FILED
United States Court of Appeals
Tenth Circuit

February 16, 2024

Christopher M. Wolpert
Clerk of Court

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

NIEVES SONNY ORTEGA,

Petitioner - Appellant,

v.

DWAYNE SANTISTEVAN, Warden; HECTOR H. BALDERAS, Attorney General of the State of New Mexico,

Respondents - Appellees.

No. 22-2029
(D.C. No. 2:20-CV-00506-JCH-SCY)
(D.N.M.)

ORDER DENYING CERTIFICATE OF APPEALABILITY*

Before **HOLMES**, Chief Judge, **KELLY**, and **ROSSMAN**, Circuit Judges.

Nieves Sonny Ortega, a New Mexico state prisoner proceeding pro se,[1] requests a certificate of appealability ("COA") to challenge the district court's denial of his habeas corpus petition filed pursuant to 28 U.S.C. § 2254.

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* This order is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel.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 Federal Rule of Appellate Procedure 32.1 and Tenth Circuit Rule 32.1.

[1] We "liberally" construe Mr. Ortega's pro se filings, but we do not act as his advocate. *Yang v. Archuleta*, 525 F.3d 925, 927 n.1 (10th Cir. 2008).

Exercising jurisdiction under 28 U.S.C. § 1291, we **DENY** Mr. Ortega's request for a COA and **DISMISS** this matter. We nevertheless **GRANT** Mr. Ortega's request to proceed in forma pauperis.

I

In September 2011, a New Mexico jury convicted Mr. Ortega of first-degree murder, attempted first-degree kidnapping, attempted armed robbery, conspiracy to commit first-degree murder, conspiracy to commit robbery, and conspiracy to commit first-degree kidnapping. The charges arose from a dispute concerning a debt that Chris Laureles owed to Mark Ruiz. *See State v. Ortega*, 327 P.3d 1076, 1081 (N.M. 2014) ("*Ortega I*"). Around midnight on January 29, 2010, Mr. Ruiz and Mr. Ortega arrived at a small social gathering at which Mr. Laureles was present. Mr. Ruiz threatened Mr. Laureles and demanded that Mr. Laureles cede his car or jewelry to satisfy the debt. Mr. Laureles refused. Mr. Laureles, Mr. Ortega, Mr. Ruiz, and others then went outside together. Mr. Laureles entered his car. Standing outside the car, Mr. Ruiz reached into it, grabbed a flashlight, and hit Mr. Laureles over the head with it. As Mr. Laureles attempted to drive away, Mr. Ortega and Mr. Ruiz opened fire on Mr. Laureles and his car. Mr. Laureles died at the scene.

In November 2011, a New Mexico trial court sentenced Mr. Ortega to life imprisonment followed by two years of parole for the murder conviction and various concurrent terms of imprisonment for the remaining convictions.

On direct appeal, *see* N.M. R. APP. P. 12-102(A)(1), the New Mexico Supreme Court vacated Mr. Ortega's convictions for conspiracy to commit robbery and conspiracy to commit kidnapping. *See Ortega I*, 327 P.3d at 1086. The court held that the convictions violated Mr. Ortega's federal and state double jeopardy rights. *See id.* The court affirmed Mr. Ortega's convictions as to the remaining counts of first-degree murder, conspiracy to commit first-degree murder, attempted first-degree kidnapping, and attempted armed robbery. *See id.* at 1092.

Mr. Ortega then pursued state post-conviction relief, claiming, *inter alia*, ineffective assistance of counsel. *See* R. at 323–28 (Pet. for Writ Habeas Corpus, filed Mar. 9, 2015). The state habeas court summarily denied relief as to all of Mr. Ortega's claims except those asserting ineffective assistance of counsel. The court directed Mr. Ortega to restate his ineffective assistance of counsel claims in a manner that would include supporting factual detail and appointed counsel for the continued state habeas proceedings. Mr. Ortega then, through his appointed counsel, filed a restated petition for a writ of habeas corpus.

The state habeas court held an evidentiary hearing in April 2019 and subsequently denied relief to Mr. Ortega. Mr. Ortega filed a petition for a writ of certiorari in the New Mexico Supreme Court, which the court denied.

On May 26, 2020, Mr. Ortega filed his § 2254 habeas petition pro se, asserting six independent grounds for relief. The magistrate judge recommended denying the petition. *See Ortega v. Santistevan*, No. 20-CV-506, 2021 WL 6062125, at *1 (D.N.M. Dec. 22, 2021), *report and recommendation adopted*, No. 20-CV-506, 2022

WL 670865 (D.N.M. Mar. 7, 2022) ("*Ortega II*"). Mr. Ortega filed objections to the magistrate judge's report and recommendation. The district court overruled Mr. Ortega's objections, adopted the magistrate judge's recommendation, dismissed the petition, and denied a COA. *See Ortega v. Santistevan*, No. 20-CV-506, 2022 WL 670865, at *4 (D.N.M. Mar. 7, 2022) ("*Ortega III*"). Mr. Ortega now seeks a COA from this Court.

II

A COA is a jurisdictional prerequisite to our adjudication of the merits of a 28 U.S.C. § 2254 appeal. *See* 28 U.S.C. § 2253(c)(1)(A); *Miller-El v. Cockrell*, 537 U.S. 322, 335–36 (2003). We may issue a COA "only if the applicant has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2).

Whether to issue a COA is a "threshold question" that we decide "without 'full consideration of the factual or legal bases adduced in support of the claims.'" *Buck v. Davis*, 580 U.S. 100, 115 (2017) (quoting *Miller-El*, 537 U.S. at 336). To cross that threshold, a petitioner need not show "that the appeal will succeed." *Welch v. United States*, 578 U.S. 120, 127 (2016) (quoting *Miller-El*, 537 U.S. at 337). Rather, a petitioner "must demonstrate 'that reasonable jurists could debate whether (or, for that matter, agree that) the petition should have been resolved in a different manner or that the issues presented were adequate to deserve encouragement to proceed further.'" *United States v. Lewis*, 904 F.3d 867, 870 (10th Cir. 2018) (quoting *Slack v. McDaniel*, 529 U.S. 473, 484 (2000)).

When a state court has addressed the merits of a habeas petitioner's claims—as the New Mexico Supreme Court has done here with Mr. Ortega's claims—the "deferential treatment of state court decisions" under the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA")[2] "must be incorporated into our consideration of [the] petitioner's request for a COA." *Dockins v. Hines*, 374 F.3d 935, 938 (10th Cir. 2004). Under AEDPA, our "review is limited to determining whether the [state court's] conclusion is 'contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States' or whether the conclusion 'was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.'" *Lockett v. Trammell*, 711 F.3d 1218, 1230 (10th Cir. 2013) (quoting 28 U.S.C. § 2254(d)). "The AEDPA standard is 'highly deferential . . . [and] demands that state-court decisions be given the benefit of the doubt.'" *Littlejohn v. Trammell*, 704 F.3d 817, 824 (10th Cir. 2013) (alterations in original) (quoting *Woodford v. Visciotti*, 537 U.S. 19, 24 (2002) (per curiam)).

III

Mr. Ortega raises multiple issues, including: (A) whether trial counsel was ineffective; (B) whether the trial court erred by denying use immunity to a potential witness (i.e., Mr. Ruiz); (C) whether the trial court erred by not excluding surrogate testimony of an expert that relied on a report generated by an available declarant;

[2] *See* Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214.

(D) whether the trial court erred in instructing the jury; (E) whether the State violated its duty to disclose exculpatory evidence; and (F) whether there was cumulative error. We conclude that Mr. Ortega is not eligible for a COA on any of these issues. Accordingly, we deny his application and dismiss this matter.

A

Mr. Ortega alleges that his trial counsel rendered ineffective assistance in violation of the Sixth Amendment. In this regard, Mr. Ortega argues that his trial counsel performed deficiently by failing to: (1) investigate and interview the State's expert witnesses; (2) prepare for plea negotiations; (3) preserve issues of use immunity; (4) introduce evidence at trial; (5) assert a double jeopardy defense; and (6) challenge the jury instruction on accessory liability.

We evaluate claims for ineffective assistance of counsel under the two-pronged standard established in *Strickland v. Washington*, 466 U.S. 668 (1984). To prove ineffective assistance of counsel, a petitioner "must show both that his counsel's performance 'fell below an objective standard of reasonableness' *and* that 'the deficient performance prejudiced the defense.'" *Byrd v. Workman*, 645 F.3d 1159, 1167 (10th Cir. 2011) (quoting *Strickland*, 466 U.S. at 687–88).

In determining the reasonableness of counsel's performance, we assess "whether [the] representation amounted to incompetence under 'prevailing professional norms,' not whether it deviated from best practices or most common custom[s]." *Harrington v. Richter*, 562 U.S. 86, 105 (2011) (quoting *Strickland*, 466 U.S. at 690); *accord Simpson v. Carpenter*, 912 F.3d 542, 593 (10th Cir. 2018).

In doing so, "we strongly presume that '[counsel] acted in an objectively reasonable manner and that [the] challenged conduct *might* have been part of a sound trial strategy." *Hanson v. Sherrod*, 797 F.3d 810, 826 (10th Cir. 2015) (quoting *Bullock v. Carver*, 297 F.3d 1036, 1046 (10th Cir. 2002)); *see also Strickland*, 466 U.S. at 689 ("Judicial scrutiny of counsel's performance must be highly deferential . . . ."). Further, we "'judge the reasonableness of counsel's challenged conduct' on the specific facts of the case 'viewed as of the time of counsel's conduct.'" *Hanson*, 797 F.3d. at 826 (quoting *Strickland*, 466 U.S. at 690).

Even if counsel performed unreasonably, a petitioner must also show prejudice—that is, "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.*

Importantly, we "need not determine whether counsel's performance was deficient before examining the prejudice suffered by the [petitioner] as a result of the alleged deficiencies." *Id.* at 697. Nor need we "address both components of the inquiry if the defendant makes an insufficient showing on one." *Id.*

This *Strickland* standard and the standard under § 2254(d) are "both 'highly deferential.'" *Harrington*, 562 U.S. at 105 (quoting *Strickland*, 562 U.S. at 689). Their application "in tandem[] . . . is 'doubly' so." *Id.* (quoting *Knowles v. Mirzayance*, 556 U.S. 111, 123 (2009)). The relevant question therefore "is whether there is any reasonable argument" that the performance of Mr. Ortega's trial counsel

"satisfied *Strickland*'s deferential standard"—"not whether [his] counsel's actions were reasonable." *Id.*

Against that backdrop, we cannot conclude, for any of Mr. Ortega's six claims of ineffective assistance of counsel, that the New Mexico Supreme Court's decision was contrary to or an unreasonable application of Supreme Court precedent. *See* 28 U.S.C. § 2254(d)(1). Nor can we conclude that the decision was premised upon an unreasonable determination of the facts presented at trial. *See id.* § 2254(d)(2). Accordingly, reasonable jurists could not debate the correctness of the district court's decision to deny relief regarding Mr. Ortega's ineffective assistance claims, and we deny Mr. Ortega a COA as to these claims.

1

Mr. Ortega first argues that his trial counsel performed deficiently by failing to interview the State's key witnesses in advance of his trial. Mr. Ortega's argument focuses on "two [witnesses] whose testimony was critical of the defense[']s] attempt to attack the credibility and reliability of the sole eyewitness who testified that Mr. Ortega had a firearm." Aplt.'s Combined Opening Br. & Appl. for COA at 8.[3] Those two witnesses that Mr. Ortega's trial counsel did not interview are Kevin Streine, a firearms and toolmaker expert, and Dr. Ross Zumwalt, the Chief Medical Investigator for the State of New Mexico at the time of Mr. Ortega's trial. Mr. Ortega's argument also pertains to Alanna Williams, a forensic analyst with the

[3] Two page numbers appear on each page of Mr. Ortega's brief. For clarity, we cite to the ECF page numbers in the top right-hand corner.

Albuquerque Police Department, and Kristin Radecki, a forensic analyst with the New Mexico Department of Public Safety Crime Lab.

At trial, the firearms expert testified, based on his review of bullets and casings recovered from the crime scene, that two different firearms were used during the shooting. *See Ortega I*, 327 P.3d at 1088–89 (noting the testimony that the bullets and fragments recovered from the scene and Mr. Laureles's body were from two firearms, one .32 caliber and the other .38). Mr. Ortega asserts that this testimony has relevance that would have been important to his defense against the murder charge. Mr. Ortega appears to argue that, through interviewing the firearms expert, his counsel could have confirmed that none of the bullets that killed Mr. Laureles came from Mr. Ortega's gun.

The chief medical investigator testified to the results of a toxicology report, which determined that Mr. Laureles was not intoxicated. *See id.* at 1088 (stating that Mr. Laureles's "blood alcohol concentration was .018, which [was] described as a 'small amount' compared to the standard of .08 for driving under the influence"). Mr. Ortega maintains that whether Mr. Laureles was intoxicated has relevance that would have been important to his defense against the kidnapping charge. Specifically, he asserts that an interview with the medical investigator would have enabled his trial counsel to establish that Mr. Laureles was intoxicated and thus not inclined to be intimidated into going outside; that is, as Mr. Ortega reasoned, Mr. Laureles's intoxication would support the contention that he *consented* to going outside with Mr. Ruiz and Mr. Ortega.

The New Mexico Supreme Court, on direct appeal, rejected these arguments. *See id.* at 1091–92. The court concluded that the record supported the presumption that "defense counsel made a strategic decision not to interview" the firearms expert and the medical investigator, reasoning that "[a]ny information that was likely to be gleaned from interviewing these witnesses would unlikely [have been] helpful to [Mr. Ortega's] case, or otherwise [have] change[d] the outcome of his convictions." *Id.* at 1091. The court also concluded that Mr. Ortega failed to establish prejudice in light of the "sufficient evidence in the record to support [his] conviction." *Id.* at 1092. The court pointed to the testimony of two eyewitnesses to the shooting and "additional witnesses [that] testified in a corroborative manner regarding events leading to and immediately following the shooting." *Id.*

The district court concluded that the New Mexico Supreme Court reasonably applied the clearly established precedent of the Supreme Court for ineffective assistance of counsel. *See Ortega III*, 2022 WL 670865, at *2; *see also Ortega II*, 2021 WL 6062125, at *7. Acting under the assumption that trial counsel was in fact ineffective, the court also determined that Mr. Ortega failed to establish prejudice. *See Ortega III*, 2022 WL 670865, at *2 (citing *Strickland*, 466 U.S. at 685–86).

The propriety of the district court's decision is not debatable. Mr. Ortega does not present any basis to conclude that the New Mexico Supreme Court's decision is contrary to or an unreasonable application of clearly established Supreme Court precedent, or that its decision "was based on an unreasonable determination of the facts." *Littlejohn*, 704 F.3d at 824 (quoting 28 U.S.C. § 2254(d)(1)–(2)).

Specifically, Mr. Ortega does not explain how interviewing the firearms expert could have impacted his potential liability as an accessory to the murder or how interviewing the medical investigator could have changed the outcome on his kidnapping charge. Moreover, he does not even address how interviewing the forensic analysts—Ms. Williams and Ms. Radecki—would have impacted his defense at all. As such, he presents no basis on which to conclude that reasonable jurists could debate the district court's decision. Accordingly, we deny a COA on this ineffective assistance claim.

2

Mr. Ortega's next argument is related to his first. He argues that his trial counsel's failure to interview witnesses infected his plea negotiations. Mr. Ortega acknowledges that the record "does not reflect the history of any plea negotiations below." Aplt.'s Combined Opening Br. & Appl. for COA at 8. This argument fails for lack of preservation.

"To properly raise an argument [in the district court], a litigant must present the argument 'with sufficient clarity and specificity.'" *Simpson*, 912 F.3d at 565 (quoting *Folks v. State Farm Mut. Auto. Ins. Co.*, 784 F.3d 730, 741 (10th Cir. 2015)). Mr. Ortega failed to raise any claim regarding plea negotiations—or his trial counsel's performance in connection thereto—before the district court. As a consequence of this failure, Mr. Ortega has not preserved such a claim for our review. *See id.*; *see also Harmon v. Sharp*, 936 F.3d 1044, 1085 (10th Cir. 2019) (Holmes, J., concurring) ("[I]n the AEDPA context, our precedent usually has treated

arguments that petitioners have not advanced before the district court as waived—*viz.*, not subject to review at all."); *United States v. Ramsey*, 830 F. App'x 584, 586 (10th Cir. 2020) ("This waiver principle holds true even if, as here, a prisoner generally alleges ineffective assistance of counsel in the district court and on appeal yet includes new particular claims of ineffective assistance of counsel for the first time on appeal."). We therefore deny Mr. Ortega a COA on this claim of ineffective assistance.

3

Mr. Ortega argues that his trial counsel was ineffective for failing to create an adequate record supporting use immunity for Mr. Ruiz. Mr. Ortega contends that, if the trial court would have granted Mr. Ruiz use immunity—that is, a guarantee that the State would refrain from using Mr. Ruiz's trial testimony as evidence in any future prosecution against him—and the jury had heard his testimony, there is a "reasonable probability that the outcome of the trial would have been different[]." Aplt.'s Combined Opening Br. & Appl. for COA at 14. Mr. Ortega faults his attorney for arguing the exculpatory effect of Mr. Ruiz's proposed testimony rather than proffering his specific testimony. We cannot agree.

The magistrate judge found that the state court properly applied both prongs of the *Strickland* standard, stating: "The state habeas court clearly followed the *Strickland* test, finding that Mr. Ortega's claim for ineffective assistance of counsel failed under both prongs." *Ortega II*, 2021 WL 6062125, at *9. In particular, the

magistrate judge rejected Mr. Ortega's habeas arguments, which primarily focused on the prejudice prong. The magistrate judge offered this reasoning:

> Mr. Ortega presents no facts to show that the trial judge would have made a different decision had Mr. Ortega's counsel proffered Mr. Ruiz's specific testimony compared to just arguing that Mr. Ruiz's testimony was exculpatory. In other words, Mr. Ortega does not specify what information Mr. Ruiz would have testified to such that this Court could say there is a reasonable probability the outcome of his case would have been different—i.e., that the trial court would have granted Mr. Ruiz use immunity and Mr. Ruiz would have testified to exculpatory evidence—had Mr. Ortega's trial attorney proffered Mr. Ruiz's testimony to the trial judge.

Id. The district court agreed with this analysis and likewise rejected this claim of ineffective assistance. *See Ortega III*, 2022 WL 670865, at *3.

We conclude that reasonable jurists could not debate the correctness of the district court's determination. Notably, both on the questions of deficient performance and prejudice, the hearing held by the state habeas court is telling. During that hearing, Mr. Ruiz presented the purportedly exculpatory testimony, as to which Mr. Ruiz was granted use immunity. After the hearing, the court observed that Mr. Ruiz "did not make a credible witness": he incorporated "a great deal of affectation and exaggeration in [his] testimony," and expressed "a desire, even after he had been granted immunity [for the state habeas proceedings], to avoid topics that might [have led] to more criminal liability, such as the whereabouts of the murder weapons." R. at 436–37 (Tr. Ct.'s Findings of Fact & Conclusions of Law, filed Dec. 26, 2019).

Ultimately, the state habeas court concluded that "trial counsel's assessment of Mark Ruiz's testimony in view of the circumstances prevailing when [Mr. Ortega] was tried"—including Mr. Ruiz's own trial being scheduled for three weeks after Mr. Ortega's—"may have been that [Mr. Ruiz's testimony] would have been more harmful than helpful or even simply unknown." *Id.* at 436. These observations of the state court underscore the soundness of the district court's conclusion that Mr. Ortega was not entitled to habeas relief. More to the point, reasonable jurists could not debate the district court's resolution of this ineffective assistance claim.

4

Mr. Ortega asserts that his trial counsel provided ineffective assistance of counsel by failing to investigate and introduce exculpatory evidence showing that his weapon was not used to shoot Mr. Laureles. This argument relates to ballistics evidence. As to this claim, the district court, on the magistrate judge's recommendation, held that Mr. Ortega failed to establish either prong of the *Strickland* standard and thus denied habeas relief. In other words, the district court effectively determined that the state court's decision was neither contrary to nor an unreasonable application of *Strickland*. Reasonable jurists could not debate the correctness of this outcome.

As to the ballistics evidence, Mr. Ortega fails to identify the evidence that his counsel should have, but did not, present. The jury heard testimony that Mr. Ortega fired a .45 caliber firearm but that the projectiles recovered from the murder scene

were not from a .45 caliber firearm.[4] *See id.* at 382 (Restated Pet. for Writ Habeas Corpus, filed Nov. 13, 2015). Accordingly, we are left to wonder what evidence, beyond what the jury heard, would result in a reasonable probability that the jury would have reached a different outcome as to Mr. Ortega's murder charge. *See Strickland*, 466 U.S. at 694–95; *see also Harrington*, 562 U.S. at 108 (2011) ("An attorney need not pursue an investigation that would be fruitless, much less one that might be harmful to the defense."). Additionally, as the magistrate judge observed, Mr. Ortega does not explain how evidence potentially undermining the State's theory that there were two shooters would have impacted his liability as an accessory. *See Ortega II*, 2021 WL 6062125, at *8.

Because Mr. Ortega has failed to identify what further evidence his counsel should have presented, or what further investigation his counsel should have undertaken, he fails to demonstrate either *Strickland* prong.

5

Mr. Ortega argues that his trial counsel failed to develop and present a double jeopardy defense. This argument appears to concern Mr. Ortega's successful challenge on direct appeal, in which the New Mexico Supreme Court determined that his convictions on conspiracy to commit robbery and conspiracy to commit first-degree kidnapping violated his double jeopardy rights. *See Ortega I*, 327 P.3d

[4] The New Mexico Supreme Court noted that the firearms expert determined that the bullets and fragments were from a .38 caliber firearm. *See Ortega I*, 327 P.3d at 1088.

at 1086. We are unable to discern whether this argument also concerns Mr. Ortega's conspiracy to commit first-degree murder. But in any event, we conclude that Mr. Ortega failed to preserve this issue in the district court.

Mr. Ortega only "perfunctor[il]y present[ed]" this argument as support for his cumulative error claim. R. at 5, 18 (Pet. Under 28 U.S.C. § 2254 for Writ Habeas Corpus, filed May 26, 2020). He simply proclaimed error without citation to any facts. Mr. Ortega has therefore waived this issue. *See Goode v. Carpenter*, 922 F.3d 1136, 1149 (10th Cir. 2019) ("[W]e do not consider an issue that was not adequately raised in the federal district court."); *see also Brown v. Lengerich*, 680 F. App'x 761, 764 (10th Cir. 2017) (explaining that although we "liberally construe[]" a pro se § 2254 petition, "[w]e do not . . . 'take on the responsibility of serving as the litigant's attorney in constructing arguments.'" (quoting *Garrett v. Selby Connor Maddux & Janer*, 425 F.3d 836, 840 (10th Cir. 2005))). We decline to consider this argument further and deny a COA regarding it.[5]

[5] Even if we were inclined to reach it, we recognize that Mr. Ortega's § 2254 petition states: "The Trial [sic] Erred in Instructing The Jury." R. at 13. The magistrate judge acknowledged that "[t]here appears to be a word missing from this allegation, and the most natural reading is that the trial *court* erred in instructing the jury, as the court is the one that instructs the jury." *Ortega II*, 2021 WL 6062125, at *12. But the magistrate judge nevertheless recommended denying the claim even if Mr. Ortega's argument concerned an error committed by trial counsel—that is, ineffective assistance of counsel—"because Mr. Ortega offers no further facts to show how his counsel was ineffective." *Id.* The district court adopted the magistrate judge's recommendation. *See Ortega III*, 2022 WL 670865, at *3–4. In our view, reasonable jurists could not debate the correctness of this determination. Accordingly, on this ground too, we would deny a COA on this claim.

6

Mr. Ortega's final argument of ineffective assistance of counsel meets a fate similar to the last. Mr. Ortega seems to argue that his trial counsel rendered ineffective assistance with regard to the jury instruction concerning accessory liability. In his state habeas petition, he contended that the instruction was not clearly limited to the murder charge.

Mr. Ortega, however, failed to preserve this argument for review in his federal petition. "[V]ague, arguable references to a point in the district court proceedings do not preserve the issue on appeal." *Folks*, 784 F.3d at 741; *see also Simpson*, 912 F.3d at 565. His petition is devoid of references to the accessory liability instruction or his trial counsel's performance in connection with the accessory liability instruction and contains no other "supporting factual averments." *United States v. Fisher*, 38 F.3d 1144, 1147 (10th Cir. 1994). "Although we must liberally construe [Mr. Ortega's] pro se petition, we are not required to fashion [his] arguments for him." *Id.* (citation omitted); *see also Stouffer v. Trammell*, 738 F.3d 1205, 1221 n.13 (10th Cir. 2013) (noting that a petitioner's "attempt to restyle the allegation as a new prosecutorial misconduct claim [was] procedurally improper because . . . it was not raised before the district court as part of the habeas petition"). We thus decline to reach this argument here and deny a COA.

7

In sum, we conclude that Mr. Ortega has failed to demonstrate that reasonable jurists would debate the correctness of the district court's rulings as to his claims of

ineffective assistance of counsel. We therefore deny a COA on any ground for this issue.

B

Mr. Ortega argues that the trial court erred in denying witness use immunity to Mr. Ruiz. He argues that the trial court failed to "apprise itself" of Mr. Ruiz's proposed testimony before denying use immunity. Aplt.'s Combined Opening Br. & Appl. for COA at 10 (citing *State v. Belanger*, 210 P.3d 783 (N.M. 2009)). We conclude that this argument—which turns on the trial court's interpretation of New Mexico law—falls outside the scope of federal habeas review. Thus, reasonable jurists could not debate the district court's decision to deny it, and we deny a COA as to this particular claim.

On direct appeal, the New Mexico Supreme Court applied the state-law standard for permitting use immunity. *See Ortega I*, 327 P.3d at 1082. Under Rule 5-116 of the New Mexico Rules of Criminal Procedure, a defendant may request witness use immunity. *See id.* When the State objects, as it did here, "the defendant must show that the proffered testimony is admissible, relevant and material to the defense and that without it, his or her ability to fairly present a defense will suffer to a significant degree." *Id.* (quoting *Belanger*, 1210 P.3d at 793). The New Mexico Supreme Court determined that Mr. Ortega failed to meet his burden under state law—to "make a proffer as to what testimony [Mr. Ruiz] would give"—and held that the trial court did not abuse its discretion in denying use immunity. *Id.* at 1082–83.

"We cannot review a state court's interpretation of its own state law." *House v. Hatch*, 527 F.3d 1010, 1025 (10th Cir. 2008) (citing *Estelle v. McGuire*, 502 U.S. 62, 67–68, (1991)); *see also Wilson v. Corcoran*, 562 U.S. 1, 5 (2010) (per curiam) ("[I]t is only noncompliance with *federal* law that renders a State's criminal judgment susceptible to collateral attack in the federal courts."); *Eizember v. Trammell*, 803 F.3d 1129, 1145 (10th Cir. 2015) ("[T]his court's role on collateral review isn't to second-guess state courts about the application of their own laws but to vindicate federal rights.").

Mr. Ortega is therefore not entitled to federal habeas relief based on a state court's purported errors in denying use immunity unless he can show that the errors "so infused the trial with unfairness as to deny due process of law." *Estelle*, 502 U.S. at 75 (quoting *Lisenba v. California*, 314 U.S. 219, 228 (1941)). But Mr. Ortega makes no such due process argument. Nor does he suggest that the trial court's decision was based on any unreasonable factual determinations. Accordingly, there is no basis for granting a COA regarding this issue.

C

Mr. Ortega next asserts that the trial court admitted surrogate testimony in violation of the Confrontation Clause. Mr. Ortega argues that the State's chief medical investigator improperly testified about a toxicology report performed on Mr. Laureles by another doctor with the New Mexico Department of Health.

On direct appeal, the New Mexico Supreme Court concluded that the trial court erred, found the error harmless, and rejected Mr. Ortega's claim. *See Ortega I*,

327 P.3d at 1084–86. In federal habeas proceedings, the district court concluded that the New Mexico Supreme Court's decision was not contrary to or an unreasonable application of clearly established federal law. *See Ortega III*, 2022 WL 670865, at *4; *Ortega II*, 2021 WL 6062125, at *11. Because reasonable jurists could not debate the district court's conclusion, we deny a COA on this claim.

The Confrontation Clause provides that, "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him." U.S. CONST. amend. VI. The Clause prohibits "testimonial statements of a witness who did not appear at trial unless [the witness] was unavailable to testify, and the defendant . . . had a prior opportunity [to] cross-examin[e]" the witness. *Crawford v. Washington*, 541 U.S. 36, 53–54 (2004).

"Sixth Amendment violations that do not pervade the entire proceeding are subject to harmless-error review." *Acosta v. Raemisch*, 877 F.3d 918, 932 (10th Cir. 2017). "When harmless-error review applies, the type of analysis required depends on whether the issue comes to us on direct appeal or on federal habeas review." *Id.* at 933. "Because this is a petition for habeas relief, we ask whether the constitutional error 'had substantial and injurious effect or influence in determining the jury's verdict.'" *Holland v. Allbaugh*, 824 F.3d 1222, 1232 (10th Cir. 2016) (quoting *Brecht v. Abrahamson*, 507 U.S. 619, 623 (1993)); *see, e.g.*, *Welch v. Workman*, 639 F.3d 980, 993 (10th Cir. 2011) ("Notwithstanding the basis for the OCCA's conclusion, it determined the admission of the statement was harmless error.

Therefore, we review only whether the admission of the testimony is harmless . . . ."). This is referred to as the *Brecht* standard.[6]

We understand Mr. Ortega's argument to only concern the kidnapping charge. Mr. Ortega argues that the toxicology report influenced the jury's conclusion as to Mr. Laureles's ability to consent to go to his car with Mr. Ruiz. Mr. Ortega contends that "[i]f [Mr. Laureles] was intoxicated[,] it was more likely that he was not intimidated into going with [Mr.] Ruiz out to his car and thus was kidnapped." Aplt.'s Combined Opening Br. & Appl. for COA at 12.

The New Mexico Supreme Court agreed that the trial court erred in admitting the medical investigator's testimony. *See Ortega I*, 327 P.3d at 1084–86. The court determined that (1) the statements from the report were "testimonial" because their "primary purpose [was] to . . . 'prove past events potentially relevant to later criminal prosecution'"; (2) the statements were offered for the truth of the matter asserted—that is, Mr. Laureles's death was *not* caused by alcohol or drugs; (3) the State failed to demonstrate the doctor's unavailability; and (4) Mr. Ortega had no opportunity for

[6] Our analysis would differ had this issue come to us on direct appeal; we would have then applied the harmless-error standard adopted in *Chapman v. California*, 386 U.S. 18 (1967). *See Acosta*, 877 F.3d at 933. Under *Chapman*, an error is harmless if "the State . . . prove[s] 'beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained.'" *Satterwhite v. Texas*, 486 U.S. 249, 258–59 (1988) (quoting *Chapman*, 386 U.S. at 24). But as the Supreme Court has made clear, "the *Brecht* standard 'subsumes' the requirements that § 2254(d) imposes when a federal habeas petitioner contests a state court's determination that a constitutional error was harmless under *Chapman*." *Davis v. Ayala*, 576 U.S. 257, 268 (2015).

cross-examination. *Id.* at 1084 (quoting *State v. Navarette*, 294 P.3d 435, 437 (N.M. 2013)).

Nevertheless, the court held that the error was harmless because the toxicity report showed that Mr. Laureles was "closer to sober." *Id.* at 1085. This tended to show, the court concluded, that Mr. Laureles "had capacity[] and *did* consent by voluntarily going outside with [Mr. Ortega and Mr. Ruiz]" and thus the report "would only have helped [Mr. Ortega's] case," despite his arguments to the contrary. *Id.*

On federal habeas review, the district court agreed with the magistrate judge's determination that the New Mexico Supreme Court reasonably applied Supreme Court precedent. *See Ortega III*, 2022 WL 670865, at *4; *Ortega II*, 2021 WL 6062125, at *10–11 (concluding that the New Mexico Supreme Court correctly applied *Delaware v. Van Arsdall*, 475 U.S. 673, 681 (1986), and *Bullcoming v. New Mexico*, 564 U.S. 647, 651 (2011)).

Mr. Ortega does not grapple with the New Mexico Supreme Court's reasoning. We therefore "cannot say that '[g]rave doubt' exists as to the effect of the [the trial court's] Confrontation Clause error or that 'the matter is so evenly balanced that . . . [we feel] in virtual equipoise regarding the error's harmlessness.'" *Littlejohn*, 704 F.3d at 847 (alterations in original). As such, reasonable jurists could not debate the district court's conclusion that the New Mexico Supreme Court's

harmless error decision was not contrary to or an unreasonable application of clearly established federal law. We cannot grant a COA on this claim.[7]

D

Mr. Ortega argues that the trial court failed to inform the jury of the scope of the accessory liability instruction. He contends that a question from the jury about the instruction indicates their confusion and that the trial court erred in not responding to the query.

Mr. Ortega's "perfunctory presentation" of this argument in his § 2254 petition fails to preserve the issue for our review. *Folks*, 784 F.3d at 741 (quoting *Tele–Commc'ns, Inc. v. Comm'r*, 104 F.3d 1229, 1233–34 (10th Cir. 1997)); *cf. Owens v. Trammell*, 792 F.3d 1234, 1246 (10th Cir. 2015) ("We have long applied the rule that we do not consider issues not raised in the district court to bar not only 'a bald-faced new issue' presented on appeal, but also situations 'where a litigant changes to a new theory on appeal that falls under the same general category as an argument presented [below].'" (alteration in original) (quoting *Lyons v. Jefferson Bank & Tr.*, 994 F.2d 716, 722 (10th Cir. 1993)). In his petition, Mr. Ortega summarily asserted that "[the]

[7] In his opening brief, Mr. Ortega also asserts a violation of his rights under the Confrontation Clause based on Detective Corey Helton "sit[ting] at [the] prosecution table" and "prepar[ing] witnesses" while also serving as a witness at trial. Aplt.'s Combined Opening Br. & Appl. for COA at 7; *see also* R. at 590 (Register of Actions in *State v. Ortega*, No. D-506-CR-2010-00142, filed Jan. 27, 2021). It is unclear whether Mr. Ortega attributes this alleged error to the trial court or trial counsel. In any event, he has failed to preserve this claim for our review by failing to raise it in his § 2254 petition. *See Harris v. Sharp*, 941 F.3d 962, 975 (10th Cir. 2019); *Simpson*, 912 F.3d at 565.

trial court erred in instructing the jury." R. at 5; *see also id.* at 13, 18. In support, Mr. Ortega alleged that a potential juror indicated during voir dire that "her family had previously experienced problems" with him.[8] *Id.* at 13. He did not, however, identify the accessory instruction as the source of the error or otherwise specify the basis for this claim. Therefore, we deny a COA on this claim.[9]

E

Mr. Ortega next claims a *Brady* violation with respect to the State's failure to disclose the expert reports, regarding which the medical investigator and the firearms expert testified. Specifically, Mr. Ortega asserts that the medical investigator

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[8] Mr. Ortega also offered comments regarding technical difficulties in the original courtroom that supposedly frustrated the trial and the fact that the jury apparently could hear certain bench conferences in the second courtroom. These arguments do not seem to relate to Mr. Ortega's jury instruction argument. Viewing these contentions separately, we conclude that Mr. Ortega has not "present[ed] the argument[s] 'with sufficient clarity and specificity'" and therefore has failed to preserve them. *Simpson*, 912 F.3d at 565 (quoting *Folks*, 784 F.3d at 741).

[9] Even if we overlooked this failure of preservation, Mr. Ortega's argument would still be unavailing. For an erroneous jury instruction to entitle a petitioner to habeas review, "the ailing instruction by itself [must have] so infected the entire trial that the resulting conviction violates due process." *Cupp v. Naughten*, 414 U.S. 141, 147 (1973)); *see also Estelle*, 502 U.S. at 72; *Nguyen v. Reynolds*, 131 F.3d 1340, 1357 (10th Cir. 1997) ("[E]rrors in jury instructions in a state criminal trial are not reviewable in federal habeas corpus proceedings, 'unless they are so fundamentally unfair as to deprive petitioner of a fair trial and to due process of law.'" (quoting *Long v. Smith*, 663 F.2d 18, 23 (6th Cir. 1981))). We are provided neither evidence of fundamental unfairness nor proof of juror confusion to enable us to answer this due process inquiry in the affirmative. *Cf. Waddington v. Sarausad*, 555 U.S. 179, 191 (2009) ("[I]t is not enough that there is some 'slight *possibility*' that the jury misapplied the instruction . . . ." (quoting *Weeks v. Angelone*, 528 U.S. 225, 236 (2000))). Accordingly, even if we reached it, we would deny Mr. Ortega a COA for his jury instruction claim.

testified to a toxicology report that differed from the report his counsel received. He further asserts that the firearms expert testified about the weight of certain bullets and casings—information not included in the ballistics report produced to his counsel. *See Ortega I*, 327 P.3d at 1088.

The New Mexico Supreme Court agreed that the State failed to disclose the correct reports. However, the court rejected Mr. Ortega's argument because he failed to establish prejudice resulting from the nondisclosure. *See id.* at 1090. Consistent with the magistrate judge's recommendation, the district court effectively concluded that the New Mexico Supreme Court's decision was not contrary to or an unreasonable application of federal law, as defined by the U.S. Supreme Court, and did not involve an unreasonable determination of the facts. *See Ortega III*, 2022 WL 670865, at *4; *see also Ortega II*, 2021 WL 6062125, at *14–15. Mr. Ortega makes no argument that leads us to believe that reasonable jurists could debate these conclusions.

On direct appeal, the New Mexico Supreme Court applied a state-law standard governing the duty to disclose. *See Ortega I*, 327 P.3d at 1089–90. Under New Mexico law, a disclosure violation occurs when (1) the State breached a "duty or intentionally deprived the defendant of evidence," (2) the "non-disclosed evidence was material," (3) "the non-disclosure . . . prejudiced the defendant," and (4) the trial court did not "cure[] the failure to timely disclose the evidence." *Id.* at 1089 (citing *State v. Mora*, 950 P.2d 789, 800 (N.M. 1997), *abrogated on other grounds by Kersey v. Hatch*, 237 P.3d 683, 688–89 (N.M. 2010)).

As to the first and second prongs, the New Mexico Supreme Court determined that the State intentionally deprived Mr. Ortega of material evidence. *See id.* at 1090. As to the third prong, the New Mexico Supreme Court determined that Mr. Ortega failed to establish prejudice and rested its disclosure conclusion on that determination. *See id.* More specifically, the New Mexico Supreme Court, in effect, reasoned that the disclosure of the toxicology report would not have altered the litigation playing field in a material way that favored Mr. Ortega and, thus, the failure to disclose it did not prejudice him. The results of the report, the court observed, were in line with Mr. Ortega's defense theory of consent—*viz.*, "the toxicology report would not have materially altered [Mr. Ortega's] defense." *Id.* Moreover, the New Mexico Supreme Court explained that the "ballistics report . . . would not have changed the outcome of [Mr. Ortega's] murder conviction," reasoning that "the jury had ample evidence to convict [him] . . . even if the [report showed that] the bullets did not come from his gun." *Id.*

As to the fourth prong, the New Mexico Supreme Court expressed concern as to whether the trial court cured the State's failure by allowing Mr. Ortega's trial counsel to review the reports during (what was effectively) a seventeen-minute break during trial. *See id.* The New Mexico Supreme Court noted that such a small amount of time, "[i]n most circumstances, . . . would not [have been] sufficient . . . to read and digest lengthy scientific documentation and to prepare an adequate cross-examination." *Id.* Nevertheless, the court ultimately concluded that this concern was not determinative, stating the following: "The foregoing concern notwithstanding,

defense counsel should have asked for more information from the State. . . . [Moreover,] [a]lthough there is always a risk of prejudice in not disclosing such evidence, in this case we conclude that Defendant was not prejudiced by the non-disclosure of the expert reports." *Id.*

As relevant here, the magistrate judge determined the following:

> In his present § 2254 petition, Mr. Ortega makes no arguments and presents no facts to meet his high burden of establishing that the New Mexico Supreme Court's decision was contrary to or an unreasonable application of clearly established federal law, or that it was based on an unreasonable determination of facts in light of the evidence presented to the state court. True, the New Mexico Supreme Court followed the prongs established in a state-court case, and not specifically *Brady* and its progeny. However, the court was not required to cite federal cases, or even be aware of such cases . . . . And the New Mexico Supreme Court's reasoning and result do not contradict or unreasonably apply federal law. [The New Mexico Supreme Court] considered the three components of a *Brady* violation—whether the evidence was favorable, whether the evidence was suppressed, and prejudice—and found that although the State failed to disclose material evidence, no prejudice resulted because the results of the trial . . . would not have been changed by earlier disclosure.

Ortega II, 2021 WL 6062125, at *15. On these grounds, the magistrate judge recommended denying Mr. Ortega's petition. *See id.* The district court, by virtue of adopting the magistrate judge's report and recommendation in full, effectively adopted its reasoning. *See Ortega III*, 2022 WL 670865, at *4.

We conclude that reasonable jurists could not debate the district court's resolution of Mr. Ortega's *Brady* claims. More specifically, even though the New Mexico Supreme Court applied a state-law disclosure standard, like the district court,

we cannot say that the court "applie[d] a rule that contradicts the governing law set forth in [Supreme Court] cases." *Fairchild v. Trammell*, 784 F.3d 702, 710 (10th Cir. 2015) (alterations in original) (quoting *Williams v. Taylor*, 529 U.S. 362, 405–06 (2000)). In particular, with respect to the toxicology report, Mr. Ortega does nothing to cast doubt on the New Mexico Supreme Court's determination that Mr. Laureles's relative sobriety "would not have materially altered [Mr. Ortega's] defense" theory, *Ortega I*, 327 P.3d at 1090, and, therefore, the failure to disclose it, under the circumstances here, did not prejudice him. And with respect to the weight of the bullets, Mr. Ortega fails to address the New Mexico Supreme Court's conclusion that he would have still been subject to accessory liability on the first-degree murder count even if the weights showed Mr. Ortega's firearm did not kill Mr. Laureles. *See id.* Given this failure by Mr. Ortega, we cannot say that there is a reasonable probability that the result of Mr. Ortega's trial would have been different but for the lack of disclosure of the ballistics report.

Accordingly, reasonable jurists could not debate the district court's decision to deny habeas relief as to this claim. And, consequently, we deny Mr. Ortega a COA.

F

Finally, Mr. Ortega raises a claim of cumulative error. In so doing, he argues that he "did not receive a fair trial," pointing to the alleged ineffective assistance of counsel, improper surrogate testimony, witness use immunity, double jeopardy, *Brady*, and jury instruction issues. Aplt.'s Combined Opening Br. & Appl. for COA at 14.

The New Mexico Supreme Court summarily rejected this claim, stating that "the errors committed by the district court were harmless, and thus do not call into question the decision of the jury." *Ortega I*, 327 P.3d at 1091. Placing a finer point, the magistrate judge explained that "[t]he state supreme court found only one harmless error: Mr. Ortega's confrontation rights were violated by the surrogate testimony of Dr. Zumwalt regarding the toxicology report" and that there can be no cumulative error "[w]ithout more than one actual error."[10] *Ortega II*, 2021 WL 6062125, at *15 (citing *Hanson*, 797 F.3d at 852). For its part, the district court agreed. *See Ortega III*, 2022 WL 670865, at *4.

As a consequence of our foregoing analysis, we conclude that no reasonable jurist could debate the district court's resolution of this issue.[11] "We cumulate error only upon a showing of *at least two actual errors*." *Hanson*, 797 F.3d at 852 (emphasis added). Further, only "[t]he cumulative effect of *two or more individually harmless errors* has the potential to prejudice a defendant to the same extent as a *single reversible error*." *United States v. Rivera*, 900 F.2d 1462, 1469 (10th Cir. 1990) (en banc) (emphasis added); *accord Grant v. Royal*, 886 F.3d 874, 954 (10th Cir. 2018). Therefore, on a finding of one harmless error, we have nothing to

[10] In agreement with the magistrate judge, we note that despite the New Mexico Supreme Court's reference to harmless *errors* (that is, in the plural), it in fact found only one error it deemed harmless—admission of improper surrogate testimony in violation of Mr. Ortega's rights under the Confrontation Clause.

[11] We assess this claim in view of Tenth Circuit precedent recognizing "cumulative error as a separate constitutional ground for granting habeas relief." *Darks v. Mullin*, 327 F.3d 1001, 1017 (10th Cir. 2003).

cumulate. *See United States v. Yeley-Davis*, 632 F.3d 673, 686 (10th Cir. 2011) ("In sum, Ms. Yeley-Davis's cumulative error argument fails because she has identified only one harmless error."); *see also Hatfield v. Wal-Mart Stores, Inc.*, 335 F. App'x 796, 804 (10th Cir. 2009) ("[B]ecause we have identified only one harmless error, the juror issue, cumulative error is not applicable."). We thus conclude that reasonable jurists could not debate the district court's rejection of Mr. Ortega's cumulative-error claim and deny him a COA.

IV

Mr. Ortega has filed a motion to proceed in forma pauperis ("IFP"). Notwithstanding Mr. Ortega's failure to persuade us on any of his claims for a COA, he has "demonstrate[d] 'a financial inability to pay the required [filing] fees'" and presented "reasoned, nonfrivolous" factual and legal arguments supporting his COA request. *Watkins v. Leyba*, 543 F.3d 624, 627 (10th Cir. 2008) (second alteration in original) (quoting *McIntosh v. U.S. Parole Comm'n*, 115 F.3d 809, 812 (10th Cir. 1997)). We therefore grant Mr. Ortega's IFP motion.

V

For the foregoing reasons, we **DENY** Mr. Ortega's request for a COA and **DISMISS** this matter. We **GRANT** his motion to proceed IFP.

Entered for the Court

Jerome A. Holmes
Chief Judge