FILED
United States Court of Appeals
Tenth Circuit

March 28, 2023

Christopher M. Wolpert
Clerk of Court

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

KENNETH UEDING,

Petitioner - Appellant,

v.

COLORADO DEPARTMENT OF CORRECTIONS; THE ATTORNEY GENERAL OF THE STATE OF COLORADO,

Respondents - Appellees.

No. 22-1417
(D.C. No. 1:22-CV-02166-LTB-GPG)
(D. Colo.)

ORDER

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

Mr. Kenneth Ueding obtained a conviction in state court and asked a federal district court for habeas relief based on the delay in bringing him to trial. The district court denied habeas relief, and Mr. Ueding seeks a certificate of appealability so that he can appeal. 28 U.S.C. § 2253(c)(1)(A). We deny this request.

Mr. Ueding based his habeas claim on both state law and the federal constitution. The district court concluded that (1) habeas relief is unavailable for violations of state law and (2) the constitutional claim is procedurally barred.

For the state-law claim, we consider whether Mr. Ueding has made "a substantial showing of the denial of a constitutional right." *Miller-El v. Cockrell*, 537 U.S. 322, 336 (2003). Under this standard, any reasonable jurist would reject the state-law claim because it doesn't involve a constitutional right. *See Estelle v. McGuire*, 502 U.S. 62, 67–68 (1991) (stating that habeas relief does not lie for the violation of state law). So the state-law claim doesn't merit a certificate of appealability.

For the constitutional claim, the district court declined to reach the merits based on a procedural default. So here we consider whether a reasonable jurist could debate the applicability of a procedural default. *Slack v. McDaniel*, 529 U.S. 473, 484 (2000). In our view, the applicability of a procedural default is not reasonably debatable.

A procedural default occurs when "a state court dismisses [a] federal habeas claim on the basis of noncompliance with adequate and independent state procedural rules." *Banks v. Workman*, 692 F.3d 1133, 1144 (10th Cir. 2012). A state procedural rule is "adequate" if it is "strictly or regularly followed and applied evenhandedly to all similar claims." *Id.* (quoting *Thacker v. Workman*, 678 F.3d 820, 835 (10th Cir. 2012)). A rule is "independent" "if it relies on state law, rather than federal law, as the basis for the decision." *Simpson v. Carpenter*, 912 F.3d 542, 571 (10th Cir. 2018) (quoting *Banks v. Workman*, 692 F.3d 1133, 1145 (10th Cir. 2012)).

Here the federal district court concluded that the state court's application of the plain-error standard constituted an adequate and independent defect. For this conclusion, the district court reasoned that the application of the plain-error standard

- was adequate because it had been evenhandedly applied and
- independent because it had been based on state law.

In seeking a certificate of appealability, Mr. Ueding contests the existence of a procedural default, arguing that application of the plain-error standard was not independent because he had presented a constitutional claim when objecting to joinder.

We disagree with Mr. Ueding's interpretation of his objection in state court. There he argued that joinder would lead to the admission of unfairly prejudicial evidence. Here he's asserting the denial of a speedy trial. Mr. Ueding did not say anything in his objection to joinder that would alert the state courts to a claim involving the denial of a speedy trial. So any reasonable jurist would reject Mr. Ueding's reliance on his objection to joinder in state court. *See Finlayson v. State*, 6 F.4th 1235, 1241 (10th Cir. 2021) (concluding that when a state court recognizes or assumes a constitutional error but denies relief because the error is not plain, the plain-error standard "serves as an independent state rule" for purposes of procedural default).

Given the procedural bar, we could consider the merits of the claim only if Mr. Ueding satisfies the requirements for one of two exceptions: (1) cause and prejudice or (2) a fundamental miscarriage of justice based on actual innocence. *Coleman v. Thompson*, 501 U.S. 722, 750 (1991). Mr. Ueding has not invoked either exception.

We thus deny Mr. Ueding's request for a certificate of appealability and dismiss the appeal.[1]

Entered for the Court

Robert E. Bacharach
Circuit Judge

[1] Mr. Ueding also requests leave to proceed in forma pauperis and release on his own recognizance pending the appeal. We grant leave to proceed in forma pauperis, but our dismissal moots the request for release pending the appeal.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 22-cv-02166-LTB-GPG

KENNETH UEDING,

Petitioner,

v.

COLORADO DEPARTMENT OF CORRECTIONS, and
THE ATTORNEY GENERAL OF THE STATE OF COLORADO,

Respondents.

ORDER

This matter is before the Court on the Recommendation of United States Magistrate Judge filed on October 14, 2022 (ECF No. 16). Petitioner has filed timely written objections to the Recommendation (ECF No. 17). The Court has therefore 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 Petitioner's Objection to the Recommendation of the United States Magistrate Judge (ECF No. 17) are overruled. It is

FURTHER ORDERED that the Recommendation of United States Magistrate Judge (ECF No. 16) 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 Petitioner's federal constitutional speedy trial claim is procedurally barred, and his state

speedy trial claim is not cognizable in this federal habeas action. It is

FURTHER ORDERED that no certificate of appealability will issue because Petitioner 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 Petitioner's Request for Pro Bono/Alternative Defense Counsel (ECF No. 12) is denied as moot.

DATED at Denver, Colorado, this 3rd day of November, 2022.

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. 22-cv-02166-LTB-GPG

KENNETH UEDING,

Petitioner,

v.

COLORADO DEPARTMENT OF CORRECTIONS, and
THE ATTORNEY GENERAL OF THE STATE OF COLORADO,

Respondents.

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) filed *pro se* by Petitioner Kenneth Ueding on August 23, 2002. The matter has been referred to this Magistrate Judge for recommendation (ECF No. 15).[1]

The Court has reviewed the filings to date. The Court has considered the entire case file, the applicable law, and is advised of the premises. This Magistrate Judge respectfully recommends dismissing the *§ 2254 Application*.

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[1] 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).

I. BACKGROUND

Petitioner is in the custody of the Colorado Department of Corrections currently incarcerated at the Centennial Correctional Facility. The *§ 2254 Application* challenges Petitioner's convictions imposed in El Paso County District Court, case numbers 17CR948, 17CR1781, and 17CR4361. (ECF No. 1 at 2). These cases involved three separate incidents of Petitioner spitting on a peace officer while he was in custody. (ECF No. 10-7 at 2-3). The three cases were joined for trial, and a jury convicted Petitioner of four counts of second-degree assault. (*Id.*). The trial court held a habitual criminal hearing, determined that Petitioner was a habitual offender, and imposed an aggregate sentence of twenty-four years in prison. (*Id.*).

Petitioner appealed, and on December 9, 2021, the Colorado Court of Appeals affirmed the judgment and sentence. (ECF No. 10-7). Petitioner's writ of certiorari was denied by the Colorado Supreme Court on April 11, 2022. (ECF No. 10-8).

Petitioner next challenged his convictions in state court by filing a petition for postconviction relief pursuant to Crim. P. 35(c) on May 23, 2022. (ECF No. 10-9). The state district court denied the petition on July 22, 2022. (ECF No. 10-10). Petitioner did not appeal.

Petitioner initiated this federal habeas corpus action on August 23, 2022, by filing the *§ 2254 Application*. (ECF No. 1). He asserts that his statutory and constitutional right to a speedy trial was violated under both federal and Colorado law. (*Id.* at 4-8).

On September 12, 2022, Respondents filed a *Pre-Answer Response* limited to addressing the affirmative defenses of timeliness under 28 U.S.C. § 2244(d) and exhaustion of state remedies under 28 U.S.C. § 2254(b)(1)(A). (*See* ECF No. 10). In the

Pre-Answer Response, Respondents do not raise untimeliness as an affirmative defense.[2] (*Id.* at 3-5). Respondents, however, assert that although the speedy trial claim based on state law is exhausted, Petitioner's constitutional speedy trial claim is procedurally defaulted. (*Id.* at 7-11).

Petitioner filed a *Reply* on September 23, 2022, contending that his constitutional claim was exhausted in state court, that "review of the constitutional violation was not the cause of any rejection" in state court, and that the speedy trial right is a fundamental and important right. (*See* ECF No. 13).

II. DISCUSSION

A. State Court Proceedings

The Colorado Court of Appeals addressed and rejected Petitioner's speedy trial claim as follows:

> I. Speedy Trial
>
> ¶ 9 We conclude that Ueding's statutory right to a speedy trial was not violated and that any violation of his constitutional right to a speedy trial was not plain.
>
> ¶ 10 Ueding moved to dismiss on statutory speedy trial grounds. We thus conclude that he preserved his statutory speedy trial claim but not his constitutional speedy trial claim. *See Martinez v. People*, 2015 CO 16, ¶ 14.
>
> ¶ 11 Ueding's first arrest was on February 13, 2017. During the four months that passed before his arraignment, Ueding repeatedly delayed the proceedings. On the date set for his preliminary hearing, Ueding's aggressive behavior and disagreement with his counsel required the court to continue the matter. Ueding twice requested continuances and waived time requirements to set the preliminary hearings for his first two cases at the same time. The court entered Ueding's first not guilty plea on June 19, 2017. The case proceeded to trial on December 5, 2017.

[2] Because timeliness is not raised as an affirmative defense, the Court will not address it.

A. Statutory Speedy Trial

¶ 12 We conclude that the trial court did not violate Ueding's statutory right to a speedy trial.

¶ 13 Section 18-1-405(1), C.R.S. 2021, mandates that a criminal defendant must be brought to trial "within six months from the date of the entry of a plea of not guilty," with certain exceptions that are not at issue.

¶ 14 Ueding concedes that his jury trial began within six months of the date he pleaded guilty. So, we see no error.

¶ 15 But wait, Ueding says, the four-month delay between his advisement and arraignment violated his statutory speedy trial rights. Ueding identifies no case law that applies statutory speedy trial rights to pre-arraignment delays. Additionally, much of the delay is credited to Ueding, *see Vermont v. Brillon*, 556 U.S. 81, 91 (2009), and he twice waived time requirements to set the preliminary hearings.

¶ 16 And, although Ueding contends that the trial court should have entered a not guilty plea on his behalf on the date of his advisement, we disagree because Ueding was entitled to a preliminary hearing before his arraignment. *See* § 16-5-301(1)(b)(II), C.R.S. 2021; Crim. P. 7(h), 10. And Ueding asserted his right to a preliminary hearing, even after his counsel indicated that he would waive it.

B. Constitutional Speedy Trial

¶ 17 On appeal, Ueding contends for the first time that his federal and Colorado speedy trial rights were violated. We conclude any error was not plain.

¶ 18 We review this unpreserved claim for plain error and only reverse if the error is obvious, substantial, and so undermines the fundamental fairness of the proceedings as to cast serious doubt on the reliability of the judgment of conviction. *See Hagos v. People*, 2012 CO 63, ¶ 14.

¶ 19 We conclude that any error was not plain because it was not obvious. *See id.* The majority of the delay between arrest and arraignment was attributable to Ueding and his counsel. *See Vermont*, 556 U.S. at 91. There was no violation of Ueding's statutory speedy trial rights between arraignment and trial. And Ueding points to no authority finding that a ten-month arrest-to-trial period amounts to a constitutional violation. So, any error was not so "obvious and so clear-cut that a trial judge should have been expected to avoid it without benefit of an objection." *People v. Carter*, 2015 COA 24M-2, ¶ 58.

(ECF No. 10-7 at 4-7).

B. Exhaustion of State Court Remedies

Pursuant to 28 U.S.C. § 2254(b)(1), 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 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). A claim must be presented as a federal constitutional claim in the state court proceedings to be exhausted. *See Duncan v. Henry*, 513 U.S. 364, 365-66 (1995) (per curiam).

"[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 claim. *See Miranda v. Cooper*, 967 F.2d 392, 398 (10th Cir. 1992). Even if state remedies properly have been exhausted as to one or more of the claims presented, a habeas corpus application is subject to dismissal as a mixed petition unless state-court remedies have been exhausted for all the claims raised. *See Rose v. Lundy*, 455 U.S. 509, 522 (1982); *Harris v. Champion*, 48 F.3d 1127, 1133 (10th Cir. 1995).

C. Procedural Default

Additionally, under the "procedural default" doctrine, a claim that was presented in state court cannot be reviewed on the merits in a federal habeas action if it was precluded from review in the state court under an "independent and adequate state ground." *Coleman v. Thompson*, 501 U.S. 722, 731 (1991). "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). "[I]n order to be adequate, a state rule of procedural default must be applied evenhandedly in the vast majority of cases." *Id.* (citation omitted). "In determining whether a state procedural bar rule is an adequate and independent ground to bar federal review of a constitutional claim, a federal habeas court must apply the state's rule in effect at the time of the purported procedural default." *Barnett v. Hargett*, 174 F.3d 1128, 1134 (10th Cir. 1999).

D. Speedy Trial Claim

As noted above, Petitioner seeks habeas relief based on a denial of his statutory and constitutional right to a speedy trial under both federal law and Colorado law. (*See* ECF No. 1 at 4-8).

First, § 2254 provides relief only for violations of federal law, not violations of state law. *See* 28 U.S.C. § 2254(a); *see also Estelle v. McGuire*, 502 U.S. 62, 67-68 (1991) ("In conducting habeas review, a federal court is limited to deciding whether a conviction violated the Constitution, laws, or treaties of the United States."). Thus, to the extent Petitioner asserts a speedy trial claim based on a violation of Colorado law, such claim is not cognizable under federal habeas corpus law. *See Estelle,* 502 U.S. at 67-68 ("[I]t is not the province of a federal habeas court to reexamine state-court determinations on state-law questions."). Therefore, this Magistrate Judge recommends dismissing Petitioner's speedy trial claim alleging a violation of state law.

Next, with respect to Petitioner's speedy trial claim asserting a federal constitutional violation, Respondents argue that the claim is procedurally defaulted and, therefore, precluded from federal habeas review.

Under the procedural default doctrine, a federal court "ordinarily won't review the merits of a claim the state court declined to consider based on a petitioner's failure to follow that state's procedural rules." *McCormick v. Parker*, 821 F.3d 1240, 1245 (10th Cir. 2016) (citation omitted); *see also Fairchild v. Workman,* 579 F.3d 1134, 1141 (10th Cir. 2009) ("claims that are defaulted in state court on adequate and independent state procedural grounds will not be considered by a habeas court, unless the [applicant] can demonstrate cause and prejudice or a fundamental miscarriage of justice.")[3]. The state procedural rule must be independent and adequate. *Jackson v. Shanks*, 143 F.3d 1313,

[3] Although a procedurally defaulted claim may have been "presented to" the state court and therefore exhausted in a technical sense, "exhaustion in this sense does not automatically entitle the habeas petitioner to litigate his or her claims in federal court. Instead, if the petitioner procedurally defaulted those claims, the prisoner generally is barred from asserting those claims in a federal habeas proceeding." *Woodford v. Ngo*, 548 U.S. 81, 93 (2006) (citing *Gray v. Netherland,* 518 U.S. 152, 162 (1996).

1317 (10th Cir. 1998).

Here, although Petitioner presented a constitutional speedy trial claim on appeal, (*see* ECF No. 10-4 at 22-27), the Colorado Court of Appeals found that Petitioner's constitutional claim was unpreserved because at trial Petitioner only moved to dismiss on statutory speedy trial grounds and did not object on constitutional grounds. (*See* ECF No. 10-7 at 4, 6). Thus, the Colorado Court of Appeals performed a limited plain error review of the unpreserved claim, *i.e.,* whether the error is obvious, substantial, and so undermines the fundamental fairness of the proceedings as to cast serious doubt on the reliability of the judgment of conviction. (*Id.* at 6). The Colorado Court of Appeals concluded that any "error was not plain because it was not obvious." (*Id.*).

The procedural default argument asserted by Respondents raises the following question: "[D]oes a state court's plain-error review of an issue otherwise waived for lack of a trial objection constitute a merits decision under *Harris v. Reed*, 489 U.S. 255, 109 S. Ct. 1038, 103 L.Ed.2d 308 (1989), thus negating application of procedural bar, or does . . . use of the . . . plain error [standard] constitute the enforcement of a state waiver rule under *Harris*, thus necessitating application of procedural bar?" *Cargle v. Mullin*, 317 F.3d 1196, 1205 (10th Cir. 2003). The answer to this question "depends on the substance of the plain-error disposition." *Id.*

> 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, there is no independent state ground of decision and, thus, no basis for procedural bar. . . . On the other hand, a state court could deny relief for what it recognizes or assumes to be federal error, because of the petitioner's failure to satisfy some independent state law predicate. In such a case, that non-merits predicate would constitute an independent state ground for decision which would warrant application of procedural-bar principles on federal habeas.

Id. (internal citation omitted). Numerous courts have held that when a state court reviews procedurally barred claims for plain error or a miscarriage of justice, such limited review does not deprive a state court ruling of its independent character and does not relieve a petitioner from procedural default. *See Campbell v. Burris,* 515 F.3d 172, 178–79 (3d Cir. 2008) (collecting cases from the First, Fourth, Sixth, Seventh, Tenth, and Eleventh Circuits).

Here, on plain-error review, the Colorado Court of Appeals did not deny relief because it found that Petitioner's claim lacked merit under federal law after analyzing the facts under the relevant federal constitutional standard. (*See* ECF No. 10-7 at 6). Rather, the Colorado Court of Appeals resolved the claim under a prong of plain-error review unrelated to the federal constitutional issue – *i.e.,* finding that any violation of the constitutional right to a speedy trial was not plain because it was not "so 'obvious and so clear-cut that a trial judge should have been expected to avoid it without benefit of an objection." (*Id.*). As such, the state appellate court assumed a constitutional error and denied the claim on a non-merits predicate. (*Id.*). In short, Petitioner's failure to preserve his federal constitutional claim at trial resulted in the Colorado Court of Appeals rejecting his claim on plain-error review.

The Colorado Court of Appeals relied on state law as the basis for its decision. Specifically, the state appellate court followed state law requiring the court to "review all other errors, constitutional or nonconstitutional, that were not preserved by objection for plain error," which requires reversal only if the error is "obvious." (ECF No. 10-7 at 6; citing *Hagos v. People,* 288 P.3d 116, 120 (Colo. 2012)). Because the decision was based on state law, the state procedural ground was independent. *See English*, 146

F.3d at 1259. And at the time the Colorado Court of Appeals resolved Petitioner's claim on appeal, the state rule was applied evenhandedly, making it adequate. *See e.g.*, *People v. Jompp,* 440 P.3d 1166, 1171-72 (Colo. App. 2018) (finding that defendant did not preserve his constitutional speedy trial and reviewing defendant's constitutional speedy trial claim for plain error); *Olier v. Zupan*, No. 10-cv-02779-BNB, 2011 WL 1043558, at *3 (D. Colo. Mar. 18, 2011) (unpublished) (addressing similar constitutional speedy trial claim and finding, "[t]he state procedural bar is firmly established and regularly followed"). Therefore, the Court finds that Petitioner's federal constitutional speedy trial claim is procedurally defaulted for purposes of federal habeas review.

A claim that has been procedurally defaulted in the state courts on an independent and adequate state procedural ground is precluded from federal habeas review unless the prisoner can demonstrate cause for the default and actual prejudice from the federal law violation or demonstrate that failure to consider the claim will result in a fundamental miscarriage of justice. *Coleman*, 501 U.S. at 750; *Cummings*, 506 F.3d at 1224. In the *Reply*, Petitioner argues that he preserved the constitutional speedy trial claim because he filed a motion to dismiss the charges based on a speedy trial violation in his earlier two cases, 17CR948 and 17CR1781. (ECF No. 13 at 1-2). He states that he "did in fact argue a constitutional error in the trial court with speedy trial which the appellate court chose to ignore." (*Id.* at 2).

This argument does not overcome the Colorado Court of Appeals' determination that Petitioner "moved to dismiss on statutory speedy trial grounds," and finding that Petitioner failed to preserve his constitutional speedy trial claim. (*See* ECF No. 10-7 at 4). And as explained above, Petitioner's constitutional speedy trial claim was decided on

an independent and adequate state procedural ground, which precludes this Court from reviewing the claim. Petitioner further fails to present any cogent argument to demonstrate cause and prejudice for the procedural default of his constitutional claim.

Petitioner also does not demonstrate that a failure to consider the merits of the claim will result in a fundamental miscarriage of justice. A "fundamental miscarriage of justice" means that "a constitutional violation has probably resulted in the conviction of one who is actually innocent." *See Murray v. Carrier*, 477 U.S. 478, 495-96 (1986). This standard requires an applicant to "support his allegations of constitutional error with new reliable evidence—whether it be exculpatory scientific evidence, trustworthy eyewitness accounts, or critical physical evidence—that was not presented at trial." *Schlup v. Delo*, 513 U.S. 298, 324 (1995). As a result, fundamental miscarriages of justice are "extremely rare." *Id.* Petitioner makes the conclusory argument that "a speedy trial in Colorado is a fundamental and important civil right that arises from federal and state constitutions." (ECF No. 13 at 2). This argument does not establish that Petitioner is actually innocent of the crimes of which he was convicted. *See U.S. v. Maravilla*, 566 Fed. App'x 704, 708 (10th Cir. 2014) (unpublished) (requiring a petitioner to show actual, factual innocence, not merely legal innocence).

Because Petitioner fails to demonstrate that the procedural default of his constitutional speedy trial claim is excused, this Magistrate Judge recommends dismissing Petitioner's speedy trial claim alleging a violation of federal law.

III. RECOMMENDATION

For these reasons, this Magistrate Judge respectfully recommends that the *Application for a Writ of Habeas Corpus Pursuant to 28 U.S.C. § 2254* (ECF No. 1) be

denied and this action **dismissed** because Petitioner's federal constitutional speedy trial claim is procedurally barred, and his state speedy trial claim is not cognizable in this federal habeas action.

DATED October 14, 2022.

BY THE COURT:

Gordon P. Gallagher
United States Magistrate Judge