WY 12, ¶ 6, 105 P.3d at 1057 (citing *Whitney v. State*, 745 P.2d 902, 903-04 (Wyo. 1987)).

10. In Wyo. Stat. Ann. § 7-14-103(a), the legislature further limited the availability of post-conviction relief by procedurally barring claims that: 1) could have been raised on direct appeal to the Wyoming Supreme Court; 2) the petitioner failed to raise in a previous petition for post-conviction relief; or 3) were decided "on [the] merits or on procedural grounds in any previous proceeding which has become final." *See* Wyo. Stat. Ann. § 7-14-103(a)(i) through (iii).

11. In § 7-14-103(b), however, the legislature provided three exceptions to § 7-14-103(a)(i), which permit a court to consider claims that could have been raised on direct appeal. Two of the exceptions require the petitioner to either: 1) present new facts not known or available at the time of appeal, or 2) prove that appellate counsel was ineffective for failing to raise existing claims. *Id.* The last exception allows a court to consider the otherwise barred claims if the petitioner was represented by the same counsel at trial and on appeal. *Id.* Under the second exception, a petitioner whose appellate counsel did not pursue a given claim may use the alleged ineffectiveness of appellate counsel as the "portal" through which the courts can reach and consider otherwise waived claims of trial-level error, even though a claim regarding appellate counsel cannot serve as a stand-alone claim. *See Harlow*, 2005 WY 12, ¶ 6, 105 P.3d at 1057 (citation omitted).

12. When the petitioner seeks to overcome the procedural bar in § 7-14-103(a)(i) by alleging that his appellate counsel was ineffective, the Wyoming Supreme Court has explicitly described what the petitioner must show in his petition to open the "portal" through which the

substantive claim can be considered. *Schreibvogel*, 2012 WY 15, ¶ 12, 269 P.3d at 1103 (quoting *Smizer v. State*, 835 P.2d 334, 337 (Wyo. 1992)).

13. The use of the ineffective assistance of appellate counsel exception under § 7-14-103(b)(ii) is a concept which has a "potential for abuse[,]" where the entire record of any trial could be re-litigated on post-conviction relief. *Harlow*, 2005 WY 12, ¶ 6, 105 P.3d at 1058.

14. In light of this potential for abuse, the Wyoming Supreme Court has provided a "strict test" that a petitioner must meet to show that appellate counsel truly provided constitutionally deficient assistance in not raising the issue on direct appeal. *Id.*; *Smizer*, 835 P.2d at 337. This analysis is similar to the three-part analysis applied in plain error review. *Cuthirth v. State*, 751 P.2d 1257, 1266 (Wyo. 1988). The first requirement is that the record be clear in demonstrating the particular facts of the claimed error: "[i]n submitting a claim of deficient representation by appellate counsel, the petitioner in the post-conviction proceeding must demonstrate to the district court, by reference to the record of the original trial without resort to speculation or equivocal inference, what occurred at that trial." *Id.* The second requirement mandates a petitioner allege a clear violation of law: "[t]he petitioner then must identify a clear and unequivocal rule of law which those facts demonstrate was transgressed in a clear and obvious, not merely arguable, way." *Id.* The third requirement necessary to demonstrate ineffective assistance of appellate counsel is likewise akin to the prejudice prong of plain error. "[T]he petitioner must show the adverse effect upon a substantial right in order to complete a claim that the performance of appellate counsel was constitutionally deficient because of a failure to raise the issue on appeal." *Id.* In applying this prejudice prong, the Wyoming Supreme Court adopted the well-developed definition of prejudice from *Strickland v. Washington*: "The adverse effect upon a substantial right in the context of ineffective assistance of appellate counsel is shown by

demonstrating a ['Jreasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome."' *Id.* at 1267 (quoting *Strickland v. Washington*, 466 U.S. 668, 694 (1984)).

A. Appellate counsel was not ineffective for not challenging trial counsel's decision not to pursue claims regarding the allegedly false affidavit of probable cause, unconstitutional false arrest, actual innocence, or fruit of the poisonous tree.

15. Mr. Leners asserts that Detective Hickerson made several false statements in his affidavit of probable cause, and that because of these statements. he was unconstitutionally arrested. (Pet. Part 2 at 5-55); (Pet. App. at 70-72).

16. Mr. Leners failed to raise the false affidavit issue at trial or on appeal, and therefore, it is procedurally barred pursuant to Wyo. Stat. Ann. § 7-14-103(a)(i).

17. Mr. Leners attempts to bring the claim through the narrow exception of ineffective assistance of appellate counsel. (Pet. Part 2 at 5); *see also* Wyo. Stat. Ann. § 7-14-103(b)(ii). However, he cannot show counsel was ineffective because the record is not clear in demonstrating the particular facts of the claimed error. there is not a violation of a clear and unequivocal rule of law, and the affidavit had no bearing on the outcome of his trial. *Cutbirth*. 751 P.2d at 1266; *Smizer*, 835 P.2d at 337 (quoting *Strickland*. 466 U.S. at 694). Mr. Leners cannot show appellate counsel was ineffective on this claim.

B. Mr. Leners has failed to set forth facts supported by affidavits or other credible evidence which were not known or reasonably available to him at the time of direct appeal. Therefore, his claims under Ground Two are procedurally barred under Wyo. Stat. Ann. § 7-14-103(a)(iii). Further, counsel was not ineffective for not asserting the evidence Mr. Leners argues shows he is factually innocent stood for such a conclusion.

18. Mr. Leners addresses several pieces of evidence that he asserts shows he is factually innocent. (Pet. Part 2 at 56-78). Primarily, he argues Appendices 1-5 are new pieces of evidence that were not presented at trial or on appeal. (*Id.*).

19. Appendices 1-5 were reasonably available to Mr. Leners at the time of direct appeal. Therefore, the Appendices are not new evidence under § 7-14-103(b)(i).

20. Mr. Leners also asserts that counsel was ineffective for not presenting Appendices 1-5 at trial.

21. While the record is clear that Appendices 1-5 were not presented at trial, Mr. Leners has not shown a clear and unequivocal rule of law was violated in a clear and obvious way by trial counsel's failure to use Appendices 1-5 at trial, nor can he show that there is a reasonable probability the verdict would have been different had Appendices 1-5 been introduced. Mr. Leners, therefore, cannot show ineffective assistance of counsel.

C. Mr. Leners asserted self-defense throughout trial. Further, Mr. Leners has failed to set forth facts supported by affidavits or other credible evidence which were not known or reasonably available to him at the time of direct appeal. Therefore, his claims under Ground Three are procedurally barred under Wyo. Stat. Ann. § 7-14-103.

22. Mr. Leners argues appellate counsel was ineffective for failing to assert he was factually innocent, was denied his state and federal rights to self-defense, and that trial counsel was ineffective for asserting these claims at trial. (Pet. Part 2 at 79-92).

23. All of Mr. Leners's Ground Three Claims are procedurally barred under Wyo. Stat. Ann. § 7-14-103. Mr. Leners's factual innocence claim could have been but was not raised in a direct appeal and is therefore procedurally barred under Wyo. Stat. Ann. § 7-14-103(a)(i). Mr. Leners's self-defense claim was asserted throughout his trial, and therefore, this claim is barred pursuant to Wyo. Stat. Ann. § 7-14-103(a)(iii).

24. Mr. Leners attempts to overcome the procedural bar on his factual innocence claim by asserting that Appendices 1, 2, 3, 4, 5, S, and I are new pieces of evidence "which [were] not known or reasonably available to him at the time of a direct appeal." *See* Wyo. Stat. Ann. § 7-14-103(b)(i).

25. The court finds Appendices 1-5 and S were reasonably available to him at the time of direct appeal. *See* Wyo. Stat. Ann. § 7-14-103(b)(i).

26. Additionally, Mr. Leners was afforded his right to assert self-defense at trial as it was his sole theory of defense. *Leners*, 2021 WY 67, ¶¶ 1, 4, 13, 34, 486 P.3d at 1015, 1017, 1020. Therefore, this claim is procedurally barred pursuant to Wyo. Stat. Ann. § 7-14-103(a)(iii).

D. Appellate and trial counsel were not ineffective for not asserting that the jury instructions were unconstitutional and insufficient.

27. Mr. Leners argues that appellate and trial counsel were ineffective for not arguing that the jury instructions were unconstitutional and insufficient. (Pet. Part 2 at 93-109).

28. As addressed in the State's motion, the court finds that Mr. Leners cannot meet the three-part test to show that appellate counsel provided constitutionally deficient assistance in not raising the jury instruction issues on direct appeal. *See Smizer*; *Cutbirth*, 751 P.2d at 1266.

E. Appellate and trial counsel were not ineffective for not arguing prosecutorial misconduct, police misconduct, and *Brady* violations.

29. Mr. Leners argues appellate and trial counsel were ineffective for not arguing prosecutorial misconduct, police misconduct, and *Brady* violations at trial and on appeal. (Pet. Part 2 at 110-31).

30. The court previously addressed the allegations of police misconduct under subsection A of this Order. Mr. Leners cannot meet the three-part test to show that appellate

counsel was deficient for not arguing the alleged police misconduct at trial or on appeal. *See Smizer*; *Cutbirth*, 751 P.2d at 1266.

31. Mr. Leners also cannot meet the three-part test to show that counsel was deficient for not arguing the alleged prosecutorial misconduct and alleged *Brady* violations. *Id.*

F. Mr. Leners's claim of judicial misconduct and bias in the district court's Rule 21 Order Denying Motion for a New Trial is procedurally barred.

32. Mr. Leners argues the district court judge violated the Wyoming Code of Judicial Conduct in his Rule 21 Order Denying Motion for a New Trial. (Pet. Part 2 at 132-39).

33. The Wyoming Supreme Court decided this issue on its merits in Mr. Leners's most recent appeal, and therefore, it is procedurally barred under Wyo. Stat. Ann. § 7-14-103(b)(iii). *See Leners v. State*, 2022 WY 127, ¶¶ 17, 18, 22, 518 P.3d at 693-94.

G. Mr. Leners's claim that he was denied a constitutional right to attend argument for his direct appeal is not a cognizable claim in post-conviction relief because it is not a part of the proceedings which resulted in his conviction or sentence.

34. Mr. Leners argues that he was denied his constitutional right to attend oral argument for his direct appeal. (Pet. Part 2 at 140-44).

35. Mr. Leners' claim is not cognizable in these proceedings because post-conviction relief is limited to claims of error in proceedings which resulted in his conviction or sentence. *See* Wyo. Stat. Ann. § 7-14-101(b).

H. Appellate counsel was not ineffective for failing to assert that the State Public Defender constructively denied him trial counsel.

36. Mr. Leners asserts appellate counsel was ineffective for failing to argue on appeal that the State Public Defender constructively denied Mr. Leners counsel. (Pet. Part 2 at 145-160).

37. Mr. Leners, again, failed to meet the three-part test to show that counsel was deficient for failing to assert the State Public Defender constructively denied him trial counsel. *See Smizer*; *Cutbirth*, 751 P.2d at 1266.

IT IS THEREFORE ORDERED that Plaintiff's Motion to Dismiss Petition for Post-Conviction Relief is **GRANTED;** and further,

ORDERED that Timothy Leners's Petition is **DISMISSED WITH PREJUDICE;** and further,

ORDERED that any matter not addressed in this **ORDER IS DENIED AS MOOT.**

Dated this 18 day of April 2023.

Steven K. Sharpe
District Court Judge

Copy to:

Timothy Leners, #32733, WMCI, 7076 Rd 55F, Torrington, WY 82240
Kellsie J. Singleton, Wyoming Attorney General's Office

STATE OF WYOMING COUNTY OF LARAMIE, SS CHEYENNE

I Diane Sanchez, Clerk of the District Court in and for the [illegible] of Laramie, Wyoming, do hereby certify that the within and [illegible] is a full true and correct copy of the original thereof as [illegible] on file or of record in my office and that the [illegible] is in full force and effect as of this date 18 April 23

[illegible] said court this [illegible] day of [illegible]

DIANE SANCHEZ
Clerk of District Court

By: [illegible]

APPENDIX

E.

Prior Court Opinion

No. _____,

_____

IN THE
SUPREME COURT OF THE UNITED STATES OF AMERICA
PETITION FOR WRIT OF CERTIORARI

Timothy D. Leners; Pro-Se / In Propria Persona Petitioner
vs.
State of Wyoming; Wyoming Attorney General, Respondent

ON PETITION FOR A WRIT OF CERTIORARI TO:
United States Court Of Appeals – 10th Circuit

TIM'S ORIGINAL HAND WRITTEN "JAIL NOTES" TO COUNSEL *(used in appeals instructing his attorneys to assert various structural errors)*, WERE REMOVED TO PLEASE THE COURT

(some small lines could not be removed because they were between sentences and prison refused 'white-out')

IN THE SUPREME COURT, STATE OF WYOMING

April Term, A.D. 2021

TIMOTHY DEAN LENERS, **Appellant** **(Defendant),** **v.** **THE STATE OF WYOMING,** **Appellee** **(Plaintiff).**	**S-20-0001, S-20-0208**

ORDER DENYING MOTION TO FILE *PRO SE* SUPPLEMENTAL BRIEF

This matter came before the Court upon Appellant's "Motion for Permission to File *Pro Se* Supplemental Brief," filed herein April 12, 2021. After a careful review of the motion and the file, this Court finds Appellant's motion should be denied. See *Herdt v. State*, 891 P.2d 793, 795-96 (Wyo. 1995). The Court notes the captioned cases were taken under advisement on February 10, 2021, over two months before Appellant filed his motion. It is, therefore,

ORDERED that Appellant's "Motion for Permission to File *Pro Se* Supplemental Brief," filed herein April 12, 2021, be, and hereby is, denied.

DATED this 4th day of May, 2021.

BY THE COURT:

/s/

MICHAEL K. DAVIS
Chief Justice

Appendix E

Additional material from this filing is available in the Clerk's Office.