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United States Court of Appeals
Tenth Circuit

October 14, 2021

Christopher M. Wolpert
Clerk of Court

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

BILLY E. REID,

Petitioner - Appellant,

v.

WARDEN JEFF LONG, Sterling Correctional Facility; PHIL WEISER, Attorney General of the State of Colorado,

Respondents - Appellees.

No. 21-1109
(D.C. No. 1:20-CV-00181-PAB)
(D. Colo.)

ORDER DENYING CERTIFICATE OF APPEALABILITY*

Before **McHUGH**, **BALDOCK**, and **MORITZ**, Circuit Judges.

Billy E. Reid, a state prisoner proceeding pro se, seeks a certificate of appealability (COA) to appeal the district court's denial of his application for habeas relief under 28 U.S.C. § 2254.[1] We deny his request for 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* This order is not binding precedent except under the doctrines of law of the case, res judicata, and collateral estoppel.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] "A pro se litigant's pleadings are to be construed liberally and held to a less stringent standard than formal pleadings drafted by lawyers. . . . At the same time, . . . it is [not] the proper function of the [courts] to assume the role of advocate for the pro se litigant." *Hall v. Bellmon*, 935 F.2d 1106, 1110 (10th Cir. 1991).

I. BACKGROUND

A. State Court Proceedings

Facts relevant to our disposition are set forth in the Colorado Court of Appeals' (CCA) opinion in Mr. Reid's direct appeal. In February 1988, police found the body of twenty-three-year-old Q.S. behind a dumpster in east Denver. A forensic examination showed she sustained blunt force trauma to her neck and a hyoid bone fracture consistent with strangulation. In March 1989, police discovered the partially decomposed and mummified body of L.K., age thirty-three, on Lookout Mountain. A forensic examination established that she had fractures to the hyoid bone and cartilage in her neck. Thirty-year-old L.W.'s body was found near Clear Creek in October 1989. L.W. was wearing jeans, which had been pulled down to her mid-thighs, and an extension cord, belt, and tube sock were found wrapped around her neck. A forensic examination indicated that she died of asphyxiation consistent with strangulation. The examiner also discovered several stones in her vagina, which appeared to have been manually inserted, and semen in her anal cavity. All three women were African American.

"Fifteen years later, [a] cold case [i]nvestigator . . . reopened the L.W. and L.K. cases and submitted the evidence collected during investigation of L.W.'s death for analysis using modern technology." R., Vol. 1 at 226. "In addition to the semen found in L.W.'s anal cavity, a semen stain was discovered on the extension cord, and trace DNA was found at both ends of the extension cord and the belt." *Id.* at 227. "Technicians developed a DNA profile and performed a database comparison of that profile to known DNA profiles, which pointed to [Mr. Reid]." *Id.*

The investigator discovered that Mr. Reid "was incarcerated in the Denver County Jail (DCJ) on traffic matters," *id.*, and had him transported to Jefferson County for a videotaped interview. When the investigator showed Mr. Reid photographs of L.W. and L.K., he "acknowledged that it was possible that he had had sex with them, but stated that he did not recognize them and did not remember if he had ever known them." *Id.* "During the interview, [the investigator] did not use L.W.'s last name, discuss the details of any of the crime scenes, or mention Q.S. at all." *Id.* The investigator also told Mr. Reid that the forensic evidence pointed to him as the perpetrator, and urged him to tell her what happened. Mr. Reid denied any involvement. At the conclusion of the interview, the investigator told Mr. Reid he would be charged with homicide, and he was transported back to the DCJ.

The following day, an inmate at the DCJ "telephoned [the investigator] and stated that he had information regarding the L.W. murder. In a series of interviews, [the inmate] relayed information to [the investigator] concerning conversations he had with [Mr. Reid] while both were in the DJC that implicated [Mr. Reid] in the deaths of L.W. and L.K." *Id.* at 227-28. "According to [the inmate], [Mr. Reid] said that he had strangled L.W. with his hands at a motel because [she] had stolen drugs from him, and that he had both anal and vaginal sex with [her] on the day she was killed." *Id.* at 228. The inmate also provided law enforcement "with [Mr. Reid's] handwritten notes, which identified L.K. and Q.S. by name and L.W. by her initials." *Id.*

Because the investigator did not recognize Q.S.'s name, she asked a detective to interview the inmate. "During that interview, [the inmate] reported that [Mr. Reid] said

he used his hands to kill all three women because they had big mouths and that it was over dope." *Id.* (internal quotation marks omitted). At trial, the informant testified that he could not remember speaking to or even meeting Mr. Reid, the investigator, or the detective; however, he was impeached with his prior inconsistent statements through the testimony of the investigator and detective.

A jury convicted Mr. Reid on two counts of first-degree murder after deliberation in the deaths of L.K. and L.W., one count of first-degree felony murder as to L.W., and one count of first-degree aggravated sexual assault by force or violence as to L.W.[2] The court, however, did not impose a sentence for the felony murder conviction; instead, it noted on the mittimus that the felony murder count merged into the count for first-degree murder after deliberation and sentenced Mr. Reid on the conviction for first-degree murder after deliberation.

Mr. Reid appealed, and the CCA affirmed in part, vacated in part, and remanded with directions. Specifically, the court vacated the judgment of conviction for first-degree murder after deliberation as to L.K. because there was insufficient evidence to establish that Mr. Reid acted after deliberation; however, the court determined the evidence supported a conviction for second-degree murder and directed the trial court to enter a judgment of conviction on that count and resentence Mr. Reid accordingly. The court also vacated the judgment of conviction for first-degree aggravated sexual assault

[2] Mr. Reid was not charged with the murder of Q.S.; rather, evidence regarding her homicide was admitted at trial for the limited purpose of establishing identity and a common plan or scheme.

as to L.W. because it was barred by the statute of limitations and remanded for correction of the mittimus to delete that conviction and sentence. The convictions were otherwise affirmed. The Colorado Supreme Court denied certiorari review. On remand, the trial court sentenced Mr. Reid to 48 years' imprisonment for second-degree murder.

Mr. Reid filed a motion for postconviction relief in the trial court under Rule 35(a) of the Colorado Rules of Criminal Procedure. The court denied the motion and the CCA affirmed. Following the Colorado Supreme Court's denial of certiorari review, Mr. Reid timely filed an application for habeas relief in the federal district court.

B. Federal District Court Proceedings

In an amended application, Mr. Reid asserted five claims, including two claims with subparts. Claim 1(a) alleged Fourteenth Amendment due process and Fifth Amendment double jeopardy violations based on the trial court's failure to give the jury a special verdict form that would have allowed it to choose between first-degree murder after deliberation and first-degree felony murder. Claim 1(b) alleged a Fourteenth Amendment due process violation on the grounds he was prosecuted under an invalid charging document because the statute of limitations had run on the charge of first-degree aggravated sexual assault. Claim 2 alleged a Fifth Amendment double jeopardy violation on the grounds that he was convicted of both first-degree murder after deliberation and first-degree felony murder. Claim 3 alleged a violation of Fourteenth Amendment due process when the CCA directed the trial court to vacate the conviction for first-degree murder after deliberation and enter a conviction for second-degree murder. Claim 4(a) alleged a Fourteenth Amendment due process violation based on the admission at trial of

the videotaped-interview because it showed him in handcuffs and jail attire. Claim 4(b) alleged an illegal seizure under the Fourth Amendment based on the collection of his DNA from a soda can and cigarette. And Claim 5 alleged a due process violation under the Fourteenth Amendment when the court failed to redact the investigator's statements from the videotaped interview in which she expressed her belief that he committed the murders.

After an initial round of briefing, the district court entered an order finding that Claims 1(a) (double jeopardy), 2, 4(a), and 5 were exhausted and could proceed to a merits determination. However, the court found Claims 1(a) (due process), 1(b), 3, and 4(b) were defaulted and should be dismissed because Mr. Reid either (1) failed to raise them in the state courts or (2) improperly raised them for the first time on appeal of the denial of his postconviction application. Accordingly, the court concluded these claims were subject to anticipatory procedural default under independent and adequate state-court procedural rules.[3] The court further found that Mr. Reid failed to demonstrate cause and prejudice for his failure to raise the claims or that its refusal to review them would result in a fundamental miscarriage of justice, such as might excuse the default.

Following additional briefing, the district court issued an order denying Claims 1(a), 2, 4(a), and 5 on the merits, denied Mr. Reid's application, and dismissed the case

[3] *See* Colo. R. Crim. P. 35(c)(3)(VII) (preventing a defendant from returning to state court to raise an argument that could have been presented in a prior appeal or postconviction proceeding); Colo. Rev. Stat. § 16-5-402(1) (providing a three-year statute of limitations for filing a postconviction collateral attack); *DePineda v. Price*, 915 P.2d 1278, 1280 (Colo. 1996) ("Issues not raised before the district court in a motion for postconviction relief will not be considered on appeal of the denial of that motion.").

with prejudice. It also denied Mr. Reid's motion to vacate the judgment, his motion to proceed on appeal without prepayment of costs or fees, and a COA.[4]

Mr. Reid requests a COA to appeal the district court's procedural and merits orders. He also appeals the order denying the motion to vacate and renews his request to proceed on appeal without prepayment of costs or fees.

II. DISCUSSION

A. COA Standard

No appeal may be taken from a final order denying a § 2254 application without a COA. *See* 28 U.S.C. § 2253(c)(1)(A). To receive a COA, the petitioner must make "a substantial showing of the denial of a constitutional right," *id.* § 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).

Under the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), when a state court has adjudicated the merits of a claim, a federal district court cannot grant habeas relief unless the state court's decision "was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States," 28 U.S.C. § 2254(d)(1), or "was based on an

[4] The district court denied Mr. Reid's motion to proceed on appeal without prepayment of costs or fees "because it is not submitted on the proper form and [Mr. Reid] has not submitted a certificate showing the balance in his inmate account." R., Vol. 1 at 773.

unreasonable determination of the facts in light of the evidence presented in the State court proceeding," *id.* § 2254(d)(2).

Further, where, as here, the district court dismissed certain claims on procedural grounds, such as the failure to exhaust state-court remedies, we will grant a COA as to those claims only if the applicant can demonstrate both "that jurists of reason would find it debatable 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*, 529 U.S. at 484.

B. Analysis of COA Application

Mr. Reid is not entitled to a COA because reasonable jurists would not debate whether the district court correctly decided the issues he seeks to appeal.

i. Procedural Default

a. Legal Framework

"An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless . . . the applicant has exhausted the remedies available in the courts of the State." 28 U.S.C. § 2254(b)(1)(A). To satisfy the exhaustion requirement, a state prisoner must fairly present his claims to the state's highest court—either by direct review or in a postconviction attack—before asserting them in federal court. *See Fairchild v. Workman*, 579 F.3d 1134, 1151 (10th Cir. 2009). "Fair presentation of a prisoner's claim to the state courts means that the substance of the claim must be raised there." *Patton v. Mullin*, 425 F.3d 788, 809 n.7 (10th Cir. 2005) (internal quotation marks omitted). The "petitioner bears the burden of

demonstrating that he has exhausted his available state remedies." *McCormick v. Kline*, 572 F.3d 841, 851 (10th Cir. 2009) (internal quotation marks omitted).

If the federal court determines that an applicant's claims are not exhausted, it may, among other things, deny the claims on the merits, *see* 28 U.S.C. § 2254(b)(2), or dismiss the unexhausted claims without prejudice to allow the applicant to return to state court to exhaust the claims, *see Bland v. Sirmons*, 459 F.3d 999, 1012 (10th Cir. 2006). However, permitting the applicant to return to state court is not appropriate if the applicant's claims are subject to an anticipatory procedural bar. *See id.*; *Frost v. Pryor*, 749 F.3d 1212, 1231 (10th Cir. 2014) ("Anticipatory procedural bar occurs when the federal courts apply procedural bar to an unexhausted claim that would be procedurally barred under state law if the petitioner returned to state court to exhaust it." (internal quotation marks omitted)).

When a federal court applies an anticipatory procedural bar to a habeas applicant's claims, the applicant's claims are procedurally defaulted for purposes of federal habeas relief. *See Coleman v. Thompson*, 501 U.S. 722, 735 n.1 (1991) (noting that "there is a procedural default for purposes of federal habeas" if "the petitioner failed to exhaust state remedies and the court to which the petitioner would be required to present his claims in order to meet the exhaustion requirement would now find the claims procedurally barred").

Nevertheless, there are two circumstances where a federal court may consider claims subject to an anticipatory procedural default: (1) if the prisoner has alleged sufficient "cause" for failing to raise the claim and resulting "prejudice," *id.* at 750, or (2) if denying review would result in "a fundamental miscarriage of justice," *id.*, because

the applicant has made a "credible showing of actual innocence," *McQuiggin v. Perkins*, 569 U.S. 383, 392 (2013).

b. Analysis

Mr. Reid challenges the district court's threshold determination that Claims 1(a) (due process), 1(b), 3, and 4(b) were unexhausted, or in the alternative, that he failed to meet the cause and prejudice standard or fundamental miscarriage of justice exception to excuse the procedural default.[5]

According to Mr. Reid, he exhausted the claims because "he did present each of his claims to the State District Court. When defense counsel objected to the trial errors, which were constitutional[,] it not only put the trial court on notice, but also each court that followed thereafter." COA Appl. at 26. This argument lacks merit. A state prisoner cannot exhaust a claim by raising an objection at trial; rather, a claim is properly exhausted only when the state prisoner fairly presents the claim to the state's highest court either on direct appeal or in a postconviction attack. *See Ellis v. Raemisch*, 872 F.3d 1064, 1076 (10th Cir. 2017). Reasonable jurists would not debate the district court's conclusion that the claims were unexhausted.

There is likewise no merit to Mr. Reid's contention that he demonstrated cause and prejudice based on direct-appeal counsel's ineffective assistance when he failed to raise the claims on appeal. Although the Supreme Court "ha[s] not identified with precision exactly what constitutes cause to excuse a procedural default," it has recognized

[5] Mr. Reid does not challenge the district court's finding that the unexhausted claims were procedurally barred.

that "in certain circumstances counsel's ineffectiveness in failing properly to preserve the claim for review in state court will suffice." *Edwards v. Carpenter*, 529 U.S. 446, 451 (2000) (internal quotation marks omitted). However, not only must the assistance "have been so ineffective as to violate the Federal Constitution," *id.*, but "*that* constitutional claim, like others, [must] first [be] raised in state court," *id.* at 452. In other words, "[a] claim of ineffective assistance . . . generally must be presented to the state courts as an independent claim before it may be used to establish cause for a procedural default." *Id.* (internal quotation marks omitted).

Here, the district court found that Mr. Reid failed to present an ineffective assistance of counsel claim in state court and therefore could not rely on direct-appeal counsel's ineffective assistance to demonstrate cause. Reasonable jurists would not debate whether the court's procedural ruling was correct.

Last, we reject Mr. Reid's argument that he made a credible showing of actual innocence. Habeas relief is not always precluded simply because a petitioner has defaulted his claims; rather, the courts can consider such claims when it is necessary to avoid a miscarriage of justice. *See Schlup v. Delo*, 513 U.S. 298, 324 (1995). But this exception applies only when a petitioner can demonstrate that he is actually innocent of the crime of conviction. *See id*. In such a case, the claim of actual innocence is joined with the procedurally defaulted claim to provide "a gateway through which a habeas petitioner must pass to have his otherwise barred constitutional claim considered on the merits." *Id.* at 315 (internal quotation marks omitted). The gateway claim, however, must "be credible" and requires "new reliable evidence—whether it be exculpatory

scientific evidence, trustworthy eyewitness accounts, or critical physical evidence—that was not presented at trial." *House v. Bell*, 547 U.S. 518, 537 (2006) (internal quotation marks omitted).

The district court declined to consider the defaulted claims on the merits because Mr. Reid failed to present any new reliable evidence of actual innocence that was not presented at trial. Reasonable jurists would not debate whether the court's procedural ruling was correct.

ii. Merits Claims

a. Legal Framework

For purposes of § 2254(d)(1), a state-court decision is contrary to clearly established federal law when (1) "the state court applies a rule that contradicts the governing law set forth in Supreme Court cases"; or (2) "the state court confronts a set of facts that are materially indistinguishable from a decision of the Supreme Court and nevertheless arrives at a result different from that precedent." *House v. Hatch*, 527 F.3d 1010, 1018 (10th Cir. 2008) (brackets and internal quotation marks omitted). "A state court decision involves an unreasonable application of clearly established federal law when it identifies the correct governing legal rule from Supreme Court cases, but unreasonably applies it to the facts." *Id.*

Whether there has been an unreasonable application of clearly established federal law is an objective inquiry. *Williams v. Taylor*, 529 U.S. 362, 409-10 (2000). A decision is objectively unreasonable "only if all fairminded jurists would agree that the state court got it wrong." *Stouffer v. Trammell*, 738 F.3d 1205, 1221 (10th Cir. 2013) (internal

quotation marks omitted). And "whether a rule application was unreasonable requires considering the rule's specificity. The more general the rule, the more leeway courts have in reaching outcomes in case-by-case determinations." *Harrington v. Richter*, 562 U.S. 86, 101 (2011) (internal quotation marks omitted).

In deciding whether the state court's decision was based on an unreasonable determination of the facts given the evidence presented in the state-court proceeding, "a determination of a factual issue made by a State court shall be presumed to be correct," and "[t]he applicant [has] the burden of rebutting the presumption of correctness by clear and convincing evidence." 28 U.S.C. § 2254(e)(1).

In sum, we make a general assessment of the merits of Mr. Reid's claims to determine whether reasonable jurists could debate the district court's conclusion that the state court's decision was "*unreasonable*, either as a determination of fact or as an application of clearly established federal law." *Dockins v. Hines*, 374 F.3d 935, 940 (10th Cir. 2004). Stated otherwise, "[w]e look to the [d]istrict [c]ourt's application of AEDPA to [the applicant's] constitutional claims and ask whether that resolution was debatable amongst jurists of reason." *Miller El v. Cockrell*, 537 U.S. 322, 336 (2003).

b. Analysis

1. Claims 1(a) (double jeopardy) and 2

According to Mr. Reid, he was placed in jeopardy twice for the same offense in violation of the double jeopardy clause of the Fifth Amendment because the jury was permitted to consider (Claim 1(a)), and convict him (Claim 2), of both first-degree murder after deliberation and felony murder as to L.W. "[T]he Fifth Amendment

guarantee against double jeopardy is enforceable against the States through the Fourteenth Amendment." *North Carolina v. Pearce*, 395 U.S. 711, 717 (1969), *overruled on other grounds by Alabama v. Smith*, 490 U.S. 794 (1989). Among other things, "it protects against multiple punishments for the same offense." *Id.*

The CCA addressed the issue in Mr. Reid's appeal from the denial of his motion for postconviction relief and concluded there was no double jeopardy violation. "[T]he [trial] court did not impose a sentence for the felony murder conviction and noted on the mittimus that the felony murder count merge[d] into the murder after deliberation count for sentencing [and therefore Mr. Reid was] protected against multiple punishments for the same offense." R., Vol. 1 at 443. The district court denied habeas relief based on its conclusion that Mr. Reid failed to demonstrate that the CCA's resolution of these claims was contrary to or involved an unreasonable application of clearly established federal law or was based on an unreasonable determination of the facts. Because reasonable jurists would not debate the district court's conclusion, we deny a COA.

2. Claim 4(a)

In Claim 4(a), Mr. Reid alleged that his constitutional rights were violated when the trial court admitted the video recording of his interview with the investigator because it showed him in jail attire and handcuffs. "The right to a fair trial is a fundamental liberty secured by the Fourteenth Amendment" and "[t]he presumption of innocence . . . is a basic component of a fair trial under our system of criminal justice." *Estelle v. Williams*, 425 U.S. 501, 503 (1976). To protect these rights, "the State cannot, consistently with the Fourteenth Amendment, compel an accused to stand trial before a

jury while dressed in identifiable prison clothes." *Id.* at 512. Additionally, "the Fifth and Fourteenth Amendments prohibit the use of physical restraints *visible to the jury* absent a trial court determination, in the exercise of its discretion, that they are justified by a state interest specific to a particular trial." *Deck v. Missouri*, 544 U.S. 622, 629 (2005) (emphasis added).

On direct appeal, the CCA found that assuming there was a constitutional violation, there was no prejudice. As to the jail attire, the court found "[i]t is undisputed that [Mr. Reid] was in custody at the time of his videotaped interview [and the] parties acknowledged that the tape would be admitted at trial." R., Vol. 1 at 266. "In fact, defense counsel told the jury in opening statement that [Mr. Reid] was sitting in the Denver County jail [on the day he] was brought to Jefferson County so [the investigator] could interrogate him," and he also "expressly pointed to the fact that the prosecution would play the videotape of the interrogation." *Id.* at 266-67 (internal quotation marks omitted). "Thus, not only did the jury know from defense counsel that [Mr. Reid] was incarcerated at the time of the interview, but it fully expected to see the videotape of the interrogation conducted at the jail." *Id.* at 267.

The CCA noted the rule announced in *Estelle* "aimed to alleviate the concern 'that the *constant* reminder of the accused's condition implicit in such distinctive, identifiable attire [throughout the course of a trial] may affect a juror's judgment.'" *Id.* at 267-68 (quoting *Estelle*, 425 U.S. at 504-05) (emphasis added by CCA). But there was no constant reminder in Mr. Reid's case. To the contrary, "[t]he videotaped interview here was played for approximately one hour and twenty-two minutes during a lengthy trial.

Therefore, the prison attire [Mr. Reid] wore during the videotaped interview did not act as a *constant* reminder during the course of trial." *Id.* at 268 (emphasis added) (internal quotation marks omitted). "Instead, the jury observed [Mr. Reid] in jail attire for a limited time on a videotape that defense counsel told the jury it would see. Therefore, we conclude that [Mr. Reid] was not prejudiced." *Id.*

The CCA also determined there was no constitutional violation or prejudice concerning the handcuffs. The court acknowledged that although the trial court ordered the redaction of the portion of the videotape that showed an officer placing Mr. Reid in handcuffs at the conclusion of the interview, "a portion of the video shows [Mr. Reid] standing while handcuffed. But that portion of the video is only eleven seconds long and, due to the quality of the video, the handcuffs themselves are not plainly visible." *Id.* at 264. The CCA concluded there was no constitutional violation "because the handcuffs were not plainly visible" and Mr. Reid "was not prejudiced." *Id.* at 268.

The district court denied relief because it concluded Mr. Reid failed to demonstrate the CCA's resolution of the claim was contrary to or involved an unreasonable application of clearly established federal law or was based on an unreasonable determination of the facts. In particular, the court concluded "[i]t was not unreasonable [for the CCA] to conclude admission of the video recording of Mr. Reid's eighty-two-minute jailhouse interview during a trial that lasted more than three weeks does not implicate the . . . concern [discussed in *Estelle*]." *Id.* at 753. And the court further concluded "[w]ith respect to the eleven-seconds of the video recording showing Mr. Reid in handcuffs, the [CCA's] decision is not contrary to or an unreasonable

application of *Deck* because the handcuffs were not plainly visible." *Id.* Because reasonable jurists would not debate the district court's conclusions, we deny a COA on this claim.

3. Claim 5

Mr. Reid maintained in Claim 5 that his constitutional right to a fair trial was violated by the admission of the investigator's statements during the videotaped interview in which she expressed her belief that he committed the murders, and the district attorney and judge held the same belief. Specifically, what the investigator said was: (1) "Now is the time to give me your side of the story, 'cause . . . that's what goes to the district attorney's office. That's . . . what they see. That's what the judge sees when we put things together," *id.* at 269 (internal quotation marks omitted); and (2) "Well I can tell you that you killed this girl. . . . Your semen is in this girl, on this girl . . . in a multitude of locations," *id.* at 270 (internal quotation marks omitted).

The CCA disagreed that the failure to redact these statements deprived Mr. Reid of a fair trial. "It is an unavoidable fact in all criminal trials that the defendant is on trial because the government has decided to prosecute. Such a fact is necessarily accompanied by the inference that the government has chosen to disbelieve a defendant's account of events." *Id.* at 279. Therefore, the investigator's "statements did not create any inference that deprived [Mr. Reid] of a fair trial." *Id.* at 280.

In determining whether the admission of evidence violates the Constitution, the question is whether the evidence is "so unduly prejudicial that it renders the trial fundamentally unfair." *Payne v. Tennessee*, 501 U.S. 808, 825 (1991); *Dowling v. United*

States, 493 U.S. 342, 352 (1990) (only evidence that "is so extremely unfair that its admission violates fundamental conceptions of justice" fails the due process test of "fundamental fairness" (internal quotation marks omitted)). A proceeding is fundamentally unfair in a constitutional sense if it is "shocking to the universal sense of justice." *United States v. Russell*, 411 U.S. 423, 432 (1973) (internal quotation marks omitted).

"[B]ecause a fundamental-fairness analysis is not subject to clearly definable legal elements, when engaged in such an endeavor a federal court must tread gingerly and exercise considerable self-restraint." *Duckett v. Mullin*, 306 F.3d 982, 999 (10th Cir. 2002) (internal quotation marks omitted); *see Richter*, 562 U.S. at 101 ("The more general the rule, the more leeway courts have in reaching outcomes in case-by-case determinations." (internal quotation marks omitted)). The "[i]nquiry into fundamental unfairness requires examination of the entire proceedings, including the strength of the evidence against the petitioner." *Le v. Mullin*, 311 F.3d 1002, 1013 (10th Cir. 2002) (per curiam).

The district court denied a COA because Mr. Reid failed to demonstrate that the CCA's decision was based on an unreasonable determination of the facts given the evidence presented or contrary to or an unreasonable application of clearly established law. "Based on the Court's review of the entire proceedings, the Court cannot conclude that the admission of [the investigator's] statements rendered Mr. Reid's trial fundamentally unfair." R., Vol. 1 at 758. Because reasonable jurists would not debate the court's resolution of this claim, we deny a COA.

C. The Rule 59(e) Motion

Mr. Reid filed a motion to vacate the district court's final judgment and reinstate his amended habeas application to give him an opportunity to file a reply to Respondents' answer that addressed the merits of his claim. As grounds, Mr. Reid alleged he was unable to file a reply within the deadline set by the court because of restrictions imposed as a result of the COVID-19 pandemic that prevented access to the prison library. Because the motion was filed within twenty-eight days after the final judgment, the court construed it as being asserted under Rule 59(e) of the Federal Rules of Civil Procedure.

A Rule 59(e) motion may be granted "to correct manifest errors of law or to present newly discovered evidence." *Phelps v. Hamilton*, 122 F.3d 1309, 1324 (10th Cir. 1997). Relief under Rule 59(e) is also appropriate when "the court has misapprehended the facts, a party's position, or the controlling law." *Servants of the Paraclete v. Does*, 204 F.3d 1005, 1012 (10th Cir. 2000). However, a Rule 59(e) motion is not the appropriate vehicle in which to advance for the first time "arguments that could have been raised earlier" in the proceedings. *United States v. Christy*, 739 F.3d 534, 539 (10th Cir. 2014).

"This court reviews the district court's ruling on a Rule 59(e) motion for abuse of discretion. Accordingly, we will not reverse the decision of the district court unless the . . . court made a clear error of judgment or exceeded the bounds of permissible choice in the circumstances." *Loughridge v. Chiles Power Supply Co.*, 431 F.3d 1268, 1275 (10th Cir. 2005) (citation and internal quotation marks omitted).

The district court explained the chronology of events as follows. In its October 13, 2020 order that dismissed several of Mr. Reid's claims on procedural grounds, the court directed Respondents to file an answer that addressed the merits of the remaining claims and "advised [Mr. Reid] he could file a reply within thirty days after Respondents filed their [a]nswer." R., Vol. 1 at 768. The court also denied Mr. Reid's motion to appoint counsel because he demonstrated the ability to present his claims and respond to Respondents' legal arguments.

Respondents filed their answer on October 30, 2020. But "Mr. Reid did not file a reply within thirty days or at any time" between October 30 and January 25, 2021, when the court entered its order dismissing Mr. Reid's remaining claims on the merits. *Id.* at 769. "In fact, prior to filing the motion to reconsider, Mr. Reid has not communicated with the Court in any way since September 14, 2020." *Id.*

After considering Mr. Reid's motion "and the entire file," the district court found "that Mr. Reid fail[ed] to demonstrate any reason why the Court should reconsider and vacate the Final Judgment." The court acknowledged that "facility restrictions imposed during the global pandemic have created obstacles to prison inmates like Mr. Reid who are litigating claims *pro se*." *Id.* Nevertheless, during the pandemic, "Mr. Reid was able to prepare the second amended application that was filed in May 2020 and he was able to prepare a substantive response to Respondents' Pre-Answer Response that was filed in August 2020." *Id.* at 769-70. More to the point, the court found that regardless of whether additional restrictions were imposed over time and remained in effect during the time for filing a reply, "Mr. Reid [never] explain[ed] why he failed to inform the Court

about those restrictions and request an extension of time if additional time was necessary." *Id.* at 770.

We affirm for two reasons. First, Mr. Reid cannot use a Rule 59(e) motion to raise issues that could have been raised earlier in the proceedings. *See Christy*, 739 F.3d at 539. When Respondents filed their answer on October 30, 2020, Mr. Reid was aware that he would not be able to file a reply within thirty days due to the COVID-19 restrictions and could have raised the issue then instead of waiting until after the district court had disposed of the case.

Second, there was no abuse of discretion. The district court's detailed order explained that Mr. Reid had both the ability and ample time to ask for an extension of time to file a reply but failed to do so. The court's decision to deny Mr. Reid's motion was a permissible choice under the circumstances. *See Loughridge*, 431 F.3d at 1275.

III. CONCLUSION

We deny Mr. Reid's request for a COA and dismiss this matter. We affirm the district court's order denying Mr. Reid's Rule 59(e) motion. We grant Mr. Reid's motion to proceed without prepayment of costs and fees.

Entered for the Court

Carolyn B. McHugh
Circuit Judge