

2015

**The State of Utah, Plaintiff I Appellee v. Sherman Alexander Lynch,
Defendant I Appellant.**

Utah Court of Appeals

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20140402
Case No. ~~20130229~~-CA

IN THE
UTAH COURT OF APPEALS

THE STATE OF UTAH,

Plaintiff/Appellee

v.

SHERMAN ALEXANDER LYNCH,

Defendant/Appellant.

OPENING BRIEF

Appeal from the Third District Court, Salt Lake County, State of Utah
The Honorable Denc Himonas

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Mr. Lynch is presently incarcerated.

FILED
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JAN 30 2015

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TABLE OF CONTENTS

STATEMENT OF JURISDICTION	1
STATEMENT OF ISSUES	1
CONSTITUTIONAL PROVISIONS, STATUTES, AND RULES	2
STATEMENT OF THE CASE	2
Statement of Facts	2
Statement of Proceedings	7
SUMMARY OF ARGUMENT	9
ARGUMENT	12
I. THE DISTRICT COURT ERRED BY GRANTING THE STATE'S MOTION FOR SUMMARY JUDGMENT ON LYNCH'S CLAIMS OF INEFFECTIVE ASSISTANCE OF COUNSEL.	12
A. The District Court Wrongly Held That Utah Code § 78B-9- 106(1)(b)—Which Prohibits a Post-Conviction Petitioner From Raising Claims That Were Raised at Trial or on Appeal— Barred Several of Lynch's Ineffective-Assistance-of-Counsel Claims.	12
1. Claims raised in a post-judgment motion for new trial do not fall within the purview of Utah Code § 78B-9- 106(1)(b), which bars only claims raised "at trial" or "on appeal."	13
2. Lynch's ineffective-assistance-of-counsel claims should not be barred even if Utah Code § 78B-9-106(1)(b) applies here, because Lynch did not "raise" his post-conviction claims in his motion for new trial.	16
B. Lynch Introduced Sufficient Evidence To Create a Genuine Dispute of Material Fact as to Whether Lynch Was Deprived of His Sixth Amendment Right to the Effective Assistance of Counsel.	18
1. There is a genuine dispute of fact as to whether Lynch's trial counsel performed deficiently by failing to adequately investigate the facts underlying the charged crime.	20

2.	There is a genuine dispute of fact as to whether Lynch was prejudiced by the deficient performance of his trial counsel.	30
3.	Given the disputes of material fact as to whether trial counsel performed deficiently, there is a genuine dispute of material fact as to whether appellate counsel's performance fell short of the Sixth Amendment's requirements.	36
II.	THE DISTRICT COURT ERRED WHEN IT HELD THAT NEWLY DISCOVERED EVIDENCE WAS INSUFFICIENT TO DEMONSTRATE THAT NO REASONABLE TRIER OF FACT COULD HAVE FOUND LYNCH GUILTY OF THE CHARGED OFFENSE.	37
	CONCLUSION.	40

TABLE OF AUTHORITIES

	Page(s)
CASES	
<i>Adams v. State</i> , 2005 UT 62, 123 P.3d 400.....	18, 22
<i>Archuleta v. Galetka</i> , 2011 UT 73, 267 P.3d 232.....	14
<i>Berrett v. Purser & Edwards</i> , 876 P.2d 367 (Utah 1994).....	18
<i>Bigelow v. Williams</i> , 367 F.3d 562 (6th Cir. 2004).....	23
<i>Brookside Mobile Home Park, Ltd. v. Peebles</i> , 2002 UT 48, 48 P.3d 968.....	19
<i>Dep't of Homeland Sec. v. MacLean</i> , --- U.S. ---, 2015 WL 248560 (U.S. Jan. 21, 2015).....	16
<i>Eze v. Senkowski</i> , 321 F.3d 110 (2d Cir. 2003).....	34, 38
<i>Goodman v. Bertrand</i> , 467 F.3d 1022 (7th Cir. 2006).....	36
<i>Honie v. State</i> , 2014 UT 19	26, 35
<i>Jennings v. Stephens</i> , 135 S. Ct. 793 (2015).....	19
<i>Julian v. State</i> , 2002 UT 61, 52 P.3d 1168.....	44
<i>Kell v. State</i> , 2008 UT 62, 194 P.3d 913.....	14
<i>Kimmelman v. Morrison</i> , 477 U.S. 365 (1986).....	18, 22, 34
<i>Lindstadt v. Keane</i> , 239 F.3d 191 (2d Cir. 2001)	35

<i>Medel v. State</i> , 2008 UT 32, 184 P.3d 1226.....	45
<i>Olsen v. Eagle Mountain City</i> , 2011 UT 10, 248 P.3d 465.....	15
<i>Rompilla v. Beard</i> , 545 U.S. 374 (2005).....	22, 26
<i>State v. Charles</i> , 2011 UT App 291, 263 P.3d 469.....	34, 35, 42
<i>State v. Hernandez</i> , 2005 UT App 546, 128 P.3d 556.....	34
<i>State v. King</i> , 2010 UT App 396, 248 P.3d 984.....	36
<i>State v. Lenkart</i> , 2011 UT 27, 262 P.3d 1.....	passim
<i>State v. Loose</i> , 2000 UT 11, 994 P.2d 1237.....	46
<i>State v. Lynch</i> , 2011 UT App 1, 246 P.3d 525.....	3
<i>State v. Maestas</i> , 1999 UT 32, 984 P.3d 376.....	42
<i>State v. Ross</i> , 2012 UT 93, 293 P.3d 345.....	14, 44
<i>State v. Sharkey</i> , 322 P.3d 325 (Kan. 2014)	17
<i>State v. Templin</i> , 805 P.2d 182 (Utah 1990).....	22
<i>State v. Thompson</i> , 2014 UT App 14, 318 P.3d 1221.....	26
<i>Strickland v. Washington</i> , 466 U.S. 668 (1984).....	21
<i>Taylor v. State</i> , 2007 UT 12, 156 P.3d 739.....	1

<i>Taylor v. State</i> , 2012 UT 5, 270 P.3d 471.....	1, 2, 16, 21
--	--------------

STATUTES

42 Pa. Cons. Stat. § 9544(a)(2) (2015).....	17
Post-Conviction Remedies Act	passim
Utah Code § 76-8-306	2
Utah Code § 78A-4-103(2)(j).....	1
Utah Code § 78B-9-104.....	2, 13, 44
Utah Code § 78B-9-106.....	passim

OTHER AUTHORITIES

Md. Crim. Proc. § 7-102(b)(2) (2015).....	17
Utah R. App. P. 23(b).....	43
Utah R. Evid. 804(b)(3)(B).....	33
U.S. Const. amend. VI	2, 21, 22, 41
U.S. Const. amend. XIV.....	2
Webster's Third New Int'l Dictionary 136 (1993)	15

STATEMENT OF JURISDICTION

This is an appeal from the district court's dismissal of Mr. Lynch's post-conviction petition. This Court has jurisdiction under Utah Code § 78A-4-103(2)(j). The trial court's summary judgment ruling and oral ruling are attached hereto as Addendum A.

STATEMENT OF ISSUES

Issue 1: Did the trial court err when it held that Mr. Lynch was procedurally barred, under Utah Code § 78B-9-106(1)(b), from raising claims of ineffective assistance of counsel in his post-conviction petition?

Standard of Review: A trial court's denial of post-conviction relief is reviewed for correctness. *Taylor v. State*, 2007 UT 12, ¶ 13, 156 P.3d 739.

Preservation: Mr. Lynch raised and preserved his ineffective assistance claims in his Second Amended Petition for Post-Conviction Relief ("Second Amended Petition"). R. 996–1008.

Issue 2: Did the trial court err when it granted summary judgment on Mr. Lynch's remaining claims of ineffective assistance of counsel?

Standard of Review: The Court "review[s] an appeal from an order dismissing or denying a petition for post-conviction relief for correctness without deference to the lower court's conclusions of law." *Taylor v. State*, 2012 UT 5, ¶ 8, 270 P.3d 471.

Preservation: Mr. Lynch raised and preserved his claims of ineffective assistance of counsel in his Second Amended Petition. R. 996–1008.

Issue 3: Did the trial court err when it ruled that newly discovered evidence did not entitle Mr. Lynch to post-conviction relief?

Standard of Review: The Court “review[s] an appeal from an order dismissing or denying a petition for post-conviction relief for correctness without deference to the lower court’s conclusions of law.” *Taylor v. State*, 2012 UT 5, ¶ 8, 270 P.3d 471.

Preservation: Mr. Lynch raised and preserved his claims regarding newly discovered evidence in his Second Amended Petition. R. 1008.

CONSTITUTIONAL PROVISIONS, STATUTES, AND RULES

The following constitutional provisions and statutes can be found in Addendum B.

U.S. Const. amend. VI

U.S. Const. amend. XIV (relevant portions)

Utah Code § 78B-9-104

Utah Code § 78B-9-106

STATEMENT OF THE CASE

Statement of Facts

On October 3, 2007, Patricia Rothermich (the “victim”) was struck by a vehicle from behind while taking an afternoon walk in Holladay, Utah. R. 58. The force of the impact catapulted her forward, causing her to slide 43 feet. R. 59. She suffered significant injuries to her head and calves. R. 49. Her left calf was split open by something on the front of the vehicle. R. 112. She died on the way to the hospital. *State v. Lynch*, 2011 UT App 1, ¶ 2, 246 P.3d 525.

No one saw what happened. R. 81 (“There were no eyewitnesses, no.”), 121. One man who was working nearby told the police he heard a “loud noise,” like a vehicle striking a pothole at a high rate of speed, and that, when he looked up, he saw a “large red truck driving by.” R. 1083, 81, 84.

Three days after the incident, another woman reported a conversation she overheard in a Herriman grocery store, in which one man told another he had hit a woman with his car in Holladay and learned later that day she had died. R. 707. The woman reported that she saw the two men leave the store in a pearly white truck with damage to its hood and a partial license-plate listing of "758." R. 707. Lynch later learned that this woman's name was Michelle Ashe and that she had recorded the experience in her journal. R. 216.

The police declined to pursue these leads, instead focusing on a "white," "high-profile vehicle" like a "truck or a van," R. 57, claiming that that was where the evidence "led" them. R. 82. Eventually, the investigation focused on a white truck (not the pearly white truck described above) owned by the victim's husband, Sherman Lynch. R. 1531–32. The discovery of Lynch's white truck was made possible through a tip from Lynch's then-girlfriend, Nancy Scott. R. 1531. Distressed at her discovery that Lynch was married, Scott reported to authorities that she helped Lynch buy a white truck at an auction. R. 1531–32. After additional investigation, the police found the white truck in an abandoned garage. R. 1532–33.

With no eyewitnesses, the police set out to prove Lynch's involvement in the victim's death by connecting Lynch's white truck to the auto-pedestrian collision in Holladay. As relayed at trial, the prosecution attempted to link the truck with the death of the victim in a few different ways. First, Deputy Anderson attributed the victim's serious left calf injury to a "tow hook" located in the front of the white truck. R. 73–75. Second, Anderson noted at the preliminary hearing that marks on the victim's

body—suggestive of a grill of some sort—measured three centimeters across. R. 162.

Third, Anderson testified that the exterior of the truck bore the “kind of damage”—some dents in the hood—he would have expected to see given the nature of the collision. R. 70. Earlier in his testimony, however, Detective Anderson testified that he would have expected the vehicle involved to have incurred more serious damage, including the “breaking of lamps or bending of materials, such as the hood or fenders,” and the “breaking of plastic pieces.” R. 699. Other than the dents and the tow hook, however, Deputy Anderson testified at trial that he could not “see anything of value” in a picture of the front of the truck. R. 1213; *cf.* R. 1534 (referring to stipulated testimony at trial from the truck’s prior owner, in which he testified that the only “new” damage to the truck was a missing antenna, a crack in the windshield, and damage to the front of the hood).

Similarly inconsistent on this point was the testimony of Deputy Anderson’s “successor” on the case, Detective Adamson. In response to the anonymous phone call described above, in which a woman reported a man confessing a hit-and-run and then leaving in a pearl white truck with a dent in the hood, Detective Adamson noted that the “description of the damage to the vehicle d[id] not match the expected damage on the suspect vehicle.” R. 707. But when asked if Lynch’s truck had incurred the kind of damage he would have expected to see—which, again, consisted of dents in the hood—Detective Adamson testified in the affirmative. R. 1216.

Fourth, Deputy Anderson reported that he found three zip ties at the scene of the collision. R. 50, 705. He subsequently found a piece of a zip tie

fragment in the engine department of Lynch's truck. R. 76–77. A forensic lab analyst testified at trial that the zip tie fragment found in the engine department matched one of the broken zip ties found at the scene. R. 113. In attempting to explain the presence of zip ties at the scene of the crime and in the truck's engine department, Deputy Anderson testified that the white truck had a "faulty hood" that the zip ties were used to secure. R. 75–76.

Fifth, the State tried to establish that the paint found on the victim's clothing came from Lynch's truck. To do so, they first noted that some portions of the truck had been painted with spray paint. R. 102. They then hired a paint expert to compare the paint from the truck to the paint found on the victim's clothing. R. 754–56. Despite hours of testing, however, the paint expert could only conclude that the paint found on the victim's clothing was the "same distinct type of paint" as some of the paint from the truck. R. 756. At its essence, this conclusion stood for nothing more than that there were chemical similarities between the two paints.

Defense counsel did very little to rebut the force of this physical evidence. Despite the truck's central place in the determination of Mr. Lynch's guilt, defense counsel never examined the truck. R. 453. Counsel never tested Deputy Anderson's assertions that the zip ties were necessary to secure a faulty hood, that a "tow hook" at the bottom of the truck was responsible for the victim's left calf injury, or that the paint from the truck and from the victim's clothing shared certain chemical similarities. Making matters worse, defense counsel declined to consult with or call a paint expert of their own, and never bothered to follow up with the potential witnesses described above.

Even after the State's painstaking examination of the truck and conducting related tests, the physical evidence connecting Mr. Lynch's truck to the collision remained underwhelming. Indeed, some of the State's findings were flatly inconsistent with a connection between the truck and the victim's death. To begin with, the front grill—which was made of a “heavy plastic-type material”—was unscathed, a hard-to-explain occurrence given its alleged high-speed collision with a 161-pound woman. R. 1015. In addition, given the force of the collision, one would naturally expect the grill's oxidized substrate—which came off the grill with the rub of Deputy Anderson's finger, R. 1217—to end up on the victim's clothing. But the State's expert report contained no such finding. R. 755–56. In addition, the State was unable to conclusively identify any individual person's DNA on the truck. R. 109, 711–13. One of the State's witness expressed surprise regarding the lack of DNA evidence on the truck, explaining that, given the extent of the injury to the victim's calf, he would have expected to find recoverable DNA on the truck. R. 112.

In 2012, two veteran police officers conducted their own examination of Lynch's white truck. Their conclusions departed dramatically from the testimony of the State's witnesses at trial. According to Agent Steed, he and Agent Warren “examined the hood latch.” R. 1016. Although Deputy Anderson testified at trial that the zip ties were necessary to secure a faulty hood, Agent Steed testified that the hood “appeared to work perfectly for the age of the vehicle.” R. 1016. The officers' opened and closed the hood several times, finding that “there was no evidence of a malfunction.” R. 1016. Next, the two got down on their “hands and knees” to see whether there was a “tow

hook” or “tow ring” that could be “located on the Truck’s front end,” but found nothing of the sort. R. 1017, 2096:115. Finally, they tried to understand from where the zip ties might have fallen off the truck. In response to their inquiry regarding zip ties, Deputy Anderson responded: “what zip ties”? R. 1016. Deputy Anderson went on to explain that there were “no zip ties found at the actual scene,” and that the only “zip ties” were used by the “police officers themselves while transporting the Truck from its initial location in the Evidence Center.” R. 1016, 2096:17–18, 37–38.

Unfortunately for Mr. Lynch, Agents Steed and Warren conducted this investigation long after it would have made a difference in his trial. He was convicted of his wife’s murder on November 14, 2008.

Statement of Proceedings

Lynch was convicted of first degree murder and second degree obstruction of justice following a trial in 2008. R. 36. At trial, he was represented by Monte Sleight and Julie George. Following his conviction, Lynch moved for a new trial. At that point, Lynch was represented by Patrick Corum. R. 663. In his motion and supporting memorandum, Lynch argued that trial counsel was ineffective because she (1) did not share discovery or consult with him properly prior to trial, (2) precluded Lynch from presenting certain evidence and arguments at trial and advised him not to testify on his own behalf, (3) did not follow obvious investigative leads, and (4) failed to have important evidence examined or challenged. *Id.*

At the hearing on Lynch’s motion for new trial, trial counsel—Ms. George—was asked regarding some of the decisions she made at trial. In response to one such question, she set forth her reasons for declining to

further investigate Ashe's report of a hit-and-run in Holladay, Utah. According to Ms. George, following up with Ashe did not make sense because the "information [wa]s hearsay, and it would not be admissible in court." R. 455. Ms. George's second concern was that the person making the statement, even if he could be tracked down, would "take the Fifth Amendment." R. 455.

As for her reasons for ultimately failing to examine the truck, Ms. George failed to identify any. She did testify that she informed the State before trial she "wanted to have an opportunity to have [her] investigator go out and examine the truck," but admitted that was never done. R. 453. She thought her failure had little effect on the trial because the "truck was *tested* prior to trial." R. 454 (emphasis added). Finally, as to her failure to consult a defense expert on the topic of paint matching and analysis, counsel said there was no need to do so because all necessary information could be found in the findings and report of the "State's expert." R. 451.

The trial court denied Lynch's motion. R. 667-68. Lynch subsequently appealed his conviction. His appeal focused on two critical issues: (1) failure of the trial court to provide the jury with an instruction regarding Lynch's alibi defense, and (2) prosecutorial misconduct during closing argument. R. 44-47. Because neither issue was preserved below, Lynch pressed these arguments based on a theory of ineffective assistance of counsel. *Id.* Lynch's appeal was denied. R. 39-47.

Following the denial of his appeal, Lynch—proceeding pro se—filed for relief under the Post-Conviction Relief Act ("PCRA"). After securing representation, Lynch filed an amended PCRA petition (the same "Second

Amended Petition” described above) on February 5, 2013. R. 991. The claims outlined in that petition are the subject of this appeal.

The Second Amended Petition raises two primary grounds for relief, ineffective assistance of counsel and newly discovered evidence. R. 991-1009. Many of the facts supporting Lynch’s ineffective-assistance-of-counsel claims were not developed, however, as a result of the trial court’s summary judgment ruling on those claims. R. 1741–45. Lynch’s newly-discovered-evidence claims were dismissed following an evidentiary hearing. R. 2096:145.

SUMMARY OF ARGUMENT

For purposes of this appeal, the question is not whether Lynch is innocent of the crimes of which he was convicted. The questions, instead, are two-fold. First, in his Second Amended Petition, did Lynch present enough evidence to warrant a hearing on his claims of ineffective assistance of counsel? Second, did the newly discovered evidence Lynch presented in his Second Amended Petition justify relief under the PCRA? Contrary to the trial court’s holding, the answer to both questions is yes.

As to the first question, the trial court initially erred when it held that many of Lynch’s ineffective-assistance claims were barred by Utah Code § 78B-9-106(1)(b). The Utah Legislature very carefully limited the reach of that section to claims “raised or addressed *at trial* or *on appeal*.” Utah Code § 78B-9-106(1)(b) (emphasis added). To the extent they were raised before he initiated post-conviction proceedings, Mr. Lynch’s claims were raised in his motion for a new trial, which does not fall within the terms “at trial” or “on appeal.” Even if arguments pressed in a motion for a new trial fall within the

confines of § 78B-9-106(1)(b), moreover, the trial court's holding still barred far more claims than were "raised or addressed" in the motion for a new trial.

As to the substance of Lynch's claims, the trial court barely bothered to explore them, instead resting on the briefing put forth by the State. R. 1744–45. But nowhere in the trial court's holding or in the State's briefing will one find an adequate explanation for the inadequate performance of Lynch's counsel. There is no plausible explanation as to defense counsel's failure to examine the alleged murder weapon—the white truck. When it came to direct, physical evidence, the State's case was that truck and that truck alone: its dimensions, its attributes, its hood, its alleged tow hook, its paint, its existence. And yet, although the truck stood in the State's possession, free to be examined and potentially reveal exculpatory information, defense counsel sat on their heels, satisfied with their ability to review the results of the *State's* examination. The evidence suggests defense counsel fell short in other ways—failure to properly investigate the zip ties, failure to consult or call a paint expert, failure to hammer home exculpatory facts on cross-examination, and failure to pursue other investigative leads, including potential witnesses—but their failure to examine the State's primary and only piece of physical evidence was the epitome of deficient performance.

In its briefing below, the State largely focused on the prejudice prong of Lynch's ineffective-assistance claims, pointing to circumstantial evidence that tended to support the conviction. But without much of the physical evidence upon which it had relied, the State's circumstantial evidence would have substantially diminished in strength. Had counsel properly examined and investigated the truck, the jury would have learned that the truck did

not actually have a tow hook on it, which, in turn, would have considerably weakened the State's explanation for the victim's left-calf injury. The jury would have learned that the truck's hood was not actually faulty, which would have considerably weakened the State's only explanation for the presence of the zip ties. Furthermore, both of these revelations would have seriously undermined the credibility of the State's primary witness and chief investigator. Without this evidence and with Deputy Anderson's credibility called into question, the jury might have been willing to consider other suspects, including the man involved in a hit-and-run in Holladay. Unfortunately, defense counsel also failed to pursue that lead.

In short, had counsel performed effectively, the jury would have been left with Lynch's questionable behavior and paint found on the victim's clothing that was consistent—not a match, but consistent—with paint from the truck. On that record, there is a reasonable probability the jury would have decided differently.

Finally, and as to the second question, Lynch's newly discovered evidence was sufficient to warrant relief under Utah Code § 78B-9-104(e). That evidence showed that the truck did not have a tow hook, that there were not zip ties, and that there was no need to store zip ties on the truck because its hood worked perfectly well. With this evidence before it, no reasonable jury could conclude beyond a reasonable doubt that Lynch was guilty of murdering his wife.

ARGUMENT

I. THE DISTRICT COURT ERRED BY GRANTING THE STATE'S MOTION FOR SUMMARY JUDGMENT ON LYNCH'S CLAIMS OF INEFFECTIVE ASSISTANCE OF COUNSEL.

In the post-conviction context, “summary judgment” is a “drastic remedy” that requires “strict compliance with the rules governing summary judgment.” *Kell v. State*, 2008 UT 62, ¶ 48, 194 P.3d 913. Thus, on review of a grant of summary judgment on post-conviction review, the Court “affirm[s] a grant of summary judgment when the record shows that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law.” *State v. Ross*, 2012 UT 93, ¶ 18, 293 P.3d 345. “In making this assessment,” the Court “view[s] the facts and all reasonable inferences drawn therefrom in the light most favorable to the nonmoving party.” *Id.* Stated otherwise, “[a]ny showing in support of summary judgment ‘must preclude all reasonable possibility that the loser could, if given a trial, produce evidence which would reasonably sustain a judgment in his favor.’” *Archuleta v. Galetka*, 2011 UT 73, ¶ 43, 267 P.3d 232.

A. The District Court Wrongly Held That Utah Code § 78B-9-106(1)(b)—Which Prohibits a Post-Conviction Petitioner From Raising Claims That Were Raised at Trial or on Appeal—Barred Several of Lynch’s Ineffective-Assistance-of-Counsel Claims.

The trial court wrongly concluded that many of Lynch’s claims of ineffective assistance of counsel—including his first, second, third, fourth, eleventh, sixteenth, eighteenth, nineteenth, twentieth, twenty-first, twenty-second, and twenty-third—were procedurally barred under § 78B-9-106(1)(b) of the PCRA. To begin with, § 78B-9-106(1)(b)’s procedural bar extends only to claims raised “at trial” or “on appeal,” and therefore does not extend to

claims raised in a motion for new trial. In addition, even if § 78B-9-106(1)(b) is not so limited, it applies only to claims that have already been “raised” or “addressed,” and most if not all of Lynch’s ineffective-assistance claims were not “raised” or “addressed” in his motion for new trial.

1. Claims raised in a post-judgment motion for new trial do not fall within the purview of Utah Code § 78B-9-106(1)(b), which bars only claims raised “at trial” or “on appeal.”

Section 78B-9-106(1)(b) does not bar the presentation of claims on post-conviction review that may have been raised and presented in a motion for new trial. By its terms, § 78B-9-106(1)(b) bars on post-conviction review the presentation of claims that have been “raised or addressed *at trial or on appeal*.” (emphasis added). Like other statutes, the meaning of the PCRA is determined according to the “plain meaning of [its] text.” *Olsen v. Eagle Mountain City*, 2011 UT 10, ¶ 9, 248 P.3d 465. Here, the PCRA’s text is unambiguous and unequivocal. “At” is used as a “function word to indicate *presence* in, on, or near.” Webster’s Third New Int’l Dictionary 136 (1993) (emphasis added). “On,” meanwhile, is used as a “function word to indicate *presence* within.” *Id.* at 1574 (emphasis added). Neither preposition is typically used to more broadly encompass events that do not take place “at” or “on” a particular location. One would never say, for example, that a party cross-examined three witnesses “at trial” while meaning to say that the witnesses were cross-examined in a proceeding after the trial was concluded. Consistent with these definitions, the Utah Supreme Court has observed that § 78B-9-106(1)(b) applies to grounds raised “in any previous *trial, appeal, or*

post-conviction proceeding.” *Taylor v. State*, 2012 UT 5, ¶ 22, 270 P.3d 471 (emphasis added).

There is good reason to believe, moreover, that the Utah Legislature’s choice of words was no accident. The PCRA’s immediately preceding provision bars claims on post-conviction review that “may still be raised . . . by a *post-trial motion*.” Utah Code § 78B-9-106(1)(a) (emphasis added). Had the Legislature wanted, it could have added “post-trial motion” to subsection (b), but it declined to do so. A legislature’s decision to include certain language in one part of a statute but not in another part suggests the addition or (as in this case) omission is purposeful. *See Dep’t of Homeland Sec. v. MacLean*, --- U.S. ---, 2015 WL 248560, at *6 (U.S. Jan. 21, 2015) (“Congress generally acts intentionally when it uses particular language in one section of a statute but omits it in another.”). This maxim of legislative meaning applies with particular force where, as here, the reference to “post-trial motion” and its omission are “in close proximity.” *Id.*

A similar approach has been adopted in some other states. In Pennsylvania, for example, an issue has not been “previously litigated” unless “the highest appellate court in which the petitioner could have had review . . . has ruled on the merits of the issue.” 42 Pa. Cons. Stat. § 9544(a)(2) (2015). Other states, by contrast, apply a broader procedural bar by preventing the introduction of issues on collateral review that have been “previously and finally litigated in the proceeding resulting in conviction or in *any other proceeding* that the person has taken to secure relief from the person’s conviction.” Md. Crim. Proc. § 7-102(b)(2) (2015) (emphasis added). The Utah Legislature could have borrowed this kind of language from Maryland’s or

other states' statutes. But it did not do so. By choosing different and more precise language, the Utah Legislature limited § 78B-9-106(1)(b)'s procedural bar to a narrower universe of claims—those claims raised or addressed “at trial” or “on appeal.”

Several good reasons might explain the relatively limited reach of the Utah statute. First, the Legislature may have wanted to ensure coordination between the scope of § 78B-9-106(1)(b)'s bar and a criminal defendant's right to counsel. *Cf. State v. Sharkey*, 322 P.3d 325, 329 (Kan. 2014) (explaining that a criminal defendant's right to counsel “attaches only to critical stages of a felony proceeding,” and that the “United States Supreme Court has not directly answered the question of whether a hearing on a motion for new trial is a critical stage of the proceedings”). Unrepresented criminal defendants or defendants with limited representation, the Legislature might have surmised, should not be held to the underdeveloped and unsupported legal arguments they sometimes make. *See Adams v. State*, 2005 UT 62, ¶ 23, 123 P.3d 400 (pointing out that “it is nearly impossible for even the most conscientious prisoner to discover possibly valid legal claims of error and pursue them completely”). Second, the Legislature might have recognized that the claims most often raised on post-conviction review involve ineffective assistance of counsel or newly discovered evidence, both of which are difficult to develop and support in a post-trial motion. *See, e.g., Kimmelman v. Morrison*, 477 U.S. 365, 378 (1986) (“[A]n accused will often not realize that he has a meritorious ineffectiveness claim until he begins collateral review proceedings.”).

Whatever the Legislature's reasons, the fundamental point is this: the plain and unambiguous text of the statute limits its procedural bar to claims raised "at trial" or "on appeal." If the Legislature wishes to expand the statute's reach, it is free to do so, but appellate courts are not in the habit of rewriting statutes in pursuit of unstated objectives. *See Berrett v. Purser & Edwards*, 876 P.2d 367, 370 (Utah 1994). There is no good reason for it to start now.

2. Lynch's ineffective-assistance-of-counsel claims should not be barred even if Utah Code § 78B-9-106(1)(b) applies here, because Lynch did not "raise" his post-conviction claims in his motion for new trial.

Even if § 78B-9-106(1)(b) bars a petitioner from introducing claims on post-conviction review that were "raised or addressed" in a post-trial motion, the trial court's conclusion that § 78B-9-106(1)(b) bars twelve of Lynch's twenty-eight ineffective-assistance-of-counsel claims is unsustainable. Few Utah cases have interpreted the meaning of the Act's use of the term "raise," but it stands to reason that the term would bear the same meaning in the post-conviction context as it does in the regular course of appellate procedure. *Cf. Jennings v. Stephens*, 135 S. Ct. 793, 800 (2015) (explaining that, even in "habeas cases," the default rule is to "adhere to the usual law of appeals"). And under Utah law, to "raise" an issue requires a party to be "specific[]" and "introduce supporting evidence or relevant legal authority." *Brookside Mobile Home Park, Ltd. v. Peebles*, 2002 UT 48, ¶ 14, 48 P.3d 968. Under this standard, Lynch did not "raise" most of his ineffective-assistance-of-counsel claims in his motion for new trial. R. 1620–26.

In his motion for new trial, Lynch claimed that his counsel was ineffective for four reasons: (1) they did not share discovery with him; (2) they barred him from presenting certain evidence and arguments at his trial; (3) they did not follow obvious investigative leads; and (4) they failed to have important evidence examined or challenged. R. 663. Lynch raised neither of the first two claims in his Second Amended Petition. As to the latter two claims, Lynch argued in his post-trial motion that his counsel “did not consult with or hire an expert regarding DNA evidence,” did not “have the truck examined by a mechanic to determine its working condition,” and did not contact the truck’s previous owner “to testify as to the truck’s poor mechanical condition and the extreme difficulty it had on hills.” R. 1623–24. Lynch raises none of these arguments in his Second Amended Petition. The closest he comes is when he contends that his counsel was ineffective because she failed to cross-examine and develop the undisputed fact that the victim’s DNA was not found on the truck, but Lynch does not press that theory of ineffective assistance on this appeal.

To be sure, as the State pointed out below, Lynch hinted at some of his other claims during the hearing on his motion for new trial and in handwritten letters to the trial court, but nothing said during that hearing or in those letters suggests that Lynch “raised” the claims for purposes of applying § 78B-9-106(1)(b)’s bar. Perhaps for this reason, the trial court lowered that bar. The trial court did not hold that Lynch raised *his claims* in his motion for new trial; instead, the court held that it was enough that the “essence” of Lynch’s post-conviction claims were raised in his motion for new trial. R. 1743. But that is not the law. Taken to its logical end, the trial

court's holding would dramatically expand § 78B-9-106(1)(b)'s reach. By the trial court's reasoning, § 78B-9-106(1)(b) bars far more than claims "raised or addressed at trial or on appeal"; it bars any claim of ineffective assistance, newly discovered evidence, or constitutional violation, no matter the topic or subject matter to which it applies, as long as the claim's "essence" is later raised in a petition for post-conviction relief. Nothing in the statute or the case law requires such a draconian result.

B. Lynch Introduced Sufficient Evidence To Create a Genuine Dispute of Material Fact as to Whether Lynch Was Deprived of His Sixth Amendment Right to the Effective Assistance of Counsel.

In his Second Amended Petition, Lynch introduced sufficient evidence to create a genuine dispute of material fact as to whether he was deprived of the effective assistance of counsel. The right to counsel "plays a crucial role" in our system of justice. *Strickland v. Washington*, 466 U.S. 668, 685 (1984). This is because "access to counsel's skill and knowledge is necessary to accord defendants the 'ample opportunity to meet the case of the prosecution to which they are entitled.'" *Id.* Thus, counsel's role is not to merely be "present at trial alongside the accused," but to "provide adequate legal assistance" to ensure "just results" and a fair trial. *Id.* at 686, 685; see *Taylor v. State*, 2012 UT 5, ¶ 24, 270 P.3d 471 (explaining that, to be considered effective, an attorney's performance must be "reasonable" when compared to "prevailing professional norms"). In the words of the Utah Supreme Court, the "effective assistance of counsel" is one of the "greatest safeguards of individual rights" because there is no "adequate substitute . . . for a competent and dedicated advocate." *Adams v. State*, 2005 UT 62, ¶ 24, 123 P.3d 400.

A large part of the dedication required by the Sixth Amendment is an advocate's investigation into the facts, the evidence, and the witnesses. According to the U.S. Supreme Court:

It is the duty of the lawyer to conduct a prompt investigation of the circumstances of the case and to explore all avenues leading to facts relevant to the merits of the case and the penalty in the event of conviction.

Rompilla v. Beard, 545 U.S. 374, 387 (2005). Only after conducting this kind of investigation may counsel decide on a particular trial strategy. *State v. Lenkart*, 2011 UT 27, ¶ 28, 262 P.3d 1. This message has been directly and consistently delivered by the U.S. Supreme Court, see *Kimmelman*, 477 U.S. at 384 (explaining that the criminal adversarial process “will not function properly unless defense counsel has done some investigation into the prosecution’s case and into various defense strategies”), and the Utah Supreme Court, see *State v. Templin*, 805 P.2d 182, 188 (Utah 1990) (“If counsel does not adequately investigate the underlying facts of a case, including the availability of prospective defense witnesses, counsel’s performance *cannot fall within the ‘wide range of reasonable professional assistance.’*” (emphasis added)). In short, adequately investigating the crime with which one’s client is charged is the price an attorney pays to receive the deference to which precedent says he or she is entitled. If an attorney conducts a half-hearted or partial investigation, by contrast, his decisions receive the respect “to the extent of the investigation [he] in fact conducted.” *Bigelow v. Williams*, 367 F.3d 562, 566 (6th Cir. 2004) (Sutton, J.).

1. **There is a genuine dispute of fact as to whether Lynch's trial counsel performed deficiently by failing to adequately investigate the facts underlying the charged crime.**

Unfortunately, the investigative efforts of defense counsel fell woefully short. To see why, one need only consider the nature of the State's case and the limited direct evidence it presented to implicate Lynch in the murder of his wife. There were no eyewitnesses; there were no ear-witnesses (at least that the State bothered to look into). With respect to physical evidence, the State's entire case hinged on its ability to connect the white truck found in an abandoned garage to the victim's death. As the ensuing discussion demonstrates, defense counsel's performance in attempting to combat that connection was deficient.

- a. Failure to Examine the Truck

To begin, Lynch's counsel never examined the white truck. R. 453. Counsel did not do so even though the State's case was devoted almost exclusively to convincing the jury that the white truck was the murder weapon. As relevant here, the State did this in two primary ways.

First, the State introduced evidence to suggest that a "tow hook" on the front of the white truck explained the devastating injury to the victim's left calf. R. 1213 (Deputy Anderson pointing to the bottom of a picture presented at trial, and testifying: "Down here there is the tow hook," which, he explained, was believed to have been "involved with causing the injury to the calf"); *see also* R. 778 (Deputy Anderson referring to the tow hook as a "steel hook" that "sticks out" and is "attached to the frame"); R. 75; 166 ("The injury to the left calf, the major injury, lined up with the tow hook, that is on

the front of the vehicle.”); R. 212 (State’s Brief on Appeal: “A tow hook on the front of the truck lined up with where [the victim’s] left calf had been split open . . .”).

Second, the State introduced evidence to suggest that a broken zip tie was found in the white truck’s engine compartment, and that the zip tie was likely used to secure the truck’s purportedly faulty hood. R. 75–76. Deputy Anderson first introduced this theory when he testified that the zip ties he found had taken on a particular “shape,” as if they had been “adhered” to “something,” possibly “in the front of the vehicle.” R. 52–53. Soon enough, Anderson began positing that the “something” to which the zip ties were “adhered” was the hood of the truck because it was not “latched down correctly” and it “appeared to be loose.” R. 1307; R. 76; R. 66 (Deputy Anderson: “[T]here was some information that had come forth on this truck that potentially could have had a faulty latch for the hood.”). The State never really described how the zip ties were used to secure the hood, but it remained the State’s only explanation for the presence of the zip ties in the truck’s engine compartment, even while defending the conviction on appeal. R. 212 (“[T]he hood of Defendant’s truck did not close properly, and officers found a zip tie fragment in the engine compartment—suggesting that zip ties had been used to secure the hood.”). According to the State, the zip tie found in the engine compartment was the “one piece” of the case that “really clinche[d] it.” R. 125.

Despite the State’s unyielding efforts to connect the white truck to the victim’s death, defense counsel never examined the truck, never personally saw it, never tested it, and never double-checked the accuracy of the State’s

examination. R. 453. In failing to take these basic investigative steps, defense counsel fell short of “one of criminal defense counsel’s most fundamental obligations”: to “investigate the underlying facts of a case.” *Lenkart*, 2011 UT 27, ¶ 28. To be clear, counsel did not just fail to look into a possible witness, a tangential piece of evidence, or some hare-brained theory. Counsel failed to examine the State’s primary piece of evidence—the only physical evidence that directly connected Lynch to the crime. Whatever else is encompassed in an attorney’s duty to investigate, it at least extends to investigating the State’s primary—and in some ways only—piece of direct evidence. *Cf. Rompilla*, 545 U.S. at 377 (“[L]ooking at a file the prosecution says it will use is a sure bet: whatever may be in that file is going to tell defense counsel something about what the prosecution can produce.”). By failing to examine or even look at the truck, defense counsel performed deficiently. *See Honie v. State*, 2014 UT 19, ¶ 36. (“[A]n attorney is required to perform any investigation competently and thoroughly.”).

Illustrative of the importance of investigating the State’s primary piece of evidence is this Court’s decision in *State v. Thompson*, 2014 UT App 14, ¶ 36, 318 P.3d 1221. There, the State introduced evidence in the form of a computer report, which purportedly established that the defendant truck driver could not have made a particular trip within the time he claimed to have made it. *Id.* Despite the report’s central importance to the case, defense counsel did not inquire into the report’s “foundational issues,” did not “attempt to contact representatives of the company that produced [the report],” and did not “otherwise investigate the program or report.” *Id.* ¶ 18. These failures, the Court held, amounted to deficient performance.

Below, the State did not seriously attempt to defend counsel's failure to examine the truck, instead insisting that "no facts in this record show that counsel did not examine the truck or have an expert do so." R. 1564. The State's position is not easy to reconcile with defense counsel's testimony:

A: At that time I contacted the State, indicated that I wanted to have an opportunity to have my investigator go out and examine the truck. . . . [The State] could make arrangements to go out to where the truck was being held and test-drive it, and examine it specifically.

Q: And was that ever done?

A: No, it was not done.

R. 453. At the very least, this testimony creates a genuine dispute of material fact as to the extent of counsel's investigation below.

In sum, although defense counsel claimed to have spent "many, many hours" with a "private investigator" with some experience in "accident reconstruction," R. 448:2-8, counsel's failure to examine the State's primary piece of evidence fell below an objective standard of reasonableness. Although defense counsel's failure to examine the truck is sufficient by itself to render counsel's performance deficient, counsel's performance fell short of reasonable professional standards in other ways as well.

b. Failure to Test the State's Theory Regarding the Zip Ties

On October 7, 2003, Deputy Anderson reported that he had found three zip ties at the crime scene. R. 705. At trial, the State tried to connect the zip ties to the auto-pedestrian collision in two ways. First, the State introduced testimony that the zip ties had what appeared to be "white paint" on them. R.

50. Second, the State introduced testimony that the zip ties “were in line with the collision path,” and had fallen in kind of a “consecutive” pattern. R. 51.

Despite the central importance of the zip ties to the State’s case, defense counsel never independently examined the zip ties, R. 452, and declined to seriously probe the problems associated with them. Counsel did not, for example, have the zip ties tested for the presence of paint. Nor did counsel independently evaluate how the zip ties were placed on the truck or found at the crime scene. Most troubling, defense counsel did not seek (by examining the truck) to undermine the State’s theory as to the purpose it served. In the words of the Utah Supreme Court, one “cannot imagine a circumstance in which defense counsel could justify declining to test physical evidence that his client reasonably believes could be exculpatory.” *Lenkart*, 2011 UT 27, ¶ 35.

c. Failure to Investigate the Paint Found on Victim’s Clothing or to Consult or Call an Expert for the Defense

Defense counsel also failed to adequately investigate the paint found on the victim’s clothing. The State’s paint expert concluded that two of the smears on the victim’s pants “originated” from the “same distinct type of paint” as the “passenger’s side truck bed” or from “another source of paint having the same characteristics.” R. 102. She further concluded that the “multi-layered paint fragments from the [victim’s] blue pants” came from the same “distinct type of paint” as could be found on the “hood of the truck.” R. 103.

Defense counsel cross-examined the paint expert regarding the expert’s conclusions, including pointing out that the paint was merely “consistent”

with the truck's paint but was not a complete match. R. 756. Unfortunately, counsel failed to conduct their own investigation into the paint or hire an expert. According to Ms. George, counsel did not call a paint expert because the needed information would already be presented by the "State's expert." R. 451. But this argument could be made about any expert in any case. There is a reason parties typically hire their own expert. It is not advisable to rely on an opposing expert who is paid by the State and likely to make favorable findings for the State.

What is more, without countervailing evidence, the defense was incapable of offering a plausible alternative regarding the paint's origins, and was left without the necessary ammunition to attack the methods used by the State's expert and the conclusions she reached. In addition, an expert could have explained the significance of the State's findings. Is all white paint "chemically" similar? Is all automotive paint "chemically" similar? How broad a universe did the State's expert suggest when she opined that the paint on the victim's clothing came from the same "distinct" type of paint as was found on the truck?¹ Although each of these questions might have presented a fruitful avenue to explore, defense counsel declined to do so.

The other problem with defense counsel's approach to the State's paint expert was counsel's failure to press the expert with respect to the absence of

¹ The absence of an alternative explanation for the paint also allowed the State to play fast and loose with the expert's conclusions, such as on appeal, when the State incorrectly claimed to have proved that "paint from Defendant's truck ended up on Patricia's clothing." R. 213. Not so. The State proved only that there were general chemical similarities between the paint on Lynch's truck and the paint found on the victim's clothing. Consulting an expert would have given defense counsel the tools to intelligently respond to the State's exaggerated claims as to the origin of the white paint.

oxidized material on the victim's clothing. At trial, Deputy Anderson explained that the "residue . . . used to cover the grill" had "flaked off," and that it would come off as "some kind . . . of plastic transfer" that was white in color. R. 1217. According to Anderson, the oxidized material would come off the grill with nothing more than a rub of a glove. R. 1217. The State's paint expert confirmed the flaking of the grill in her report, referring to it as "grey substrate." R. 785. Given the force of the collision involved, one would naturally expect the grill's oxidized substrate—which, again, came off the grill with the rub of Deputy Anderson's finger—to end up on the victim's clothing. Although the paint expert's report contained no such finding, R. 755–56, defense counsel never inquired as to this apparent anomaly.

Below, the State did not specifically defend the reasonableness of defense counsel's failure to consult or call a paint expert, but did generally point out the risks associated with blindly cross-examining a hostile expert witness. R. 1573–77. The State's argument, however, only highlights the problems with defense counsel's performance. Had counsel properly examined the truck or hired a paint expert for the defense, there would have been no need to "blindly" cross-examine a hostile witness. Instead, as pointed out above, counsel would have been able to tailor their cross-examination to the information acquired through investigation and a defense expert.

d. Failure to Interview or Otherwise Follow Up on Critical Witnesses

Defense counsel also failed to follow up on potential witnesses. An ear-witness—Maxwell—told investigators that he "heard a loud noise"—like a large vehicle hitting a speed bump or a pothole—and that when he "looked

toward the road” he saw a “large red truck driving by.” R. 145. Deputy Adamson admitted at trial that Maxwell thought he heard noises “associated” with the incident, but he did not pursue that investigative path further because he could not “definitively” say that what Maxwell heard was a vehicle hitting the victim. R. 121. Defense counsel cross-examined Deputy Anderson regarding the red truck, but without Maxwell’s own testimony regarding what he saw, defense counsel could do nothing beyond vaguely suggesting the testimony’s existence. R. 118.

Ashe called into the police station on October 6, 2007, to report that she overheard a conversation between two males in a local Smith’s. R. 148. During that conversation, one of the men said he had “hit a woman in Holladay,” and that he later “saw on the news the woman had died.” R. 148. The two men then left the store in “a pearl white pick-up truck” that “had damage on the front end in the center of the hood area,” and a partial license-plate listing of “758.” R. 148. Although this anonymous tip seemed to very closely align with the available evidence, Detective Adamson declined to pursue it further, reasoning that the evidence did not match and that there were just too many hits on the partial “758” license plate. R. 148–49. Defense counsel’s investigation into Ashe’s report was nonexistent, and their cross-examination on the topic was correspondingly brief. With nothing else to go on, she could do nothing but confirm that the truck’s license plate contained the digits 758. R. 1504.

According to the State below, defense counsel was justified in their complete refusal to follow up with Ashe because Ashe’s testimony was “inadmissible hearsay,” and counsel could “obtain the same information from

other witnesses.” R. 1559. The State is wrong on both counts. On the hearsay front, by investigating the call-in, counsel could have tried to narrow down the possible owners of the pearl white pickup truck far more aggressively than the State did. R. 707 (giving up on tracking down the truck’s owner because a search of partial plates with number “758” had 300 hits in Salt Lake County alone). If counsel was unable to locate the witness—making him “unavailable” for purposes of testifying—she could have introduced the unavailable witness’s statements through Ashe under Utah Rule of Evidence 804(b)(3), which excludes from the definition of hearsay statements that might “expose the declarant to civil or criminal liability.”²

There are two additional problems with the State’s suggestion that the “same information” was available from other witnesses. First, the example the State points to belies any suggestion that this was the “same information.” Detective Adamson testified that Ashe heard a man say that “he *may* have been distracted by an item that fell in his truck and *may* have hit someone.” R. 1559 (emphasis added). Ashe’s report to the police, by contrast, was not nearly so indeterminate. She told the police that the man said he “hit a woman in Holladay” and that he later “saw on the news the woman had died.” R. 707.

Even if the testimony had provided the “same information,” cross-examination is no substitute for the firsthand testimony of a witness. Indeed, in *Kimmelman*, the State offered a similar argument, trying “to lift counsel’s

² To the extent the statement would expose its declarant to criminal liability, Rule 804(b)(3)(B) requires “corroborating circumstances.” Utah R. Evid. 804(b)(3)(B). At least one “corroborating circumstance[]” was that Ashe recorded the conversation she heard in her journal. R. 216.

performance back into the realm of professional acceptability” by pointing to counsel’s “vigorous cross-examination, attempts to discredit witnesses, and effort to establish a different version of the facts.” *Kimmelman*, 477 U.S. at 385-86. The U.S. Supreme Court, however, would not have it. “Respondent’s lawyer,” the Court observed, “neither investigated, nor made a reasonable decision not to investigate, the State’s case through discovery.” *Id.* at 385; see also *Lenkart*, 2011 UT 27, ¶¶ 31-36 (concluding that counsel performed deficiently despite asking some pertinent questions on cross-examination). The same conclusion is warranted here.

Counsel’s failure to contact or follow up with Maxwell or Ashe fell below professional standards of assistance. *Cf. State v. Charles*, 2011 UT App 291, ¶¶ 33-35, 263 P.3d 469. Although an attorney’s decision as to which witnesses to call is usually considered strategic, courts refuse to shield counsel’s decisions with that label if counsel has not even bothered to talk to the potential witness, see *State v. Hernandez*, 2005 UT App 546, ¶ 21, 128 P.3d 556, or when it appears that the failure to call the witness was nothing more than the result of counsel’s “desire to avoid extra work,” *Eze v. Senkowski*, 321 F.3d 110, 136 (2d Cir. 2003). As both conditions appear to be met here, counsel’s failures to contact Maxwell or Ashe can hardly be called “strategic.”

e. Cumulative Impact of Deficient Representation

Even if none of counsel’s errors considered on its own was deficient, there remains a genuine dispute of material fact as to whether the cumulative effect of those errors rendered counsel’s performance deficient. See, e.g., *Lindstadt v. Keane*, 239 F.3d 191, 199 (2d Cir. 2001) (explaining that

a reviewing court faced with a claim of ineffective assistance of counsel should “consider” counsel’s alleged “errors in the aggregate”).

2. There is a genuine dispute of fact as to whether Lynch was prejudiced by the deficient performance of his trial counsel.

There is a genuine dispute of material fact as to whether defense counsel’s deficient performance prejudiced Lynch because there is a reasonable likelihood the outcome would have been different had counsel performed effectively. To show prejudice, Lynch must “show ‘that there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.’” *Honie v. State*, 2014 UT 19, ¶ 33. In making this determination, the Court takes into account how the evidentiary and trial record would have changed had defense counsel performed effectively. Thus, when considering the “impact of an error,” the Court considers the “totality of the evidence before the jury.” *State v. Charles*, 2011 UT App 291, ¶ 38, 263 P.3d 469. Below, the trial court and the State assessed the potential prejudice of each of counsel’s individual errors, but the question is whether the combined errors prejudiced Lynch. *See State v. King*, 2010 UT App 396, ¶ 35, 248 P.3d 984; *see also Goodman v. Bertrand*, 467 F.3d 1022, 1030 (7th Cir. 2006) (“In weighing each error individually, the Wisconsin Court of Appeals overlooked a pattern of ineffective assistance and unreasonably applied *Strickland*.”).

Starting with the truck, counsel’s examination of it would have revealed trial-changing evidence. For one thing, counsel would have learned that the truck does not have a tow hook on it. R. 1132 (“On our hands and knees, Agent Warren and I physically checked on and under the Truck’s front

bumper, but no 'tow hook or tow ring' could be located on the Truck's front end."). In doing so, counsel would have been able to substantially discredit the State's explanation for the victim's left calf injury. R. 1213. The vehicle that collided with the victim had something on its front end that seriously damaged the victim's calf, but it turns out that the white truck had no such "something."

For another thing, counsel would have learned that the truck's hood was not actually "faulty." At trial, the State offered one explanation and one explanation only for the presence of a broken zip tie in the truck's engine compartment: the zip ties were used to secure a faulty hood. But according to Agent Steed, a former police officer with twenty-four years of experience, the hood "work[ed] perfectly for the age of the vehicle," and although it was not necessarily "easy" to get the hood open and shut, "there was no evidence of a malfunction." R. 1131. The broken zip tie, according to the State, was the "clinch[ing]" piece of evidence in the case. R. 125. A proper examination of the truck would have allowed defense counsel to seriously discredit the State's only explanation for the presence of the "clinch[ing]" piece of evidence.

What is more, counsel's investigation would have turned up exculpatory evidence in the form of an undamaged grill with different dimensions than the marks on the victim's body. As to the lack of damage, counsel's investigation would have revealed that the truck's grill did not sustain the kind of damage one would expect from a collision that caused a 161-pound woman to fly forty-three feet through the air. R. 1130, 139. According to Agent Steed's examination, the "front grill was intact" with no evidence that it had "sustained any damage" or "been broken in any way." R.

1130. On the “dimensions” front, examining the truck would have demonstrated that the spacing on the grill did not line up with the alleged grill marks found on the victim’s body. R. 558, 364.

All of this would have helped undercut the force of the State’s physical evidence, but perhaps even more importantly, it would have called into question the credibility of the State’s primary witness and chief investigator: Deputy Anderson. It was Deputy Anderson who told the jury that a tow hook was responsible for the injury to the victim’s left calf, and it was Deputy Anderson who testified that the zip ties were necessary to secure the truck’s faulty hood. As suggested by counsel’s cross-examination of Deputy Anderson during the evidentiary hearing below, defense counsel would have had a golden opportunity to present Deputy Anderson to the jury in a far different light:

Q: And you represented to a jury in this case, in front of Judge Himonas, . . . you represented that you actually saw [the tow hook]. You didn’t just say maybe or I don’t remember. You told the jury there was such a steel hook. Isn’t that correct?

A: Okay.

Q: And if it wasn’t there, that would be false testimony. Isn’t that true?

A: Well, I don’t know. I don’t know that it’s false testimony. I don’t know what the questions at trial were. So.

Q: Very well. Thank you.

R. 2096:99. Undercutting Deputy Anderson’s credibility at trial would have significantly enhanced the possibility of an acquittal. *See Eze*, 321 F.3d at 133

(finding prejudicial trial counsel's "inexplicabl[e]" failure to "undercut" the "credibility" of the State's primary witness).

In sum, if counsel had acquired this information in the course of preparing for trial, it would have "alter[ed] the entire evidentiary picture," resulting in a far different version of events presented to the jury. *See Lenkart*, 2011 UT 27, ¶ 38. The jury would have wondered how it was possible for the victim to suffer a devastating injury to her left calf without anything on the white truck capable of causing such an injury. The jury would have wondered why a broken zip tie was found in the engine compartment when there was no conceivable need for the zip tie in that part of the truck. The jury would have been confused by the fact that the grill marks on the victim's body did not match the truck's grill. The jury would have questioned the credibility of the investigator who told them differently. All of this would have raised reasonable doubts as to the State's theory.

Counsel's examination of the truck would also have highlighted for the jury how little direct physical evidence of guilt the State had presented. The State tried to connect the truck to the collision, but without the faulty hood, the tow hook, and the grill marks, that connection appears far weaker. For starters, even though oxidized material was flaking off the grill, there was no oxidized material on the victim's clothing. R. 755-56. The grill was made of some kind of "heavy plastic," but was not damaged in any way after allegedly colliding with a 161-pound woman. R. 1015. Indeed, the white truck had suffered little of the damage Deputy Anderson said he would have expected to

see, including broken lamps, bending of the “hood or fender,” or “breaking of plastic pieces.”³ R. 699, 73.

In addition, and on a related note, Lynch’s truck did not contain any observable traces of the victim’s DNA, which, again, one would have expected given the severity of the collision. R. 109-11; R. 173-74. The State’s own expert testified that, given the severity of the injury to the victim’s calf, he would have expected “a lot of blood and tissue on the vehicle, but there wasn’t any.” R. 112.

That leaves the paint. The most the State could say on that topic was that the paint found on the victim’s clothing was “consistent” with paint found on Lynch’s truck, but that is far from testimony that the paint on the victim’s clothing definitively and unequivocally came from Lynch’s truck. *But see* R. 213 (State’s Brief on Appeal: “[P]aint from Defendant’s truck ended up on Patricia’s clothing during the fatal hit-and-run.”). What is more, defense counsel might have been able to undercut the paint evidence with an expert of his or her own.

With far less direct physical evidence, and the credibility of the State’s chief investigator seriously undermined, the jury would likely have been

³ Detective Adamson testified at trial that the white truck had incurred the kind of damage he expected to see given the alleged collision involved, presumably having in mind the dent in the truck’s hood. R. 1216. But a dent in the front hood was precisely what Michelle Ashe reported seeing in a white truck in Herriman, Utah, after overhearing a conversation about a hit-and-run in Holladay, Utah. R. 707. Detective Adamson declined to follow up on that report because the “description of the damage to the vehicle d[id] not match the expected damage on the suspect vehicle.” R. 707. Although Detective Adamson’s different approaches to different dents might have called his credibility into question, there is no evidence that trial counsel ever asked Detective Adamson to explain this apparent contradiction.

willing to listen to the possibility of other suspects, another area in which defense counsel fell short. Despite having leads with respect to at least two possible suspects, one based on Maxwell's report and one on Ashe's, counsel declined to pursue either. Counsel thought it better to address these reports through cross-examination. R. 455. But as explained above, cross-examination is an inadequate substitute for the kind of thorough investigation the Sixth Amendment requires. In addition, counsel's further investigation into different explanations of the events might well have borne fruit. Armed with the same information available to defense counsel, an investigator for the Salt Lake Legal Defender Association was able to track down Michelle Ashe. R. 215–16. Ashe confirmed to the investigator that she provided that information to the police and that she had recorded the experience in her journal. R. 216.

To be sure, all of this would have still left the State with some potentially persuasive circumstantial evidence, but given the requirement that the jury must find a criminal defendant guilty beyond a reasonable doubt, such circumstantial evidence would not have been enough to carry the day. *See State v. Maestas*, 1999 UT 32, ¶ 36, 984 P.3d 376 (holding the defendant was prejudiced by his counsel's deficient performance because, inter alia, "the circumstantial evidence against [the defendant] [wa]s not overwhelming or conclusive"). In sum, even if any particular "piece of evidence" is not, "by itself, overwhelmingly suggestive of [Lynch's] innocence," when considered together the evidence is enough to "undermine" the Court's "confidence in the jury's verdict." *State v. Charles*, 2011 UT App 291, ¶ 37, 263 P.3d 469.

3. **Given the disputes of material fact as to whether trial counsel performed deficiently, there is a genuine dispute of material fact as to whether appellate counsel's performance fell short of the Sixth Amendment's requirements.**

Appellate counsel made none of these arguments on appeal. Despite raising ineffective-assistance-of-counsel claims regarding some aspects of defense counsel's performance, appellate counsel never pointed to counsel's investigative deficiencies.

Below, the State tried to erect a permanent barrier to the presentation of investigation-related ineffective-assistance claims on post-conviction review. The State argued that Lynch should be barred from raising his ineffective-assistance claims on post-conviction review because trial counsel's investigative deficiencies were not "apparent on the record," and appellate counsel does not perform deficiently unless grounds for an appealable issue are "apparent on the record." R. 1565. But of course, an attorney's *failure* to explore crucial evidence—whether in the form of physical evidence or potential witnesses—will rarely be "apparent on the record." Inaction does not lead to record evidence. Under the State's theory, a post-conviction court in Utah may never address trial counsel's investigative deficiencies as long as those investigative deficiencies were not placed directly before appellate counsel.

The Utah Supreme Court has refused to adopt such a theory. Recognizing the avenues afforded by Rule 23B of the Utah Rules of Appellate Procedure, and refusing to impugn a defendant with a silent record as to appellate counsel's investigation of the deficiencies in trial counsel's investigative efforts, the Court provided this guidance:

These are red flags in the trial record that should have sparked some investigation by appellate counsel. And appellate counsel may have been ineffective for either failing to investigate them, or, after investigating, failing to bring a claim of ineffective assistance of trial counsel. But the record does not tell us whether such an investigation was conducted or what such an investigation might have uncovered. The record is simply silent on that matter. Thus, we cannot determine whether appellate counsel's failure to raise the trial counsel claim was "objectively unreasonable." And we are in no position to speculate on these matters in this appeal. Instead, it is precisely this confusion — on the disputed, genuine issues of whether an investigation occurred and on what it might have uncovered — that requires remand on the appellate counsel claim. We conclude that genuine issues of material fact preclude summary judgment on this issue. Accordingly, we conclude that the post-conviction court erred in granting the State's motion for summary judgment on [the defendant's] claim regarding appellate counsel, and we remand for further proceedings on that claim.

Ross v. State, 2012 UT 93, ¶ 51, 293 P.3d 345. For similar reasons, the Court should not fault Lynch for the absence of evidence regarding what his appellate counsel did or did not do here, and reverse and remand for an evidentiary hearing on that very question.

II. THE DISTRICT COURT ERRED WHEN IT HELD THAT NEWLY DISCOVERED EVIDENCE WAS INSUFFICIENT TO DEMONSTRATE THAT NO REASONABLE TRIER OF FACT COULD HAVE FOUND LYNCH GUILTY OF THE CHARGED OFFENSE.

The PCRA makes relief available to a post-conviction petitioner when newly discovered evidence demonstrates that "no reasonable trier of fact could have found petitioner guilty of the offense." Utah Code Ann. § 78B-9-

104(e). To qualify for relief under this provision, a petitioner must demonstrate that the newly discovered evidence: (1) is such as could not with reasonable diligence have been produced at trial; (2) is not merely cumulative; (3) is not being used solely for impeachment purposes; and (4) is such as to render a different result probable on retrial. *See Julian v. State*, 2002 UT 61, ¶ 14, 52 P.3d 1168. In addition, the newly discovered evidence must, when viewed with the other evidence in the record, “create a reasonable doubt as to the defendant’s guilt.” *Medel v. State*, 2008 UT 32, ¶ 51, 184 P.3d 1226.

This standard is satisfied here. The newly discovered evidence is the result of the investigation of Lynch’s truck performed by two veteran officers. During this investigation, Mssrs. Steed and Warren discovered that there were not any zip ties on the truck, but that zip ties were merely used to secure parts of Lynch’s truck in transport once it was obtained for examination, and that Lynch’s truck did not have a tow hook. This new evidence, considered in light of the evidence presented at trial, is sufficient to create a reasonable doubt as to Lynch’s guilt.

Mssrs. Steed and Warren examined Lynch’s truck a few years after his trial. During this investigation, the pair of former police officers discovered, for the first time, that zip ties were not present at the crime scene. R. 1016, 2096:17–18, 37–38. Instead, according to Deputy Anderson, the zip ties were used by officers to transport the vehicle to the evidence facility. *Id.* Deputy Anderson’s admission is supported by Steed’s and Warren’s further discovery that the hood of Lynch’s truck worked “perfectly for the age of the vehicle,” and that there was no apparent functional use for zip ties on the truck R.

1016, 1131, 2096:21–23. Indeed, the State never presented an explanation as to why zip ties would be affixed to the truck, R. 2096:94, despite the fact that the zip ties were the State’s key piece of evidence to connect Lynch’s truck to the crime scene. R. 125.

In fulfilling its obligation to assess the credibility of the newly discovered evidence, *see State v. Loose*, 2000 UT 11, ¶ 18, 994 P.2d 1237, the trial court found Steed and Warren “credible” and did not doubt that they heard Anderson tell them that zip ties were not found at the crime scene. R. 2096:143. The only thing contradicting these witnesses’ credible testimony was the testimony of Anderson himself. R. 2096:86-87. Although Anderson insisted that he never made any such statement and remained resolute that he discovered the zip ties at the crime scene, he had difficulty remembering how the zip ties were secured once they were discovered and when they were or were not booked in to evidence. R. 2096:66–71.

Anderson displayed similar uncertainty regarding the presence (or not) of a tow hook located at the front of Lynch’s truck. R. 2096:97–99. Indeed, although Anderson testified that the truck had a tow hook, investigators for Lynch and photographs of the truck revealed that no such tow hook was present. R. 2096:115, 724–42.


Considered within the context of the evidence established at trial, the evidence discovered in the course of the former police officers’ investigation of the truck is critical. It eliminates, or at least severely compromises, major parts of the State’s theory. By the State’s own admission, the zip tie evidence was the “clinch[ing]” piece of evidence in securing Lynch’s conviction. R. 125. But the newly discovered evidence suggests that zip ties were not found at

the scene and there was no need for them because the hood worked perfectly well. Time and again, the State attempted to tie the victim's left-calf injury to the truck's tow hook, but the newly discovered evidence establishes that there was no such tow hook. By calling into serious question two of the State's strongest pieces of evidence, the newly discovered evidence creates reasonable doubt as to Lynch's guilt. That reasonable doubt is sufficient to award Lynch relief under the PCRA.

CONCLUSION

For these reasons, the Court should reverse the trial court's grant of summary judgment and subsequent dismissal of Lynch's Second Amended Petition.

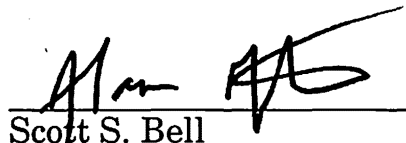
DATED this 30th day of January, 2015.



SCOTT S. BELL
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CERTIFICATE OF COMPLIANCE

I hereby certify that in compliance with Rule 24(f)(1) of the Utah Rules of Appellate Procedure, this brief contains 11,044 words, excluding the table of contents, table of authorities, and addenda. I further certify that in compliance with Rule 27(b) of the Utah Rules of Appellate Procedure, this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in Century Schoolbook 13 point.

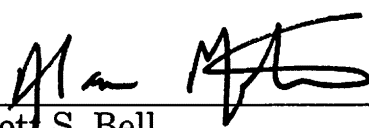


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CERTIFICATE OF SERVICE

I hereby certify that on this 30th day of January, 2015, I caused to be served by U.S. mail, postage prepaid, two true and correct copies of the foregoing **OPENING BRIEF** to:

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Addendum A

JAN 15 2014

In the Third Judicial District Court, Salt Lake County, State of Utah	
SHERMAN ALEXANDER LYNCH, Petitioner, vs. STATE OF UTAH, Respondent.	MEMORANDUM DECISION Case No. 110913691 Hon. Deno G. Himonas

Deputy Clerk

This matter is before the Court on Respondent the State of Utah's (the State) Motion for Summary Judgment. In the motion, the State seeks the dismissal of Petitioner Sherman Lynch's remaining claims for relief under Utah's Postconviction Remedies Act (the PCRA), *see* Utah Code Ann. §§ 78B-9-101, *et seq.* (2013). For the reasons set forth below, I DENY the motion with respect to the newly discovered evidence claim, and GRANT the motion with respect to the other claims.

PROCEDURAL BACKGROUND

Lynch's wife, Patricia Rothermic, was killed in 2007 when a vehicle struck her from behind. Lynch was charged with murdering his wife and, at the conclusion of a trial in 2009, a jury convicted him on that charge. Following his trial, Lynch filed a post-trial motion for a new trial on the grounds that he received ineffective assistance of counsel and that newly discovered evidence justified holding a new trial. The trial court denied that motion. Lynch then appealed his conviction to the Utah Court of Appeals, which affirmed Lynch's conviction.¹ *See State v. Lynch*, 2011 UT App 1, 246 P.3d 525.

Shortly after the court of appeals affirmed his conviction, Lynch filed a petition for postconviction relief in this Court. Through counsel, Lynch subsequently filed two amended petitions. In his second amended petition (the Second Amended Petition), Lynch claims that he is entitled to relief on grounds of ineffective assistance of counsel and newly discovered evidence. The State previously filed a motion for summary judgment seeking dismissal of Lynch's claims. At a hearing on the motion, the Court did not reach the merits of Lynch's claims but denied the motion without prejudice and allowed the state to refile its motion for summary judgment.²

¹ Apparently, Lynch did not seek appellate review of the trial court's ruling on his motion for a new trial, as that motion and the issues associated therewith are not discussed in the court of appeals' ruling. Following the court of appeals' ruling, Lynch did not pursue further review from the Utah Supreme Court.

² In a separate but related case, *Lynch v. State*, Case No. 110913690, Lynch claimed that he was entitled to postconviction relief on factual innocence grounds. The Court granted the State's motion for summary judgment and dismissed that case at the same hearing where the Court denied the State's motion in the case at bar.

ANALYSIS

In their current motion, the State argues that it is entitled to summary judgment on the remaining claims because Lynch cannot prevail on his ineffective assistance of counsel and newly discovered evidence claims. "Summary judgment is appropriate 'if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.'" *Orvis v. Johnson*, 2008 UT 2, ¶ 13, 177 P.3d 600 (quoting Utah R. Civ. P. 56(c)). As the party moving for summary judgment, the State has the burden to "show both that there is no material issue of fact *and* that the [State] is entitled to judgment as a matter of law." *Orvis v. Johnson*, 2008 UT 2, ¶ 10, 177 P.3d 600.

Here, Lynch makes no attempt to controvert the State's numbered statement of facts, and therefore, I presume that the facts asserted by the State are true.³ See Utah R. Civ. P. 7(c)(3). The State argues that the undisputed facts establish that Lynch's ineffective assistance of counsel claims are procedurally barred or fail on the merits, and that his newly discovered evidence claim fails on the merits. I address each of these arguments in turn.

I. The Ineffective Assistance of Counsel Claims

Turning first to the ineffective assistance of counsel claims, the State correctly notes that under the PCRA, postconviction relief is not available on a ground for relief that has been "raised or addressed at trial or on appeal."⁴ Utah Code Ann. § 78B-9-106(1)(b) (2013). A petitioner is also barred from asserting relief on a ground that "could have been but was not raised at trial or on appeal," *id.* § 78B-9-106(1)(c), unless "the failure to raise that ground was due to ineffective assistance of counsel," *id.* § 78B-9-106(3); see also *id.* (providing that the ineffective assistance exception only applies to a claim for relief under subsection -106(1)(c)). Thus, under the PCRA, claims that have previously been raised before a trial or appellate court are barred, regardless of whether those claims are now raised as a part of an ineffective assistance of counsel claim. In contrast, claims that could have been but were not raised previously are barred unless the failure to raise those claims was attributable to the ineffective assistance of counsel. Moreover, before addressing the merits of a claim for postconviction

³ In his opposition memorandum, Lynch does object to several of the State's asserted facts on the grounds that the facts are vague or unsupported. However, all of the actual facts in the State's memorandum are supported by citations to the record that make the source and context of the information clear. Therefore, I DENY Lynch's objections to the State's asserted facts. I also note that Lynch does provide his own list of undisputed facts in his opposition memorandum. Those facts appear largely to be a summary of the allegations contained in the Second Amended Petition and most of the facts in Lynch's statement of undisputed facts are not supported by a citation to the record. Regardless, even considering the facts asserted by Lynch in their entirety, those facts do not change the resolution of the issues currently before the Court.

⁴ Lynch argues that because the PCRA uses the phrase "at trial," Utah Code Ann. § 78B-9-106(1)(b), that bar does not apply to matters raised in post-trial motions. I disagree and reject that argument. As the State explains in its reply memorandum, the phrases "at trial" and "on appeal" in the PCRA *id.*, do not refer only to the matters raised at trial or on appeal. Rather, those phrases are clearly meant to refer broadly to the trial and appellate stages of criminal litigation, which includes matters raised in post-trial motions before a trial court. Moreover, the apparent purpose of the procedural bars in the PCRA is to prevent a petitioner from repeatedly raising the same claims in a postconviction proceeding after first raising them in a trial or appellate court. As the Utah Supreme Court has explained, the PCRA is not intended to be a substitute for appellate review, nor is the PCRA intended to give a petitioner a proverbial second bite at the apple and give them a second opportunity to obtain appellate review. See *Kell v. State*, 2008 UT 62, ¶ 13, 194 P.3d 913; *Carter v. Galetka*, 2001 UT 96, ¶ 14, 44 P.3d 626.

relief, a court must first “determine whether that claim is independently precluded under Section 78B-9-106.” Utah R. Civ. P. 65C(b). Accordingly, I begin my analysis of Lynch’s ineffective assistance of counsel’s claims by addressing the question of whether his claims are barred.

Here, the State argues that several of Lynch’s ineffective assistance of counsel claims were previously raised and that his remaining ineffective assistance of counsel claims fail on the merits. I agree.

A. Several of Lynch’s Ineffective Assistance of Counsel Claims Are Barred Under Subsection -106(1)(b).

Turning first to the claims already raised, as the State has established, many of Lynch’s ineffective assistance of counsel claims have already been raised by Lynch in previous proceedings before this court and the court of appeals. These include Lynch’s first, second, third, fourth, eleventh, sixteenth, eighteenth, nineteenth, twentieth, twenty-first, twenty-second, and twenty-third claims for relief.⁵ The essence of the grounds underlying each of these claims has previously been raised in either Lynch’s motion for a new trial or on appeal. Therefore, these claims are barred under the PCRA. *See* Utah Code Ann. § 78B-9-106(1)(b).

B. Lynch’s Remaining Ineffective Assistance of Counsel Claims Are Barred and Fail as a Matter of Law.

With respect to the remaining ineffective assistance of counsel claims, the State asserts that these claims are barred under subsection -106(1)(c) because those claims could have been raised at trial. In doing so, the State also acknowledges that under the PCRA, the procedural bar does not apply to subsection -106(1)(c) if the failure to raise those claims was due to ineffective assistance of counsel. *See id.* § 78B-9-106(3). Consequently, the question of whether those claims are barred is necessarily dependent upon a determination of the merits of Lynch’s remaining ineffective assistance of counsel claims. Given that fact, I address the merits of the remaining claims and the procedural bar simultaneously.

The Sixth Amendment to the United States Constitution provides that a criminal defendant has the right to have the assistance of counsel. *See* U.S. Const. Amend. VI. In order to ensure that a criminal defendant receives a fair trial, the United States Supreme Court “has recognized that the right to counsel is the right to the effective assistance of counsel.” *Strickland v. Washington*, 466 U.S. 668, 686 (1984) (internal quotation marks omitted). However, the “Constitution entitles a criminal defendant to a fair trial, not a perfect one.” *Delaware v. Van Arsdall*, 475 U.S. 673, 681 (1986). Therefore, a party seeking to overturn their conviction on the ground that they received ineffective assistance of counsel must demonstrate two prongs: “First, the defendant must show that counsel’s performance was deficient,” and “[s]econd, that the deficient performance prejudiced the defense.” *Strickland*, 466 U.S. at 687.

To satisfy the first *Strickland* prong, a criminal defendant “must show that counsel’s representation fell below an objective standard of reasonableness,” which “is to be determined

⁵ The State acknowledges that portions of Lynch’s third, fourth, and twenty-first claims for postconviction relief may not have been expressly raised previously. While I agree with the State that the essence of these claims was largely raised in previous proceedings, I address the claim in connection with both subsection -106(1)(b) and subsection -106(1)(c).

by 'prevailing professional norms.'" *Kell v. State*, 2008 UT 62, ¶ 28, 194 P.3d 913 (quoting *Strickland*, 466 U.S. at 688). In evaluating counsel's performance, a court must evaluate that performance in light of the totality of the circumstances, "with 'a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance.'" *Id.* (quoting *Strickland*, 466 U.S. at 689). Indeed, a criminal defendant bears the burden of "overcom[ing] the 'strong presumption that [his] trial counsel rendered adequate assistance by persuading the court that there was no conceivable tactical basis for counsel's actions.'" *State v. Clark*, 2004 UT 25, ¶ 6, 89 P.3d 162 (citation and internal quotation marks omitted) (second alteration in original).

Similarly, to satisfy the second *Strickland* prong, a criminal defendant must establish that counsel's performance was prejudicial by "showing that counsel's errors were so serious as to deprive the defendant of a fair trial." *Strickland*, 466 U.S. at 687. Stated another way, a "defendant must show 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; accord *Kell*, 2008 UT 62, ¶ 29. Likewise, a petitioner like Lynch who claims that "appellate counsel was ineffective in failing to raise a claim . . . must show that the 'issue [was] obvious from the trial record and . . . probably would have resulted in reversal on appeal.'" *Kell*, 2008 UT 62, ¶ 42 (internal quotation marks omitted) (alteration and second omission in original).

In this case, the State has met its burden of demonstrating that Lynch cannot maintain his remaining ineffective assistance of counsel claims. With respect to the third, fourth, fifth, sixth, seventh, eighth, ninth, tenth, twelfth, thirteenth, fourteenth, fifteenth, twenty-first, twenty-fourth, twenty-fifth, twenty-sixth, twenty-seventh, and twenty-eighth claims, the State has shown that Lynch's previous counsel had a conceivable tactical basis or justification for failing to take the actions in question.⁶ These bases include that the actions in question would have been futile, that the actions may have backfired or been harmful to the defense, that the evidence had already been presented by other witnesses, that the actions would have focused on weaker arguments, that the available record evidence would not have alerted trial counsel to a potential issue, that any error by trial counsel would not have been obvious to Lynch's appellate counsel, and that a challenge to various statements by the prosecution and prosecution witnesses would be futile because those statements were accurate.⁷

In response to the State's argument, Lynch does not separately respond to each of the claims discussed in the State's memorandum, nor does he separately address the tactical bases identified by the State in connection with each claim. Rather, Lynch argues that his previous counsel should have taken other actions that would have been more effective. In doing so, however, Lynch largely fails to provide the Court with any evidence to challenge the State's assertions that Lynch's defense counsel had reasonable tactical bases for their failure to take the

⁶ I also note that the State has offered evidence to show that at least some of counsel's alleged failures were actually performed by counsel, including counsel's cross-examination of witnesses, counsel's investigation of Lynch's claims, and counsel's retention of an investigator with the necessary training to investigate Lynch's technical claims.

⁷ Rather than repeating the State's argument with respect to each of those claims separately, I incorporate by reference the State's argument on those claims.

actions in question.⁸ Therefore, Lynch has not met his burden on summary judgment of presenting any evidence to controvert the State's assertions that previous counsel had tactical reasons for failing to take the actions that are the subject of Lynch's petition for postconviction relief. Moreover, after reviewing of each of the claims discussed in the State's supporting memorandum, I agree with the State that defense counsel had a legitimate reason for failing to take each of the actions in question. Consequently, as a matter of law, Lynch cannot satisfy the first prong of the *Strickland* test.

Furthermore, even if Lynch could satisfy the first *Strickland* prong, he is unable to satisfy the prejudice prong for similar reasons. As discussed above and in the State's supporting memorandum, many of the actions in question would have been futile and, in any event, the resulting evidence was squarely contradicted by the great weight of the other credible evidence credible sources. Therefore, as a matter of law, Lynch is unable show that if his trial or appellate counsel would have taken other action, Lynch would have prevailed at trial or on appeal.

In accordance with the foregoing, I GRANT the State's motion for summary judgment on Lynch's ineffective assistance of counsel claims.

II. The Newly Discovered Evidence Claim

Next, the State argues that Lynch's newly discovered evidence claim, *see* Utah Code Ann. § 78B-9-104(1)(e), fails as a matter of law. I disagree.

Under the PCRA, a petitioner seeking postconviction relief on newly discovered evidence grounds must show that

newly discovered material evidence exists that requires the court to vacate the conviction or sentence, because:

- (i) neither the petitioner nor petitioner's counsel knew of the evidence at the time of trial or sentencing or in time to include the evidence in any previously filed post-trial motion or post-conviction proceeding, and the evidence could not have been discovered through the exercise of reasonable diligence;
- (ii) the material evidence is not merely cumulative of evidence that was known;

⁸ Lynch does assert that under Utah law, counsel's failure to call a witness is not a legitimate tactic. However, in the first case cited by Lynch, it was not the failure to call a witness but counsel's failure to investigate that was deficient. *See State v. Templin*, 805 P.2d 182, 188-89 (Utah 1990). The Utah Supreme Court further emphasized that after a sufficient inquiry or investigation, it may be a reasonable tactic for counsel to refrain from calling a witness but such a decision may only be made after undertaking an investigation. *See id.* at 189. The other case cited by Lynch, *State v. Charles*, 2011 UT App 291, 263 P.3d 469 is also inapposite. In that case, defense counsel also failed to investigate one potential witness, *see id.* ¶ 34, and was unable to call other witnesses because of defense counsel's own negligence in securing the testimony, *see id.* ¶ 30. In reversing the defendant's conviction, the court of appeals expressly noted that there was no strategic or tactical reason for defense counsel's failure to investigate and secure the testimony of key witnesses. *See id.* ¶¶ 30-31. To the contrary, defense counsel intended to call the witnesses but failed to take the necessary action to secure their testimony. *See id.* Those facts stand in stark contrast to this case, where the State has offered several tactical reasons for the actions of Lynch's counsel and the undisputed evidence shows that counsel did undertake an investigation and thoroughly reviewed the case with Lynch.

- (iii) the material evidence is not merely impeachment evidence; and
- (iv) viewed with all the other evidence, the newly discovered material evidence demonstrates that no reasonable trier of fact could have found the petitioner guilty of the offense or subject to the sentence received.

Id. The evidence in question must demonstrate that there is more than “a mere possibility that an item of undisclosed information might have helped the defense or might have affected the outcome of the trial,” *Medel v. State*, 2008 UT 32, ¶ 50, 184 P.3d 1226 (internal quotation marks omitted). Instead, the newly discovered evidence, when viewed with the other evidence in the record, must “create a reasonable doubt as to the defendant’s guilt.” *Id.* ¶ 51; *cf. Brown v. State*, 2013 UT 42, ¶ 45, 308 P.3d 486 (holding that a factual innocence claim based on newly discovered evidence under the PCRA “allows a court to base its determination of factual innocence on all available evidence—both old and new”).

In this case, the State first argues that the newly discovered evidence—two affidavits from investigators who examined the truck and overheard Detective Anderson—does not meet the PCRA’s newly discovered evidence standard because the information regarding the condition of the truck could have been discovered by the investigators and experts that were utilized by Lynch’s trial counsel. *See* Utah Code Ann. § 78B-9-104(f)(1). However, the State does not make any argument regarding Lynch’s ability to obtain the other information contained in the affidavits, including the statement that the investigators heard Detective Anderson state that no zip ties were found at the scene of the accident where Lynch’s wife was killed. Therefore, in the absence of any evidence to the contrary, I cannot say that Lynch could have learned of Detective Anderson’s alleged statement at an earlier time.

Furthermore, viewing Detective Anderson’s alleged statement with the other evidence in the record and in the light most favorable to Lynch, as I must, *see Orvis*, 2008 UT 2, ¶ 6, that evidence is clearly material. Indeed, the presence (or lack thereof) of the zip ties at the scene and the related questions of whether the hood of Lynch’s truck could latch and the damage to the truck were key pieces of evidence that the State relied on to demonstrate that Lynch’s truck was the truck that actually struck and killed the victim. Moreover, as Lynch notes, there is evidence that Detective Anderson delayed booking the zip ties as evidence, which would also support Lynch’s claim that the zip ties were not found at the scene of the accident. Thus, assuming that all of the statements in the affidavits are true, the newly discovered evidence would clearly be material and could create a reasonable doubt regarding Lynch’s guilt.⁹ In light of those facts, I DENY the State’s motion for summary judgment with respect to Lynch’s newly discovered evidence claim.

⁹ The State notes that some of the allegations in the affidavits is controverted by other statements by witnesses at trial. However, on summary judgment, a trial court may not weigh evidence, assess credibility, or otherwise resolve disputed issues of fact. *See Webster v. Sill*, 675 P.2d 1170, 1172 (Utah 1983); *Kilpatrick v. Wiley, Rein & Fielding*, 909 P.2d 1283, 1292 (Utah Ct. App. 1996). Therefore, it would clearly be inappropriate for me to weigh the new evidence or judge the credibility of the affiants’ statements at this stage of the proceeding. Instead, as explained above, I must accept those statements as true and view the facts in the light most favorable to Lynch. *See Orvis*, 2008 UT 2, ¶ 6.

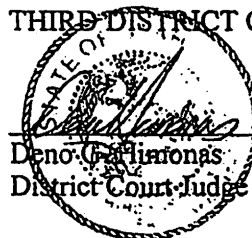
CONCLUSION

In sum, the claims Lynch has previously asserted before this Court and the appellate court are barred under the PCRA. Lynch's remaining ineffective assistance of counsel claims also fail on the merits because defense counsel had legitimate tactical reasons for their actions and Lynch is unable to establish that counsel's actions were prejudicial. Therefore, I GRANT the State's motion for summary judgment with respect to Lynch's ineffective assistance of counsel claims.

There is nothing before me to suggest that Lynch would have been able to discover Detective Anderson's statements regarding the zip ties at an earlier time. When viewed in the light most favorable to Lynch, along with the other new and existing evidence, that evidence is material. Therefore, I DENY the State's motion for summary judgment with respect to Lynch's newly discovered evidence claim.¹⁰

DATED this 6th day of January, 2014

THIRD DISTRICT COURT



¹⁰ In the memorandum supporting the motion for summary judgment, the State also seeks dismissal of Lynch's claims that are predicated on a new rule, *see* Utah Code Ann. § 78B-9-104(f) (2013) (allowing a petitioner to seek postconviction relief where the appellate courts announce a new rule that would entitle a petitioner to postconviction relief) announced by the Utah Supreme Court in *Gregg v. State*, 2012 UT 32, 279 P.3d 396. Lynch does not respond to the State's argument that the supreme court did not actually announce a new rule in *Gregg*, and there is nothing in the *Gregg* decision that appears to be a new rule. Therefore, to the extent that Lynch seeks relief on the newly announced rule provision, I agree with the State that Lynch's claim fails as a matter of law and I GRANT summary judgment on that claim for relief.

CERTIFICATE OF NOTIFICATION

I certify that a copy of the attached document was sent to the following people for case 110913691 by the method and on the date specified.

MAIL: STEPHEN B AUSTIN 336 N 930 E LINDON, UT 84042

MAIL: RYAN D TENNEY 160 E 300 S P O BOX 140854 SALT LAKE CITY UT 84114-0854

Date: 01/06/2014

/s/ JENNIFER JONES

Deputy Court Clerk

ORIGINAL TRANSCRIPT

IN THE THIRD JUDICIAL DISTRICT COURT OF

SALT LAKE COUNTY, STATE OF UTAH

SHERMAN ALEXANDER LYNCH,

Petitioner,

vs.

Case No. 110913691


Case No. 110913960

STATE OF UTAH,

Respondent.

FILED DISTRICT COURT
Third Judicial District

JUL 30 2014

By  SALT LAKE COUNTY
Deputy Clerk

TRANSCRIPT OF EVIDENTIARY HEARING

BEFORE THE HONORABLE DENO HIMONAS

MAY 1, 2014

FILED
UTAH APPELLATE COURTS

AUG 20 2014

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1 credibility of Detective Anderson and of their entire case and
2 of the booking process and so forth and, for those reasons, I
3 request that our motion be granted.

4 THE COURT: Thank you. It is, I think, clear that the
5 standard, here, as to the Court, you must establish, by a
6 preponderance of the evidence, that the newly-discovered
7 evidence, when viewed with the existing evidence, would lead--no
8 reasonable trier of fact would be able to find Mr. Lynch guilty.
9 We are miles and miles away from that. I deny the motion and
10 let me indicate why.

11 The newly-discovered evidence, in this particular case,
12 was sworn testimony that one of the leador, lead investigator
13 for the beginning, and a lead witness in the matter, perjured
14 himself at trial and, in fact, that the evidence was not the
15 zip-ties were not found at the scene. I believe look at the
16 specific quotation. Something to the effect of zip-ties. What
17 zip-ties? Those weren't found at the scene.

18 Leaving aside Detective Steedor, Officer Steed's inability
19 to specifically tie it to Mr. Anderson, Detective Anderson,
20 let's assume that that's the case. Along with the other
21 testimony, it would mean that all of the objective evidence, the
22 photographs that were taken, were false.

23 This is beyond it's beyond dispute that the zip-ties, that
24 evidence, was observed in situ, by Detective Anderson and others
25 and photographed that day and, then, taken into evidence, into a

1 secure facility and, then, ultimately, to the evidence building.

2 The petitioner would have the Court believe that Detective
3 Anderson carries with him don't forget that that, while on the
4 scene, Detective Anderson, in the presence of others, who knew
5 nothing at the time of Mr. Lynch, truck, or anything else, had
6 planted the zip-ties and, then, apparently, later, clipped a
7 portion of the zip-tie to place in another vehicle. Well,
8 forget the fact that that's completely inconsistent with what
9 the alleged newly-discovered evidence is. The newly-discovered
10 evidence is that they weren't at the scene.

11 This is, kind of, a moving target. It's, now, become that
12 the evidence was planted and, then but this is theory with
13 nothing, whatsoever, to back it up and I can only assume was in
14 light of the overwhelming evidence, the objective evidence that,
15 in fact, they were discovered at the scene. The petitioner is
16 forced to do the best he can with that.

17 Petitioner would also have the Court believe that this
18 detective, knowing that these individuals were, in fact,
19 representatives of Mr. Lynch and had no relationship with them,
20 openly admitted to committing a major felony. It defies common
21 sense.

22 Whether, frankly, there is sufficient evidence that the
23 hood was not latching properly, that the hood was opening, the
24 witness saw the hood blow open and more than a reasonable basis
25 to believe the zip-ties were used to tie-down the hood, but I

1 think Mr. Tenney is right. Who cares? It doesn't matter
2 whether or not the hood was tied down.

3 I, frankly, found Officer Steed I found everybody quite
4 credible. I don't doubt that Officer Steed and the others,
5 whatever they thought they heard, they heard. I don't think
6 anybody is shading the truth. What actually was said, I don't
7 know. It's impossible to believe that Detective Anderson said
8 he was the first one on the scene. It's so easily disproven.
9 Impossible to believe that they told him the truck was removed
10 from the scene. Everybody knows that wasn't the case and, you
11 know, it's not just a couple of minor words here that's
12 important and, very importantly, right?

13 It's why would he tell an individual that those zip-ties
14 didn't exist at the time, knowing that there was photographs
15 that placed him there, aside from the lack of motive. It,
16 simply, defies logic in any way, shape or form and, frankly, I
17 found the Detective credible on this point.

18 The question about the tow hook or the chain not being
19 broken, I think the chain was fine. I don't have any problem
20 with it going into a secure facility and, then, ultimately going
21 into evidence. I have no indication the chain was actually
22 broken and the tow hook kind of thing suffers from the same kind
23 of problems.

24 The truck is there. The Detective knows, even at the
25 time, that it's available for inspection. Mr. Lynch would have

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1 the Court believe that, despite knowing that they could bring it
2 in, or the Court could go out and see it, that somebody is
3 fabricating their testimony about an obviously objective piece
4 of evidence.

5 Now, you know, is the tow hook meant to describe an
6 attachment to which a hook could apply or was the word used
7 inappropriately? I don't know, but it doesn't come close to
8 suggesting perjury or lack of credibility and the fact I found
9 the Detective to be eminently credible, but I don't want to
10 suggest, by that I want to be very careful about this, that I
11 didn't find the other witnesses, as well. I didn't have any
12 sense, frankly, that Mr. Lynch's witnesses were lying.

13 I thought Mr. Steed, in particular, was quite credible.
14 Unfortunately, people mishear things and it would be if there was
15 any untruth that was said at the time, it would be that they
16 were, in fact, found at the scene, but were pulling Mr. Steed's
17 leg, if anything was said. Why somebody would do that, I don't
18 know, but it's the overwhelming objective evidence. It's just
19 that, overwhelming and objective, of where those zip-ties were
20 and viewed in light of the additional evidence as well, the
21 motive, all of the specific reasons that I remember.

22 Frankly, this is a trial that I remember. I mean, it's
23 not lost on me and I've heard various motions, over the years.
24 I don't--this is not one in which I believe that, when viewed in
25 the context of all the evidence frankly, I don't buy the

1 newly-discovered evidence at this point. I think it's clear,
2 based on what I've said there, it's, you know I don't know what
3 was said, but there was no perjury and there's no indication
4 that it was planted and there's absolutely no evidence,
5 whatsoever, in this record to suggest that these detectives took
6 the evidence to what they thought was a hit and run, that they
7 carry it with them so that they can plant it at a scene and use
8 it later to plant on some other piece of evidence is, frankly,
9 there's not a shred of evidence, in this record, that that's
10 what occurred and, frankly, it's irrelevant because that's
11 nothing but theory. It has nothing to do with the
12 newly-discovered evidence in this particular case.

13 For all of those reasons and, frankly, more, this petition
14 is denied in its entirety. I don't believe that writings are
15 necessary. I believe that the Court's recitation, on the
16 record, of its findings is appropriate. Thank you.

17 MR. AUSTIN: Thank you, Your Honor.

18 THE COURT: Thank you. Thank you both. The exhibits.
19 Make sure that you gather the exhibits and, Mr. Austin, I think
20 you did a fine job.

21 MR. AUSTIN: Thank you, Your Honor.

22 THE COURT: I think you did aboth you and Mr. Tenney--
23 [End of audio recording.]
24
25

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Addendum B

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U.S. Const. amend. VI

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

U.S. Const. amend. XIV (relevant portions)

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Utah Code § 78B-9-104

(1) Unless precluded by Section 78B-9-106 or 78B-9-107, a person who has been convicted and sentenced for a criminal offense may file an action in the district court of original jurisdiction for post-conviction relief to vacate or modify the conviction or sentence upon the following grounds:

(a) the conviction was obtained or the sentence was imposed in violation of the United States Constitution or Utah Constitution;

(b) the conviction was obtained or the sentence was imposed under a statute that is in violation of the United States Constitution or Utah Constitution, or the conduct for which the petitioner was prosecuted is constitutionally protected;

(c) the sentence was imposed or probation was revoked in violation of the controlling statutory provisions;

(d) the petitioner had ineffective assistance of counsel in violation of the United States Constitution or Utah Constitution;

(e) newly discovered material evidence exists that requires the court to vacate the conviction or sentence, because:

(i) neither the petitioner nor petitioner's counsel knew of the evidence at the time of trial or sentencing or in time to include the evidence in any previously filed post-trial motion or post-conviction proceeding, and the evidence could not have been discovered through the exercise of reasonable diligence;

(ii) the material evidence is not merely cumulative of evidence that was known;

(iii) the material evidence is not merely impeachment evidence; and

(iv) viewed with all the other evidence, the newly discovered material evidence demonstrates that no reasonable trier of fact could have found the petitioner guilty of the offense or subject to the sentence received; or

(f) the petitioner can prove entitlement to relief under a rule announced by the United States Supreme Court, the Utah Supreme Court, or the Utah Court of Appeals after conviction and sentence became final on direct appeal, and that:

(i) the rule was dictated by precedent existing at the time the petitioner's conviction or sentence became final; or

(ii) the rule decriminalizes the conduct that comprises the elements of the crime for which the petitioner was convicted.

(2) The court may not grant relief from a conviction or sentence unless the petitioner establishes that there would be a reasonable likelihood of a more favorable outcome in light of the facts proved in the post-conviction proceeding, viewed with the evidence and facts introduced at trial or during sentencing.

(3) The court may not grant relief from a conviction based on a claim that the petitioner is innocent of the crime for which convicted except as provided in Title 78B, Chapter 9, Part 3,

Postconviction Testing of DNA, or Part 4, Postconviction Determination of Factual Innocence. Claims under Part 3 or Part 4 of this chapter may not be filed as part of a petition under this part, but shall be filed separately and in conformity with the provisions of Part 3 or Part 4.

Utah Code 78B-9-106

(1) A person is not eligible for relief under this chapter upon any ground that:

- (a) may still be raised on direct appeal or by a post-trial motion;
- (b) was raised or addressed at trial or on appeal;
- (c) could have been but was not raised at trial or on appeal;
- (d) was raised or addressed in any previous request for post-conviction relief or could have been, but was not, raised in a previous request for post-conviction relief; or
- (e) is barred by the limitation period established in Section 78B-9-107.

(2)(a) The state may raise any of the procedural bars or time bar at any time, including during the state's appeal from an order granting post-conviction relief, unless the court determines that the state should have raised the time bar or procedural bar at an earlier time.

(b) Any court may raise a procedural bar or time bar on its own motion, provided that it gives the parties notice and an opportunity to be heard.

(3) Notwithstanding Subsection (1)(c), a person may be eligible for relief on a basis that the ground could have been but was not raised at trial or on appeal, if the failure to raise that ground was due to ineffective assistance of counsel.

(4) This section authorizes a merits review only to the extent required to address the exception set forth in Subsection (3).