APPENDIX A

FILED
United States Court of Appeals
Tenth Circuit

February 16, 2023

Christopher M. Wolpert
Clerk of Court

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

CHARLES ALFRED ARMAJO, JR.,

Petitioner - Appellant,

v.

WYOMING ATTORNEY GENERAL; STATE OF WYOMING; NEICOLE MOLDEN, Warden of WSP,

Respondents - Appellees.

No. 22-8049
(D.C. No. 2:21-CV-00184-NDF)
(D. Wyo.)

ORDER DENYING CERTIFICATE OF APPEALABILITY*

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

Charles Armajo, Jr., proceeding pro se,[1] seeks a Certificate of Appealability (COA) to appeal the district court's denial of his 28 U.S.C. § 2254 petition challenging his conviction in Wyoming state court for second-degree sexual abuse of a minor. We deny a COA and dismiss this matter.

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* This order is not binding precedent except under the doctrines of law of the case, res judicata, and collateral estoppel.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 Mr. Armajo proceeds pro se, we construe his arguments liberally, but we "cannot take on the responsibility of serving as [his] attorney in constructing arguments and searching the record." *Garrett v. Selby Connor Maddux & Janer*, 425 F.3d 836, 840 (10th Cir. 2005).

BACKGROUND

A Wyoming jury convicted Mr. Armajo of sexual abuse of a child in the second degree. The victim, ZL, was his fifteen-year-old stepdaughter. Mr. Armajo is a Native American. The state alleged Mr. Armajo inappropriately touched ZL in October 2018 when he performed a ceremony in connection with ZL's first hunting trip. ZL informed a school counselor the day after the ceremony that Mr. Armajo touched her inappropriately. The school counselor reported this information to law enforcement, which opened an investigation ultimately leading to the criminal proceedings against Mr. Armajo. At trial, the state's evidence included testimony from ZL, her mother, the school counselor, and the investigating officers.

The Wyoming Supreme Court affirmed Mr. Armajo's conviction on direct appeal. *See Armajo v. State*, 478 P.3d 184, 196 (Wyo. 2020). Mr. Armajo pursued state habeas relief before the Wyoming Supreme Court, which denied his petition. He filed his § 2254 petition in the District of Wyoming and amended that petition twice.

In his second amended petition, Mr. Armajo brought four claims: (1) violation of his First Amendment rights to practice his religion (i.e., ceremonial/healing rites), (2) ineffective assistance of counsel (IAC) at trial, (3) IAC on appeal, and (4) denial of his right to exercise his religion under the American Indian Religious Freedom Act (AIRFA), 42 U.S.C. § 1996. The district court concluded a state procedural bar—Wyo. Stat. Ann. § 7-14-103—applied to claims (1), (2), and (4) because Mr. Armajo did not raise them on direct appeal in his state appellate proceedings. The district court

further concluded the bar was adequate and independent because it was firmly established and regularly followed.

As to claim (3)—ineffective assistance of state appellate counsel—the court analyzed it both as a freestanding habeas claim and as a potential basis to overcome the state procedural bar to his other three claims. But the court concluded the claim failed because Mr. Armajo did not allege any sufficiently prejudicial errors by counsel. Although Mr. Armajo asserted his state appellate counsel was ineffective for failing to "present four specific errors that should have been raised," R. at 109, he never articulated what those errors were. This foreclosed him from showing that his counsel's performance was constitutionally deficient or that it resulted in prejudice. The court concluded the detailed testimony of ZL and her mother, alone,

> was more than sufficient for a jury to find . . . beyond a reasonable doubt that [Mr. Armajo] was guilty of second-degree sexual abuse of a minor under Wyoming law. This is true regardless of whether his trial counsel failed to raise a *Brady* violation, the privilege against evidence of spousal communications, other allegedly exculpatory evidence from a cell phone that was not made available for trial, and inconsistencies among the testimony and police reports.

R. at 210. The court further rejected any IAC claims in connection with appellate counsel's failure to raise issues related to either the First Amendment or AIRFA. As the court noted, "[s]tate 'laws burdening religion are ordinarily not subject to strict scrutiny under the Free Exercise Clause so long as they are neutral and generally applicable.'" R. at 211 (quoting *Fulton v. City of Philadelphia*, 141 S. Ct. 1868, 1876 (2021)). And it explained Mr. Armajo failed to "point to any lack of neutrality, lack of general application, or lack of rational relationship

to a legitimate government interest in protecting children" in Wyoming's statute prohibiting sexual abuse of a child. *Id.* And the court further explained that AIRFA "is simply a policy statement and does not create a cause of action or any judicially enforceable individual rights." R. at 212 (internal quotation marks omitted). Because the First Amendment and AIRFA claims failed as a matter of law, the district court concluded Mr. Armajo's counsel was not ineffective for not raising them on appeal.

The district court therefore denied Mr. Armajo's petition with prejudice and denied a COA.

DISCUSSION

To appeal the denial of his § 2254 petition, Mr. Armajo must obtain a COA by "showing that reasonable jurists could debate whether . . . the petition should have been resolved in a different manner or that the issues presented were adequate to deserve encouragement to proceed further." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000) (internal quotation marks omitted). Mr. Armajo seeks a COA to raise three issues on appeal. In the first issue, he presses his IAC claim as to state appellate counsel. In the second, he argues the trial court erroneously instructed the jury. In the third, he asserts the district court misapplied AIRFA. No reasonable jurist could debate the district court's resolution of these issues.

As to the first, although Mr. Armajo now appears to articulate the four issues he alleges his appellate counsel missed, he does not show where he did so before the district court. And ordinarily "we do not consider an issue that was not adequately raised in the

federal district court." *Goode v. Carpenter*, 922 F.3d 1136, 1149 (10th Cir. 2019). Further, to establish IAC, Mr. Armajo must show that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland v. Washington*, 466 U.S. 668, 694 (1984). Here though, the district court concluded Mr. Armajo could not make this showing in light of the detailed testimony of ZL and her mother. Mr. Armajo offers no basis to reject this conclusion. Moreover, Mr. Armajo's representations to the state habeas court indicate his state appellate counsel *did* raise issues related to his motion for acquittal, sufficiency of the evidence, and prosecutorial misconduct. The Wyoming Supreme Court rejected these arguments, but Mr. Armajo has not demonstrated that rejection was due to ineffectiveness of appellate counsel. We therefore deny a COA as to this issue.

The second issue for which Mr. Armajo seeks a COA—jury instructions—does not appear to bear any relation to the arguments he raised before the district court. We therefore do not consider it for the first time on appeal. *See Goode*, 922 F.3d at 1149. To the extent we could look past the preservation issue and construe this argument as an extension of his IAC claim as to state appellate counsel,[2] it still fails for want of prejudice. To establish entitlement to habeas relief based on a jury instruction, "it must be established not merely that the instruction is undesirable, erroneous, or even universally condemned, but that it violated some right which was guaranteed to the

[2] The district court considered the jury-instructions issue in connection with Mr. Armajo's IAC claim as to state appellate counsel, noting also that Mr. Armajo failed to identify the allegedly erroneous instruction in his second amended petition. *See* R. at 212–13.

defendant by the Fourteenth Amendment." *Cupp v. Naughten*, 414 U.S. 141, 146 (1973) (internal quotation marks omitted). Mr. Armajo does not even identify the allegedly defective jury instruction, so he falls well short of showing a Fourteenth Amendment violation. We therefore deny a COA as to this issue.

Finally, although Mr. Armajo includes a challenge to the district court's rejection of his AIRFA argument in his listing of issues on appeal, he does not develop this argument in his brief. He has therefore waived it, and we deny a COA as to this issue. *See Utahns for Better Transp. v. U.S. Dep't of Transp.*, 305 F.3d 1152, 1175 (10th Cir. 2002), *as modified on reh'g*, 319 F.3d 1207 (10th Cir. 2003) ("[I]ssues will be deemed waived if they are not adequately briefed. We do not consider merely including an issue within a list to be adequate briefing." (citation omitted)).

CONCLUSION

We deny a COA and dismiss this matter. We deny Mr. Armajo's motion to proceed in forma pauperis for failure to show "the existence of a reasoned, nonfrivolous argument on the law and facts in support of the issues raised on appeal." *DeBardeleben v. Quinlan*, 937 F.2d 502, 505 (10th Cir. 1991). We deny Mr. Armajo's motion for discovery.

Entered for the Court

Joel M. Carson III
Circuit Judge

UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT
Byron White United States Courthouse
1823 Stout Street
Denver, Colorado 80257
(303) 844-3157
Clerk@ca10.uscourts.gov

Christopher M. Wolpert
Clerk of Court

Jane K. Castro
Chief Deputy Clerk

February 16, 2023

Charles Alfred Armajo Jr.
Wyoming Medium Correctional Center
7076 Road 55F
Torrington, WY 82240-7771
#32914

RE: 22-8049, Armajo v. Wyoming Attorney General, et al
Dist/Ag docket: 2:21-CV-00184-NDF

Dear Appellant:

Enclosed is a copy the court's final order issued today in this matter.

Please contact this office if you have questions.

Sincerely,

Christopher M. Wolpert
Clerk of Court

cc: Kristen Jones

CMW/na

APPENDIX B

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF WYOMING

CHARLES ALFRED ARMAJO, JR.,

Petitioner,

vs.

WYOMING ATTORNEY GENERAL and the STATE OF WYOMING,

Respondents.

Case No. 21-CV-184-NDF

ORDER DISMISSING AMENDED PETITION

This matter comes before the Court on Petitioner's amended petition for habeas relief (CM/ECF Document [Doc.] 8) which was filed October 20, 2021. The Court dismissed the first habeas petition on October 18, 2021. (Doc. 7).

Petitioner adds 17 additional grounds for relief in his amended petition that were not raised initially. However, all fail to survive initial review for the same reason the first petition was dismissed: non-exhaustion of state remedies. Petitioner admits that all grounds for relief raised in the amended petition have not been previously raised before the Wyoming Supreme Court. As Petitioner has not exhausted his state remedies as required under § 2254(b)(1)(A), his amended petition for a writ of habeas corpus (Doc. 8) is DISMISSED.

As the amended petition does not survive initial review, Petitioner's motion to compel (Doc. 10) and motion for production of documents (Doc. 11) are deemed MOOT.

And, because petitioner has not made a "substantial showing of the denial of a constitutional right," the Court also denies the issuing of a certificate of appealability for this order. 28 U.S.C. §2253(c)(1)(A).

IT IS SO ORDERED this 25th day of October, 2021.

NANCY D. FREUDENTHAL
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF WYOMING

CHARLES ALFRED ARMAJO, JR.,

Plaintiff,

vs.

WYOMING ATTORNEY GENERAL and the STATE OF WYOMING,

Defendants.

Case No. 21-CV-184-NDF

ORDER ON INITIAL REVIEW OF SECOND AMENDED PETITION AND PENDING MOTIONS

Petitioner Charles Alfred Armajo, Jr.'s second amended § 2254 petition (ECF 14) and memorandum in support (ECF 15) come before the Court on initial review. Rule 4 of the Rules Governing Section 2254 Cases in the United States District Courts provides: "If it plainly appears from the petition and any attached exhibits that the petitioner is not entitled to relief in the district court, the judge must dismiss the petition and direct the clerk to notify the petitioner." See also 28 U.S.C. § 2243 (the court shall screen a habeas petition and "forthwith award the writ or issue an order directing respondent to show cause why the writ should not be granted, unless it appears from the application that the applicant or person detained is not entitled thereto"). The Court previously dismissed the original and first amended petitions in this case.

Petitioner is *pro se*. As such, the Court construes his filings liberally. *Erickson v. Pardus*, 551 U.S. 89, 94 (2007) (per curiam); *Garza v. Davis*, 596 F.3d 1198, 1201 n.2 (10th Cir. 2010). This rule means the court will "make some allowances for the pro se plaintiff's . . . unfamiliarity with pleading requirements." *Garrett v. Selby Conner Maddux & Janer,* 425 F.3d 836, 840 (10th Cir. 2005).

Petitioner is in custody in the Wyoming State Penitentiary ("WSP") in Rawlins, Wyoming. He names as Respondent the Warden of WSP, Neicole Molden. He was convicted after a jury trial of second-degree sexual abuse of a minor in violation of Wyo. Stat. § 6-2-315(a)(iv). His criminal judgment entered on February 13, 2020, sentencing him to 10-12 years of imprisonment. He appealed to the Wyoming Supreme Court, and his appeal was denied. *Armajo v. State,* 2020 WY 153, 478 P.3d 184 (Wyo. 2020). His previous filings in this Court are described in prior orders.

The petition appears to be timely. 28 U.S.C. § 2254 habeas petitions are subject to a one-year period of limitation. *See* 28 U.S.C. § 2244(d)(1). The Wyoming Supreme Court affirmed petitioner's sentence on December 18, 2020. Petitioner did not seek certiorari to the United States Supreme Court. Accordingly, his conviction became final "when the time for filing a certiorari petition expire[d]." *Jimenez v. Quarterman*, 555 U.S. 113, 119 (2009). Ninety days are allowed from the date of the conclusion of direct appeal to seek certiorari. Sup. Ct. R. 13(1). Thus, Petitioner's time for filing a certiorari petition expired March 18, 2021, and the one-year period of limitation to petition for habeas corpus began to run on March 19, 2021. On January 14, 2022, he filed a habeas petition in state district court. This tolled the clock. 28 U.S.C. § 2244(d)(2). His state habeas petition went to the

Wyoming Supreme Court twice. The Court takes judicial notice that the Wyoming Supreme Court issued the final denial of Petitioner's state habeas petition (Case S-22-0133) on June 21, 2022. He filed his second amended petition with this Court 23 days later. When he filed the state habeas petition, he had 63 days remaining on his clock to file here, so the second amended petition is timely.

It also appears that Petitioner has exhausted his state habeas remedies as required under § 2254(b)(1)(A). He brings four claims here: 1) violation of his First Amendment freedom to exercise his Native American religion (specifically, ceremonial or healing rites); 2) violation of his Sixth Amendment rights by ineffective assistance of counsel ("IAC") at trial; 3) violation of his Fourteenth Amendment right to effective assistance of counsel on appeal; and 4) denial of his right to exercise his Native American religion (healing or ceremonial rites) under 42 U.S.C. § 1996 (the American Indian Religious Freedom Act, "AIRFA"). The Court takes judicial notice of Petitioner's state habeas petition to the Wyoming Supreme Court in Case S-22-0133. The state habeas petition is difficult to follow, but it appears Petitioner asserted each of these claims.

However, Petitioner's first, second[1] and fourth claims are procedurally barred. Wyoming law bars collateral attacks on issues that could have been raised on direct appeal and weren't. Wyo. Stat. § 7-14-103(a)(i). Petitioner alleges that the state district court

[1] Wyoming law requires a defendant to bring a claim of ineffective assistance of trial counsel on direct appeal, unless he was represented by the same counsel at trial and on appeal. *Keats v. State,* 2005 WY 81 ¶¶ 11-17, 115 P.3d 1110, 1115-17 (Wyo. 2005).

denied his habeas petition because he did not raise these issues on direct appeal. ECF 14 at 5-6 ¶¶ 4.19, 4.21.

> Absent cause or prejudice or a showing of a fundamental miscarriage of justice, this court is barred from reviewing the claims of a federal habeas petitioner which have been procedurally defaulted in state court under an "adequate and independent state procedural rule."

Anderson v. Attorney General of State of Kansas, 342 F.3d 1140, 1143 (10th Cir. 2003) (quoting *Walker v. Attorney Gen.,* 167 F.3d 1339, 1344 (10th Cir. 1999)). An adequate and independent state procedural rule is one that is based on state law and is "firmly established and regularly followed" at the time. *Id.* Section 7-14-103(a)(i) has been on the books for many years. It is an adequate and independent state procedural rule.

In order to establish "cause," a defendant must show that there existed some external impediment which prevented him from raising this claim during the original proceedings on his case, or on direct appeal. *Murray v. Carrier,* 477 U.S. 478, 492 (1986). A petitioner could show "cause" by demonstrating that his claim was so novel that its legal basis was not reasonably available to his counsel. *See Reed v. Ross,* 468 U.S. 1, 16 (1984). A petitioner could also establish "cause" by demonstrating that the constitutional violations he complains of in support of his habeas motion resulted in a "fundamental miscarriage of justice;" *i.e.,* that they resulted in the conviction of a person who was actually innocent of the charged crime. *See United States v. Cervini,* 379 F.3d 987, 990-91 (10th Cir. 2004).

An IAC claim is another way a defendant may overcome the procedural bar in a § 2254 proceeding, but the claim must first be exhausted in state court. To prevail on an IAC claim, a petitioner must meet the well-established two-prong test set forth in *Strickland v.*

Washington, 466 U.S. 668 (1984); *United States v. Taylor,* 454 F.3d 1075, 1079 (10th Cir. 2006). That is, the petitioner must show: (1) "counsel's performance was deficient" ("fell below an objective standard of reasonableness"); and (2) "the deficient performance prejudiced the defense" ("there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different"). *Strickland,* 466 U.S. at 687-88, 694. "If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, which we expect will often be so, that course should be followed." *Smith v. Robbins,* 528 U.S. 259, 286 n.14 (2000) (quoting *Strickland,* 466 U.S. at 697).

The Court's review is "highly deferential," based on "a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the [petitioner] must overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy." *Taylor,* 454 F.3d at 1079 (quoting *Strickland,* 466 U.S. at 689). Moreover, a defendant challenging his conviction on the basis of ineffective assistance of counsel must do more than simply offer conclusory allegations; he must make particularized and specific factual averments which, if proven, would demonstrate both the ineffectiveness of his attorney's performance and the resulting prejudice to his case. *Hatch v. Oklahoma,* 58 F.3d 1447, 1457 (10th Cir. 1995), *overruled on other grounds by Daniels v. United States,* 254 F.3d 1180, 1188 n.1 (10th Cir. 2001); *United States v. Fisher,* 38 F.3d 1144, 1147 (10th Cir. 1994). This requirement must be satisfied even where, as here, the petitioner is proceeding pro se, and notwithstanding the usual rule that pro se pleadings are to be liberally construed. *Id.*

In this case, Petitioner does not allege cause or prejudice for his failure to bring his First Amendment, AIRPA and IAC at trial claims on direct appeal. Although he alleges that he was prevented from accessing counsel, a law library and his files while he was in custody in Minnesota from May 11, 2021 until April 6, 2022, his direct appeal was already concluded before then. As for his IAC claim regarding trial counsel, Petitioner alleges he had new counsel for his appeal. There was, therefore, no impediment to his raising the ineffectiveness of trial counsel on direct appeal. This leaves only the question of whether Petitioner's IAC claim regarding appellate counsel (his third claim here) suffices to overcome the procedural default on the other claims.

Petitioner alleges his appellate counsel was ineffective because he did not "present four specific errors that should have been raised." But neither the second amended petition nor his lengthy memorandum[2] identify what issues his appellate counsel failed to raise.[3] Again, for an IAC claim, Petitioner cannot offer only conclusory allegations; he must make particularized and specific factual averments. This he has not done. Accordingly, Petitioner has not alleged facts to overcome the procedural bar of his first, second and

[2] Petitioner's current memorandum refers to an Appendix A of transcripts from the district court, petition to rescind the divorce appendix A, and discovery violation exhibit 1. The only materials actually submitted with the memorandum were letters from Wyoming Bar Counsel regarding Petitioner's complaints concerning his lawyers and the district attorney, and news clippings regarding the latter. His prior memorandum likewise referred to an Appendix A but did not attach it. ECF 9.

[3] Petitioner does quote from the state district court's denial of his petition, stating that it "reviewed the trial and appellate records in this matter. In Appellant[']s brief, filed June 8th, 2020, appellate Counsel H. Bennett raised three issues, which the court restates as follows: (1) Whether the district court abused its discretion in denying Defendant's Rule 29 Motion for Judgment of Acquittal; (2) Whether the evidence adduced at trial was sufficient to convict Defendant; and (3) Whether prosecutorial misconduct denied Defendant a fair trial?" ECF 14 at 9 ¶ 4.29.

fourth claims. Because these claims are procedurally barred, they are denied with prejudice. *See, e.g., Gray v. Gray,* 645 F. App'x 624, 626 (10th Cir. 2016).

As for Petitioner's third claim of IAC on appeal, this claim fails for the same reason that it does not save the other claims from the procedural bar: Petitioner does not make any specific factual averments of what his appellate counsel failed to raise or do on appeal that made him ineffective.

Even if the Court liberally construes the second amended petition and memorandum as arguing appellate counsel failed to raise the First Amendment, AIRPA, and IAC claim as to trial counsel, Petitioner does not allege a plausible claim of prejudice, as follows.

Petitioner alleges he was the step-father of a fifteen-year-old girl, Z.L., who informed a school counselor that he had inappropriately touched her during a Native American ceremony on October 16, 2018. She informed the counselor the next day. The counselor reported the allegation to law enforcement. After an investigation, Petitioner was charged with one count of second-degree sexual abuse of a minor under Wyo. Stat. Ann. § 6-2-315(a)(iv). The information alleged that Petitioner, thirty-four years old at the time, engaged in sexual contact with the minor, Z.L., his step-daughter. *See Armajo v. State,* 478 P.3d 184, 188, 2020 WY 153, ¶¶ 3-5 (Wyo. 2020). Petitioner's memorandum alleges that in the offense conduct, he was performing a Native American ceremony with Z.L. in association with her first hunting trip. ECF 16 at 11-12. He alleges in detail the trial testimony the State offered, including at least three witnesses: (1) Z.L.; (2) her mother (his then-wife), M.A.; and (3) the school counselor. He also alleges a Sgt. Detective Mark

Hollenbach was "the primary witness" against him at trial, but provides no further information regarding the officer's testimony.

The detailed testimony that Petitioner alleges regarding his offense conduct was more than sufficient for a jury to find Petitioner beyond a reasonable doubt that Petitioner was guilty of second-degree sexual abuse of a minor under Wyoming law. This is true regardless of whether his trial counsel failed to raise a *Brady* violation, the privilege against evidence of spousal communications, other allegedly exculpatory evidence from a cell phone that was not made available for trial, and inconsistencies among the testimony and police reports.

Nor can Petitioner show he was prejudiced from appellate counsel's failure to raise the First Amendment and AIRFA issues. In his habeas proceedings, Petitioner alleges his trial (really, his conviction) violated his First Amendment right of religious expression and statutory right to the same under AIRFA. Specifically, he alleges that he is Native American and has healing abilities and tools for healing that were given to him by his grandfather. He argues that his conduct was not criminal because he was conducting a Native American healing ceremony, and his conviction violates his right to do so.

> Touching is a necessary element of this charge. This charge is facially invalid under the First Amendment, and invalid as applied to Petitioner's conduct. The main thrust of the case is complainant saying that "the petitioner had performed a ceremony and during the ceremony he had touched her improperly on her back." Yet petitioner had not the opportunity to explain the protected conduct that is protected by the First and Fourteenth Amendment petitioner says that "he did a healing and initiation ceremony with the complainant and did not touch her inappropriately, a Medicine Man's duty to his family, and community this is the equivalent of clergy and has many meanings in the Native American culture."

ECF 15 at 23. At this stage, the Court accepts Petitioner's allegation that he was performing a Native American ceremony as true.

Petitioner fails to state a plausible claim that his First Amendment rights were violated. State "laws incidentally burdening religion are ordinarily not subject to strict scrutiny under the Free Exercise Clause so long as they are neutral and generally applicable." *Fulton v. City of Philadelphia,* 141 S. Ct. 1868, 1876, 210 L. Ed. 2d 137 (2021) (citing *Employment Div., Dep't of Human Resources of Oregon v. Smith,* 494 U.S. 872 (1990)). "A law that is 'neutral' and 'generally applicable' is constitutional if it is rationally related to a legitimate government interest." *Ashaheed v. Currington,* 7 F.4th 1236, 1243 (10th Cir. 2021). *See also United States v. Mitchell,* 502 F.3d 931, 949 (9th Cir. 2007) (because "a rationally based, neutral law of general applicability does not violate the right to free exercise of religion even though the law incidentally burdens a particular religious belief or practice," sentencing defendant under the Federal Death Penalty Act did not violate defendant's First Amendment rights based on the "Navajo Nation's religious opposition to capital punishment").

Petitioner argues Wyo. Stat. § 6-2-315(a)(iv) is vague and overbroad because it encompasses touching in a Native American healing ceremony, but he does not point to any lack of neutrality, lack of general application, or lack of rational relationship to a legitimate government interest in protecting children. He therefore fails to state a claim under the longstanding precedent of *Smith. Cf., United States v. King,* Nos. 99-2333, 99-2306, 2000 WL 725480 (10th Cir. June 6, 2000) (affirming conviction of medicine man of sexually abusing his victim under guise of treatment). Petitioner argues caselaw regarding

overbroad statutes that impinge on free speech, but his claim does not regard speech but rather the exercise of religion. Petitioner's claim is instead governed by the rational-basis test set out in *Smith.* Because it fails as a matter of law and allowing amendment would be futile, the First Amendment claim is therefore denied with prejudice.

As for Petitioner's claim under AIRFA, this "is simply a policy statement and does not create a cause of action or any judicially enforceable individual rights." *Id. See also Lyng v. Nw. Indian Cemetery Protective Ass'n,* 485 U.S. 439, 455 (1988); *Rojas v. Heimgartner,* 604 F. App'x 692, 695 (10th Cir. 2015). This claim likewise fails as a matter of law. Because the First Amendment and AIRFA claims fail as a matter of law, Petitioner's appellate counsel was not ineffective in not raising them.

Nor does the second amended petition or memorandum raise any other aspect of trial counsel's representation of Petitioner that suggests he was prejudiced if appellate counsel failed to raise other evidentiary or jury instruction issues. As noted above, Petitioner's quote from the state district court's denial of his petition reflects that appellate counsel did raise the question of whether his motion for acquittal should have been granted, whether the evidence supported his conviction, and whether prosecutorial misconduct made his trial unfair. Even if appellate counsel failed to argue (an unidentified) jury instruction was erroneous, to prove this violated the Fourteenth Amendment as Petitioner contends,

> the instruction must not merely be undesirable, erroneous, or even "universally condemned," but rather it must violate some right guaranteed to the defendant by the Fourteenth Amendment. *Cupp v. Naughten,* 414 U.S. 141, 146 (1973). ... [P]etitioner must show that there is a "reasonable likelihood that the jury applied the

instruction in a way that violated a constitutional right." *Carriger v. Lewis,* 971 F.2d 329, 334 (9th Cir. 1992).

Preston v. Campbell, No. C-05-05154 RMW, 2010 WL 94270, at *4 (N.D. Cal. Jan. 6, 2010) (denying habeas petition of medicine man convicted of rape and lewd and lascivious conduct upon a minor under California law). The second amended petition and memorandum are devoid of allegations regarding any specific jury instructions that would meet this standard.

Accordingly, Petitioner's third claim for relief asserting IAC on his appeal fails as a matter of law and is denied with prejudice.

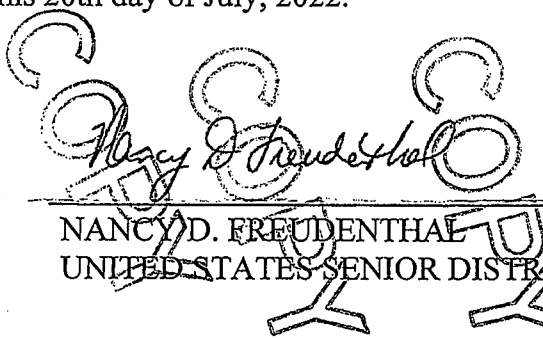
Finally, the Court notes that the second amended petition and memorandum contain extraneous allegations regarding Petitioner's divorce action, which is not a cognizable subject for a § 2254 petition. His allegations that facility staff in Minnesota prevented him from accessing either his legal files or his counsel are also not cognizable here. If those allegations state a claim for relief at all, it would have to be brought in a Section 1983 action in the appropriate jurisdiction where the conduct occurred.

In light of the Court's denial with prejudice of the second amended petition, Petitioner's pending second motion to proceed in forma pauperis (ECF 16), motion to order production of documents (ECF 17) and motion to compel evidence (ECF 18) are moot.

Because petitioner has not made a "substantial showing of the denial of a constitutional right," the Court also denies the issuing of a certificate of appealability for this order. 28 U.S.C. §2253(c)(1)(A).

Accordingly, IT IS ORDERED THAT the second amended petition (ECF 14) is DENIED WITH PREJUDICE, and Petitioner's pending motions (ECF 16, 17, and 18) are deemed MOOT. The Clerk's office shall close this case.

IT IS SO ORDERED this 20th day of July, 2022.



NANCY D. FREUDENTHAL
UNITED STATES SENIOR DISTRICT JUDGE

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