FILED
United States Court of Appeals
Tenth Circuit

September 6, 2019

Elisabeth A. Shumaker
Clerk of Court

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

THEODORE VINCENT HORN, II,

Petitioner - Appellant,

v.

STATE OF KANSAS; ATTORNEY GENERAL OF KANSAS,

Respondents - Appellees.

No. 18-3258
(D.C. No. 5:16-CV-03156-CM)
(D. Kan.)

ORDER DENYING CERTIFICATE OF APPEALABILITY[*]

Before **CARSON**, **BALDOCK**, and **MURPHY**, Circuit Judges.

Petitioner Theodore Vincent Horn II, a Kansas state prisoner appearing pro se, seeks a certificate of appealability ("COA") to challenge the district court's denial of his 28 U.S.C. § 2254 petition for post-conviction relief. We deny Petitioner's request for a COA.

[*] After examining the briefs and appellate record, this panel has determined unanimously that oral argument would not materially assist in the determination of this appeal. *See* Fed. R. App. P. 34(a)(2); 10th Cir. R. 34.1(G). The case is therefore ordered submitted without oral argument. This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. It may be cited, however, for its persuasive value consistent with Fed. R. App. P. 32.1 and 10th Cir. R. 32.1.

I.

A jury convicted Petitioner in Kansas state court of first-degree murder. The trial judge sentenced Petitioner to life without the possibility of parole for 50 years (a "Hard 50"). Petitioner filed a direct appeal. The Kansas Supreme Court affirmed his conviction and sentence. Petitioner filed five motions for post-conviction relief under Kan. Stat. Ann. § 60-1507. Kansas courts denied each motion.

Petitioner then filed a pro se writ of habeas corpus pursuant to 28 U.S.C. § 2254 in federal district court raising thirty-two claims for relief. The district court denied the petition on all thirty-two claims. Petitioner now seeks a certificate of appealability ("COA") on eleven of those claims.[1]

II.

A COA is a jurisdictional prerequisite to our review of a habeas application. 28 U.S.C. § 2253(c)(1)(A); Miller-El v. Cockrell, 537 U.S. 322, 336 (2003). Under the Antiterrorism and Effective Death Penalty Act ("AEDPA"), "[w]e will issue a COA 'only if the applicant has made a substantial showing of the denial of a constitutional right.'" Allen v. Zavaras, 568 F.3d 1197, 1199 (10th Cir. 2009) (quoting 28 U.S.C. § 2253(c)(2)). Under this standard, "the applicant must show 'that reasonable jurists could debate whether (or, for that matter, agree that) the petition should have been resolved in a different manner or that the issues presented were adequate to deserve encouragement to proceed further.'" United States v.

[1] By Petitioner's count, he raises twelve grounds for relief. We, however, identify only eleven.

Taylor, 454 F.3d 1075, 1078 (10th Cir. 2006) (quoting Slack v. McDaniel, 529 U.S. 473, 484 (2000)). Our "inquiry does not require full consideration of the factual or legal bases adduced in support of the claims," but rather "an overview of the claims" and "a general assessment of their merits." Miller-El, 537 U.S. at 336.

Under AEDPA,

> a state prisoner will be entitled to federal habeas corpus relief only if he can establish that a claim adjudicated by the state courts "resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States," or "resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." [28 U.S.C. § 2254(d).] Further, "a determination of a factual issue made by a State court shall be presumed to be correct." [Id.] § 2254(e)(1). That presumption of correctness is rebuttable only "by clear and convincing evidence." Id.

Boyd v. Ward, 179 F.3d 904, 911–12 (10th Cir. 1999).

III.

The facts of the case, as determined by the Kansas Supreme Court in Petitioner's direct appeal, are as follows:

> Theodore V. Horn, II, had been an alcoholic for years. When his girlfriend kicked him out of her residence because he had resumed his drinking, he moved in with his grandmother, Tina Weaver, in May 2002. Weaver had raised Horn, and he called her "Mom." She disapproved of his drinking and had called the police when he had previously been drinking or had been drunk at her house. She had once obtained a protection from abuse order against him, though it had expired in June 2000.
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> On Friday, May 17, 2002—within a week or two of Horn's moving in with Weaver—Krystal Kern, who lived across the street, left for work around noon. She saw Weaver standing inside Weaver's house staring out through the screen door. Kern waved, but Weaver did not acknowledge her, which was unusual because Weaver would always wave, tell her good morning, and wish her a nice day. Kern then heard a man's loud, angry voice coming from

inside the house, but did not see Weaver react in any way. Kern never saw her again.

Another neighbor, Greg Fisher, last saw Weaver on May 17 between 5 and 5:30 p.m. when she stuck her head outside her door. The next morning, May 18, he stopped at Weaver's to drop off a bag of fruit and vegetables. He rang the bell, but received no answer, so he left the bag on the doorknob. That afternoon at 2:15 he received a call from his daughter advising him that another neighbor, Betty Roux, was requesting his assistance in checking on Weaver's welfare. When he later approached Weaver's door, he noticed the bag of fruit and vegetables still hanging outside. He received no response to the buzzer, and when he attempted to open the door, a safety chain only allowed it to open several inches. He detected a commotion in the dark living room and Horn called out to say they had overslept but everything was ok. As Fisher walked away, Roux advised that she had already called 911 to come and check on Weaver.

Officer Gregory Johnson of the Wichita police was dispatched that day to 422 North Custer for a check-welfare call. He had been told that he was going to check the welfare of an 89–year–old female whom the neighbors said they had not seen in a couple of days. Officer Michelle Woodrow arrived at the same time, i.e., approximately 3 p.m. Emergency medical services personnel and ambulances also arrived.

The officers spoke to Roux and Roux's daughter. Roux told them that she had not seen Weaver for a couple of days and that she was concerned because she was used to Weaver being at her front door collecting mail. Roux was concerned because the mail was still in Weaver's mail slot, which was unusual. According to Roux, Weaver knew exactly when the mail was supposed to arrive, and if it was a few minutes late, she would call her neighbors. Roux told Officer Johnson that she had knocked on Weaver's door but Horn refused to open it. Horn told Roux that Weaver was okay, but Roux thought his response was unusual so she called 911.

After the conversation with Roux and her daughter in Roux's front yard, Officer Johnson and Officer Woodrow walked next door to 422 North Custer. Johnson confirmed the mail was still in the slot next to the door. He opened the screen door and knocked on the inner door. Johnson heard a male voice from inside ask who it was, and Johnson identified himself as a police officer. For 4–5 minutes, Johnson continued knocking and calling for Horn by name. Officer Woodrow checked to see if the door was locked and pushed the door open. The door opened 3 to 4 inches, but a security

chain prevented it from opening further. Through the opening they were able to see what appeared to be the shape of a body nearby under a blanket.

When Horn eventually came to the door, he told the officers he and Weaver were asleep and he was naked. Johnson observed Horn was naked and directed him to get dressed because of the presence of a female officer. He also told Horn to open the door so they could check on his mother. At that point Horn stated, "She's dead. I killed her." He was again directed to put on pants and open the door, to which he stated several times, "This is murder. I killed my mom. I love my mom." After he put on his pants and unchained the door, he was placed in handcuffs. Three additional times he repeated, "This is murder. I killed my mom. I love my mom." Horn was later taken to a hospital in an ambulance because he had passed out in the patrol car.

At the hospital, Lieutenant Kenneth Landwehr observed a blood smear on Horn's right forearm and removed the blood smear with a set of swabs. He observed Horn's hands and detected no sign of injury. Landwehr also took a swab of Horn's penis before medical personnel cleaned it.

Mark Alexander was on duty as a detention deputy at the Sedgwick County jail at 7 p.m. when Horn was brought in. According to Alexander, Horn was screaming, saying that Weaver had been "bitching" at him and he got mad and twisted her neck and took a saw and started cutting her head off. Horn told the officers that she had been dead since Thursday, May 16.

Police found Weaver's body in the living room covered with a green blanket. They observed a massive trauma to her head and a massive amount of pooling of blood underneath it. A wooden carpenter's level, broken and blood-spotted, was nearby. They also observed she was partially decapitated and a carpenter's handsaw was underneath her body. The saw contained hair and blood, consistent with a pattern of blood drops near Weaver's head. In front of the couch and 3 feet from Weaver's feet was a pornographic magazine entitled "Live Young Girls" folded in half lengthwise. The magazine contained Horn's semen and one of his fingerprints.

The forensic pathologist who investigated the cause of Weaver's death testified that based on the receding of rigor mortis in the body, she had probably been dead since 10:15 p.m. on Friday, May 17. He concluded she had died from multiple blunt and sharp force injuries. The neck injuries were consistent with the handsaw and reflected five separate starting points, with one major cut entirely through the vertebrae and ending at the trachea. The pathologist concluded that the major cut alone took between 30 minutes and 2 hours to inflict and that Weaver was still alive when the sawing occurred.

> Weaver's body was partially clad, with her upper garments pushed over a shoulder and her slacks pulled down to the midpoint on her buttocks. Her genital area also contained small lacerations and abrasions, but no seminal fluid was found on swabs taken from her or her clothing. Horn's DNA was not found on Weaver's fingernails, her clothing, or the bloodstains on the tools used to kill her. Weaver's DNA was not found on Horn's jeans, his penile swab, or his forearm swab.
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> At trial, Horn testified that on Friday, May 17, he had called his employer around 5 a.m. to see if he would be working that day. The employer had no work for him, so he began to drink. He remembered waking up after passing out on the couch and Weaver griping at him. He got up and ate something in the kitchen. Horn remembered the program Wheel of Fortune was on the television, which typically begins at 6:30 p.m. He returned to the couch and passed out again. It was dark when he woke up again and he learned he had urinated on himself. He got up, but did not remember what he did before he fell asleep again.
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> Horn testified that he first saw Weaver's body when he retrieved the newspaper. He started crying, got drunk again, and put a spread over her. He had no recollection of killing her.

State v. Horn, 91 P.3d 517, 520–22 (Kan. 2004).

IV.

A. Newly discovered evidence

Petitioner asserted as an addendum to his first Kan. Stat. Ann. § 1507 motion for post-conviction relief that newly discovered evidence—his recovered memory—would support a case for provocation killing.[2] The state district court denied the motion, and the Kansas Court of Appeals affirmed. Petitioner then filed a second motion for post-

[2] The newly discovered evidence Petitioner references is his "recovered memories" of the killing. According to Petitioner he now remembers that the victim struck him "upside the head with the phone and pushed her way past [him]." This evidence, Petitioner asserts, shows that the victim provoked the killing and Petitioner responded in a fit of rage.

conviction relief under Kan. Stat. Ann. § 1507 claiming newly discovered evidence entitled him to a new trial. Petitioner did not timely file the motion. The state district court determined that the one-year statute of limitations barred Petitioner's motion and that the motion was second or successive. The Kansas Court of Appeals affirmed on those grounds. The appellate court also held that Petitioner's recovered memories could not overcome the procedural bar.

> We must reject Horn's assertion that his ever-recovering memory should entitle him to an ever-evolving series of postconviction motions and hearings. If we were to accept each additional recovered memory as newly discovered evidence, one can only imagine how many motions and evidentiary hearings might be warranted. Our Supreme Court has clearly indicated the import of finality in such matters[.]

Horn v. State, 2009 WL 3270856, at*3 (Kan. Ct. App. 2009).

Petitioner raised the same argument in his § 2254 petition in federal district court. The district court determined that "[a]s matters of state law, these grounds for rejecting petitioner's claim are insulated from federal habeas review." Horn v. Kansas, 2018 WL 6436065, at *10 (D. Kan. Dec. 7, 2018) (citing Estelle v. McGuire, 502 U.S. 62, 67–68 (1991)).

Petitioner can only overcome this procedural bar if he can show cause for his default and actual prejudice.[3] Coleman v. Thompson, 501 U.S. 722, 750 (1991).

[3] A petitioner may also overcome a procedural bar if he can demonstrate that a fundamental miscarriage of justice will arise out of this court's failure to consider the claim. Coleman, 501 U.S. at 750. To show a miscarriage of justice, a petitioner must establish that the alleged error probably resulted in the conviction of an innocent person. Bousley v. United States, 523 U.S. 614, 623 (1998). But Petitioner does not claim that he is *actually* innocent. Indeed, he admitted to killing the victim.

Notably, Petitioner did not argue to the district court that he could establish cause or prejudice to overcome the procedural default. We consider arguments not presented initially to the district court forfeited. See United States v. Moya, 676 F.3d 1211, 1213 (10th Cir. 2012). Further, Petitioner does not request that we review this argument for plain error. Thus, we deny his request for a COA on this forfeited argument. Richison v. Ernest Grp., Inc., 634 F.3d 1123, 1131 (10th Cir. 2011) ("[T]he failure to argue for plain error and its application on appeal . . . surely marks the end of the road for an argument for reversal not first presented to the district court.").

B. Lesser included offense instruction

Petitioner next claims that he is entitled to relief because the trial court should have instructed the jury that it could have found Petitioner guilty of manslaughter, a lesser included offense. But we have noted that "[t]he Supreme Court has never recognized a federal constitutional right to a lesser included offense instruction in non-capital cases, and neither has this court." Dockins v. Hines, 374 F.3d 935, 938 (10th Cir. 2004) (citing Beck v. Alabama, 447 U.S. 625, 638 n.14 (1980)). Indeed, "[o]ur 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." Id. (citing Chavez v. Kerby, 848 F.2d 1101, 1103 (10th Cir. 1988)). Thus, reasonable jurists could not debate our resolution of this claim. We deny Petitioner's request for a COA on this ground.

C. Hard 50 sentence

A judge sentenced Petitioner to a life sentence with a "Hard 50," meaning that Petitioner has a mandatory term of fifty years' imprisonment before he can be eligible for parole. Petitioner argues that his Hard 50 sentence is unconstitutional under Apprendi v. New Jersey, 530 U.S. 466 (2000).

Petitioner made this same argument on direct appeal. The Kansas Supreme Court rejected this argument because in 2009 when the court rendered its decision, Apprendi only applied to the maximum sentence imposed. At that time, the Kansas Supreme Court's conclusion was consistent with United States Supreme Court precedent. Indeed, in Harris v. United States, 536 U.S. 545, 565–68 (2002), overruled by Alleyne v. United States, 570 U.S. 99 (2013), the Court held that Apprendi did not extend to mandatory minimum sentences. It was not until 2013 that the Court held that increasing a minimum sentence based on judicial factfinding violates the constitution and the holding of Apprendi. Alleyne, 570 U.S. 107–17.

We will only grant federal habeas relief for violations of clearly established United States Supreme Court precedent. 28 U.S.C. § 2254(d)(1). "Clearly established" requires that the precedent must be in place at the time of the state court decision. Greene v. Fisher, 565 U.S. 34, 38 (2011). In this case, the Alleyne holding was not clearly established when the Kansas Supreme Court issued its decision in 2009. Accordingly, the decision of the Kansas Supreme Court was not contrary to clearly established United States Supreme Court precedent at the time it was decided. We thus deny Petitioner a COA on this claim.

D. Evidence of pornographic magazine

Petitioner claims that he was deprived of due process rights when prosecutors admitted evidence at trial of the pornographic magazine that was found close to the victim's body. He argues that prosecutors did not charge him with sexual assault and, therefore, the evidence of the pornographic magazine was irrelevant and unfairly prejudicial. Notably, when Petitioner presented these arguments to the state court, he relied only on state law, not on constitutional due process. And as the district court noted, state court evidentiary decisions are matters of state law, and we do not "reexamine state-court determinations on state-law questions" on federal habeas review. Estelle, 502 U.S. at 68.

But even if Petitioner had properly preserved this claim, he would not be entitled to relief. The Kansas Supreme Court determined that the evidence was relevant to "supporting the State's theory of sexual assault as a motive for the murder," and therefore was properly admitted. Horn, 91 P.3d at 527. The court further held that Petitioner had not demonstrated that the trial court's admission of that evidence was an abuse of discretion. Id. at 528.

"[F]ederal courts may not interfere with state evidentiary rulings unless the rulings in question rendered 'the trial so fundamentally unfair as to constitute a denial of federal constitutional rights.'" Moore v. Marr, 254 F.3d 1235, 1246 (10th Cir. 2001) (quoting Tucker v. Makowski, 883 F.2d 877, 881 (10th Cir. 1989)). The state court's decision was not contrary to established United States Supreme Court precedent. Nor did it involve an unreasonable application of United States Supreme Court precedent. Accordingly,

reasonable jurists could not debate the resolution of this claim. Petitioner is not entitled to a COA on this issue.

E. Prosecutorial misconduct

Petitioner also alleges four instances of prosecutorial misconduct which denied him his right to a fair trial. In reviewing Petitioner's fourth § 1507 motion, the Kansas Court of Appeals concluded that Petitioner's prosecutorial misconduct claims were procedurally barred under state rules. Horn v. State, 2012 WL 3629867, at *3 (Kan. Ct. App. 2012). Petitioner fails to argue cause and prejudice to overcome the procedural default. Thus, we do not consider this claim for relief.

F. Ineffective assistance claims

Petitioner seeks a COA on multiple ineffective assistance of counsel claims. We evaluate these claims under the standard set forth in Strickland v. Washington, 466 U.S. 668 (1984). Under Strickland, a petitioner bears the burden of satisfying a two-pronged test. First, he must show that his attorney's "performance was deficient" and "fell below an objective standard of reasonableness." Strickland, 466 U.S. at 687–88. When evaluating attorney performance, we give deference to an attorney's strategic decisions, recognizing that "counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." Id. at 690. Second, he must demonstrate prejudice, which requires a showing that there is "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Id. at 694. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." Id. We need not address

both prongs of the Strickland analysis if the petitioner "makes an insufficient showing on one" prong. Id. at 697. Further, a state court's decision on ineffective assistance claims is entitled to "doubly deferential" review. Woods v. Etherton, 136 S. Ct. 1149, 1151 (2016).

a. Expert witness

Petitioner asserts that his trial counsel provided ineffective assistance by selecting an inappropriate expert witness for the defense and for failing to present evidence of Petitioner's blood alcohol content ("BAC") to the jury.

The Kansas Court of Appeals addressed this issue and applied the proper standard. Horn v. State, 2007 WL 1964958, at*2 (Kan. Ct. App. 2007). The court explained:

> [a]t trial forensic toxicologist John Robert Zettl . . . testif[ied] for the defense. Zettl, who specializes in drugs and alcohol and their effects upon humans, testified about the typical reactions individuals have to various levels of alcohol in their bodies. Zettl testified that some individuals who have been nonviolent alcoholics for a number of years may have episodes where they commit violent acts as a result of intoxication. Zettl also testified that alcohol consumption can make people behave in ways that they never would have sober and that it can cause hallucinations. Based on Horn's blood alcohol concentration level of .516 and a videotape of Horn several hours after he was taken into custody, Zettl stated that Horn was highly intoxicated. In fact, according to Zettl, most people cannot survive at that blood alcohol level. Zettl further testified that high levels of intoxication can lower a person's ability to remember events and can distort a person's ability to gauge time.
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> Zettl's testimony specifically rebuts Horn's allegation that his counsel failed to introduce sufficient testimony relevant to the effects of intoxication on Horn's psychological state. Nothing was presented in Horn's motion to establish that a second witness would have been able to testify to anything beyond Zettl's testimony or to further support Horn's defense. See State v. Lewis, 33 Kan.App.2d 634, 653, 111 P.3d 636 (2003) (failing to call a witness offering only cumulative testimony is not ineffective assistance). Horn's claim that his counsel was ineffective for failing to call a psychiatrist

> or psychologist to testify as to the effects of intoxication on Horn's mental state is meritless.

Id.

Strategic decisions, like which witnesses to call and what evidence to present at trial, are left to counsel's discretion. Hoxsie v. Kerby, 108 F.3d 1239, 1246 (10th Cir. 1997). This includes expert testimony. Turner v. Calderon, 281 F.3d 851, 876 (9th Cir. 2002) ("The choice of what type of expert to use is one of trial strategy and deserves 'a heavy measure of deference.'"). As the district court explained, "[c]laims of ineffective assistance based on calling one expert over another consistently fail." Horn, 2018 WL 6436065, at *7; see, e.g., Turner, 281 F.3d at 876; Tibbetts v. Bradshaw, 633 F.3d 436, 443 (6th Cir. 2011). Indeed, a habeas petitioner is not entitled "to the testimony of every qualified expert who might possess some specialized knowledge regarding the petitioner's case." Tibbetts, 633 F.3d at 443. Accordingly, the state court's resolution of this claim was not contrary to, or an unreasonable application of, clearly established Federal law. See 28 U.S.C. § 2254(d)(1). We deny Petitioner a COA on this claim.

b. Failure to object to coroner's testimony at trial

Petitioner also alleges that his trial counsel provided ineffective assistance by failing to challenge the testimony of the coroner at trial. Specifically, the coroner testified that bruising appeared on the victim after the autopsy and approximately four days after the victim's death. This, Petitioner claims, is a scientific impossibility, because bruising is caused by blood flow and the victim was deceased at this time. Further, the coroner testified that the victim's neck injury took anywhere from thirty

minutes to two hours to achieve, and that the autopsy showed that Petitioner cut the victim's neck while she was still alive. Petitioner claims that is untrue, and that the victim's neck injury took less time than the coroner testified. Accordingly, he claims his trial counsel's failure to challenge the coroner's testimony was ineffective assistance.

Notably, the Kansas Court of Appeals found this claim to be procedurally barred. See Horn, 2012 WL 3629867, at *3. And the federal district court concluded that the procedural bar applied in federal court as well. Horn, 2018 WL 6436065, at *10. Petitioner fails to argue cause and prejudice to overcome the procedural default. See Magar v. Parker, 490 F.3d 816, 819 (10th Cir. 2007). Reasonable jurists, therefore, could not debate the resolution of this claim. Accordingly, we deny Petitioner's request for a COA on this ground.

c. Failure to investigate crime scene

Petitioner next claims that his trial counsel failed to investigate the crime scene, and thus provided ineffective assistance. Specifically, Petitioner asserts that his trial counsel should have investigated the elastic band on the victim's underpants.[4] Importantly, Petitioner did not present this allegation in state court proceedings.

[4] In Petitioner's initial § 2254 petition he raised an additional three allegations related to counsel's failure to investigate, namely, that counsel should have investigated the distance between the victim's body and furniture, where the telephone cord was torn from the wall, and the amount of vodka bottles in the garage. Petitioner has not renewed those allegations here.

When a state prisoner fails to give the state courts "full and fair" opportunity to resolve a claim, the procedural default doctrine bars federal review. O'Sullivan v. Boerckel, 526 U.S. 838, 845 (1999). But "[a] habeas petitioner who has defaulted his federal claims in state court meets the technical requirements for exhaustion; there are no state remedies any longer 'available' to him." Coleman, 501 U.S. at 732. Even so, if a state court "would now find the claims procedurally barred," then the claims are also "procedural[ly] default[ed] for purposes of federal habeas." Id. at 735 n.1.

Petitioner could have raised this allegation in his first Kan. Stat. Ann. § 60-1507 motion. Indeed, "there have been no unusual events or changes in the law" that prevented Petitioner from raising this issue in his first Kan. Stat. Ann. § 60-1507 motion. Horn, 2012 WL 3629867, at *3. Accordingly, Petitioner defaulted this claim under state procedural rules. Walker v. State, 530 P.2d 1235, 1238 (Kan. 1975) ("When a petitioner, in [a Kan. Stat. Ann. § 60-1507 motion], sets out a ground or grounds for relief, he is presumed to have listed all the grounds upon which he is relying, and a second motion in which additional grounds for relief are alleged may be properly denied."); see also Kan. Stat. Ann. § 60-1507(c) (barring "second or successive [collateral] motion[s] for similar relief"). And this claim is likewise barred on federal habeas review. Petitioner does not argue cause and prejudice to overcome the procedural bar. Thus, he is not entitled to a COA on this claim.

d. Booking desk video

Petitioner asserts that his counsel should have introduced at trial the video from the booking desk at the police station the night of Petitioner's arrest. According to Petitioner, the video would have shown the jury how drunk he was when he police booked him, and thus would have supported his claim that he was unable to form the requisite mental state for first degree murder.

The Kansas Court of Appeals found that counsel's decision to not use the video was a strategic decision within counsel's discretion. Horn, 2007 WL 1964958, at *5. Indeed, "strategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable." Strickland, 466 U.S. at 690–91. And decisions about what evidence to present at trial are strategic decisions. Sallahdin v. Mullin, 380 F.3d 1242, 1248 (10th Cir. 2004) (attributing counsel's decision to not present certain evidence to trial strategy). Accordingly, Petitioner has not "made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). We deny Petitioner a COA on this ground.

e. Failure to pursue newly discovered evidence claim

Petitioner also asserts that his state appellate counsel denied him effective assistance by not pursuing his claim of newly discovered evidence. Like the preceding claim, the Kansas Court of Appeals concluded Petitioner procedurally defaulted this claim, and the federal district court agreed. Again, Petitioner fails to argue cause and prejudice to overcome the procedural default. Thus, we are procedurally barred from considering this claim for relief.

f. Cumulative effect

Finally, Petitioner asks us to consider the cumulative effect of his counsel's errors. Petitioner, however, failed to argue cumulative effect in his initial § 2254 petition. Accordingly, Petitioner forfeits that argument. Even so, Petitioner has not made a substantial showing of the denial of a constitutional right with respect to his ineffective assistance of counsel claims. Thus, we have no error to cumulate.

V.

We DENY Petitioner's request for a COA.

Entered for the Court

Joel M. Carson III
Circuit Judge