FILED
United States Court of Appeals
Tenth Circuit

October 21, 2020

Christopher M. Wolpert
Clerk of Court

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

ERIK SANCHEZ,

Petitioner - Appellant,

v.

TERRY JACQUES, Warden of the Limon Correctional Facility,

Respondent - Appellee.

No. 20-1253
(D.C. No. 1:20-CV-00427-LTB-GPG)
(D. Colo.)

ORDER DENYING CERTIFICATE OF APPEALABILITY*

Before **PHILLIPS**, **MURPHY**, and **McHUGH**, Circuit Judges.

Erik Sanchez, a Colorado state prisoner proceeding pro se,[1] seeks a certificate of appealability ("COA") to challenge a district court order denying his petition for a writ of habeas corpus under 28 U.S.C. § 2254. He also moves to supplement the record and to proceed in forma pauperis. Although we grant Sanchez's motion to proceed in forma pauperis, we deny both his motion to supplement the record and his request for a COA.

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* This order is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. It may be cited, however, for its persuasive value consistent with Fed. R. App. P. 32.1 and 10th Cir. R. 32.1.

[1] Because Sanchez appears pro se, we liberally construe his pleadings, stopping short of serving as his advocate. *See United States v. Pinson*, 584 F.3d 972, 975 (10th Cir. 2009).

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BACKGROUND

I. State Court Proceedings

In June 2016, several Colorado police officers in patrol cars pursued Sanchez after an officer spotted him speeding through a residential area in his car. One of the police officers—in a fully marked patrol car with his lights and siren activated—tried to pull Sanchez over but was unable to do so. Sanchez eventually stopped in a Taco Bell parking lot allegedly to meet friends for dinner. Two officers pulled their SUV behind his car, got out, and, with guns drawn, ordered Sanchez and his passenger to exit the car.

In response, Sanchez twice rammed the back of his car into the officers' SUV.[2] Sanchez then sped away, forcing another officer standing in front of Sanchez's car to jump out of the way to avoid being run over. Another car chase ensued. Ultimately, Sanchez crashed and abandoned his car, and officers arrested him as he tried to flee on foot.

On June 10, 2016, Sanchez was charged in Colorado state court with two counts of first-degree assault, two counts of attempted first-degree assault by extreme indifference, one count of vehicular eluding, and one count of possession of drug paraphernalia. On March 10, 2017, he pleaded guilty to two of the five charges—attempted first-degree assault by extreme indifference and vehicular eluding. At the

[2] Sanchez denied backing his car into the officers' SUV a second time.

plea hearing, the government set forth a short factual basis covering the entire episode:

> On June 10th just after midnight, Mr. Sanchez, you were operating a motor vehicle. There was a chase.
>
> At some point you were corralled behind a Taco Bell. Officers got out of the car; you back up towards them, hit the car, backed up again, hit the car again. They got out of harm's way and you drove away.

R. at 85. After accepting Sanchez's two guilty pleas, the trial court sentenced Sanchez to two consecutive terms of imprisonment: six years for the attempted assault and three years for the vehicular eluding.

On July 24, 2017, Sanchez filed in the trial court a "Motion to Correct Illegal Sentence" ("Rule 35(a) Motion") under Colorado Rule of Criminal Procedure 35(a). In short, he argued that Colorado law required the trial court to impose concurrent sentences because the charges arose out of the same incident and identical evidence supported both convictions. *See* Colo. Rev. Stat. § 18-1-408(3). In a single sentence near the end of the Rule 35(a) Motion, Sanchez asserted that the "[t]rial court's order to run Mr. Sanchez's [sentences consecutively] violated Mr. Sanchez's 8th and 14th Amendments to the Constitution of the United States and the due process clause of . . . Colorado's Constitution." R. at 131.

The trial court denied the Rule 35(a) Motion, ruling that identical evidence didn't support Sanchez's two convictions. The trial court explained that, although the assault "was committed the moment [Sanchez] accelerated his car into the officers' SUV," the vehicular eluding began when the officers tried to stop Sanchez before he

stopped at Taco Bell "and continued as [officers] attempted to arrest [Sanchez] at the Taco Bell." *Id.* at 137. This defeated Sanchez's one-sentence constitutional claim.

Sanchez appealed the decision to the Colorado Court of Appeals. In his opening brief, Sanchez advanced three arguments. First, Sanchez reasserted his state-law statutory argument that the court could impose only concurrent sentences, because, he said, identical evidence supported his two convictions. Second, he asserted that the allegedly insufficient factual basis for the vehicular-eluding charge violated the Due Process and Equal Protection Clauses of the Fourteenth Amendment.[3] Third, he asserted (in a new claim) that the trial court denied him the opportunity to dispute the sufficiency of the factual basis relied on for the vehicular-eluding charge, in violation of his right under the Sixth Amendment's Confrontation Clause (not specifying what in the record supported this allegation).

The Colorado Court of Appeals affirmed. Having reviewed the factual basis the trial court established for the attempted assault charge at the plea hearing, the court held that the proffered basis "in fact provided a factual basis for both counts." *Id.* at 85. Because the factual basis recounted Sanchez's ramming his car into the officers' SUV and his eluding before and after this ramming, the court found that the trial court had not erred by imposing consecutive sentences.

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[3] Sanchez's Rule 35(a) Motion in the trial court referenced only a violation of his "Fourteenth Amendment" rights; he didn't specifically discuss his due process and equal protection rights until his opening brief in the Colorado Court of Appeals.

As to Sanchez's federal claims, the court denied them on both procedural grounds and on the merits. Because Sanchez had raised his constitutional claims "for the first time on appeal," the court concluded he had forfeited them. *Id.* at 82. Regardless, the court also denied them on the merits because "there was a factual basis for the vehicular eluding count." *Id.* at 82 n.1.

II. Federal Court Proceedings

In his § 2254 petition for a writ of habeas corpus, Sanchez reasserts the same constitutional arguments he raised in the Colorado Court of Appeals. He premises his constitutional claims on his disagreement with that court's conclusion that Sanchez's factual basis covered both convictions.

The magistrate judge didn't reach the merits of Sanchez's claims. Instead, he recommended denying Sanchez's petition on grounds that Sanchez had not fairly presented his federal constitutional claims to Colorado's state courts. Further, the magistrate judge found that Sanchez's claims were procedurally barred because Colorado rules would preclude Sanchez from returning to Colorado's courts to exhaust his federal claims. After considering the magistrate judge's report de novo, the district court adopted the report, denied Sanchez a COA, and dismissed the case.

DISCUSSION

Under 28 U.S.C. § 2253(c)(1)(A), Sanchez may appeal the district court's decision only if we issue a COA. To be entitled to a COA, he must make "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). Where, as here, the district court rejected the petitioner's habeas application on

procedural grounds, he must show (1) "that jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right," and (2) "that jurists of reason would find it debatable whether the district court was correct in its procedural ruling." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000).

"Each component of the § 2253(c) showing is part of a threshold inquiry, and a court may find that it can dispose of the application in a fair and prompt manner if it proceeds first to resolve the issue whose answer is more apparent from the record and arguments." *Id.* at 485. Although "[t]he procedural issue is frequently the easier one to resolve," *Burke v. Bigelow*, 792 F. App'x 562, 564 (10th Cir. 2019), here, we conclude the issue whose answer is more apparent concerns whether the petition states a valid claim of the denial of a constitutional right. When we deny a COA on the first prong, "we need not examine the district court's procedural ruling." *United States. v. Springfield*, 337 F.3d 1175, 1178 (10th Cir. 2003).

Under the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), "the standard of review applicable to a particular claim depends on how that claim was resolved by the state courts." *Byrd v. Workman*, 645 F.3d 1159, 1165 (10th Cir. 2011) (citation omitted). When the state court has adjudicated a claim on the merits, we may grant relief only if the state court's decision "was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States," 28 U.S.C. § 2254(d)(1), or "was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding," *id.* § 2254(d)(2). And we must apply AEDPA's deferential

standard for evaluating state-court rulings when considering requests for a COA. *See Dockins v. Hines*, 374 F.3d 935, 938 (10th Cir. 2004) ("AEDPA's deferential treatment of state court decisions must be incorporated into our consideration of a habeas petitioner's request for COA.").

We first consider whether the state court adjudicated Sanchez's federal claims on the merits. Sanchez argues that "[i]ts clear the Colorado Court of Appeals ruled on the merits of Mr. Sanchez's federal habeas corpus claims." Opening Br. 35. We agree. On plain error review, the Colorado Court of Appeals rejected Sanchez's federal constitutional claims because "there was a factual basis for the vehicular eluding count."[4] R. at 82 n.1. Because the state adjudicated Sanchez's claims on the merits, Sanchez can obtain a COA only if reasonable jurists could debate whether the state's adjudication was contrary to clearly established federal law or was based on an unreasonable determination of the facts. Sanchez fails to meet that burden.

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[4] When a state court summarily denies relief for a federal claim on plain-error review, whether its disposition is entitled to § 2254(d) deference "depends on the substance of the plain-error disposition." *Cargle v. Mullin*, 317 F.3d 1196, 1206 (10th Cir. 2003). "A state court may deny relief for a federal claim on plain-error review because it finds the claim lacks merit under federal law. In such a case, . . . the state court's disposition would be entitled to § 2254(d) deference because it was a form of merits review." *Id.* (internal citation omitted). But sometimes a state court's cursory explanation prevents the court from determining whether the court's review was merits-based. *Douglas v. Workman*, 560 F.3d 1156, 1178 (10th Cir. 2009). In such instances, "our cases require us to assume that the state's review is on the merits and thus afford it § 2254(d) deference." *Id.* (applying § 2254(d) deference where the state court's opinion stated only that it "reviewed" the petitioner's prosecutorial misconduct claims that were not properly preserved and found no plain error) (citation omitted). Thus, although the Colorado Court of Appeals didn't detail its reasons for denying relief, we must assume its review was on the merits.

"Whether the law is clearly established is the threshold question under § 2254(d)(1)." *House v. Hatch*, 527 F.3d 1010, 1015 (10th Cir. 2008) (citation omitted). "That is, without clearly established federal law, a federal habeas court need not assess whether a state court's decision was 'contrary to' or involved an 'unreasonable application' of such law." *Id.* at 1017 (quoting § 2254 (d)(1)) (citation omitted). "Clearly established law is determined by the United States Supreme Court, and refers to the Court's 'holdings, as opposed to the dicta.'" *Id.* at 1015 (quoting *Lockyer v. Andrade*, 538 U.S. 63, 71 (2003)). Sanchez fails to direct us to any Supreme Court precedent holding that a state trial court's failure to identify which specific facts support a defendant's vehicular eluding charge violates the defendant's constitutional rights. Nor has our independent research identified any such case. This absence of clearly established law "is dispositive under § 2254(d)(1)." *Id.* at 1018.

Sanchez's petition fares no better under § 2254(d)(2). Section 2254(d)(2) presents "a daunting standard—one that will be satisfied in relatively few cases." *Byrd*, 645 F.3d at 1172 (citation omitted). "[E]ven if reasonable minds reviewing the record might disagree about the finding in question, on habeas review that does not suffice to supersede the [state] court's determination." *Wood v. Allen*, 558 U.S. 290, 301 (2010) (brackets, ellipsis, and internal quotation marks omitted).

Reasonable jurists couldn't debate whether the state court's adjudication was based on an unreasonable determination of the facts. The Colorado Court of Appeals reviewed the factual basis the trial court established at the plea hearing and concluded that "the factual basis provided for the attempted assault count in fact

provided a factual basis for both counts." R. at 85. That is, while the attempted first-degree assault conviction "was based on Sanchez's act of driving his car into the officer's vehicle," the vehicular-eluding conviction "was based on the chase that occurred before the attempted assault and the chase that occurred when Sanchez drove away from the scene in his car after the attempted assault." *Id.* Accordingly, the court ruled that "the evidence supporting the attempted assault charge was not identical to the evidence supporting the eluding charge," so the trial court "was not required to sentence Sanchez concurrently." *Id.* at 86. We find no error in the Colorado Court of Appeals' factual findings that support its holding.

In sum, reasonable jurists couldn't debate whether the state court's adjudication was contrary to clearly established federal law or was based on an unreasonable determination of the facts.

CONCLUSION

For the foregoing reasons, we conclude that jurists of reason couldn't debate whether Sanchez's petition states a valid claim of the denial of a constitutional right. We thus **DENY** Sanchez's request for a COA and **DISMISS** this matter.

We further deny Sanchez's motion to supplement the record but grant his motion to proceed on appeal in forma pauperis. For Sanchez's benefit, we note that 28 U.S.C. § 1915 doesn't allow litigants to avoid payment of filing and docketing fees—only the *prepayment* of those fees.

He is still required to pay the full amount of the filing fee in this matter. *See* § 1915(b).

Entered for the Court

Gregory A. Phillips
Circuit Judge

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 20-cv-00427-LTB-GPG

ERIK SANCHEZ,

Applicant,

v.

TERRY JACQUES, Warden of the Limon Correctional Facility,

Respondent.

ORDER

This matter is before the Court on the Recommendation of United States Magistrate Judge (ECF No. 15) filed April 21, 2020. On May 4, 2020, Applicant filed a "Motion for Enlargement of Time to File Objections to Recommendation of United States Magistrate Judge and Request for Appointment of Counsel to File the Objections" (ECF No. 16). Included in the motion are four objections to the Recommendation. (*See* ECF No. 16 at pp.6-8.) On May 7, 2020, Magistrate Judge Gordon P. Gallagher granted the motion in part by allowing additional time until June 8, 2020, to file objections. (*See* ECF No. 17.) Magistrate Judge Gallagher denied Applicant's request for appointment of counsel to file the objections. (*See id.*)

Applicant has not filed any additional written objections within the time allowed. However, in light of the timely written objections included in the motion filed on May 4, 2020, the Court has reviewed the Recommendation *de novo* in light of the file and

record in this case. On *de novo* review the Court concludes that the Recommendation is correct.

Accordingly, for the foregoing reasons, it is

ORDERED that the Recommendation of United States Magistrate Judge (ECF No. 15) is accepted and adopted. It is

FURTHER ORDERED that the Application for a Writ of Habeas Corpus Pursuant to 28 U.S.C. § 2254 (ECF No. 1) is denied and the action is dismissed because Applicant's claims are procedurally barred. It is

FURTHER ORDERED that no certificate of appealability will issue because Applicant has not made a substantial showing of the denial of a constitutional right. It is

FURTHER ORDERED that leave to proceed *in forma pauperis* on appeal is denied without prejudice to the filing of a motion seeking leave to proceed *in forma pauperis* on appeal in the United States Court of Appeals for the Tenth Circuit. The Court certifies pursuant to 28 U.S.C. § 1915(a)(3) that any appeal from this dismissal would not be taken in good faith. It is

FURTHER ORDERED that all pending motions are denied as moot.

DATED: June 25, 2020

BY THE COURT:

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

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
Gordon P. Gallagher, United States Magistrate Judge

Civil Action No. 20-cv-00427-LTB-GPG

ERIK SANCHEZ,

Applicant,

v.

TERRY JACQUES, Warden of the Limon Correctional Facility,

Respondent.

RECOMMENDATION OF UNITED STATES MAGISTRATE JUDGE

This matter comes before the Court on the Application for a Writ of Habeas Corpus Pursuant to 28 U.S.C. § 2254 (ECF No. 1)[1] filed *pro se* by Applicant on February 18, 2020. The matter has been referred to this Magistrate Judge for recommendation (ECF No. 14.)[2]

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[1] "(ECF No. 1)" is an example of the convention I use to identify the docket number assigned to a specific paper by the Court's case management and electronic case filing system (CM/ECF). I use this convention throughout this Recommendation.

[2] Be advised that all parties shall have fourteen (14) days after service hereof to serve and file any written objections in order to obtain reconsideration by the District Judge to whom this case is assigned. Fed. R. Civ. P. 72(b). The party filing objections must specifically identify those findings or recommendations to which the objections are being made. The District Court need not consider frivolous, conclusive or general objections. A party's failure to file such written objections to proposed findings and recommendations contained in this report may bar the party from a de novo determination by the District Judge of the proposed findings and recommendations. *United States v. Raddatz*, 447 U.S. 667, 676-83 (1980); 28 U.S.C. § 636(b)(1). Additionally, the failure to file written objections to the proposed findings and recommendations within fourteen (14) days after being served with a copy may bar the aggrieved party from appealing the factual findings and legal conclusions of the Magistrate Judge that are accepted or adopted by the District Court. *Thomas v. Arn*, 474 U.S. 140, 155 (1985); *Moore v. United States*, 950 F.2d 656, 659 (10th Cir. 1991).

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The Court must construe the Application and other papers filed by Mr. Sanchez 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 be an advocate for a *pro se* litigant. *See Hall*, 935 F.2d at 1110.

The Court has reviewed the filings to date. The Court has considered the entire case file, the applicable law, and is sufficiently advised in the premises. This Magistrate Judge respectfully recommends that the Application be denied.

I. FACTUAL AND PROCEDURAL BACKGROUND

Mr. Sanchez is challenging the validity of his consecutive sentences in Denver District Court case number 16CR3754. He agreed to plead guilty to attempted first degree assault and vehicular eluding and he was sentenced to consecutive terms of six years on the attempted first degree assault count and three years on the vehicular eluding count. Mr. Sanchez did not file a direct appeal. He did file a postconviction motion in the trial court pursuant to Rule 35(a) of the Colorado Rules of Criminal Procedure challenging the imposition of consecutive sentences. The trial court denied the Rule 35(a) motion and, on January 31, 2019, the Colorado Court of Appeals affirmed the trial court's order. (*See* ECF No. 8-3.)

Mr. Sanchez claims in the Application that the trial court imposed consecutive sentences without a proper factual basis in violation of his rights to confrontation, due process, and equal protection. More specifically, Mr. Sanchez contends his confrontation rights were violated because he was not afforded an opportunity at his

providency hearing to challenge the factual basis that supported the trial court's imposition of a consecutive sentence for the vehicular eluding count. With respect to due process and equal protection, he apparently contends that violation of the Colorado statute governing consecutive sentences also violates those constitutional provisions.

On February 20, 2020, the Court ordered Respondent 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 remedies pursuant to 28 U.S.C. § 2254(b)(1)(A) if Respondent intends to raise either or both of those defenses in this action. On February 26, 2020, Respondent filed a Pre-Answer Response (ECF No. 8) arguing that Mr. Sanchez's claims are unexhausted and procedurally defaulted. Respondent also notes in the Pre-Answer Response that the proper Respondent is Terry Jacques, who is the warden of the prison in which Mr. Sanchez is confined, rather than the Attorney General of the State of Colorado. On April 1, 2020, in reply to the Pre-Answer Response, Mr. Sanchez filed a combined "Motion for Supplement Respondents Dean Williams and Terry Jacques to be Added as Respondents if Needed and Applicant's Reply to Respondent's Pre-Answer to Petition for Writ of Habeas Corpus" (ECF No. 12). The motion will be granted in part and Terry Jacques will be substituted as Respondent.

II. DISCUSSION

A. ONE-YEAR LIMITATION PERIOD

Respondents do not argue that this action is barred by the one-year limitation period in 28 U.S.C. § 2244(d).

B. EXHAUSTION OF STATE REMEDIES

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 petitioner has exhausted state remedies or that no adequate state remedies are available or effective to protect the petitioner's rights. *See O'Sullivan v. Boerckel*, 526 U.S. 838 (1999); *Dever v. Kan. 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. Peoples*, 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). 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). However, "[i]t is not enough that all the facts necessary to support the federal claim were before the state courts, or that a somewhat similar state-law claim was made." *Anderson v. Harless*, 459 U.S. 4, 6 (1982) (per curiam) (citation omitted). "If state courts are to be given the opportunity to correct alleged violations of prisoners' federal rights, they must surely be alerted to the fact that the prisoners are asserting claims under the United States Constitution." *Duncan v. Henry*, 513 U.S. 364, 365-66 (1995) (per curiam).

Finally, "[t]he 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 he has exhausted all available state remedies for each particular claim. *See Miranda v. Cooper*, 967 F.2d 392, 398 (10th Cir. 1992). A blanket statement that state remedies have been exhausted does not satisfy this burden. *See Olson v. McKune*, 9 F.3d 95 (10th Cir. 1993); *see also Fuller v. Baird*, 306 F. App'x 430, 431 n.3 (10th Cir. 2009) (stating a bald assertion unsupported by court records is insufficient to demonstrate state remedies are exhausted).

As noted above, Mr. Sanchez claims his confrontation rights were violated because he was not afforded an opportunity at his providency hearing to challenge the factual basis that supported the trial court's imposition of a consecutive sentence for the vehicular eluding count. He also claims that violation of the Colorado statute governing consecutive sentences violates due process and equal protection. Respondent contends that Mr. Sanchez did not fairly present these federal constitutional claims to the Colorado Court of Appeals. Mr. Sanchez counters that he fairly presented the claims to the state courts in his Rule 35(a) motion and on appeal from the denial of that motion to the Colorado Court of Appeals. In order to determine whether Mr. Sanchez has exhausted state remedies the Court has considered the Rule 35(a) motion (*see* ECF No. 12 at pp.17-28), the trial court's order denying the Rule 35(a) motion (*see id.* at pp.30-33), Mr. Sanchez's opening brief on appeal from the denial of the Rule 35(a) motion (*see* ECF No. 8-2), Mr. Sanchez's reply brief (*see* ECF No. 12 at pp.35-54), and the opinion of the Colorado Court of Appeals affirming the trial court's order (*see* ECF

No. 8-3). Mr. Sanchez also has submitted copies of various papers he filed in an effort to persuade the Colorado Supreme Court to grant certiorari review after the Colorado Court of Appeals affirmed the denial of his Rule 35(a) motion (*see* ECF No. 12 at pp.56-116), but those papers are not relevant to whether the federal constitutional claims in the Application were fairly presented to the Colorado Court of Appeals.

Mr. Sanchez claimed in the Rule 35(a) motion that the trial court was required under Colorado state law to impose concurrent rather than consecutive sentences for attempted first degree assault and vehicular eluding because both crimes arose from the same criminal episode and were supported by identical evidence. In a single sentence at the end of the state law argument Mr. Sanchez also asserted that the consecutive sentences "violated [the] 8th and 14th Amendments to the Constitution of the United States" as well as the Colorado Constitution. (*See* ECF No. 12 at p.26.) The trial court rejected the state law claim. The trial court did not address any constitutional claims.

Mr. Sanchez appealed to the Colorado Court of Appeals and presented three arguments in his opening brief. He first argued as a matter of state law that the trial court erred by imposing consecutive sentences because the convictions arose from a single criminal episode and proof of the vehicular eluding formed a substantial portion of the proof of attempted first degree assault. As his second argument Mr. Sanchez presented the following constitutional claim:

> Trial court violated Appellant Sanchez's due process & equal protection of law right when it failed to enter into evidence the factual basis of the actual conduct that would later serve as the basis to impose concurrent or consecutive sentences,

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> and/or serve as the basis for denying post conviction 35(a) motion to correct illegal sentence relief before it accepted the guilty plea for the vehicular eluding charge. (5th & 14th U.S.C.A.)

(ECF No. 8-2 at p.10 (some capitalization altered).) Mr. Sanchez's third argument in his opening brief raised another constitutional claim:

> Trial court violated Appellant Sanchez's confrontation right when it denied post conviction Rule 35(a) motion to correct illegal sentence relief based on factual basis conduct without allowing Appellant Sanchez the fair opportunity to dispute such allegations as trial court failed to enter into evidence the factual basis it later used to impose consecutive sentences and also use factual basis not entered into evidence to deny the post conviction Rule 35(a) motion to correct illegal sentence entitled before trial court accepted the guilty plea for the vehicular eluding charge. (6th &14 U.S.C.A.)

(*Id.* (some capitalization altered).) In his reply brief Mr. Sanchez also argued that his rights under *Apprendi v. New Jersey*, 530 U.S. 466 (2000), and *Blakely v. Washington*, 542 U.S. 296, 303 (2004), were violated.

The Colorado Court of Appeals declined to consider Mr. Sanchez's "argument that the district court violated his right to due process and equal protection when it failed to require a factual basis on the vehicular eluding count before it accepted his guilty plea" because he raised the claim for the first time on appeal in violation of Colorado procedural rules. (ECF No. 8-3 at p.3.) The Colorado Court of Appeals also declined to consider the *Apprendi* and *Blakely* argument because Mr. Sanchez violated Colorado procedural rules by raising that argument for the first time in a reply brief. (*See id.* at pp.3-4.) The Colorado Court of Appeals also did not address the Confrontation Clause claim.

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OBJECTION ONE

The Court agrees with Respondent that Mr. Sanchez did not fairly present to the Colorado Court of Appeals the federal constitutional claims he is asserting in the Application. Although Mr. Sanchez asserted a Confrontation Clause claim in his opening brief, he did not raise a Confrontation Clause claim in the Rule 35(a) motion filed in the trial court. Thus, like the due process and equal protection claims the Colorado Court of Appeals explicitly declined to consider because they were raised for the first time on appeal, the Confrontation Clause claim also was not fairly presented to the state appellate court. *See People v. Salazar*, 964 P.2d 502, 507 (Colo. 1998) ("It is axiomatic that issues not raised in or decided by a lower court will not be addressed for the first time on appeal."). The Court's review of the state court briefs reveals that Mr. Sanchez also did not raise before the Colorado Court of Appeals any claim that violation of the Colorado statute governing consecutive sentences also violated his federal constitutional rights to due process and equal protection. Therefore, the Court finds that Mr. Sanchez failed to exhaust state remedies for the claims in the Application.

OBJECTION TWO

OBJECTION THREE

C. PROCEDURAL DEFAULT

The Court may not dismiss the unexhausted claims for failure to exhaust state remedies if Mr. Sanchez no longer has an adequate and effective state remedy available to him. *See Castille*, 489 U.S. at 351. Here, the confrontation, due process, and equal protection claims are subject to an anticipatory procedural default because Mr. Sanchez no longer has an adequate and effective remedy available to him with respect to those claims. *See Coleman v. Thompson*, 501 U.S. 722, 735 n.1 (1991) (noting that, even if an unexhausted claim has not actually been raised and rejected by

the state courts on a procedural ground, the claim still is subject to an anticipatory procedural default if it is clear that the claim would be rejected because of an independent and adequate state procedural rule).

In particular, Rule 35(c)(3)(VII) of the Colorado Rules of Criminal Procedure prevents Mr. Sanchez from returning to state court to raise his federal constitutional claims in a new postconviction motion. Rule 35(c)(3)(VII) provides that, with limited exceptions not applicable to Mr. Sanchez, the state court must dismiss any claim that could have been presented in a prior appeal or postconviction proceeding.

Federal courts "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). Application of this procedural default rule in the habeas corpus context is based on comity and federalism concerns. *See Coleman*, 501 U.S. at 730.

"A state procedural ground is independent if it relies on state law, rather than federal law, as the basis for the decision." *English v. Cody*, 146 F.3d 1257, 1259 (10th Cir. 1998). A state procedural ground is adequate if it "was firmly established and regularly followed." *Beard v. Kindler*, 558 U.S. 53, 60 (2009) (internal quotation marks omitted).

Mr. Sanchez fails to demonstrate that Rule 35(c)(3)(VII) of the Colorado Rules of Criminal Procedure is not an independent and adequate state procedural rule. In any event, the Court finds it is independent because the rule relies on state rather than

federal law. Rule 35(c)(3)(VII) also is adequate because it is applied evenhandedly by Colorado courts. *See, e.g.*, *People v. Vondra*, 240 P.3d 493, 494-95 (Colo. App. 2010) (applying Crim. P. Rules 35(c)(3)(VI) and (VII) to reject claims that were or could have been raised in a prior proceeding); *see also LeBere v. Abbott*, 732 F.3d 1224, 1233 n.13 (10th Cir. 2013) (noting that several unpublished cases have indicated Colorado's rule barring claims that could have been raised previously is an independent and adequate state ground precluding federal habeas review). Therefore, the claims in the Application are procedurally defaulted and cannot be considered unless Mr. Sanchez demonstrates cause and prejudice or a fundamental miscarriage of justice. *See Jackson*, 143 F.3d at 1317.

Mr. Sanchez fails to demonstrate either cause and prejudice or a fundamental miscarriage of justice. As a result, the Court finds that Mr. Sanchez's claims are procedurally barred.

III. ORDER AND RECOMMENDATION

For the reasons set forth herein, this Magistrate Judge respectfully

ORDERS that the "Motion for Supplement Respondents Dean Williams and Terry Jacques to be Added as Respondents if Needed and Applicant's Reply to Respondent's Pre-Answer to Petition for Writ of Habeas Corpus" (ECF No. 12) is granted in part and Terry Jacques is substituted as Respondent in this action; and

RECOMMENDS that the Application for a Writ of Habeas Corpus Pursuant to 28 U.S.C. § 2254 (ECF No. 1) be denied and the action be dismissed because Applicant's claims are procedurally barred.

DATED April 21, 2020.

BY THE COURT:

Gordon P. Gallagher
United States Magistrate Judge

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 20-cv-00427-LTB-GPG

ERIK SANCHEZ,

Applicant,

v.

TERRY JACQUES, Warden of the Limon Correctional Facility,

Respondent.

ORDER

This matter is before the Court on the Recommendation of United States Magistrate Judge (ECF No. 15) filed April 21, 2020. On May 4, 2020, Applicant filed a "Motion for Enlargement of Time to File Objections to Recommendation of United States Magistrate Judge and Request for Appointment of Counsel to File the Objections" (ECF No. 16). Included in the motion are four objections to the Recommendation. (*See* ECF No. 16 at pp.6-8.) On May 7, 2020, Magistrate Judge Gordon P. Gallagher granted the motion in part by allowing additional time until June 8, 2020, to file objections. (*See* ECF No. 17.) Magistrate Judge Gallagher denied Applicant's request for appointment of counsel to file the objections. (*See id.*)

Applicant has not filed any additional written objections within the time allowed. However, in light of the timely written objections included in the motion filed on May 4, 2020, the Court has reviewed the Recommendation *de novo* in light of the file and

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record in this case. On *de novo* review the Court concludes that the Recommendation is correct.

Accordingly, for the foregoing reasons, it is

ORDERED that the Recommendation of United States Magistrate Judge (ECF No. 15) is accepted and adopted. It is

FURTHER ORDERED that the Application for a Writ of Habeas Corpus Pursuant to 28 U.S.C. § 2254 (ECF No. 1) is denied and the action is dismissed because Applicant's claims are procedurally barred. It is

FURTHER ORDERED that no certificate of appealability will issue because Applicant has not made a substantial showing of the denial of a constitutional right. It is

FURTHER ORDERED that leave to proceed *in forma pauperis* on appeal is denied without prejudice to the filing of a motion seeking leave to proceed *in forma pauperis* on appeal in the United States Court of Appeals for the Tenth Circuit. The Court certifies pursuant to 28 U.S.C. § 1915(a)(3) that any appeal from this dismissal would not be taken in good faith. It is

FURTHER ORDERED that all pending motions are denied as moot.

DATED: June 25, 2020

BY THE COURT:

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

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 20-cv-00427-LTB-GPG

ERIK SANCHEZ,

Applicant,

v.

TERRY JACQUES, Warden of the Limon Correctional Facility,

Respondent.

ORDER DENYING MOTION TO RECONSIDER

This matter is before the Court on the "Motion for Rehearing and Leave to Accept Applicant's Objections to Recommendation of United States Magistrate Judge Filed Before Motion for Extension of Time Had Been Ruled On" (ECF No. 22). The motion was filed *pro se* by Applicant on July 2, 2020. The Court must construe the motion liberally because Applicant 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). The Court construes the motion as a motion to reconsider the Court's Order (ECF No. 19) dismissing the action and the Judgment (ECF No. 20) entered on June 25, 2020. For the reasons discussed below, the motion to reconsider will be denied.

A litigant subject to an adverse judgment, and who seeks reconsideration by the district court of that adverse judgment, may "file either a motion to alter or amend the judgment pursuant to Fed. R. Civ. P. 59(e) or a motion seeking relief from the judgment pursuant to Fed. R. Civ. P. 60(b)." *Van Skiver v. United States*, 952 F.2d 1241, 1243

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(10th Cir. 1991). A motion to alter or amend the judgment must be filed within twenty-eight days after the judgment is entered. *See* Fed. R. Civ. P. 59(e).

The Court construes the motion to reconsider as being asserted pursuant to Rule 59(e) because the motion was filed within twenty-eight days after the Judgment. A Rule 59(e) motion may be granted "to correct manifest errors of law or to present newly discovered evidence." *Phelps v. Hamilton*, 122 F.3d 1309, 1324 (10th Cir. 1997) (internal quotation marks omitted). Relief under Rule 59(e) also is appropriate when "the court has misapprehended the facts, a party's position, or the controlling law." *Servants of the Paraclete v. Does*, 204 F.3d 1005, 1012 (10th Cir. 2000).

Applicant is a prisoner in the custody of the Colorado Department of Corrections. He initiated this action by filing an Application for a Writ of Habeas Corpus Pursuant to 28 U.S.C. § 2254 (ECF No. 1) challenging the validity of his consecutive sentences in Denver District Court case number 16CR3754. On April 21, 2020, Magistrate Judge Gordon P. Gallagher recommended that the Application be denied and the action be dismissed because Applicant's claims are procedurally barred. (*See* ECF No. 15.) On May 4, 2020, Applicant filed a "Motion for Enlargement of Time to File Objections to Recommendation of United States Magistrate Judge and Request for Appointment of Counsel to File the Objections" (ECF No. 16). Included in the motion are four objections to the Recommendation. (*See* ECF No. 16 at pp.6-8.) On May 7, 2020, Magistrate Judge Gallagher granted the motion in part by allowing additional time until June 8, 2020, to file objections. (*See* ECF No. 17.) Magistrate Judge Gallagher denied Applicant's request for appointment of counsel to file the objections. (*See id.*) Applicant

did not file any further objections within the time allowed.

On June 25, 2020, the Court entered an Order (ECF No. 19) accepting and adopting the Recommendation to dismiss the action because Applicant's claims are procedurally barred. In light of the timely written objections included in the motion filed on May 4, the Court reviewed the Recommendation *de novo*. Four days later, on June 29, 2020, the Court received and filed "Applicant's Objections to Recommendation of United States Magistrate Judge" (ECF No. 21). That document was submitted to prison officials for mailing to the Court on June 22, 2020. (*See* ECF No. 21 at p.33.)

In the motion to reconsider Applicant asks the Court to deem his objections (ECF No. 21) that were received after the action was dismissed as timely filed. According to Applicant, he did not file any prior objections, the Court never ruled on his motion for extension of time to file objections (ECF No. 16), and the objections (ECF No. 21) were submitted to prison officials for filing before the Court entered the order dismissing the action.

Upon consideration of the motion to reconsider and the entire file, the Court finds that Applicant fails to demonstrate any reason why the Court should reconsider and vacate the order to dismiss this action. Contrary to Applicant's assertion, his motion for extension of time to file objections (ECF No. 16) was granted in an Order (ECF No. 17) filed on May 7, 2020, and the time to file objection was extended until June 8, 2020. Thus, the Court's Order (ECF No. 19) accepting and adopting the Recommendation was not entered while the motion for extension of time remained pending. Furthermore, even accepting that "Applicant's Objections to Recommendation of United States

Magistrate Judge" (ECF No. 21) were filed on June 22, 2020, pursuant to the prisoner mailbox rule, *see Price v. Philpot*, 420 F.3d 1158, 1163-66 (10th Cir. 2005), those objections were not timely. Accordingly, it is

ORDERED that the "Motion for Rehearing and Leave to Accept Applicant's Objections to Recommendation of United States Magistrate Judge Filed Before Motion for Extension of Time Had Been Ruled On" (ECF No. 22) is DENIED. It is

FURTHER ORDERED that no certificate of appealability will issue because Applicant has not made a substantial showing of the denial of a constitutional right.

DATED at Denver, Colorado, this 7th day of July, 2020.

BY THE COURT:

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

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FILED
United States Court of Appeals
Tenth Circuit

November 17, 2020

Christopher M. Wolpert
Clerk of Court

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

ERIK SANCHEZ,

Petitioner - Appellant,

v.

TERRY JACQUES, Warden of the Limon Correctional Facility,

Respondent - Appellee.

No. 20-1253
(D.C. No. 1:20-CV-00427-LTB-GPG)
(D. Colo.)

ORDER

Before **PHILLIPS**, **MURPHY**, and **McHUGH**, Circuit Judges.

Appellant's petition for rehearing is denied.

Entered for the Court

CHRISTOPHER M. WOLPERT, Clerk