

FILED

United States Court of Appeals
Tenth Circuit

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

June 7, 2024

Christopher M. Wolpert
Clerk of Court

RICKY ALAN DEEPHOUSE,

Petitioner - Appellant,

v.

WYOMING SUPREME COURT; STATE
OF WYOMING; WYOMING
ATTORNEY GENERAL,

Respondents - Appellees,

No. 24-8007

(D.C. No. 1:23-CV-00162-SWS)

(D. Wyo.)

ORDER

Before **MATHESON, BACHARACH, and McHUGH**, Circuit Judges.

Mr. Ricky Deephouse was convicted in state court of third-degree sexual abuse of a minor. Mr. Deephouse unsuccessfully sought federal habeas relief and wants to appeal. To appeal, he needs a certificate of appealability. 28 U.S.C. § 2253(c)(1)(A). We decline to issue the certificate because Mr. Deephouse hasn't exhausted his habeas claim.

The claim involves the correct charge. Mr. Deephouse argues that his conviction should have been for sexual abuse in the fourth degree rather than in the third degree.

Mr. Deephouse had also raised this claim in state district court. The court rejected the claim, but Mr. Deephouse couldn't resort to federal

habeas proceedings until he exhausted the claim. 28 U.S.C. § 2254(b)(1). So Mr. Deephouse appealed to the state supreme court. But before the state supreme court had ruled, Mr. Deephouse reasserted the same claim in federal district court in a bid for habeas relief. Because Mr. Deephouse hadn't exhausted the claim, the federal district court dismissed the habeas petition.

We can issue a certificate of appeal only if the district court's ruling on exhaustion is reasonably debatable. *Laurson v. Leyba*, 507 F.3d 1230, 1231–32 (10th Cir. 2007). But Mr. Deephouse hasn't identified any flaws in the district court's ruling on exhaustion. *See Nixon v. City & Cnty. of Denver*, 784 F.3d 1364, 1366 (10th Cir. 2015) (stating that an appellant must “explain what was wrong with the reasoning that the district court relied on in reaching its decision.”); *Garrett v. Selby Connor Maddux & Janer*, 425 F.3d 836, 840–41 (10th Cir. 2005) (stating that even unrepresented litigants must present an argument citing the record and supporting legal authority). And no such flaws are apparent, for “state remedies cannot be exhausted if an appeal from a state conviction is pending.” *Denney v. State of Kan.*, 436 F.2d 587, 588 (10th Cir. 1971).

Because Mr. Deephouse hasn't presented a reasonably debatable challenge to the district court's ruling, we deny the request for a certificate

of appealability. And in the absence of a certificate, we dismiss the appeal.¹

Entered for the Court

Robert E. Bacharach
Circuit Judge

¹ Mr. Deephouse separately seeks leave to appear in forma pauperis. Because he cannot afford to prepay the filing fee, we grant this request.