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United States Court of Appeals
Tenth Circuit

January 16, 2025

Christopher M. Wolpert
Clerk of Court

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

HAZHAR A. SAYED,

Petitioner - Appellant,

v.

TERRY JACQUES, (S.C.F.) Warden; THE ATTORNEY GENERAL OF THE STATE OF COLORADO,

Respondents - Appellees.

No. 24-1282
(D.C. No. 1:23-CV-01880-RMR)
(D. Colo.)

ORDER DENYING CERTIFICATE OF APPEALABILITY*

Before **MATHESON**, Circuit Judge, **LUCERO**, Senior Circuit Judge, and **PHILLIPS**, Circuit Judge.

Hazhar A. Sayed, proceeding pro se,[1] seeks a certificate of appealability (COA) to appeal from the district court's denial of his 28 U.S.C. § 2254 petition. *See* 28 U.S.C. § 2253(c)(1)(A). 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* This order is not binding precedent except under the doctrines of law of the case, res judicata, and collateral estoppel.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. Sayed appears pro se, we liberally construe his filings. *Garrett v. Selby Connor Maddux & Janer*, 425 F.3d 836, 840 (10th Cir. 2005).

I. Background

While serving a prison sentence in Colorado, Mr. Sayed was charged in state court with three counts of assault on a state corrections officer. The case went to trial, and the jury convicted him on two of the three counts. He appealed to the Colorado Court of Appeals (CCA), which affirmed his conviction. Mr. Sayed then sought postconviction relief in state court, claiming he received ineffective assistance of trial counsel. The trial court denied relief without a hearing, and the CCA affirmed.

In his § 2254 habeas application, Mr. Sayed asserted a Fifth Amendment claim based on the trial court's admission of evidence of Mr. Sayed's silence during the prison investigation and a due process claim based on the trial court's failure to order a competency evaluation. He also asserted the same ineffective assistance claims he pursued in his motion for postconviction relief—namely, that his trial counsel failed to: (1) interview potential witnesses; (2) consult an expert witness concerning the possibility the video of the incident had been altered; or (3) request a self-defense instruction. The district court denied the application in a written order and denied a certificate of appealability. Mr. Sayed then filed the instant application for a COA.

II. Discussion

To receive a COA, Mr. Sayed must make "a substantial showing of the denial of a constitutional right," § 2253(c)(2), and must show "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). When the

district court has denied relief on the merits, we must determine as part of our COA analysis whether reasonable jurists could debate the court's decision given the deference owed to the state-court decision under the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA). *See Dockins v. Hines*, 374 F.3d 935, 938 (10th Cir. 2004).

A. Violation of Fifth Amendment Right to Remain Silent

Mr. Sayed claims the trial court violated his Fifth Amendment rights by allowing a prison investigator to testify about Mr. Sayed's post-arrest silence. The CCA rejected this claim on direct appeal, holding that any error was harmless beyond a reasonable doubt because it did not contribute to the verdict. The district court held the CCA's harmlessness determination was not unreasonable. *See Fry v. Pliler*, 551 U.S. 112, 119 (2007) ("[W]hen a state court determines that a constitutional violation is harmless, a federal court may not award habeas relief . . . unless the harmlessness determination itself was unreasonable.") (emphasis omitted)).

Mr. Sayed argues the trial court erred by failing to determine whether a valid evidentiary purpose existed to justify the government's use of his post-arrest silence. But on habeas review, our harmlessness standard assumes error and only asks whether that error "had substantial and injurious effect or influence in determining the jury's verdict." *Brecht v. Abrahamson*, 507 U.S. 619, 637-38 (1993) (internal quotation marks omitted). As to the issue of harmlessness, Mr. Sayed makes no argument, and it is therefore waived. *See Therrien v. Target Corp.*, 617 F.3d 1242, 1252-53 (10th Cir. 2010) (holding failure to raise an argument in the opening brief waives that argument). Accordingly, we deny a COA as to this claim.

B. Due Process Violation Based on Trial Court's Assessment of Competency

Mr. Sayed claims the trial court violated his due process rights in concluding a competency evaluation was not warranted. The CCA rejected this claim, holding the trial court did not abuse its discretion. The CCA found the trial court's assessment of Mr. Sayed's competency was supported by the following facts: (1) Mr. Sayed instructed his counsel not to pursue an affirmative defense because he was adamant he did not assault the prison officer, thus indicating he had the ability to consult with his lawyer with a reasonable degree of rational understanding; (2) his own counsel stated that he was well spoken and presented well; and (3) the trial court stated that based on its own observation of Mr. Sayed and his pro se pleadings, there was nothing suggesting he was incompetent to proceed.

The district court held the CCA did not unreasonably apply clearly established federal law as determined by the Supreme Court, *see* § 2254(d)(1), nor did Mr. Sayed present evidence to rebut the presumption that the CCA's factual findings were correct, *see* § 2254(e)(1). Mr. Sayed argues the trial court "disregard[ed]" evidence of his incompetency, Opening Br. & Appl. for COA at 14, but he identifies no facts that the trial court failed to consider. Instead, it appears he merely disagrees with the way the trial court weighed the evidence. *See, e.g., id.* (arguing the trial court violated his due process rights "[b]ecause the weight of the evidence . . . demonstrated that sufficient doubt existed as to Mr. Sayed's competency"). In short, Mr. Sayed has failed to present any evidence to rebut the presumption that the CCA's factual findings were correct.

Accordingly, we hold that no reasonable jurist could debate the district court's rejection of this claim, and we therefore deny a COA as to this claim.

C. Ineffective Assistance of Counsel

We review Mr. Sayed's ineffective assistance claims under *Strickland v. Washington*, 466 U.S. 668 (1984), which requires a defendant to show that (1) counsel's performance "fell below an objective standard of reasonableness," *id.* at 688, and (2) the deficient performance prejudiced the defense, *id.* at 692. The deficient performance prong requires a defendant to show "that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed . . . by the Sixth Amendment." *Id.* at 687. The prejudice prong requires a showing that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694.

We must review the CCA's resolution of Mr. Sayed's ineffective assistance claims "through AEDPA's deferential lens." *Frost v. Pryor*, 749 F.3d 1212, 1225 (10th Cir. 2014); *see also Lockett v. Trammell*, 711 F.3d 1218, 1248 (10th Cir. 2013) ("[W]e review [the state court's] analysis [of ineffective assistance of counsel claims] under the considerable deference required by *Strickland* itself—in addition to AEDPA deference.").

1. Failure to Interview Witnesses

Mr. Sayed's first ineffective assistance claim was based on his trial counsel's failure to interview every single inmate in Mr. Sayed's cell block. The CCA rejected the claim because "the record clearly establishes that counsel's decision was a strategic one aimed at maximizing her credibility with the jury." R vol.1 at 250. As her counsel

explained, "the mere act of presenting [inmate testimony] could [have] undermined her ability to persuade the jury." *Id.* Mr. Sayed fails to acknowledge the CCA's finding that his counsel made a strategic choice. He insists that his counsel had a duty to investigate. But as the district court correctly observed, the question under *Strickland* is not whether counsel could have done more, but whether the decision not to do more was "'[objectively reasonable] under all the circumstances, applying a heavy measure of deference to counsel's judgments.'" R vol. 1 at 359 (quoting *Turrentine v. Mullin*, 390 F.3d 1181, 1209 (10th Cir. 2004)). Mr. Sayed has not established that reasonable jurists could debate the district court's rejection of this claim. Accordingly, we deny a COA.

2. Failure to Retain Expert

Mr. Sayed next asserts that his counsel was ineffective in failing to retain an expert to determine whether the video evidence of the incident had been altered. The CCA rejected this claim because his counsel consulted an individual she believed to be knowledgeable concerning Mr. Sayed's theory, and that individual told her there were no signs the video had been tampered with. The CCA therefore held counsel's decision not to pursue Mr. Sayed's theory was a strategic one based on a reasonable exercise of professional judgment. R. vol. 1 at 251-52 ("[C]ounsel's decision to cut short her pursuit of [Mr.] Sayed's tampering theory was based on her reasonable professional judgment."). The district court held the CCA's resolution of the claim was not an unreasonable determination of the facts under § 2254(d)(2), and that Mr. Sayed had not produced any evidence to rebut the "'strong presumption of reasonableness'" that attaches to strategic

decisions, "'including whether to hire an expert.'" R. vol. 1 at 361 (quoting *Dunn v. Reeves*, 594 U.S. 731, 739 (2021)).

Mr. Sayed disagrees with the CCA's findings and argues his counsel's investigation was not sufficiently thorough. But the CCA's decision is consistent with *Strickland*, in which the Supreme Court held that "strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation." 466 U.S. at 690-91. We hold that reasonable jurists could not debate whether this claim should have been resolved in a different manner. We therefore deny a COA as to this claim.

3. Failure to Request Self-Defense Instruction

The CCA denied Mr. Sayed's last ineffective assistance claim on state-law grounds. Under Colorado law, "a defendant is not entitled to an affirmative defense instruction if he denies committing the charged crime." *People v. Snider*, 491 P.3d 423, 429 (Colo. Ct. App. 2021). The CCA held that even if the court assumed deficient performance, Mr. Sayed could not prove prejudice under *Strickland* because he denied having committed the charged crime and therefore would not have been entitled to a self-defense instruction.

"[I]t is not the province of a federal habeas court to reexamine state-court determinations on state-law questions. In conducting habeas review, a federal court is limited to deciding whether a conviction violated the Constitution, laws, or treaties of the United States." *Estelle v. McGuire*, 502 U.S. 62, 67-68 (1991). Accordingly, the district court denied this claim "[b]ecause this Court is bound to accept the CCA's conclusion

regarding its interpretation of Colorado criminal law." R. vol. 1 at 364. In his application for a COA, Mr. Sayed contends that Colorado state law does not in fact require a defendant to deny having committed the charged crime in order to be entitled to a self-defense instruction. That is precisely the type of state-law question a federal habeas court may not examine. No reasonable jurist could debate the district court's analysis of this claim, and we therefore deny a COA.

D. Right to Control Defense

Finally, Mr. Sayed's habeas application contained what the district court characterized as "stray allegations," R. vol. 1 at 362 n.2, suggesting that his counsel's failure to request a self-defense instruction "intruded" on his right to control his own defense within the meaning of *McCoy v. Louisiana*, 584 U.S. 414 (2018). Liberally construing Mr. Sayed's "stray allegations" as a separate claim, the district court rejected it because Mr. Sayed failed to properly exhaust the claim in state court. *See* § 2254(b)(1)(A). We hold that no reasonable jurist would find it debatable whether the district court was correct in its procedural ruling. *See Slack*, 529 U.S. at 484.

In his application for a COA, Mr. Sayed makes an argument he did not assert before the district court. He contends that the district court should have construed his *McCoy* claim as one invoking *Martinez v. Ryan*, 566 U.S. 1 (2012), in which the Supreme Court held that "[i]nadequate assistance of counsel at initial-review collateral proceedings may establish cause for a prisoner's procedural default of a claim of ineffective assistance of counsel." *Id.* at 9. Mr. Sayed did not make this argument before the district court. As a general rule, we will not consider issues raised for the first time on appeal, and

Mr. Sayed offers us no reason to make an exception in this instance. *See Dockins*, 374 F.3d at 940 (court of appeals may decline to consider argument in application for COA not presented first to the district court).

III. Conclusion

We deny Mr. Sayed's request for a COA and dismiss this matter.[2] We grant his motion for leave to proceed in forma pauperis.

Entered for the Court

Gregory A. Phillips
Circuit Judge

[2] Mr. Sayed also broadly asserts the district court "deprive[d] [him] of his right to receive liberal construction" of his pro se pleadings. Opening Br. & Appl. for COA at 6. But the rule on which Mr. Sayed relies does not confer any rights, nor does it elevate losing arguments into winning ones. *See Hall v. Bellmon*, 935 F.2d 1106, 1110 (10th Cir. 1991) (pro se pleadings are to be construed liberally, but pro se status does not relieve litigant "of the burden of alleging sufficient facts on which a recognized legal claim could be based"). At any rate, we are satisfied that in reviewing Mr. Sayed's habeas claims, the district court liberally construed his pleadings.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
Judge Regina M. Rodriguez

Civil Action No. 23-cv-01880-RMR

HAZHAR A. SAYED,

Petitioner,

v.

TERRY JACQUES, (S.C.F.) Warden, and
THE ATTORNEY GENERAL OF THE STATE OF COLORADO,

Respondents.

ORDER

A Colorado jury convicted Petitioner Hazhar A. Sayed of second-degree assault and third-degree assault, but acquitted him of first-degree assault. The assault charges followed a physical altercation between Mr. Sayed and a corrections officer that occurred while Mr. Sayed was incarcerated at a state prison serving another criminal sentence. For the assault convictions, the state court imposed a three-year sentence to be served consecutively to the earlier criminal sentence. Mr. Sayed asserts five claims in this habeas corpus action brought under 28 U.S.C. § 2254. The Colorado Court of Appeals (CCA) was the last state court to decide the merits of the claims Mr. Sayed asserts here. Because the CCA's decision rejecting Mr. Sayed's claims did not contradict or unreasonably apply Supreme Court precedent, nor was it based on an unreasonable

determination of the facts in light of the evidence presented, the Court denies the habeas application.

I. STANDARDS OF REVIEW

"The Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) requires a prisoner who challenges (in a federal habeas court) a matter 'adjudicated on the merits in State court' to show that the relevant state-court 'decision' (1) 'was contrary to, or involved an unreasonable application of, clearly established Federal law,' or (2) 'was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.'" *Wilson v. Sellers*, 584 U.S. 122, 124-25 (2018) (citing 28 U.S.C. § 2254(d)(1) and (2)). It is well-settled that "when the last state court to decide a prisoner's federal claim explains its decision on the merits in a reasoned opinion[,] a federal habeas court simply reviews the specific reasons given by the state court and defers to those reasons if they are reasonable." *Id.* at 125. "[A] state prisoner must show that the state court's ruling on the claim being presented in federal court was so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement." *Harrington v. Richter*, 562 U.S. 86, 103 (2011). Mr. Sayed bears the burden to make these showings under § 2254(d). *See Woodford v. Visciotti*, 537 U.S. 19, 25 (2002) (per curiam).

Because Mr. Sayed is *pro se*, the Court liberally construes his filings, but will not act as an advocate. *James v. Wadas*, 724 F.3d 1312, 1315 (10th Cir. 2013).

II. BACKGROUND

A. State trial and direct appeal.

In 2006, a jury found Mr. Sayed guilty of unlawful sexual contact in Broomfield County District Court case number 05CR70. The conviction resulted in a sentence of 24 years to life, to be served in the custody of the Colorado Department of Corrections (CDOC). While in the custody of the CDOC on the Broomfield conviction, the events giving rise to this case occurred. The CCA summarized those events as follows:

> At trial, the jury heard the following evidence.
>
> Sayed was an inmate in the custody of the Department of Corrections (DOC) who filed a grievance about the prison's policies. Captain Michael Tidwell escorted Sayed from his cell to an office where the two could discuss Sayed's grievance.
>
> Tidwell testified that while they were walking toward the office, Sayed balled up his fists, took an "aggressive stance," and said, "We're going to fight." Tidwell ordered Sayed to "get on the wall" so he could restrain him. But Sayed again said, "We're going to fight," and moved toward Tidwell.
>
> Fearing for his safety, Tidwell grabbed Sayed's arms and pushed him toward the wall. Sayed struck him in the face. Then, the two exchanged punches. Tidwell attempted to "utilize an inside takedown" on Sayed but slipped to one knee. Then, he testified, Sayed hit him in the back of the head. Eventually, Tidwell wrestled Sayed to the ground.
>
> Tidwell testified that Sayed tried to stab him with a ballpoint pen while they were on the ground. He also testified that Sayed hit him in the face, "towards the eye," on the nose, on the top of his head, and in the back. After thirty seconds, another corrections officer came to help Tidwell. This officer testified that he saw Sayed "stabbing at [Tidwell] in a downward motion," so the officer struck Sayed in the chest. Sayed continued to hit Tidwell, so the officer used "knee strikes" on Sayed until other officers arrived. The altercation ended when other officers arrived and used a taser on Sayed.

> Tidwell testified that he was "bleeding pretty badly" from the top of his head. A third corrections officer testified that she saw blood coming from Tidwell's head and took him to receive medical assistance.
>
> The jury saw security footage of the altercation, along with photographs of blood on the floor, a bent ballpoint pen, blood on Tidwell's uniform, and some bruising near Tidwell's left eye.
>
> Sayed testified that he never struck nor stabbed Tidwell. He also testified that the prison guards assaulted him because they mistook him for a "snitch" and a "federal informant." And he claimed that someone tampered with the security footage of the altercation.
>
> * * *
>
> On appeal, Sayed contends we should reverse his conviction because the trial court (1) violated his Fifth Amendment rights by admitting evidence of his silence; (2) did not give an affirmative self-defense instruction to the jury; and (3) allowed the trial to proceed without ordering a competency evaluation for him.
>
> Because we conclude that any error in admitting evidence of Sayed's silence was harmless beyond a reasonable doubt, and disagree with Sayed's final two contentions, we affirm the judgment of conviction.

(ECF No. 16-4 at 2-4). The CCA's analysis of each claim will be set forth below. Ultimately, though, the CCA affirmed Mr. Sayed's convictions on direct appeal, and the Colorado Supreme Court denied certiorari. (*Id.*; ECF No. 16-5).

B. State postconviction proceedings.

Mr. Sayed then sought postconviction relief under Colo. R. Crim. P. 35(c), which was denied by the state district court without a hearing. (ECF No. 16-10 at 3). The CCA affirmed the denial of postconviction relief in 2023, summarizing Mr. Sayed's ineffective assistance of counsel claims as follows:

> On appeal, Sayed asserts that his counsel was constitutionally ineffective because she failed to (1) interview and introduce testimony of potential witnesses; (2) consult an expert witness; and (3) request a self-defense instruction. We address and reject each claim.

(*Id.* at 4-5). The Colorado Supreme Court again denied certiorari. (ECF No. 16-11).

C. Federal habeas proceedings.

After the state direct appeal and postconviction proceedings came to an end, Mr. Sayed turned his sights to federal court. On July 24, 2023, Mr. Sayed filed the Application for a Writ of Habeas Corpus Pursuant to 28 U.S.C. § 2254 that is the operative pleading in this case. (ECF No. 1). Mr. Sayed's § 2254 application presents the following claims:[1]

1. "Violation 14th and 5th amendments by commenting on exercision of right to remain Silent, post **Miranda** advisement" (*id.* at 4);
2. "Violation 14th amendment right to a fair trial, failure of the trial court to order Competency evaluation for Mr. Sayed when there were clear indication that he May not be competent to proceed" (*id.* at 5); and
3. "Violation Sixth amendment right to receive effective assistance of counsel Throughout course of proceedings against Mr. Sayed because trial counsel: A) Failed to interview and introduce testimony of witnesses; B) consult with an expert witness; and c) request a self-defense instruction" (*id.* at 6-7).

As relief, Mr. Sayed seeks "reversal of his convictions and remand for a new trial, as well as all available relief whether stated or not." (*Id.* at 9).

[1] Where the Court quotes Mr. Sayed's allegations, it quotes the allegations verbatim without correcting or identifying errors in spelling, grammar, punctuation, or capitalization.

In their answer, Respondents contend the CCA's resolution of each claim was not contrary to, or an unreasonable application of, clearly established federal law—barring habeas relief under § 2254(d)(1). (*See* ECF No. 32). Nor were, Respondents continue, any of the CCA's decisions based on unreasonable factual findings, making relief unavailable under § 2254(d)(2). (*Id.*). In reply, Mr. Sayed maintains the state criminal proceedings violated his constitutional rights, requiring habeas relief. (*See* ECF No. 41). The Court now turns to each claim.

III. DISCUSSION

A. Claim 1: Violation of the right to remain silent.

Mr. Sayed first claims that he was denied the right to remain silent because an investigator for the CDOC commented on Mr. Sayed's silence as part of the investigator's testimony at trial. (ECF No. 1 at 4). The Court will recount why the CCA rejected the claim, and then address whether § 2254 provides any basis for habeas relief.

1. CCA's rejection of the claim.

The CCA concluded that any error in admitting evidence of Mr. Sayed's silence was harmless beyond a reasonable doubt.

> After Sayed testified, the prosecution called a DOC investigator as a rebuttal witness. The prosecution engaged the investigator in the following line of questioning:
>
> Q: You heard all of the defendant's testimony today?
>
> A: Yes.
>
> Q: Did he tell you everything today that he told you back on [the day of the charged offenses] when you saw him?

A: No.

Sayed objected, contending that these questions violated his Fifth Amendment right to remain silent. The court overruled Sayed's objection, and the prosecutor continued,

Q: Allow me to state the question again, Investigator. You heard everything the defendant testified to in court today?

A: Yes.

Q: Did he tell you the same account back on May 2, 2015, when you met with him?

A: No.

On cross-examination, Sayed's counsel asked the investigator

Q: When you met with him[,] he actually said I have nothing to say to you, turned around, and walked away; right?

A: Correct.

Q: He didn't make any statement at all, did he?

A: Correct.

Q: Yeah. So it's not that he made a different statement . . . it's that he didn't make any statement as is his right; right?

A: Correct.

Sayed contends that the investigator's testimony violated his Fifth Amendment right against self-incrimination.

B. Constitutional Harmless Error

Because Sayed preserved this contention and claims an error "of constitutional dimension," we review for constitutional harmless error. *Hagos v. People*, 2012 CO 63, ¶ 11. Under this standard, if we perceive an error, we will reverse unless the error is harmless beyond a reasonable

doubt. *Id.* An error is harmless beyond a reasonable doubt if there is no reasonable possibility that it contributed to the conviction. *Id.* The People bear the burden of proving that a constitutional error was harmless beyond a reasonable doubt. *Id.*

The People contend that any error in admitting evidence of Sayed's silence was harmless beyond a reasonable doubt. We agree with the People, for three reasons.

First, the reference to Sayed's silence was brief. The only evidence of Sayed's silence came in during his counsel's cross-examination of the DOC investigator. And the prosecution never commented on Sayed's silence during its opening statement, case-in-chief, or closing argument.

Second, the evidence at trial strongly established that Sayed committed the two offenses of which the jury found him guilty. Tidwell testified that Sayed struck him in the face and the back of the head. Tidwell also testified that Sayed hit him in the face, "towards the eye," on the nose, on the top of his head, and in the back while the two men were on the ground. The jury also heard Tidwell and another officer testify that Tidwell's head was bleeding. And, the jury saw photographs of bruising near Tidwell's left eye, blood on the floor where the assault occurred, and drops of blood on Tidwell's uniform. Taken together, this evidence strongly established that Sayed committed the two offenses of which the jury found him guilty.

And third, the jury returned a split verdict, acquitting Sayed of first degree assault; finding him guilty of the second degree assault by a person lawfully confined or in custody; and finding him guilty of third degree assault, a lesser included offense on count three. The split verdict suggests that the jury did not blindly infer Sayed's guilt from the brief reference to his silence, but instead focused on the evidence the prosecution introduced at trial. *See Martin v. People*, 738 P.2d 789, 796 (Colo. 1987) (A jury's split verdict suggested that "the jurors exercised some discretion in their deliberations and did not blindly convict the defendant based upon inferences drawn from the nature of the [defendant's] previous conviction.").

For these reasons, we see no reasonable possibility that the evidence of Sayed's silence contributed to the two guilty verdicts. *Hagos*, ¶ 11. Thus, we need not decide whether the evidence violated, or even implicated, Sayed's Fifth Amendment rights.

(ECF No. 16-4 at 4-8).

2. Application of § 2254.

Respondents answer that AEDPA bars relief because the CCA's rejection of this claim was not contrary to, or an unreasonable application of, binding Supreme Court precedent. (ECF No. 32 at 10-16). The Court agrees with Respondents.

In *Chapman v. California*, 386 U.S. 18 (1967), the United States Supreme Court held that on direct appeal a constitutional error is harmless if it appears "beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained." *Id.* at 24. Where a state court on direct review finds that "any federal error was harmless beyond a reasonable doubt under *Chapman*," the decision "undoubtedly constitutes an adjudication of [the] constitutional claim 'on the merits,'" which entitles the state-court decision to AEDPA deference. *Davis v. Ayala*, 576 U.S. 257, 269 (2015). In other words, "when a state court determines that a constitutional violation is harmless, a federal court may not award habeas relief under § 2254 unless *the harmlessness determination itself* was unreasonable." *Fry v. Pliler*, 551 U.S. 112, 119 (2007) (emphasis in original).

The CCA reasonably concluded that any error in admitting evidence of Mr. Sayed's silence was harmless beyond a reasonable doubt. The CCA applied the governing standard articulated in *Chapman*, and did so in a reasonable manner. As explained by the CCA, the references to Mr. Sayed's silence during the trial were brief, other evidence that Mr. Sayed had committed second- and third-degree assault was strong, and the jury returned a split verdict which "suggests that the jury did not blindly infer Sayed's guilt from the brief reference to his silence but instead focused on the evidence the prosecution

introduced at trial." (ECF No. 16-4 at 8). These findings are supported by the state-court record. (ECF No. 28, Trial Trs. dated Jan. 23, 24, and 25, 2017). Mr. Sayed therefore fails to demonstrate the CCA's harmlessness determination itself was unreasonable. *Fry*, 551 U.S. at 119. As such, habeas relief is barred by §§ 2254(d)(1) and (2).

B. Claim 2: Lack of competency evaluation.

Claim 2 argues that the trial court's failure to evaluate Mr. Sayed's competency to stand trial violated the Fourteenth Amendment's Due Process Clause. (ECF No. 1 at 5). The Court will set forth the CCA's resolution, and then discuss whether the requirements of § 2254 have been met.

1. CCA's resolution.

The CCA concluded that the trial court did not err by declining to order a competency evaluation of Mr. Sayed. In doing so, it analyzed the claim as follows:

> Due process dictates that a defendant may not be tried or sentenced while incompetent to proceed. § 16-8.5-102(1), C.R.S. 2019; *People v. Corichi*, 18 P.3d 807, 810 (Colo. App. 2000). A defendant is incompetent to proceed if a mental or developmental disability prevents him from (1) "having sufficient present ability to consult with [his] lawyer with a reasonable degree of rational understanding in order to assist in the defense" or (2) "having a rational and factual understanding of the criminal proceedings." § 16-8.5-101(5), C.R.S. 2019. If the court "has reason to believe that the defendant is incompetent to proceed," it shall suspend the proceedings to determine whether the defendant is competent. § 16-8.5-102(2)(a). And, if there is "sufficient doubt" that the defendant is competent, due process requires the court to make a competency determination before proceeding. *People v. Kilgore*, 992 P.2d 661, 663 (Colo. App. 1999).
>
> But due process does not require trial courts to "accept without questioning a lawyer's representations concerning the competence of his client." *Id.* (quoting *People v. Morino*, 743 P.2d 49, 51 (Colo. App. 1987)). And a defendant is presumed to be competent to stand trial. *People v.*

Stephenson, 165 P.3d 860, 866 (Colo. App. 2007).

Because the trial court is in the best position to observe the defendant's actions and demeanor, "it has substantial discretion in determining whether a legitimate issue respecting that defendant's competency has been raised." *Kilgore*, 992 P.2d at 663-64. Thus, we will affirm the trial court's competency determination absent an abuse of discretion. *Stephenson*, 165 P.3d at 866. A trial court abuses its discretion only if its decision is manifestly arbitrary, unreasonable, or unfair. *Id.*

On the morning of trial, the court held a "*Bergerud*" hearing with Sayed and Sayed's counsel outside the presence of the prosecution. *See People v. Bergerud*, 223 P.3d 686, 702-03 (Colo. 2010) ("When a defendant requests substitute counsel . . . the trial court must be able to inquire into the details of a dispute between a defendant and his attorneys — outside the presence of opposing counsel . . . ."). During this hearing, Sayed told the court that he wanted to continue the trial so he could interview 120 other inmates who witnessed the assault and investigate whether the videotapes of the assault had been altered.

At the end of the *Bergerud* hearing, Sayed's counsel asked "whether the Court believes . . . we have any issues with competency to proceed . . . ." Sayed's counsel stated, "I'm not raising competency as an issue right now" but asked for a "very short discussion as to whether . . . the court believes that some of [Sayed's] more fantastic claims" made the court question whether Sayed was competent to proceed.

The trial court responded, "Even though I refer to his theories as somewhat fantastical or conspiratorial, nothing that Mr. Sayed has presented to me either in writing or in his presence today, suggested to me that I would raise competency." And the trial began later that day.

Based on this exchange, we question whether Sayed preserved the issue of competency. Even so, we need not address the issue of preservation because we conclude the trial court did not abuse its discretion in declining to order a competency evaluation for Sayed.

The following facts support the trial court's assessment of Sayed's competency. Sayed instructed his counsel not to pursue an affirmative defense because he was "adamant" that he did not assault the prison officer. This suggests he had the "present ability to consult with [his] lawyer with a reasonable degree of rational understanding in order to assist in the

> defense." § 16-8.5-101(5). Sayed's counsel stated that Sayed "is well spoken and presents well." And the trial court stated that after observing Sayed in person and reviewing Sayed's pro se fillings, the court had seen "nothing" suggesting that Sayed was incompetent to proceed. *See Stephenson*, 165 P.3d at 866. We again note that the trial court was in the best position to assess Sayed's competency. *Id.*; *Kilgore*, 992 P.2d at 663-64.
>
> We also note that Sayed's counsel suggested she agreed with the trial court's assessment of Sayed's competency. After the trial court said it saw "nothing" suggesting Sayed was incompetent, Sayed's counsel responded, "And I haven't raised [competency] up until now based on kind of that same analysis. I was just wondering if the Court was having a different view of that than perhaps I was."
>
> Based on these facts, we conclude that the trial court did not have reason to believe Sayed was incompetent to proceed to trial. Thus, the court did not abuse its discretion when it declined to order a competency evaluation for Sayed.

(ECF No. 16-4 at 10-14).

2. *Application of § 2254.*

Respondents contend the CCA's decision does not contradict or unreasonably apply binding Supreme Court precedent, nor was it based on an unreasonable determination of the facts in light of the evidence presented, which spells the end of Claim 2 under §§ 2254(d)(1) and (d)(2). (ECF No. 32 at 17-24). The Court agrees.

"It is well established that the Due Process Clause of the Fourteenth Amendment prohibits the criminal prosecution of a defendant who is not competent to stand trial." *Medina v. California*, 505 U.S. 437, 439 (1992); *see also Pate v. Robinson*, 383 U.S. 375 (1966). A defendant is competent to stand trial when he "has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding" and he

possesses "a rational as well as factual understanding of the proceedings against him." *Dusky v. United States*, 362 U.S. 402 (1960).

The standard is flexible. "[E]vidence of a defendant's irrational behavior, his demeanor at trial, and any prior medical opinion on competence to stand trial are all relevant in determining whether further inquiry is required, but that even one of these factors standing alone may, in some circumstances, be sufficient." *Drope v. Missouri*, 420 U.S. 162, 180 (1975). Yet there are "no fixed or immutable signs which invariably indicate the need for further inquiry to determine fitness to proceed; the question is often a difficult one in which a wide range of manifestations and subtle nuances are implicated." *Id.*

The CCA did not unreasonably apply clearly established federal law as determined by the Supreme Court. After reviewing Mr. Sayed's *pro se* filings, and seeing him in person, Mr. Sayed was described as being well spoken and presenting well. Aside from his far-fetched defense theories, the trial court saw nothing that made it question Mr. Sayed's competency to proceed. Mr. Sayed's defense attorney agreed with the trial judge's assessment. *See Allen v. Mullin*, 368 F.3d 1220, 1239 (10th Cir. 2004) ("Defense counsel is often in the best position to evaluate a client's competence."). Moreover, counsel was able to consult with Mr. Sayed in developing a defense—a defense that succeeded in the jury acquitting Mr. Sayed of the most serious charge. Except for his own disagreement with the CCA's decision, Mr. Sayed points to nothing that shows the decision was contrary to or an unreasonable application of clearly established federal law. Nor does Mr. Sayed present clear and convincing evidence to rebut the presumption that

the state court's factual findings were correct under § 2254(e)(1). He thus does not show that the state court's decision was based on an unreasonable determination of the facts in light of the evidence presented. 28 U.S.C. § 2254(d)(2). Habeas relief is therefore not available.

C. Claims 3, 4, and 5: Ineffective assistance of counsel.

Mr. Sayed's final three claims contend that trial counsel was constitutionally ineffective. A defendant in a criminal case has a Sixth Amendment right to the effective assistance of counsel. *See Strickland v. Washington*, 466 U.S. 668 (1984). To establish that counsel was ineffective, Mr. Sayed must demonstrate both deficient performance and that counsel's deficient performance resulted in prejudice to his defense. *Id.* at 687. If Mr. Sayed fails to satisfy either prong of the *Strickland* test, the ineffective assistance of counsel claim must be dismissed. *Id.* at 697. In general, "[j]udicial scrutiny of counsel's performance must be highly deferential." *Id.* at 689. There is "a strong presumption" that counsel's performance falls within the range of "reasonable professional assistance." *Id.* It is Mr. Sayed's burden to overcome this presumption by showing the alleged errors were not sound strategy under the circumstances. *See id.*

The challenge of demonstrating counsel was ineffective is even greater for a state prisoner seeking federal habeas corpus review under § 2254(d). *See Harmon v. Sharp*, 936 F.3d 1044, 1058 (10th Cir. 2019). "When assessing a state prisoner's ineffective-assistance-of-counsel claims on habeas review, [federal courts] defer to the state court's determination that counsel's performance was not deficient and, further, to the attorney's

decision in how to best represent a client." *Id.* (internal quotation marks and brackets omitted). Thus, review under § 2254(d) is doubly deferential. *See id.* "The question is whether *any* reasonable argument exists that counsel satisfied *Strickland's* deferential standard." *Id.* (citations and internal quotes omitted). "And because the *Strickland* standard is a general standard, a state court has . . . more latitude to reasonably determine that a defendant has *not* satisfied that standard." *Id.*

Under the prejudice prong, Mr. Sayed must establish "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.*; *see also Richter*, 562 U.S. at 112 (stating that "[t]he likelihood of a different result must be substantial, not just conceivable"). In determining whether Mr. Sayed has established prejudice, the Court must look at the totality of the evidence and not just the evidence that is helpful to him. *See Boyd v. Ward*, 179 F.3d 904, 914 (10th Cir. 1999).

Claim 3. Mr. Sayed first contends that trial counsel was ineffective for not locating and interviewing "all the inmates in the living unit pod he was assigned to" because they would have testified that "right before Mr. Sayed was involved in his altercation with the correctional officer[], that it was announced he was a sex offender with a fake mittimus as well as a federal informant." (ECF No. 1 at 6). The Court will set forth the CCA's decision, and then discuss whether the requirements of § 2254 have been met.

1. CCA's decision.

The CCA rejected this claim, finding counsel's performance was not deficient, but rather that counsel had made a strategic decision not to interview or present testimony from other inmates in Mr. Sayed's living unit.

> Sayed first faults counsel for failing to identify and interview other inmates who heard the alleged intercom announcement. He posits that, had counsel performed this investigation, she could have introduced testimony about the announcement, which would have undercut Tidwell's credibility and given jurors a basis to conclude that Tidwell was the aggressor.
>
> But the record clearly establishes that counsel's decision was a strategic one aimed at maximizing her credibility with the jury. Indeed, she specifically explained to the court that such testimony would be inherently unreliable, and the mere act of presenting it could undermine her ability to persuade the jury. She further reasoned that, because the videotapes were the central piece of evidence, the value of a theoretical inmate's testimony was insignificant. In particular, the alleged announcement could have had no bearing on the jury's assessment of the confrontation between Tidwell and Sayed that occurred after the announcement. For these reasons, counsel's strategic decision, made after a thorough investigation of the law and facts, does not amount to deficient performance. *Ardolino*, 69 P.3d at 76 ("Strategic choices made after thorough investigation of the law and facts relevant to plausible options are virtually unchallengeable . . . ."); *see People v. Newmiller*, 2014 COA 84, ¶¶ 44-48 (concluding counsel's performance was not deficient because it was a strategic, adequately informed decision).

(ECF No. 16-10 at 9-10).

2. Application of § 2254.

Respondents contend the CCA applied *Strickland* in a reasoned manner, so habeas relief is unavailable under § 2254(d)(1). (ECF No. 32 at 25-32). The Court agrees.

Mr. Sayed's application and reply continue to take issue with counsel's failure to interview all the other inmates in his living unit. But counsel's underlying performance is

not the question before this Court. "The pivotal question [on federal habeas review] is whether the state court's application of the *Strickland* standard was unreasonable. This is different from asking whether defense counsel's performance fell below *Strickland's* standard." *Richter*, 562 U.S. at 101. To obtain habeas relief, Mr. Sayed must show that the CCA's denial of the claim was contrary to, or an unreasonable application of, clearly established federal law under § 2254(d)(1). He cites no case to meet this prerequisite for habeas relief.

Moreover, Mr. Sayed's argument boils down to a claim that trial counsel should have done more investigation or pursued a different defense theory. "As is always the case, trial counsel could have done more. But the question under *Strickland* is not whether counsel could have done more, but whether counsel's decision not to do more was '[objectively unreasonable] in all the circumstances, applying a heavy measure of deference to counsel's judgments.'" *Turrentine v. Mullin*, 390 F.3d 1181, 1209 (10th Cir. 2004) (quoting *Strickland*); *Mora v. Williams*, 111 F. App'x 537, 550 (10th Cir. 2004) (unpublished) ("To state the obvious: the trial lawyers, in every case, could have done something more or something different.") (citation and internal quotation omitted). Mr. Sayed presents no allegations or argument to meet the standard under *Strickland*, or the more demanding standard required by § 2254. Habeas relief will accordingly be denied.

Claim 4. Mr. Sayed next finds fault with counsel not retaining an expert to determine whether the video evidence of the altercation had been edited. (ECF No. 1 at 6). The Court will set forth the CCA's decision, and then discuss whether the requirements

of § 2254 have been met.

1. CCA's decision.

The CCA rejected this claim, finding counsel's performance was not deficient, but instead a reasonable strategic decision.

> Sayed also takes issue with counsel's decision not to have a computer forensics expert review the DOC videotapes for evidence of tampering. It is not clear what Sayed believes the tampering accomplished. At trial, he alleged that the tapes were edited to remove footage of officers planting the pen; in his Crim P. 35(c) motion, he argues that the tampering removed evidence of the intercom announcement.
>
> Regardless, counsel's decision to cut short her pursuit of Sayed's tampering theory was based on her reasonable professional judgment. Contrary to Sayed's assertion, counsel investigated the possibility that the tapes were tampered with by consulting an individual she believed to be knowledgeable. That individual told her there were no signs of tampering. This assessment, coupled with the fact that the tapes were produced by the DOC's automatic recording system and immediately subject to discovery, convinced her that further investigation was unwarranted. Because this decision was the product of her reasonable professional judgment, and because Sayed does not cite record evidence that suggests otherwise, counsel's performance was not deficient. *See Ardolino*, 69 P.3d at 76 ("[S]trategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation.").

(ECF No. 16-10 at 10-11).

2. Application of § 2254.

Respondents contend the CCA applied *Strickland* in a reasoned manner, so habeas relief is unavailable under § 2254(d)(1). (ECF No. 32 at 47-52). The Court agrees.

Mr. Sayed does not show that the CCA's denial of the claim was contrary to, or an unreasonable application of, clearly established federal law under § 2254(d)(1). Caselaw

actually cuts the other way. The Supreme Court has "often explained that strategic decisions—including whether to hire an expert—are entitled to a 'strong presumption' of reasonableness." *Dunn v. Reeves*, 594 U.S. 731, 739 (2021). "Such decisions are particularly difficult because certain tactics carry the risk of 'harm[ing] the defense' by undermining credibility with the jury or distracting from more important issues." *Id.* (citation omitted).

The same is true here. The decision not to retain a video expert to review footage from the CDOC's automatic recording system was sound strategy for the strategic reasons given by counsel and recounted the CCA—specifically, suggesting the video of Mr. Sayed hitting the corrections officer had been "tampered with" would undermine counsel's credibility with the jury. And aside from Mr. Sayed's own speculation, nothing in the record suggests that further examination of the video would have revealed anything helpful to his defense. *Byrd v. Workman*, 645 F.3d 1159, 1168 (10th Cir. 2011) (explaining that "mere speculation is not sufficient" to demonstrate prejudice under *Strickland*); *see also Weatherall v. Sloan*, 415 F. App'x 846, 849 (10th Cir. 2011) (unpublished) ("We conclude that the Colorado Court of Appeals' decision was not contrary to or an unreasonable application of federal law because [the petitioner] made no more than vague and conclusory allegations to support his conspiracy claim.").

The CCA's decision to deny this ineffective assistance of counsel claim was not unreasonable as required by § 2254(d)(1). And habeas relief will not be granted under § 2254(d)(2) because Mr. Sayed fails to rebut the presumption that the state-court's factual

findings were correct. Claim 4 will accordingly be denied.

Claim 5. Mr. Sayed's final claim contends that trial counsel was ineffective "by failing to seek a self-defense instruction[.]"[2] (ECF No. 1 at 7). The Court begins by recounting the CCA's resolution of the claim and then will apply § 2254.

1. CCA's resolution of the claim.

The CCA summarized and analyzed Mr. Sayed's final ineffective assistance claim as follows:

> Sayed last contends that counsel was ineffective for failing to request a self-defense instruction. He argues that her performance was deficient because she (1) failed to explain that he could assert self-defense without admitting that he committed the offense — as opposed to the underlying conduct of the offense — and (2) erred in concluding that she could not raise the affirmative defense without his approval. These compounded errors, he claims, led counsel to not request the instruction. But even if we assume these errors amount to deficient performance, Sayed's claim fails because he cannot prove prejudice. *Garner*, ¶ 17.
>
> "A defendant is entitled to a jury instruction on self-defense if there is 'some credible evidence' in the record that tends to support each element of the defense." *People v. Snider*, 2021 COA 19, ¶ 15 (quoting *People v. Saavedra-Rodriguez*, 971 P.2d 223, 228 (Colo. 1998)). But a defendant is

[2] In this claim, Mr. Sayed includes several stray allegations suggesting that counsel "intruded" on his right to control the defense. In state court, Mr. Sayed claimed only that counsel was ineffective for failing to request a self-defense instruction. To the extent the allegations in Mr. Sayed's habeas application expand upon, or differ from, the ineffective assistance of counsel claim that was presented in state court, such a claim is unexhausted. *Anderson v. Harless*, 459 U.S. 4, 6 (1982) (per curiam) (citation omitted) (explaining that to properly exhaust a claim in state court, "[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"). Moreover, any such claim is now subject to an anticipatory procedural default because the Colorado Rules of Criminal Procedure bar Mr. Sayed from raising a claim in state court that was, or could have been, presented in a prior appeal or postconviction proceeding. *See* Colo. R. Crim. P. 35(c)(3)(VI) ("The court shall deny any claim that was raised and resolved in a prior appeal or postconviction proceeding on behalf of the same defendant[.]"); Colo. R. Crim. P. 35(c)(3)(VII) ("The court shall deny any claim that could have been presented in an appeal previously brought or postconviction proceeding previously brought[.]"). Nor does Mr. Sayed overcome the procedural default by establishing cause and prejudice or a fundamental miscarriage of justice. *See Coleman v. Thompson*, 501 U.S. 722, 731 (1991).

not entitled to an affirmative defense instruction if he denies committing the charged crime. *Id.* at ¶ 16. Thus, "a defendant who testifies must 'admit [to] committing acts that would otherwise constitute an offense before being entitled to assert an affirmative defense'" to justify his actions. *Id.* (quoting *People v. Hendrickson*, 45 P.3d 786, 791 (Colo. App. 2001)).

Sayed repeatedly testified that he was only trying to "block" the officers' punches. He also made a single statement that when he was brought to the ground, he tried to "push" the officers away. None of this testimony amounts to an admission that he engaged in conduct that led to his second or third degree assault charges — a prerequisite for him to be entitled to the affirmative defense instruction. *Snider*, ¶¶ 16, 21.

A person commits second degree assault while lawfully in custody if that individual "knowingly and violently applies physical force against the person of a peace officer." § 18-3-203(1)(f), C.R.S. 2022; *see also* § 16-2.5-101, C.R.S. 2022 (a correctional officer is a peace officer). But Sayed never testified that he knowingly and violently applied physical force to the officers, an essential element of the charge. In our view, Sayed's testimony that he merely tried to block the officer's onslaught and, at one point, attempted to push them away falls short of an admission that he knowingly and violently applied physical force. *See People v. Whatley*, 10 P.3d 668, 670 (Colo. App. 2000). To the contrary, he consistently stated that he never used force against the officers. Hence, because Sayed did not testify to engaging in conduct that could constitute second degree assault while lawfully confined, he was not entitled to the self-defense instruction. *See Snider*, ¶ 22.

Similarly, as relevant here, a person commits third degree assault if that individual "knowingly or recklessly causes bodily injury to another person." § 18-3-204(1)(a), C.R.S. 2022. Yet Sayed never testified that he caused bodily injury to any officer, let alone that he did so knowingly or recklessly — both essential elements of the charge. Accordingly, because he did not admit to engaging in conduct that could constitute third degree assault, he was also not entitled to the affirmative defense instruction on that charge. *Snider*, ¶ 22.

Because the record clearly establishes, based on his testimony, that Sayed was not entitled to the self-defense instruction, counsel's failure to request the instruction did not prejudice him. *Ardolino*, 69 P.3d at 76.

(ECF No. 16-10 at 11-4).

2. Application of § 2254.

There is no basis for habeas relief on this claim. The CCA rejected this ineffective assistance claim because, as a matter of Colorado law, a criminal defendant is not entitled to a self-defense jury instruction if he denies engaging in the conduct that constitutes commission of the charged crime.

It is well-established that "it is not the province of a federal habeas court to reexamine state-court determinations on state-law questions. In conducting habeas review, a federal court is limited to deciding whether a conviction violated the Constitution, laws, or treaties of the United States." *Estelle v. McGuire*, 502 U.S. 62, 67-68 (1991); *see also Anderson-Bey v. Zavaras*, 641 F.3d 445, 453 (10th Cir. 2011) (rejecting "Defendant's challenge to the affirmance of his conviction [because it was] in essence a challenge to the Colorado Court of Appeals' interpretation of the state robbery statute, a challenge that we cannot entertain in a proceeding under § 2254"). Because this Court is bound to accept the CCA's conclusion regarding its interpretation of Colorado criminal law, there is no basis for concluding that counsel was ineffective. *See Lafler v. Cooper*, 566 U.S. 156, 167 (2012) ("Because the objection upon which his ineffective-assistance-of-counsel claim was premised was meritless, [petitioner] could not demonstrate an error entitling him to relief."); *Miller v. Mullin*, 354 F.3d 1288, 1298 (10th Cir. 2004) (explaining that "if the issue is meritless, its omission will not constitute deficient performance"). And Mr. Sayed cites nothing in the record to suggest that he admitted to engaging in the conduct that led to his second- or third-degree assault charges, which, as a matter of Colorado

law, was a prerequisite for him to be entitled to the affirmative defense instruction. As a result, Mr. Sayed fails to demonstrate any way the state court's decision was contrary to, or an unreasonable application of, binding Supreme Court precedent. Therefore, federal habeas relief is not warranted on this claim.

IV. CONCLUSION

In all, Mr. Sayed points to nothing from the state criminal proceedings that qualifies as the sort of extreme malfunction in the state criminal justice system that § 2254 guards against. *See Richter*, 562 U.S. at 102.

Accordingly, it is **ORDERED** as follows:

1) That the Application for a Writ of Habeas Corpus Pursuant to 28 U.S.C. § 2254 (ECF No. 1) is **DENIED;**
2) This case is **DISMISSED with prejudice**;
3) That leave to proceed *in forma pauperis* on appeal is **DENIED without prejudice** as 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; and
4) That a certificate of appealability pursuant to 28 U.S.C. § 2253(c) will not issue because Mr. Sayed has not made a substantial showing of the denial of a constitutional right.

DATED: June 14, 2024

BY THE COURT:

REGINA M. RODRIGUEZ
United States District Judge