

FILED
United States Court of Appeals
Tenth Circuit

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

October 2, 2026

Christopher M. Wolpert
Clerk of Court

DAVID WAYNE HEMBREE,

Petitioner - Appellant,

v.

WYOMING ATTORNEY GENERAL;
STATE OF WYOMING,

Respondents - Appellees.

No. 25-8079
(D.C. No. 2:25-CV-00138-ABJ)
(D. Wyo.)

ORDER DENYING CERTIFICATE OF APPEALABILITY*

Before **HARTZ, KELLY**, and **CARSON**, Circuit Judges.

David Wayne Hembree, a federal prisoner proceeding pro se,¹ seeks a certificate of appealability (COA) to appeal the district court's dismissal of his 28 U.S.C. § 2254 petition challenging his state court convictions. We deny Hembree's request for a COA and dismiss this matter.

Hembree was arrested and charged with stalking and criminal entry based on incidents involving his ex-girlfriend in late 2020 and early 2021. A Wyoming jury

* This order is not binding precedent except under the doctrines of law of the case, res judicata, and collateral estoppel.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 Hembree is proceeding pro se, "we liberally construe his filings, but we will not act as his advocate." *James v. Wadas*, 724 F.3d 1312, 1315 (10th Cir. 2013).

convicted Hembree on both counts and the district court sentenced him to prison. The Wyoming Supreme Court affirmed the convictions on appeal. Hembree then filed a petition for post-conviction relief in state district court and a supplement to that petition. He asserted three claims. The state district court rejected them and dismissed his petition. Hembree never filed a petition for a writ of review with the Wyoming Supreme Court.

Instead, in 2025, he filed a § 2254 habeas petition in federal district court. The district court dismissed his petition in a thorough and well-reasoned decision and declined to issue a COA. Relevant here, the district court found that Hembree failed to exhaust his state court remedies on his arguments that (1) the protection order against him and its related charging statutes were unconstitutionally vague, and (2) his appellate counsel was constitutionally ineffective for failing to raise the vagueness argument on direct appeal. And it concluded that Hembree has procedurally defaulted these claims because he can no longer pursue them in state court.²

Wishing to appeal, Hembree filed an application for a COA with this court. *See* 28 U.S.C. § 2253(c)(1)(A). Between his application and opening brief,³ he raises eight issues. As a threshold matter, seven of Hembree's eight issues are raised for the first time

² The district court also found that Hembree could not prevail on the third claim he raised in his § 2254 petition, which argued the prosecutor committed misconduct by commenting on Hembree's constitutional right to remain silent. Hembree does not raise this issue on appeal, so we do not address it here. *See Davis v. McCollum*, 798 F.3d 1317, 1320 (10th Cir. 2015) (concluding that the petitioner waived potential challenges to the district court's conclusions in a habeas proceeding by failing to address those issues in the opening brief on appeal).

³ Hembree filed an application for COA on December 11, 2025. He then filed a "Combined Opening Brief and Application for [COA]" on December 23, 2025.

in this appeal and are therefore waived.⁴ *See Owens v. Trammell*, 792 F.3d 1234, 1246 (10th Cir. 2015) (“Because the argument was not raised in his habeas petition, it is waived on appeal.”). We deny a COA on these issues.

The only remaining issues are Hembree’s claim that the protection order and related statutes he was convicted of violating are unconstitutionally vague, and his related claim that his appellate counsel was constitutionally ineffective for failing to raise the vagueness argument on direct appeal.

This court cannot grant Hembree a COA unless he “has made a substantial showing of the denial of a constitutional right.” § 2253(c)(2). When, as here, the district court denies a habeas application on procedural grounds, the prisoner must show that reasonable jurists could debate whether the application states a valid constitutional claim and whether the district court’s procedural ruling was correct. *Slack v. McDaniel*,

⁴ These arguments include: (1) the state’s probable cause determination relied on the unreasonable finding of fact that Hembree was found in his ex-girlfriend’s neighborhood even though he was 20 blocks away; (2) the Wyoming Supreme Court made an unreasonable determination of fact or application of law when it held that statements Hembree made (along with his silence in declining to respond to questions) while handcuffed in the back of the patrol car were pre-arrest; (3) trial counsel Michael Bennett was constitutionally ineffective in failing to raise the issue of Hembree’s arrest location, failing to demand unedited in-car camera footage, and failing to adequately litigate the pre-arrest custody issue regarding his statements in the patrol car; (4) appellate counsel was constitutionally ineffective for failing to raise those same issues on direct appeal and because counsel had a conflict of interest; (5) the prosecutor committed misconduct by relying on Hembree’s arrest location to say he was in his ex-girlfriend’s neighborhood, using edited video footage as evidence, introducing Hembree’s inadmissible pre-arrest statements, and engaging in a conspiracy with trial and appellate counsel; (6) application of the protection order and its related statutes “constituted an ex post facto violation under Article I, Section 10 of the United States Constitution”; and (7) “current counsel” has a conflict of interest warranting waiver of counsel or appointment of new counsel. Opening Br. at 2; *see also* COA Appl. at 1-2.

529 U.S. 473, 483-84 (2000). We need only consider the procedural ruling if it is independently dispositive. *See id.* at 485.

“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 it appears that . . . the applicant has exhausted the remedies available in the courts of the State” 28 U.S.C. § 2254(b)(1)(A). If a petitioner fails to exhaust his state court remedies and is procedurally barred from pursuing his claims in state court, then he has procedurally defaulted those claims for federal habeas purposes. *Thomas v. Gibson*, 218 F.3d 1213, 1221 (10th Cir. 2000). But an exception applies even when a state prisoner has procedurally defaulted his claims if he can demonstrate cause for the default and actual prejudice from the alleged error, or if he can show that failure to consider his claims would result in a fundamental miscarriage of justice. *Id.*

Hembree fails to show that reasonable jurists could debate whether the district court’s procedural ruling was correct. In his COA application, Hembree cites caselaw saying that ineffective assistance of counsel can provide cause for a state prisoner’s failure to exhaust his state court remedies. *See* COA Appl. at 3. He is right, but an ineffective-assistance claim can itself be procedurally defaulted. *See Edwards v. Carpenter*, 529 U.S. 446, 453 (2000). The district court held as much here, concluding Hembree procedurally defaulted his ineffective assistance of counsel claim. The court then found Hembree failed to establish cause and prejudice or a fundamental miscarriage of justice to excuse his default. And neither his COA nor his opening brief addresses the district court’s conclusion on this issue. *See Nixon v. City & Cnty. of Denver*, 784 F.3d

1364, 1366 (10th Cir. 2015) (“The first task of an appellant is to explain to us why the district court’s decision is wrong.”). Under these circumstances, we conclude Hembree has waived his challenge as to his constitutional vagueness and ineffective assistance of appellate counsel claims. *See Davis v. McCollum*, 798 F.3d 1317, 1320 (10th Cir. 2015) (concluding COA applicant’s failure to challenge district court’s procedural ruling in the opening brief waived the issue).

We deny Mr. Hembree’s application for a COA. We deny his two pending motions to supplement the record. We dismiss this matter.

Entered for the Court

Paul J. Kelly, Jr.
Circuit Judge