FILED
United States Court of Appeals
Tenth Circuit

October 22, 2025

Christopher M. Wolpert
Clerk of Court

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

NATHAN DAVID BLACK,

Petitioner - Appellant,

v.

FHURE, Warden San Carlos Correctional Facility; THE ATTORNEY GENERAL OF THE STATE OF COLORADO,

Respondents - Appellees.

No. 25-1126
(D.C. No. 1:24-CV-03574-LTB-RTG)
(D. Colo.)

ORDER DENYING CERTIFICATE OF APPEALABILITY*

Before **HARTZ**, **EID**, and **ROSSMAN**, Circuit Judges.

Nathan Black, proceeding pro se,[1] requests a certificate of appealability (COA) to appeal from the district court's denial and dismissal of his 28 U.S.C. § 2254 habeas application as procedurally defaulted. We deny a COA and dismiss this matter.

Mr. Black was convicted in the district court for Jefferson County, Colorado, of stalking (serious emotional distress), violating bail bond conditions, and violating a civil protection order. Citing his rights to equal protection and due process, he made two

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* This order is not binding precedent except under the doctrines of law of the case, res judicata, and collateral estoppel.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. Black proceeds pro se, we liberally construe his filings, but we do not act as his advocate. *See Yang v. Archuleta*, 525 F.3d 925, 927 n.1 (10th Cir. 2008).

claims in his § 2254 application. First, he asserted that state law did not authorize the prosecutor to charge him for stalking and violating bail bond conditions, but instead it allowed only a choice between charges for violating a civil protection order or committing contempt of court. Second, he alleged the state district court lacked jurisdiction to convict him on charges arising out of the violation of a protective order issued by a different court (the county court). Mr. Black sought vacatur of his convictions and $800 trillion in damages.

The magistrate judge directed the State to file a pre-answer response addressing timeliness and exhaustion of state-court remedies. The State asserted that Mr. Black had not exhausted his state remedies, resulting in a procedural default. The magistrate judge agreed. Determining that Mr. Black had not shown cause and prejudice or a fundamental miscarriage of justice to excuse the procedural default, he recommended that the district court dismiss the application. Mr. Black objected. Reviewing the record de novo, the district court agreed with and adopted the recommendation, overruled Mr. Black's objections, denied and dismissed the § 2254 application, and denied a COA.

To appeal from the district court's decision, Mr. Black must obtain a COA, 28 U.S.C. § 2253(c)(1)(A), meaning that he must make "a substantial showing of the denial of a constitutional right," § 2253(c)(2). Because the district court decided the § 2254 application on a procedural ground, for a COA Mr. Black must demonstrate that reasonable jurists "would find it debatable" both "whether the petition states a valid claim of the denial of a constitutional right" and "whether the district court was correct in its

procedural ruling." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000). Here, we begin and end with the district court's procedural ruling.

Mr. Black does not contest the district court's determination that he failed to exhaust his state remedies. Rather, he focuses on whether the district court should have excused the default—specifically, whether he established a fundamental miscarriage of justice. He reiterates his position that state law did not authorize prosecution for anything except violation of a civil protection order or contempt of court and only the county court that issued the protective order may try the charges. He continues, "As [a] result, the charges are illegal under the circumstances, thereby no facts as to the charges may be taken into account. [His] due process and equal protection rights are violated and has resulted in the conviction; of which [he is] actually innocent." Aplt. Combined Opening Br./Appl. for COA at 3. Then, without any supporting citation, he states, "Under the circumstances, legal innocence does satisfy the fundamental miscarriage of justice." *Id.*

But no reasonable jurist would debate whether Mr. Black demonstrated a fundamental miscarriage of justice. The fundamental-miscarriage exception requires a prisoner to make "a credible showing of actual innocence." *McQuiggin v. Perkins*, 569 U.S. 383, 392 (2013). As the district court recognized, "in this regard 'actual innocence' means factual innocence, not mere legal insufficiency." *Bousley v. United States*, 523 U.S. 614, 623 (1998); *see also Herrera v. Collins*, 506 U.S. 390, 404 (1993) ("The fundamental miscarriage of justice exception is available only where the prisoner supplements his constitutional claim with a colorable showing of factual innocence." (emphasis and internal quotation marks omitted)). Contradicting Mr. Black's contention

that his claims should satisfy the fundamental-miscarriage exception, we have rejected the premise that "the factual-innocence gateway is available when one has been convicted by the wrong jurisdiction." *Pacheco v. El Habti*, 62 F.4th 1233, 1242 (10th Cir. 2023).

We grant Mr. Black's motion to proceed without prepayment of fees and costs. We deny his "Motion for habeas appeal P.R. bond." We deny a COA and dismiss this matter.

Entered for the Court

CHRISTOPHER M. WOLPERT, Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 24-cv-03574-LTB-RTG

NATHAN DAVID BLACK,

Petitioner,

v.

FHURE, Warden San Carlos Correctional Facility, and
THE ATTORNEY GENERAL OF THE STATE OF COLORADO,

Respondents.

RECOMMENDATION OF UNITED STATES MAGISTRATE JUDGE

Richard T. Gurley, 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 filed *pro se* by Petitioner Nathan David Black. (ECF No. 1). Because Mr. Black 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). The matter has been referred to this Court for recommendation. (ECF No. 13).

The Court has reviewed the filings to date, considered the entire case file, analyzed the applicable law, and is advised in the premises. For the following reasons, it is respectfully recommended that Mr. Black's § 2254 application and this action be dismissed.

BACKGROUND

Mr. Black brings this federal habeas corpus action under 28 U.S.C. § 2254 to challenge criminal convictions and sentences resulting from a bench trial in Jefferson County District Court case number 2021CR2262. Mr. Black was found guilty of three crimes: Stalking – Emotional Distress – Protection Order; Violation of Bail Bond Conditions; and Violation of a Civil Protection Order. His controlling prison sentence is six years, and was imposed on March 28, 2023.

In his § 2254 application, Mr. Black asserts two claims. First, he argues that Colorado law (C.R.S. 13-14-104(1) and C.R.S. 13-14-107(1)) limits Colorado to two charging options when someone violates a civil protection order, forcing the state to either charge (a) violation of a civil protection order, *or* (b) contempt of court. (ECF No. 1 at 7-9). Second, Mr. Black contends that his convictions were obtained in violation of his due process rights. (*Id.* at 9-11). He contests the Jefferson County District Court's jurisdiction to try Count 3 (violation of a civil protection order), arguing that only the civil court that issued the protection order had jurisdiction. (*Id.*). As relief, Mr. Black asks the Court to vacate all convictions and release him from custody.[1] (*Id.* at 13).

On December 27, 2024, the Court ordered the parties to address the procedural prerequisites of timeliness and exhaustion of state remedies. (ECF No. 5). Respondents filed a timely pre-answer response contending that Mr. Black's claims have not been

1 Mr. Black also requests $800 trillion in damages. (*Id.*). But monetary damages are not available relief in a habeas corpus action. *See Nelson v. Campbell*, 541 U.S. 637, 643 (2004).

properly exhausted in state court, are barred from being exhausted now, and are therefore procedurally defaulted. (ECF No. 11). In reply, Mr. Black contends that he presented his claims in state court so they are exhausted, and, even if they are procedurally defaulted, failure to review his claims would result in a fundamental miscarriage of justice. (*See id.*). The Court will now discuss the reasons Mr. Black's § 2254 application should be dismissed.

DISCUSSION

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 in Colorado requires that the federal issue be presented properly to the Colorado Court of Appeals, but review by the Colorado Supreme Court is not necessary. *Ellis v. Raemisch*, 872 F.3d 1064, 1082 (10th Cir. 2017) (holding that Colo. App. R. 51.1(a) only requires a habeas petitioner to fairly present a claim to the Colorado Court of Appeals to have exhausted all available state remedies).

Furthermore, the "substance of a federal habeas corpus claim" must have been presented to the state courts in order to satisfy the fair presentation requirement. *Picard v. Connor*, 404 U.S. 270, 278 (1971); *see also Nichols v. Sullivan*, 867 F.2d 1250, 1252

(10th Cir. 1989). Fair presentation does not require a habeas corpus petitioner to cite "book and verse on the federal constitution." *Picard*, 404 U.S. at 278 (internal quotation marks omitted). However, "[i]t is not enough that all the facts necessary to support the federal claim were before the state courts, or that a somewhat similar state-law claim was made." *Anderson v. Harless*, 459 U.S. 4, 6 (1982) (per curiam) (citation omitted). A claim must be presented as a federal constitutional claim in the state court proceedings in order 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 exhaustion of all available state remedies for each particular claim. *See Miranda v. Cooper*, 967 F.2d 392, 398 (10th Cir. 1992). Even if state remedies have been properly exhausted as to one or more of the claims presented, a federal habeas corpus application is subject to dismissal as a "mixed petition" unless state-court remedies have been exhausted for all of the claims raised. *See Rose v. Lundy*, 455 U.S. 509, 522 (1982); *Harris v. Champion*, 48 F.3d 1127, 1133 (10th Cir. 1995).

Additionally, under the procedural default doctrine, a claim which a petitioner 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). Similarly, a habeas claim

which was not previously presented in state court, but would be precluded from state court review based on an independent and adequate state ground now if the petitioner returned to state court to present it, is subject to an "anticipatory procedural bar," and is precluded from federal habeas review. *See Gray v. Netherland*, 518 U.S. 152, 161-62 (1996); *Coleman*, 501 U.S. at 735 n.1 (noting that, even if an unexhausted claim has not actually been raised and rejected by the state courts on a procedural ground, the claim is still subject to an anticipatory procedural default if it is clear that the claim would be rejected because of an independent and adequate state procedural rule).

Respondents argue that both claims presented in Mr. Black's § 2254 application are unexhausted and procedurally defaulted. (ECF No. 9 at 5-7). The Court agrees. Mr. Black tried to present his claims to the state courts in several ways. However, none of the filings render the claims properly exhausted for purposes of federal habeas review.

Postconviction motion. Mr. Black presented his two claims to the state trial court in a postconviction motion filed pursuant to Colo. R. Crim. P. 35(c). (ECF Nos. 9-6, 9-7). That filing, though, does not help him because he must present each of his claims through one complete round of the state's established appellate review process—raising claims with only the trial court is insufficient. *Woodford*, 548 U.S. at 92; *Brown*, 185 F.3d at 1124 ("The exhaustion requirement is satisfied if the issues have been properly presented to the highest state court, either by direct review of the conviction or in a postconviction attack.") (internal quotations omitted). As will be discussed next, Mr. Black did not properly reassert these claims in any of his appellate filings.

Appeal to the Colorado Court of Appeals (CCA). After Mr. Black was found guilty, but before he was sentenced, he filed an appeal with the CCA. (*See* ECF Nos. 9-2, 9-3). The appeal was dismissed on the well-established procedural ground that an appeal may only be taken from a final judgment, which includes imposition of the sentence. (*See* ECF No. 9-2 (citing *Ellsworth v. People*, 987 P.2d 264, 266 (Colo. 1999)). 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). The CCA regularly follows the procedural rule that it only has jurisdiction to review final judgments, which includes a defendant's conviction and sentence. *See* Colo. App. R. 1(a)(1) ("An appeal to the appellate court may be taken from . . . a final judgment of any district, probate, or juvenile court[.]"); *Ellsworth*, 987 P.2d at 266; *People v. Ong*, 499 P.3d 375, 378 (Colo. App. 2021) ("A judgment or order in a criminal case is final when the defendant is acquitted, the charges are dismissed, or the defendant is convicted and sentence is imposed.") (cleaned up); *Kazadi v. People*, 291 P.3d 16, 22 (Colo. 2012) ("A deferred judgment is not a judgment of conviction or a final, appealable judgment."); *People v. Guatney*, 214 P.3d 1049, 1051 (Colo. 2009) ("Because a judgment of conviction includes the defendant's sentence, *see* Crim. P. 32(b)(3), we have also held that a final judgment in a criminal case does not come until the defendant is acquitted, the charges are dismissed, or the defendant is convicted and sentence is imposed."). Thus, Mr. Black didn't exhaust his claim via the premature

appeal to the CCA. Instead, the failure to comply with an independent and adequate state procedural rule precluded his claims from substantive review in state court.

Colorado Supreme Court (CSC) petitions. In addition to the premature appeal, Mr. Black filed several petitions—styled as "Petitions for Rule to Show Cause"—with the CSC. But the CSC's review of an original petition for an extraordinary writ is discretionary. *See* Colo. App. R. 21(a)(1) ("Relief under this rule is extraordinary in nature and is a matter wholly within the discretion of the Supreme Court."). As a result, the denial of an original petition for an extraordinary writ by the CSC does not mean the merits of the claims were considered. *See Bell v. Simpson*, 918 P.2d 1123, 1125 n.3 (Colo. 1996). Moreover, Respondents correctly rely on *Castille v. Peoples*, 489 U.S. 346 (1989) for the following: If a "claim has been presented [to the state's highest court] for the first and only time in a procedural context in which its merits will not be considered unless there are special and important reasons therefor, . . . [r]aising the claim in such a fashion does not, for the relevant purpose, constitute fair presentation." *Id.* at 351; *see also Parkhurst v. Shillinger*, 128 F.3d 1366, 1369 (10th Cir. 1997) (finding that state procedure which is discretionary and limited in scope does not constitute fair presentation). In *Curren v. Raemisch*, the Tenth Circuit similarly concluded that a Colorado state prisoner's request for extraordinary relief from the CSC—after the state trial court denied the prisoner's request for habeas relief and he did not directly appeal the denial—did not exhaust the prisoner's state remedies. *Curren*, 566 F. App'x 708, 711 (10th Cir. 2014) (unpublished). Therefore, the claims Mr. Black brought before the

CSC were neither fairly presented nor properly exhausted for purposes of this federal habeas action.

The claims are also procedurally defaulted. With limited exceptions not applicable here, the Colorado Rules of Criminal Procedure bar Mr. Black 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"). These state procedural rules are independent of federal law and applied regularly by Colorado courts. *See Mestas v. Zavaras*, 407 F. App'x 354, 355-56 (10th Cir. 2011) (unpublished) (finding state procedural bar under Colo. R. Crim. P. 35(c)(3)(VI) independent and adequate); *Burton v. Zavaras*, 340 F. App'x 453, 454-55 (10th Cir. 2009) (unpublished) (finding a procedural default based on Colorado Court of Appeals' application of Colo. Crim. P. Rule 35(c)(3)(VII)); *Welch v. Milyard*, 436 F. App'x 861, 865 (10th Cir. 2011) (unpublished) (same); *Ellis v. Raemisch*, 872 F.3d 1064, 1093 n.7 (10th Cir. 2017) (proceeding on the assumption "that the provisions of Rule 35(c)(3)(VII) at issue here satisfy the independence and adequacy criteria."). Mr. Black could have had the merits of his claims reviewed in state court, but he didn't properly raise them, and he may not do so now. Therefore, both of Mr. Black's claims are procedurally defaulted and cannot

be considered, unless he establishes grounds to excuse the default. *See Coleman*, 501 U.S. at 750.

Mr. Black must establish cause and prejudice or a fundamental miscarriage of justice to excuse the procedural default of his claims. *Coleman*, 501 U.S. at 750. To demonstrate cause for the procedural default, Mr. Black must show that some objective factor external to the defense impeded his ability to comply with the state's procedural rule. *See Murray v. Carrier*, 477 U.S. 478, 488 (1986). "Objective factors that constitute cause include interference by officials that makes compliance with the State's procedural rule impracticable, and a showing that the factual or legal basis for a claim was not reasonably available to [petitioner.]" *McCleskey v. Zant*, 499 U.S. 467, 493-94 (1991) (internal quotation marks omitted). If Mr. Black demonstrates cause, he must also show "actual prejudice as a result of the alleged violation of federal law." *Coleman*, 501 U.S. at 750. A fundamental miscarriage of justice occurs when "a constitutional violation has probably resulted in the conviction of one who is actually innocent." *Murray*, 477 U.S. at 496.

Mr. Black doesn't excuse the procedural default of his claims. He argues that he is actually innocent of the criminal charges because the state trial court lacked jurisdiction. But his jurisdictional argument is a claim of *legal* innocence, not *factual* innocence. And "'actual innocence' means factual innocence, not mere legal insufficiency." *Bousley v. United States*, 523 U.S. 614, 623 (1998); *see also Pacheco v. Habti*, 62 F.4th 1233, 1245 (10th Cir. 2023), *cert. denied*, 143 S. Ct. 2672 (2023)

(explaining, in the context of AEDPA's one-year statute of limitations, that "the rationale behind the [actual innocence] gateway does not support its application to conviction by the wrong jurisdiction"). In any event, Mr. Black fails to present new, reliable evidence that strongly shows he is factually innocent of the crimes for which he was found guilty of committing. Ultimately, Mr. Black does not state any facts in the application or reply to demonstrate cause and actual prejudice to excuse the procedural default of his claims. Nor does he raise a colorable claim of factual innocence to establish a fundamental miscarriage of justice. Consequently, his claims and habeas application should be dismissed with prejudice.

RECOMMENDATION

For these reasons, it is respectfully recommended 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 with prejudice**.[2]

DATED February 21, 2025.

BY THE COURT:

Richard T. Gurley
United States Magistrate Judge

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

Orders on Motions

1:24-cv-03574-LTB-RTG Black (PS) v. Fhure

2254,ALLMTN,CDOC Other,JD4,MAGR,PS7

U.S. District Court - District of Colorado

District of Colorado

Notice of Electronic Filing

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Case Name: Black (PS) v. Fhure
Case Number: 1:24-cv-03574-LTB-RTG
Filer:
Document Number: 22

Docket Text:
ORDER OF DISMISSAL. It is ORDERED that Petitioner's written objections (ECF No. [18]) are OVERRULED. The Recommendation of United States Magistrate Judge (ECF No. [16]) is ACCEPTED and ADOPTED. The Application for a Writ of Habeas Corpus Pursuant to 28 U.S.C. § 2254 (ECF No. [1]) is DENIED and DISMISSED WITH PREJUDICE for the reasons stated in the Recommendation. No certificate of appealability will issue. IFP on appeal is DENIED. All pending motions are DENIED AS MOOT, by Judge Lewis T. Babcock on 3/19/2025.(dgumb,)

1:24-cv-03574-LTB-RTG Notice has been electronically mailed to:

Lisa Kay Michaels lisa.michaels@coag.gov

1:24-cv-03574-LTB-RTG Notice has been mailed by the filer to:

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Centennial Correctional Facility (CCF)
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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 24-cv-03574-LTB-RTG

NATHAN DAVID BLACK,

Petitioner,

v.

FHURE, Warden San Carlos Correctional Facility, 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 dated February 21, 2025. (ECF No. 16). Petitioner has filed timely written objections to the Recommendation. (*See* ECF No. 18). 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 for the reasons stated therein.

Accordingly, it is

ORDERED that Petitioner's written objections (ECF No. 18) 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 DISMISSED WITH PREJUDICE for the reasons stated in the Recommendation. 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 that all pending motions are DENIED AS MOOT.

DATED at Denver, Colorado, this 19th day of March, 2025.

BY THE COURT:

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