COPY

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 17-cv-02320-GPG

JUAN BUSTOS-CHAVEZ,

Applicant,

v.

MATTHEW HANSEN, and
CYNTHIA COFFMAN, Attorney General of the State of Colorado

Respondents.

ORDER OF DISMISSAL

I. BACKGROUND

Applicant currently is in the custody of the Colorado Department of Corrections and is incarcerated at the Sterling Correctional Facility in Sterling, Colorado. Applicant, acting *pro se*, has filed an Application for a Writ of Habeas Corpus Pursuant to 28 U.S.C. § 2254, ECF No.1, challenging the conviction and sentence in State of Colorado Criminal Case No. 2011CR890 in the Denver County District Court in Denver, Colorado. In an order entered on October 18, 2017, Magistrate Judge Gordon P. Gallagher directed Respondents to file a Pre-Answer Response limited to addressing the affirmative defenses of timeliness under 28 U.S.C. § 2244(d) and exhaustion of state court remedies under 28 U.S.C. § 2254(b)(1)(A) if Respondents intended to raise either or both of these affirmative defenses in this action.

Respondents filed their Pre-Answer Response, ECF No. 12, on November 30, 2017. Applicant filed a Reply, ECF No. 13, on December 20, 2017.

Applicant raises three claims. The claims are as follows:

(1) Trial counsel was ineffective in not obtaining an interpreter to communicate with Applicant outside of the court;

(2) Trial counsel was ineffective in not investigating and presenting an alibi defense and in cross-examination; and

3) Applicant's right to due process was violated when the trial court admitted prior bad acts into evidence

ECF No. 1 at 5-16.

II. DISCUSSION

The Court must construe all of Applicant's pleadings liberally, because he is not represented by an attorney. *See Haines v. Kerner*, 404 U.S. 519, 520-21 (1972); *Hall v. Bellmon*, 935 F.2d 1106, 1110 (10th Cir. 1991). However, the Court should not act as an advocate for a *pro se* litigant. *See Hall*, 935 F.2d at 1110.

Respondents concede the action is timely. Respondents, however, contend that Claims One and Two are procedurally defaulted, ECF No. 12 at 9-10, and Claim Three is anticipatorily defaulted, *id.* at 10.

In his Reply, Applicant concedes that Claims One and Two are untimely, but he argues that the default is excusable because he is actually innocent of the crimes of which he was convicted. ECF No. 13 at 1. Applicant contends that during the time the crime was committed he was living in Mexico. *Id.* at 2. Applicant further contends that had counsel been able to communicate with Applicant "outside of court" he would have known

this, which was easily discoverable during the pretrial preparation, and would have presented the information to the jury, who would have acquitted Applicant. *Id.*

Applicant further argues that Claim Three was presented as a due process claim on direct appeal. ECF No. 13 at 3. Applicant contends his argument on appeal demonstrated that the substance of his claim was that the "evidence was so unduly prejudicial as to deny him a fair trial." *Id.* Applicant, however, does concede that his arguments in support of this claim on direct appeal are based on the Colorado Rule of Evidence 403 and explanatory case law, but he argues that Rule 403 is an "embodiment of due process principle that a jury must not be swayed through bias and undue influence." *Id.* at 4.

Pursuant to 28 U.S.C. § 2254(b)(1), an application for a writ of habeas corpus may not be granted unless it appears that the applicant has exhausted state remedies or that no adequate state remedies are available or effective to protect the applicant's rights. *See O'Sullivan v. Boerckel*, 526 U.S. 838 (1999); *Dever v. Kansas State Penitentiary*, 36 F.3d 1531, 1534 (10th Cir. 1994). The exhaustion requirement is satisfied once the federal claim has been presented fairly to the state courts. *See Castille v. People*, 489 U.S. 346, 351 (1989). Fair presentation requires that the federal issue be presented properly "to the highest state court, either by direct review of the conviction or in a postconviction attack." *Dever*, 36 F.3d at 1534.

Furthermore, the "substance of a federal habeas corpus claim" must have been presented to the state courts in order to satisfy the fair presentation requirement. *Picard v. Connor*, 404 U.S. 270, 278 (1971); *see also Nichols v. Sullivan*, 867 F.2d 1250, 1252

(10th Cir. 1989). Although fair presentation does not require a habeas corpus petitioner to cite "book and verse on the federal constitution," *Picard*, 404 U.S. at 278 (internal quotation marks omitted), "[i]t is not enough that all the facts necessary to support the federal claim were before the state courts," *Anderson v. Harless*, 459 U.S. 4, 6 (1982) (per curiam). A claim must be presented as a federal constitutional claim in the state court proceedings in order to be exhausted. *See Duncan v. Henry*, 513 U.S. 364, 365-66 (1995) (per curiam).

"The exhaustion requirement is not one to be overlooked lightly." *Hernandez v. Starbuck*, 69 F.3d 1089, 1092 (10th Cir. 1995). A state prisoner bringing a federal habeas corpus action bears the burden of showing that he has exhausted all available state remedies. *See Miranda v. Cooper*, 967 F.2d 392, 398 (10th Cir. 1992).

Federal courts generally "do not review issues that have been defaulted in state court on an independent and adequate state procedural ground, unless the default is excused through a showing of cause and actual prejudice or a fundamental miscarriage of justice." *Jackson v. Shanks*, 143 F.3d 1313, 1317 (10th Cir. 1998); *see also Cummings v. Sirmons*, 506 F.3d 1211, 1224 (10th Cir. 2007). "A state procedural ground is independent if it relies on state law, rather than federal law, as the basis for the decision." *Hickman v. Spears*, 160 F.3d 1269, 1271 (10th Cir. 1998) (quoting *English v. Cody*, 146 F.3d 1257, 1259 (10th Cir. 1998). "For the state ground to be adequate, it must be strictly or regularly followed and applied evenhandedly to all similar claims." *Hickman*, 160 F.3d at 1271 (citations and internal quotations omitted). Application of this

procedural default rule in the habeas corpus context is based on comity and federalism concerns. *Coleman v. Thompson*, 501 U.S. 722, 730 (1991).

Furthermore, if it is obvious that an unexhausted claim would be procedurally barred in state court the claim is subject to an anticipatory procedural bar, *see Anderson v. Sirmons*, 476 F.3d 1131, 1139 n.7 (10th Cir. 2007) (citation omitted), and is procedurally barred from federal habeas review, *Steele v. Young*, 11 F.3d 1518, 1524 (10th Cir. 1993) (citing *Coleman v. Thompson*, 501 U.S. 722, 735 n.1 (1991).

The Court will discuss below whether all claims are procedurally defaulted and barred from federal habeas review.

A. Claims One and Two

As stated above, Applicant concedes the appeal of his claims was untimely, but he contends that the default is excusable because he is actually innocent.

First, denying an appeal in a Rule 35(c) proceeding based on an untimely appeal has been applied uniformly and evenhandedly. *See People v. Banuelos-Landa*, 109 P.3d 1039, 1041 (Colo. App. 2004); *People V. Adams*, 905 P.2d 17, 18 (Colo. App. 1995). Applicant presents no argument that Colo. App. R. 4(b)(1) (requiring an appeal in a Rule 35(c) proceeding to be filed within forty-nine days) is not independent and adequate.

A federal court may proceed to the merits of a procedurally defaulted habeas claim if the applicant establishes either cause for default and actual prejudice or fundamental miscarriage of justice when the merits of a claim are not reached. *See Demarest v. Price*, 130 F.3d 922, 941 (10th Cir. 1997). Applicant's *pro se* status does not exempt him from the requirement of demonstrating cause for the default and actual prejudice or

failure as a result of the alleged violation of federal law or demonstrating that failure to consider the claims will result in a fundamental miscarriage of justice. *See Lepiscopo v. Tansy*, 38 F.3d 1128, 1130 (10th Cir. 1994).

To demonstrate cause for the procedural default, Applicant must show that some objective factor external to the defense impeded his ability to comply with the state's procedural rule. *See Murray v. Carrier*, 477 U.S. 478, 488 (1986). "Objective factors that constitute cause include interference by officials that makes compliance with the State's procedural rule impracticable, and a showing that the factual or legal basis for a claim was not reasonably available to [applicant]." *McCleskey v. Zant*, 499 U.S. 467, 493-94 (1991) (internal quotation marks omitted).

To show prejudice, an applicant must demonstrate that he suffered "actual prejudice as a result of the alleged violation of federal law." *Murray*, 501 U.S. at 750. Nothing Applicant asserts demonstrates cause and actual prejudice regarding Claims One and Two.

A fundamental miscarriage of justice occurs when "a constitutional violation has probably resulted in the conviction of one who is actually innocent." *Murray*, 477 U.S. at 496. A "substantial claim that constitutional error has caused the conviction of an innocent person is extremely rare." *Schlup v. Delo*, 513 U.S. 298, 324 (1995). A fundamental miscarriage of justice provides only "a narrow exception to the cause requirement where a constitutional violation has probably resulted in the conviction of one who is actually innocent of the substantive offense." *Dretke v. Haley*, 541 U.S. 386, 393 (2004) (citations and internal quotation marks omitted).

In order to demonstrate a fundamental miscarriage of justice, Applicant first must "support his allegations of constitutional error with new reliable evidence–whether it be exculpatory scientific evidence, trustworthy eyewitness accounts, or critical physical evidence–that was not presented at trial." *Schulp*, 513 U.S. at 324. Applicant then must demonstrate "that it is more likely than not that no reasonable juror would have convicted him in light of the new evidence." *Id.* at 327.

Applicant does not assert new reliable evidence as a basis for innocence; and as a result he fails to demonstrate a fundamental miscarriage of justice and that it is more likely than not that no reasonable juror would have convicted him in light of new evidence.

Applicant states that counsel failed to provide an interpreter "outside" of the court, but he states in the Application that the trial court ordered an interpreter for Applicant for "in-court proceedings." ECF No. 1 at 5. In his Colo. R. Civ. P. 35(c) opening brief on appeal, Applicant acknowledges that a witness, his estranged wife, testified Applicant was present at the time of the alleged kidnapping and shooting of the victim. ECF No. 12-6 at 13-16. Applicant does not assert in the opening brief, or in the instant Application, that he did not understand (1) his estranged wife's testimony, (2) cross-examination of her by his counsel; or (3) any other evidence that may have been presented by counsel, or otherwise, at the trial. Without more, Applicant has failed to set forth any new reliable evidence that he is actually innocent.

Because Applicant has failed to show cause for the default and actual prejudice as a result of an alleged violation of federal law or demonstrate that the failure to consider

Claims One and Two will result in a fundamental miscarriage of justice, these claims will be dismissed as procedurally defaulted and barred from federal habeas review.

B. Claim Three

First, as stated above, Applicant concedes that his arguments in support of this claim on direct appeal are based on Colorado Rule of Evidence 403 and explanatory case law. Applicant, however, argues the substance of his claim on appeal was that the "evidence was so unduly prejudicial as to deny him a fair trial," and, therefore, he raised a violation of his right to a fair trial. He contends that because Colo. R. Evid.403 is identical to the Fed. R. Evid. 403, and state courts routinely look to the federal version and interpretive case law, Colo. R. Evid. 414 is so prejudicial it violates Applicant's fundamental right to a fair trial. ECF No. 13 at 4-5. Applicant further contends that the application of Rule 403 should always result in the exclusion of evidence that has such a prejudicial effect. *Id.*

Applicant argued on direct appeal that "evidence of other crimes, wrongs, or acts generally is not admissible to prove a defendant's character or show his or her propensity for such conduct." *See* ECF No. 12-2 at 7 (opening brief on CCA direct appeal). Applicant relied on Colo. R. Evid. 404(b), and *People v. Apodaca*, 58 P.3d 1126, 1128 (Colo. App. 2002).

The Colorado Court of Appeals (CCA) reasoned as follows in rejecting Claim Three:

> "Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted inconformity therewith." CRE 404(b). It may, however, be admissible for another proper purpose. *Id.*

When determining the admissibility of evidence under CRE 404(b), courts are guided by the four-part test of *People v. Spoto*, 795 P.2d 1314, 1318 (Colo. 1990). Under this test, evidence is admissible if "(1) it relates to a material fact; (2) it is logically relevant by tending to make that material fact more probable or less probable; (3) its logical relevance does not depend on the intermediate inference that CRE 404 prohibits . . . ; and (4) its probative value is not substantially outweighed by its prejudicial impact." *Masters v. People*, 58 P.3d 979, 996 (Colo. 2002).

"A trial court has substantial discretion in deciding whether to admit evidence of other 'crimes, wrongs, or acts' for purposes other than to show that an accused acted in conformity with his bad character on a specific occasion . . . ." *Id.* Accordingly, we review the district court's decision for an abuse of discretion. *Id.*

Prior to trial, the People moved to admit evidence of the prior act pursuant to CRE 404(b) and section 18-6-801.5, C.R.S. 2012, a statute dealing with admissibility of prior acts of domestic violence. Over defendant's objection, the district court admitted the evidence for the limited purposes of proving defendant's intent and motive.

In support of its conclusion, the court made specific findings as to each prong of the *Spoto* test. The court identified that the prior act was logically relevant to show defendant's motive and intent in this case. The court also found a significant degree of similarity between the two acts in that they both involved the same victim, same defendant, and same method of obtaining control. Accordingly, the court found the logical relevance was independent of any inference of bad character. The court also concluded that, although inherently prejudicial, the probative value of the prior act evidence was not substantially outweighed by unfair prejudice.

Before each witness testified regarding the incident at trial, the jury was instructed to consider the evidence only to show defendant's mental state or intent. The jury was also provided with a similar instruction in the final written instructions.

We conclude the district court did not abuse its discretion in admitting this evidence. The court applied each prong of the *Spoto* test and we perceive no error in its analysis. The acts occurred only four years apart, and were significantly similar in that they both involved defendant, his ex-wife, another man, and use of a gun to control the situation. Given these similarities, the prior act was relevant to prove defendant's intent or state of mind independent of any inference of bad character by making it more likely he intended to use his gun to menace his ex-wife and control the

> man she was with in the current case. *See People v. McBride*, 228 P.3d 216, 227 (Colo. App. 2009)(*Spoto's* third requirement is met "where there is a 'similarity' between the charged and uncharged acts, showing a 'specific tendency' on the part of the defendant" (quoting *Yusem v. People*, 210 P.3d 458, 466-67 (Colo. 2009))). Moreover, we agree the probative value of the evidence was not substantially outweighed by the danger of unfair prejudice, especially given the limited purpose instructions provided to the jury. *People v. Warren*, 55 P.3d 809, 815 (Colo. App. 2002).

The People of the State of Colo. v. Bustos-Chavez, No. 11CA2477, 3-5 (Colo. App. May 23, 2013); ECF No. 12-4 at 4-6.

Based on the CCA's analysis, and a review of the opening brief on direct appeal, the Court finds that Applicant did not present Claim Three as a federal constitutional violation on direct appeal.

With limited exceptions that are not applicable to this claim, the Colorado Rules of Criminal Procedure bar an applicant from raising a claim in a postconviction motion that could have been raised on direct appeal, or that was already raised on postconviction appeal. See Colo. R. Crim. P. 35(c)(3)(VII) ("The court shall deny any claim that could have been presented in an appeal previously brought or postconviction proceeding previously brought").

Rule 35(c)(3)(VII) is independent because the rule relies on state rather than federal law. The rule also is adequate because it is applied evenhandedly by Colorado courts. *See, e.g., People of the State of Colo. v. Vondra*, 240 P.3d 493, 494 (Colo. App. 2010) (Under Colo. R. Crim. P. 35(c)(3)(VII), a court must deny any claim that could have been presented in a previously brought appeal.). Applicant presents no argument that Rule 35(c)(3)(VII) is not independent and adequate.

If it is obvious that an unexhausted claim would be procedurally barred in state court the claim is subject to an anticipatory procedural bar, *see Anderson*, 476 F.3d at 1139 n.7, and is procedurally barred from federal habeas review, *Steele*, 11 F.3d at 1524.

Based on the above findings, it is clear that the substance of this claim as presented to the CCA did not allege a violation of federal law, and that Applicant is not able to return to state court and exhaust any federal violation claim pertaining to Claim Three because he is barred under Colo. R. Crim. P.35(c)(3)(VII). Applicant, therefore, is subject to an anticipatory procedural bar in Claim Three under *Anderson*.

The Court further finds that Applicant has failed to show cause for the default and actual prejudice as a result of an alleged violation of federal law or demonstrate that the failure to consider Claim Three will result in a fundamental miscarriage of justice. This claim, therefore, will be dismissed as anticipatorily defaulted and barred from federal habeas review.

III. CONCLUSION

Claims One and Two will be dismissed as procedurally defaulted, Claim Three will be dismissed as anticipatorily defaulted, and all claims are barred from federal habeas review.

IV. ORDERS

Accordingly, it is

ORDERED that the Application is denied and the action dismissed with prejudice as either procedurally or anticipatorily defaulted in state court and barred from federal habeas review. It is

FURTHER ORDERED that no certificate of appealability shall issue because Applicant has failed to show that jurists of reason would find it debatable that the district court was correct in its procedural ruling. *See Slack v. McDaniel*, 529 U.S. 473, 484-85 (2000). It is

FURTHER ORDERED that leave to proceed in forma pauperis on appeal is denied. The Court certifies pursuant to 28 U.S.C. § 1915(a)(3) that any appeal from this Order would not be taken in good faith. *See Coppedge v. United States*, 369 U.S. 438 (1962). If Applicant files a notice of appeal he must also pay the full $505 appellate filing fee or file a motion to proceed in forma pauperis in the United States Court of Appeals for the Tenth Circuit within thirty days in accordance with Fed. R. App. P. 24.

DATED June 28, 2018.

BY THE COURT:

s/Lewis T. Babcock
LEWIS T. BABCOCK, Senior Judge
United States District Court

FILED
United States Court of Appeals
Tenth Circuit

December 4, 2018

Elisabeth A. Shumaker
Clerk of Court

UNITED STATES COURT OF APPEALS

TENTH CIRCUIT

JUAN BUSTOS-CHAVEZ,

Petitioner - Appellant,

v.

MATTHEW HANSEN; CYNTHIA COFFMAN, Attorney General of the State of Colorado,

Respondents - Appellees.

No. 18-1286
(D.C. No. 1:17-CV-02320-LTB)
(D. Colo.)

ORDER DENYING CERTIFICATE OF APPEALABILITY

Before **BACHARACH**, **MURPHY**, and **MORITZ**, Circuit Judges.

Petitioner, Juan Bustos-Chavez, a Colorado state prisoner proceeding *pro se*, seeks a certificate of appealability ("COA") so he can appeal the district court's dismissal of the habeas corpus petition he filed pursuant to 28 U.S.C. § 2254. *See* 28 U.S.C. § 2253(c)(1)(A) (providing no appeal may be taken from a final order disposing of a § 2254 petition unless the petitioner first obtains a COA).

Bustos-Chavez was convicted by a Colorado jury of attempt to commit manslaughter, first degree assault, second degree kidnapping, third degree assault,

and menacing. After his convictions were affirmed by the Colorado Court of Appeals, the Colorado Supreme Court denied certiorari. Bustos-Chavez then filed a state post-conviction application pursuant to Colo. R. Crim. P. 35(c). His application was dismissed as untimely.

On September 25, 2017, Bustos-Chavez filed the instant § 2254 habeas application, raising the following issues: (1) his trial counsel was ineffective for failing to arrange an interpreter for out-of-court communications, (2) his trial counsel was ineffective for failing to investigate and present an alibi defense and failing to adequately prepare for cross-examination, and (3) his due process rights were violated by the admission of prior bad acts into evidence. The district court ordered Respondents to file a pre-Answer response, addressing the affirmative defenses of timeliness and exhaustion of state remedies. Respondents asserted that all of Bustos-Chavez's claims were procedurally barred.

In a well-reasoned order, the district court explained why all of Bustos-Chavez's claims should be dismissed. As to the two ineffective assistance claims, the district court concluded Bustos-Chavez failed to present them to the Colorado Court of Appeals in a timely post-conviction motion. Because the claims were procedurally defaulted in state court, they were procedurally barred from federal habeas review. *Thomas v. Gibson*, 218 F.3d 1213, 1221 (10th Cir. 2000). The district court further concluded that Bustos-Chavez had not shown cause and actual prejudice for the default or a fundamental miscarriage of justice. The court

specifically rejected Bustos-Chavez's argument that he is actually innocent, concluding he had not introduced new reliable evidence to support his allegations of constitutional error. *See Schlup v. Delo*, 513 U.S. 298, 324 (1995) ("To be credible, such a claim requires petitioner to support his allegations of constitutional error with new reliable evidence—whether it be exculpatory scientific evidence, trustworthy eyewitness accounts, or critical physical evidence—that was not presented at trial.").

As to Bustos-Chavez's remaining claim, the district court concluded it was unexhausted because it had not been fairly presented to the Colorado courts as a federal constitutional violation. *Duncan v. Henry*, 513 U.S. 364, 366, (1995) (holding a § 2254 habeas claim is not exhausted unless it was presented to the state courts as a federal constitutional claim). The district court further ruled this unexhausted claim would be procedurally barred by an independent and adequate state rule if Bustos-Chavez attempted to raise it in state court. *See* Colo. R. Crim. P. 35(c)(3)(VII) ("The court shall deny any claim that could have been presented in an appeal previously brought or postconviction proceeding previously brought."). Thus, the claim was subject to an anticipatory procedural bar. *See Moore v. Schoeman*, 288 F.3d 1231, 1233 n. 3 (10th Cir. 2002) ("'Anticipatory procedural bar' occurs when the federal courts apply procedural bar to an unexhausted claim that would be procedurally barred under state law if the petitioner returned to state court to exhaust it."). After concluding Bustos-Chavez

failed to demonstrate cause for the default and actual prejudice or a fundamental miscarriage of justice, the district court ruled the third claim was procedurally barred from federal habeas review and dismissed it.[1] *See Smith v. Workman*, 550 F.3d 1258, 1274 (10th Cir. 2008) ("Claims that are defaulted in state court on adequate and independent state procedural grounds will not be considered by a habeas court, unless the petitioner can demonstrate cause and prejudice or a fundamental miscarriage of justice.").

The granting of a COA is a jurisdictional prerequisite to Bustos-Chavez's appeal from the denial of his § 2254 petition. *Miller–El v. Cockrell*, 537 U.S. 322, 336 (2003). Bustos-Chavez is not entitled to a COA unless he makes "a substantial showing of the denial of a constitutional right," 28 U.S.C. § 2253(c)(2), by demonstrating that "reasonable jurists could debate whether (or, for that matter, agree that) the petition should have been resolved in a different manner or that the issues presented were adequate to deserve encouragement to proceed further." *Miller–El*, 537 U.S. at 336 (quotations omitted). In evaluating whether Bustos-Chavez has satisfied his burden, this court undertakes "a preliminary, though not definitive, consideration of the [legal] framework"

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[1]The district court also ruled that any appeal from its order of dismissal would not be taken in good faith and therefore *in forma pauperis* status was denied for the purpose of an appeal. We also **deny** Bustos-Chavez's application to proceed *in forma pauperis* on appeal. He is ordered to immediately remit the full balance of the appellate filing fee.

applicable to each of his claims. *Id.* Bustos-Chavez need not demonstrate his appeal will succeed to be entitled to a COA, but he must "prove something more than the absence of frivolity or the existence of mere good faith." *Id.*

Having reviewed Bustos-Chavez's appellate filings, the district court's order, and the entire record before this court pursuant to the framework set out by the Supreme Court in *Miller–El*, we conclude Bustos-Chavez is not entitled to a COA. Reasonable jurists could not debate the correctness of the district court's ruling that the three claims raised in Bustos-Chavez's § 2254 petition were subject to either a procedural bar or an anticipatory procedural bar. Accordingly, this court **denies** Bustos-Chavez's request for a COA and **dismisses** this appeal.

ENTERED FOR THE COURT

Michael R. Murphy
Circuit Judge

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