20-6561

No. _____

Provided to South Bay Corr. and Rehab. Facility on 11-12-2020 for mailing.

IN THE
SUPREME COURT OF THE UNITED STATES

JESUS N. RODRIGUEZ — PETITIONER

VS.

STATE OF FLORIDA— RESPONDENT

UNITED STATES COURT OF APPEAL
ELEVENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

JESUS N. RODRIGUEZ M 61525#
South Bay Corr. Facility
P.O. Box 7171 South Bay, Florida 33493

QUESTION(S) PRESENTED

WHETHER THE DISTRICT COURT INVITED ERROR RESULTING IN FUNDAMENTAL PLEADING DEFECT BY PERMITTING "INCORPORATED GROUNDS" NOT EXPLAINED IN THE PETITION TO GO FORWARD, INTENTIONALLY CREATING WINDFALL FOR THE RESPONDENT BY STATING THE GROUNDS WOULD BE CONSIDERED AS A REPLY TO THE ANSWER, WHICH DID NOT ADDRESS ANY THEREOF. THE UNCORRECTED DEPRIVATION WARRANTS SUPERVISORY AUTHORITY OF THIS COURT, WHERE RULE 4, RHCP AND . ARE DEFIED, PRECEDENT IS LACKING AND PETITIONER WILL PERISH IN PRISON WITHOUT INTERVENTION.

LIST OF PARTIES

[XXX] All parties appear in the caption of the case on the cover page.

[ ] All parties **do not** appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

Florida Attorney General
Ashley Moody, Attorney General
Department of Legal Affairs
Office of the Attorney General
The Capitol PL-01
Tallahassee, Florida 32399-1050

TABLE OF CONTENTS

INDEX OF APPENDICES

TABLE OF AUTHORITIES CITED

CASES PAGE NUMBER

STATUTES AND RULES

OTHER

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

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

[ ] For cases from **federal courts**:

The opinion of the United States Court of Appeals appears at **Appendix A**, to the petition and is

[ ] reported at (the facility's computers are not updated so I am not sure if the decision was reported; or,
[ ] has been designated for publication but is not yet reported; or,
[++] is unpublished.

The opinion of the United States District Court appears at Appendix B to the petition and is

[++] reported at JESUS N. RODRIGUEZ vs. JONES, 2017 US Dist LEXIS 2126 (2020); or,
[ ] has been designated for publication but is not yet reported; or;
[ ] is unpublished.

[ ] For cases from **state courts**:

The opinion of the highest state court to review the merits appears at Appendix _____ to the petition and is

[ ] reported at
[ ] has been designated for publication but is not yet reported; or.
[ ] is unpublished.

The opinion of the Third District Appeals court appears at Appendix E, to the petition and id

JURISDICTION

[ ] For cases from **federal courts**:

The date on which the United States Court of Appeals, 11th Circuit decided my case was

Affirmed on May 11, 2020:

[++] A timely petition of rehearing was denied by the United States Court of Appeals on the following date: July 15, 2020, and a copy of the Order Denying Rehearing appears at Appendix A "1"

[++] An extension of time to file the petition for a writ of certiorari was granted to and including an additional 60 days per Order of the Court as a result of the Covid virus.

The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This matter regards petitioner's Sixth Amendment constitutional guarantee to Access to the Courts, as the District Court's actions nullified Petitioner's meaningful opportunity to have his constitutional claims heard.

It cannot be said that Petitioner was afforded Due Process of Law as the Federal Magistrate lead Petitioner to believe that the 25 grounds would be considered as a reply to the State's Answer. Procedurally this is impossible as the State never addressed any of these grounds. Such an assurance defies the very integrity of the process due.

STATEMENT OF CASE AND FACTS

The State of Florida charged Petitioner Rodriguez with the murder of his wife. The grand jury indicted him on (1) first-degree murder, (2) kidnapping, (3) burglary with an assault or battery, and (4) aggravated stalking. The evidence against him on the murder charge was all circumstantial, as his wife's body was never found.

The charges stem from a domestic dispute dating back to October of 2001, when Rodriguez's wife Isabel petitioned for divorce. She obtained a restraining order against Petitioner Rodriguez after she allegedly received a phone call from him threatening to kill her.*1 At trial, two witnesses, including the officer who served the injunction, testified that Rodriguez became very angry when he was served with the order and that he made threatening remarks to Isabel.

On November 13, 2001, Isabel became missing. Judith Almeida, who was a tenant on Isabel's property, testified that she received a call from Rodriguez asking her if she would be going to work the next morning and that she saw someone hiding behind a car on the property the next morning, while taking out the trash. Rodriguez's adult daughter, Rochelle, testified that she and Rodriguez had planned to take her car to his farm on the morning of November 13 for him to work on it. At Rodriguez's farm, Rochelle noticed a fire burning on the property and that

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[1] This alleged phone call was sprung on Petitioner at trial via testimony of his wife's divorce attorney. No mention of the call was made in discovery and the records of the wife's phone conclusively prove no such call was made. The ground was one of the ineffective assistance of counsel claims raised in state court postconviction and sought to be presented in the federal petition.

Rodriguez had scratches on his nose and was pressure cleaning his Lincoln Continental, which had been seen at Isabel's house earlier in the day. *[2] Petitioner Rodriguez's girlfriend also testified that he did not have scratches on his body before he left the house that day, but did have scratches on his back and nose when he returned in the evening.

On November 15, investigators transported Rodriguez's Lincoln Continental to the medical examiner's office for processing. The homicide detective that transported the vehicle testified that immediately upon opening the trunk, he noticed the smell of a decomposed body and the smell of a cleaning agent.*[3] The detective also testified that the entire trunk was soaked and was wet from condensation. On November 26, 2001, an investigating officer went to Isabel's home to serve a search warrant and encountered Petitioner Rodriguez on the property. Rodriguez invited the officer inside the home to show him the property, and told the officer that he need not worry about the restraining order because Isabel would never be coming back. Petitioner Rodriguez was arrested on April 11, 2002. While the detective was preparing paperwork on the arrest, Petitioner Rodriguez allegedly spontaneously stated that the police were mistaken about his motive for killing Isabel, namely that it was about money and not jealousy.

Petitioner Rodriguez testified on his own behalf at trial, admitting that he was at Isabel's home on November 13, to care for the many animals on the property

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[2] The pressure cleaner was an air compressor not a pressure washer.
[3] This testimony is nonsensical given that assuming all the other facts as true; Mrs. Rodriguez would have been in the trunk of the car for less than 30 minutes.

and to retrieve his Lincoln. The same was in violation of the restraining order. The jury found him guilty as charged on all four counts, and he was sentenced to life in prison for the murder and kidnapping counts, thirty years for the burglary count, and five years for the aggravated stalking count. These facts were derived from the opinion affirming Petitioner's Plenary Appeal. The same appears at **APPENDIX E,** Opinions Below.

Petitioner sought state postconviction relief wherein Petitioner raised 25 substantive grounds of ineffective assistance of trial counsel. (IAC) Petitioner was provided an evidentiary hearing on several of the grounds and via privately retained counsel presented witnesses and evidence on his behalf. The State postconviction Court (11th judicial Circuit, Miami, Fla.) denied relief with written order. Postconviction counsel failed to inform Petitioner of the denial. Apparently no notice of appeal was filed in time. An initial brief which is mandatory in such proceedings was not filed by Petitioner, as he continuously sought appointment of counsel and repeatedly denied. The appeal was apparently thereafter dismissed. A citation exists for denial of rehearing, but not for the dismissal of the appeal. The Federal Magistrate incorrectly found that the Third District Court of Appeal affirmed denial of the State Postconviction court's denial after hearing.

Petitioner proceeded to the Federal District Court, Southern District of Florida, Miami, via Writ of Habeas Corpus, 28 U.S.C. §2254, prepared by an unskilled fellow inmate.[4]

The inmate drafted the standard form and included an impermissible short cut by stating the grounds presented in the State Court postconviction motion were "incorporated and consolidated." Unfortunately, the writer did not identify the claims nor attach the postconviction motion to the Petition. Petitioner presented two additional claims that did contain some facts.

The District Court exercised It's screening obligation, found the Writ stated a prima facie case for relief, and issued Order To Show Cause. Respondent filed Answer on January 5, 2017, by addressing the two grounds presented and ignoring the "incorporated" grounds." Petitioner sought to amend the Petition on January 24, 2017. The Magistrate however, denied amendment and informed the parties that he would "consider the contents of [the motion] as a reply to the Answer, but did not treat the Motion itself as an Amended §2254 Petition. **APPENDIX A, at pg. #3,** Opinions Below.

Thusly, Petitioner as denied the opportunity to challenge his unconstitutional confinement resulting from conviction clearly obtained from ineffective assistance of trial counsel.

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[4] As noted by the Eleventh Circuit Court of Appeal, Petitioner speaks very limited English and suffered severe physical injury directly prior to preparation of the Writ, resulting from a fall down two flights of stairs. Petitioner is now wheel chair bound.

The Eleventh Circuit Court of Appeal issued opinion affirming denial primarily ignoring that the District Court invited error when finding the Petition legally sufficient and then knowingly misstating that It would treat the 25 grounds as a reply to the Answer. The opinion is presented at **APPENDIX A,** Opinions Below.

REASON FOR GRANTING PETITION

The number of pro-se petitions per 28 U.S.C. §2254 continue to increase and this cause presents a clear example of exactly how a Federal District Court's screening procedure should not operate. If the Motion For Leave to Amend was to be denied, then order should have entered accordingly. To assure petitioner that the grounds would be considered as a reply to the Answer (which ignored the grounds) was equivalent to ensuring that the grounds were never considered. Correcting this cause would guidance regarding implementation of Rule 4 and set forth framework by which a Federal District Court may discharge its screening obligation of petitions clearly failing to state a claim. Such guidance would reduce needless expenditures of judicial resources and thereby facilitate the interests of justice as liberty finds no refuge in a jurisprudence of doubt.

What could be more unfair to a disabled pro se petitioner relying on the inept services of a fellow inmate, then to be assured by a Federal magistrate that his grounds would be considered, only to be later faulted by the same Magistrate for not having pleaded the grounds. In good faith the naive Petitioner proceeded with the court's assurance only to be lead squarely into the ultimate form of default.

Command of predecessor to 28 USCS § 2243 is "to dispose of the party as law and justice require;" all the freedom of equity procedure is thus prescribed; and substantial justice, promptly administered, is ever the rule in habeas corpus. Storti v. Massachusetts, 183 U.S. 138, 22 S. Ct. 72, 46 L. Ed. 120 (1901).

The law in the Eleventh Circuit Court of Appeal as regards review and screening of a Petition prior to requiring Answer was clear at the time of Petitioner's Federal presentation and appeal. Rule 4, Rules Governing Section 2254 Cases *requires* district courts to dismiss petitions without ordering the State to respond if "it plainly appears from the petition and any attached exhibits that the petitioner is not entitled to relief." This preliminary review calls on a district court to perform a screening function, ordering summary dismissal where a petition makes no meritorious claim to relief.

To survive Rule 4 review, a 28 U.S.C.S. § 2254 petition *must set forth facts* that, if true, would establish a constitutional violation entitling the petitioner to relief. The §2254 petition must comply with the fact pleading requirements of Habeas Rule 2(c) and (d) to *survive* dismissal under Rule 4. If a petition does not set forth a *sufficient factual basis* for habeas relief, the petition is legally insufficient on its face, and the district court must dismiss it. Borden v. Allen, 646 F.3d 785, 810 (11th Cir. 2011) (holding that a § 2254 petition must comply with the "fact pleading requirements of [Habeas] Rule 2(c) and (d)" to survive dismissal under Rule 4). If a petition does not set forth a sufficient factual basis for habeas relief, the petition is "legally insufficient on its face," and the district court must dismiss it. McFarland v. Scott, 512 U.S. 849, 856, 114 S. Ct. 2568, 2572, 129 L. Ed. 2d 666 (1994). Cited in Paez v. Secretary, Florida Department Of Corrections, 947 F3d 649, 653 (11th Cir. 2020)

The District Court screened the Petition and undoubtedly noticed the pleading format, that the twenty-five grounds were incorporated by reference. The District Court found this procedure acceptable, and the Petition found to be sufficient. The District Court permitted the process to proceed and ordered Answer.

Review of the Motion For Leave to Amend reveals that Petitioner alleged that the Amendment was necessary as the 25 grounds were not addressed in the Answer. The District Court denied the Motion For Leave To Amend and in doing so, the Docket entry notes that the 25 grounds would be "considered by the Court as a reply" to the State's Response—Answer.

Thereafter, the Federal Magistrate entered Report and Recommendation "flipping the script" as follows: "Petitioner also asks this Court to order a new trial based on the 25 grounds presented herein. However, Petitioner does not articulate what those claims are." The R&R continues: "To the extent Petitioner asks for a new trial based on the 25 claims presented herein, petitioner only presented two claims in his federal habeas petition. This Court cannot be left to speculate as to what the other 25 claims might be. To that extent, Petitioner fails to state any claims other then the two addressed herein this report. As such, his request for a new trial based on 25 claims should be denied." **5** OPINION at **APPENDIX B**

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[5] In a footnote regarding the error created by the Magistrate, the Court states: Petitioner is cautioned that arguments not raised by Petitioner before the magistrate judge cannot be raised for the first time in objections to the undersigned's (citations omm.) "Parties must take before the magistrate, 'not only their best shot but all of the shots.'", Thus, [w]here a party raises an argument for the first time in an objection to a report and recommendation, the district court may exercise its discretion and decline to consider the argument." Here, if Petitioner

Petitioner respectfully contends that in no manner can this process be just. In no stretch of Due Process can this procedure comply with "all the freedom of equity procedure is thus prescribed; and substantial justice, promptly administered, is ever the rule in habeas corpus." Storti v. Massachusetts, 183 U.S. 138, 22 S. Ct. 72, 46 L. Ed. 120 (1901).

CONCLUSION

Correcting this facial, substantial injustice is sought, as only this Court can correct this mater. The Petition for a Writ Of Certiorari respectfully, should be granted.

Respectfully Submitted,

Jesus N. Rodriguez, M61525
SBCRF
P.O. Box 7171
SouthBay, Fla. 33493

Certificate of Mailing

I certify that I, Jesus N. Rodriguez, M61525 placed this Petition For A Writ Of Certiorari in the hands of South Bay Correctional Facility officials for mailing to: United States supreme Court one first street N.E. Washington DC 20543 and **Florida Attorney General** Ashley Moody, Attorney General_Department of Legal Affairs_Office of the Attorney General_The Capitol PL-01 Tallahassee, Florida 32399-1050_on NOV 12 2020.

/s/ Jesus Rodriguez

attempts to raise a new claim or argument in support of this § 2254 motion, the court should exercise its discretion and decline to address the newly-raised arguments.

IN THE
SUPREME COURT OF THE UNITED STATES

JESUS N. RODRIGUEZ — PETITIONER

VS.

STATE OF FLORIDA — RESPONDENT

PROOF OF SERVICE

I, JESUS N. RODRIGUEZ, do so swear or declare that on this date, November ____, 2020, as required by Supreme Court Rule 29 I have served the enclosed MOTION FOR LEAVE TO PROCEED IN FORMA PRUPERIS and PETITION FOR A WRIT OF CERTIORARI on each party to the above proceeding or that party's counsel, and on every other person required to be served, by depositing an envelope containing the above documents in the United States mail properly addressed to each of them and with first-class postage prepaid, or delivered to a third-party commercial carrier for the delivery within 3 calendar days.

The names and addresses of those served are as follows:

Florida Attorney General
Ashley Moody, Attorney General
Department of Legal Affairs
Office of the Attorney General
The Capitol PL-01
Tallahassee, Florida 32399-1050

I declare under penalty of perjury that the foregoing is true and correct.

Executed on November 12, 2020.

Jesús Rodriguez
(Signature)

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

JESUS N. RODRIGUEZ — PETITIONER

VS.

STATE OF FLORIDA— RESPONDENT

APPENDIX (OPINIONS BELOW)

JESUS N. RODRIGUEZ M 61525#
South Bay Corr. Facility
P.O. Box 7171 South Bay, Florida 33493

APPENDIX A
Eleventh Circuit Court Of Appeal Opinion Affirming

APPENDIX A
Eleventh Circuit Court Of Appeal Opinion Affirming

[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 18-12699
Non-Argument Calendar

D.C. Docket No. 1:16-cv-23755-KMW

JESUS N. RODRIGUEZ,

Petitioner-Appellant,

versus

ATTORNEY GENERAL, STATE OF FLORIDA,
FLORIDA DEPARTMENT OF CORRECTIONS,

Respondent-Appellee.

Appeal from the United States District Court
for the Southern District of Florida

(May 11, 2020)

Before JORDAN, NEWSOM, and LUCK, Circuit Judges.

PER CURIAM:

Jesus Rodriguez appeals the district court's denial of his motion to amend his 28 U.S.C. § 2254 petition for writ of habeas corpus. We affirm.

FACTUAL BACKGROUND AND PROCEDURAL HISTORY

On September 1, 2016, Rodriguez filed a pro se § 2254 petition in the Southern District of Florida. The petition asserted two claims that are not at issue on appeal. Separately, the petition also noted that Rodriguez had raised twenty-five claims in his state postconviction motion and that those claims were "incorporated and consolidated" into the petition. However, the petition did not describe the nature of those incorporated claims, nor was Rodriguez's state postconviction motion attached to the petition.

On January 5, 2017, the Secretary of the Florida Department of Corrections filed a response. The secretary addressed the merits of the two claims raised in Rodriguez's petition and did not address the twenty-five claims that Rodriguez sought to incorporate from his state postconviction motion.

On January 24, 2017, Rodriguez filed a motion to amend his petition. The motion copied the twenty-five claims Rodriguez had previously tried to incorporate from his state postconviction motion. The motion also set forth two claims that Rodriguez had raised on direct appeal and two claims that Rodriguez had raised in a

state habeas petition. Rodriguez asserted that those four additional claims were unknown to him until the secretary filed portions of the state court record as exhibits in response to his § 2254 petition. Rodriguez also claimed that he relied on other prisoners to assist him, he suffered from "serious and severe head injuries," and he was unable to read English. The magistrate judge said he would "consider the contents of [the motion] as a reply to the [secretary's] response," but he did not treat the motion itself as an amended § 2254 petition.

On March 14, 2017, Rodriguez filed a second motion to amend his § 2254 petition or, in the alternative, a motion to file a reply to the secretary's response. Rodriguez asserted that his § 2254 petition was "wholly inadequate" because he relied on another inmate to help him prepare the petition and was misled about that inmate's capabilities. Rodriguez explained that he relied on the same inmate to prepare his first motion to amend and acknowledged that the motion was defective because it did not "follow proper format," "[did] not raise Federal Constitutional violations," and did not "raise Federal case law to support the Constitutional violations in the State Court proceedings." Rodriguez further stated that his first motion to amend "lack[ed] substance, format, and procedure" and "varie[d] so vastly from the standard required format[] that it should be construed as a nullity." Rodriguez sought leave to amend his petition under Federal Rule of Civil Procedure 15 and argued that it would be unjust to deny him leave because he was "serving a

life sentence and [could file] a properly prepared Petition." He claimed that he was "not causing undue delay" and had not prejudiced the secretary.

In his order, the magistrate judge said "the time by which to file an amended petition ha[d] passed because the [secretary] ha[d] already filed a response," but Rodriguez could file a reply to the secretary's response. Rodriguez later filed a reply addressing the secretary's arguments but did not mention the twenty-five claims from the state postconviction motion.

On December 22, 2017, the magistrate judge entered a report and recommendation concluding that Rodriguez's petition should be denied. In doing so, the magistrate judge considered only the two claims expressly raised in Rodriguez's petition. The magistrate judge acknowledged that Rodriguez had sought to incorporate twenty-five claims from his state postconviction motion but stated that Rodriguez failed to "articulate what those [claims] are." The magistrate judge added that the court "[could not] be left to speculate as to what the other twenty-five claims might be." Rodriguez timely objected to the magistrate judge's report and recommendation, arguing in part that the magistrate judge erred in not considering the contents of his first motion to amend.

On May 25, 2018, the district court entered an order overruling Rodriguez's objections and adopting the magistrate judge's report and recommendation. The district court also denied Rodriguez a certificate of appealability. Rodriguez timely

appealed and we granted a certificate of appealability on the following issue: "Whether the district court abused its discretion in denying Rodriguez's motions to amend his 28 U.S.C. § 2254 petition to specify 25 additional claims that he had sought to incorporate by reference in his original § 2254 petition."

STANDARD OF REVIEW

"Our review is limited to the issue specified in the certificate of appealability." Castillo v. United States, 816 F.3d 1300, 1306 (11th Cir. 2016). "[T]he granting or denial of leave to amend lies within the discretion of the trial court and is subject to reversal only for abuse of discretion." Moore v. Balkcom, 716 F.2d 1511, 1526–27 (11th Cir. 1983). "[W]hen employing an abuse-of-discretion standard, we must affirm unless we find that the district court has made a clear error of judgment[] or has applied the wrong legal standard." United States v. Frazier, 387 F.3d 1244, 1259 (11th Cir. 2004) (en banc). We liberally construe pleadings filed by pro se parties. Dixon v. Hodges, 887 F.3d 1235, 1237 (11th Cir. 2018).

DISCUSSION

Rodriguez argues that the district court abused its discretion by not considering his first motion to amend as an amended § 2254 petition because he was entitled to an amendment as a matter of course under Federal Rule of Civil Procedure 15(a)(1)(B). He claims that the district court committed a clear error in judgment by instead treating his first motion as a reply. He further argues that the district court

compounded its error by ignoring the contents of his motion and concluding that he failed to articulate the claims he sought to incorporate. Rodriguez acknowledges that he did not comply with the procedural rules, but he nonetheless argues that he substantially complied with the requirements.

As to the first motion to amend, we conclude the district court did not abuse its discretion in considering the motion as a reply rather than an amended petition. Because Rodriguez sought to amend within twenty-one days of service of the secretary's response, he could amend his petition as a matter of course and didn't need to file a motion or ask for leave. See Fed. R. Civ. P. 15(a)(1)(B). Even giving it a liberal construction, the first motion to amend could not be considered an amended petition. The applicable rules set forth clear requirements for a § 2254 petition, including that petitions must "substantially follow" the form in the rules and give the district court the critical information required by the form. See Rule 2(c)–(d) of the Rules Governing § 2254 Cases; see also McFarland v. Scott, 512 U.S. 849, 856 (1994) ("Habeas corpus petitions must meet heightened pleading requirements, see 28 U.S.C. § 2254 Rule 2(c) . . . ."). Here, Rodriguez's first motion did not comply with those requirements. Indeed, Rodriguez admitted as much, telling the district court to disregard it because it lacked substance, did not raise federal constitutional violations, and did not follow the proper format and procedure. Because of these defects, Rodriguez asked the district court to treat the first motion

to amend "as a nullity." We cannot say the district court abused its discretion when it did exactly what Rodriguez asked it to do. Cf. Frazier, 387 F.3d at 1259 ("By definition . . . under the abuse of discretion standard of review there will be occasions in which we affirm the district court even though we would have gone the other way had it been our call. That is how an abuse of discretion standard differs from a de novo standard of review. As we have stated previously, the abuse of discretion standard allows a range of choice for the district court, so long as that choice does not constitute a clear error of judgment." (citation and quotation marks omitted)).

As to the second motion to amend, even giving his brief a liberal construction, Rodriguez doesn't appear to argue that the district court abused its discretion in denying leave to amend under Rule 15(a)(2). He seems to have abandoned any issue regarding the denial of the second motion. See Singh v. U.S. Att'y Gen., 561 F.3d 1275, 1278 (11th Cir. 2009) ("[A]n appellant's simply stating that an issue exists, without further argument or discussion, constitutes abandonment of that issue and precludes our considering the issue on appeal."). But even if this issue had not been abandoned, we would not find an abuse of discretion. The second motion asked the district court for one of two things: leave to file an amended petition; or, "in the alternative, to serve a reply to the [secretary's] response." The district court granted Rodriguez's alternative request and ordered that he "may file a reply to the [secretary's] response on or before March 29, 2017." Rodriguez filed a reply but

did not mention or argue the twenty-five claims from his state postconviction motion. Given that the district court gave Rodriguez the relief he asked for and Rodriguez didn't take advantage of it, we cannot say there was an abuse of discretion.

AFFIRMED.