

FILED
United States Court of Appeals
Tenth Circuit

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

October 1, 2026

Christopher M. Wolpert
Clerk of Court

KENNETH MONTGOMERY,

Petitioner - Appellant,

v.

ANDRE MOSES STANCIL,

Respondent - Appellee.

No. 26-1224
(D.C. No. 1:25-CV-03138-LTB-RTG)
(D. Colo.)

ORDER DENYING CERTIFICATE OF APPEALABILITY*

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

Petitioner-Appellant Kenneth Montgomery, a Colorado state prisoner proceeding pro se,¹ seeks a certificate of appealability (“COA”) to challenge the district court’s denial of his petition for a writ of habeas corpus under 28 U.S.C. § 2241. Although we deem Mr. Montgomery’s appeal of the district court’s order denying his § 2241 petition timely, he has failed to establish that reasonable jurists could debate the district court’s

* This order is not binding precedent except under the doctrines of law of the case, res judicata, and collateral estoppel.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 Because Mr. Montgomery is appearing without counsel, “we liberally construe his filings, but we will not act as his advocate.” *James v. Wadas*, 724 F.3d 1312, 1315 (10th Cir. 2013).

procedural resolutions of his claims. Thus, acting pursuant to 28 U.S.C. § 1291, we deny Mr. Montgomery's request for a COA and dismiss this matter.

I. BACKGROUND

Mr. Montgomery challenges the execution of various sentences imposed in Colorado state court. In 1977, Mr. Montgomery was convicted of aggravated robbery and first-degree sexual assault. He was sentenced to a twelve-to-fifteen-year term of imprisonment on the former count and a fifteen-to-twenty-year term of imprisonment on the latter count, to run concurrently. In 1978, Mr. Montgomery was convicted of first-degree sexual assault in a separate case and was sentenced to a five-to-fifteen-year term of imprisonment.

About a decade later, in 1987, Mr. Montgomery was released on parole. His parole was revoked the following year, and he was returned to the Colorado Department of Corrections ("CDOC"). Mr. Montgomery was then convicted for a litany of additional crimes in two separate cases. In the first, he was sentenced to a forty-eight-year term of imprisonment for attempted first-degree murder and a thirty-two-year term of imprisonment for first-degree assault, to run concurrently to one another but consecutively to his prior sentences. And in the second, Mr. Montgomery was sentenced to a sixteen-year term of imprisonment for robbery (Count Three), two thirty-two-year terms of imprisonment for first-degree sexual assault (Counts Four and Five), and a thirty-two-year term of imprisonment for aggravated robbery (Count Six). The sentences for Counts Three and Four ran concurrently, as did the sentences for Counts Five and Six; however, those groups ran consecutively to one another and to all prior sentences.

Mr. Montgomery was then convicted on two more occasions. First, he was sentenced to a thirty-six-month term of imprisonment for first-degree possession of contraband in 1992. And second, he was sentenced to a three-year term of imprisonment for attempted second-degree assault in 1999. Both crimes took place while he was incarcerated and both sentences were ordered to run consecutively to all prior sentences. Notably, CDOC treats a prisoner's separate sentences as one continuous sentence rather than calculating separate completion dates for each one. *See Diehl v. Weiser*, 444 P.3d 313, 317–18 (Colo. 2019).

In 2021, Mr. Montgomery filed a petition for mandamus relief in Colorado state court, raising challenges to CDOC's treatment of his earned time credits and its calculation of his sentence. The court dismissed the action pursuant to a magistrate judge's recommendation. Although Mr. Montgomery sought appellate review of the recommendation, his appeal was dismissed on account of his failure to challenge a final and appealable order. Mr. Montgomery did not appeal the subsequent order of the state court adopting the magistrate judge's recommendation. Instead, in 2024, Mr. Montgomery filed a state habeas petition raising the same claims. The state court again found dismissal proper, noting that Mr. Montgomery had filed a successive petition and that he could have raised his claims in an earlier proceeding. In April 2025, the Colorado Supreme Court affirmed that decision.

Around six months later, Mr. Montgomery filed the present § 2241 petition in federal court. Mr. Montgomery brought two claims, similar to the challenges raised in his state mandamus action. First, he challenged CDOC's calculation of his earned time

credits. CDOC maintained that Mr. Montgomery was previously held in maximum administrative segregation during a time in which such inmates were ineligible for earned time. CDOC further contended that Mr. Montgomery was periodically ineligible for earned time because of his prison disciplinary convictions. Mr. Montgomery disputed those arguments.

Second, he challenged CDOC's calculation of his parole eligibility date. CDOC determined that one of Mr. Montgomery's convictions for first-degree sexual assault was a crime of violence. In the relevant case, he held a knife to the victim's throat, threatened to kill her, and sexually assaulted her. As a result of this determination, CDOC partially relied on Colorado's 75% parole eligibility rule.² After applying the standard 50% parole eligibility rule and the heightened 75% parole eligibility rule to separate portions of Mr. Montgomery's continuous sentence, CDOC estimated his parole eligibility date to be February 3, 2064. Mr. Montgomery claimed that he was not specifically charged for a crime of violence, purportedly rendering CDOC's partial reliance on the 75% rule improper.

² Generally, Colorado inmates are eligible for parole after serving 50% of their sentences. *See* Colo. Rev. Stat. § 17-22.5-403(1). However, inmates convicted of "second degree murder, first degree assault, first degree kidnapping . . . , first or second degree sexual assault, first degree arson, first degree burglary, or aggravated robbery" must serve 75% of their sentences if they have "previously been convicted of a crime which would have been a crime of violence." *See id.* § 17-22.5-403(2)(a). When an inmate is serving some sentences subject to the 50% rule and other sentences subject to the 75% rule, CDOC must "determine the parole eligibility date for his one continuous sentence by employing a hybrid system that effectuates both of the calculation rules." *Owens v. Carlson*, 511 P.3d 637, 640 (Colo. 2022).

A magistrate judge recommended denying Mr. Montgomery’s petition, finding that he had failed to exhaust his claims and that they were untimely. Mr. Montgomery then filed a series of objections that the district judge overruled. The district court entered judgment against Mr. Montgomery on April 16, 2026. Although Mr. Montgomery signed his notice of appeal on May 12, 2026, it was postmarked June 4, 2026, and the district court did not receive it until June 8, 2026.

II. LEGAL STANDARD

In general, a prisoner may file a § 2241 petition to challenge the execution of his sentence. *See McIntosh v. U.S. Parole Comm’n*, 115 F.3d 809, 811 (10th Cir. 1997). But when a prisoner seeks to challenge the district court’s denial of a § 2241 petition, he “‘must first seek and obtain a COA’ before he may secure a merits review on appeal.” *Grant v. Royal*, 886 F.3d 874, 957 (10th Cir. 2018) (quoting *Miller-El v. Cockrell*, 537 U.S. 322, 335–36 (2003)).

We will issue a COA only upon a “substantial showing of the denial of a constitutional right.” 28 U.S.C. § 2253(c)(2). To make such a showing, a petitioner must “demonstrat[e] that the issues he seeks to raise on appeal are deserving of further proceedings, subject to a different resolution on appeal, or reasonably debatable among jurists of reason.” *Montez v. McKinna*, 208 F.3d 862, 869 (10th Cir. 2000). Relevant to the present matter, “[w]hen the district court denies a claim on procedural grounds, we may grant a COA only ‘when the prisoner shows, at least, that jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether the district court was

correct in its procedural ruling.” *Cole v. Farris*, 54 F.4th 1174, 1182–83 (10th Cir. 2022) (quoting *Slack v. McDaniel*, 529 U.S. 473, 484 (2000)).

III. ANALYSIS

Although we deem Mr. Montgomery’s appeal timely, reasonable jurists could not debate the district court’s procedural resolutions of his claims. As a result, we deny a COA.

A. *Timeliness of Appeal*

After the district court denied his § 2241 petition, Mr. Montgomery had thirty days to file a notice of appeal. *See* Fed. R. App. P. 4(a); *see also Watkins v. Leyba*, 543 F.3d 624, 626 (10th Cir. 2008). Mr. Montgomery’s notice of appeal was postmarked June 4, 2026—beyond the thirty-day window that followed the district court’s entry of judgment on April 16, 2026.

However, pro se prisoners are protected by the prison mailbox rule, which renders a notice of appeal timely when it is deposited in a prison’s internal mailing system prior to the filing deadline. *See* Fed. R. App. P. 4(c); *see also Price v. Philpot*, 420 F.3d 1158, 1163 (10th Cir. 2005). Mr. Montgomery signed a declaration under penalty of perjury indicating that he placed his notice of appeal in the prison’s legal mail system on May 9, 2026. He also provided a copy of the prison mail log supporting his claim that he used the legal mail system on that date.

There is also some conflicting evidence in the record. For instance, Mr. Montgomery dated his notice of appeal May 12, 2026, rather than May 9, 2026. Additionally, the copy of the prison mail log shows that Mr. Montgomery’s

correspondence was slated to be mailed within the week, suggesting that it would have been mailed before June 4 if it had been placed in the prison mailbox by May 9.

We take seriously our obligation to guard against untimely appeals. *See Allender v. Raytheon Aircraft Co.*, 439 F.3d 1236, 1239 (10th Cir. 2006) (“This Court can exercise jurisdiction only if a notice of appeal is timely filed.”). But given the evidence Mr. Montgomery has produced in his favor, we deem his appeal timely despite any apparent inconsistencies. To proceed to the merits of his appeal, however, he must first obtain a COA from this court.

B. Procedural Resolutions

The district court denied Mr. Montgomery’s § 2241 petition for two independently sufficient reasons: (1) his failure to exhaust his claims in state court; and (2) his failure to timely bring his claims in federal court. Mr. Montgomery does not meaningfully challenge either conclusion in his brief. Because both findings are beyond debate, we do not consider the merits of any constitutional claims that Mr. Montgomery attempts to assert before this court.

1. Exhaustion and Procedural Default

In most instances, “[a] habeas petitioner seeking relief under 28 U.S.C. § 2241 is . . . required to exhaust state remedies.” *Wilson v. Jones*, 430 F.3d 1113, 1118 (10th Cir. 2005). More specifically, the petitioner must “fairly present[] the substance of his federal habeas claim to [the] state courts,” *Hawkins v. Mullin*, 291 F.3d 658, 668 (10th Cir. 2002), by carrying his “claims through one ‘complete round of the [s]tate’s established appellate review process,’” *Woodford v. Ngo*, 548 U.S. 81, 92 (2006) (quoting

O'Sullivan v. Boerckel, 526 U.S. 838, 845 (1999)). The petitioner bears the burden of proving exhaustion. *See Miranda v. Cooper*, 967 F.2d 392, 398 (10th Cir. 1992).

Although Mr. Montgomery twice raised his arguments in state court, he failed to present the substance of his constitutional claims in either instance. In fact, neither his 2021 mandamus action nor his 2024 state habeas petition specifically identifies *any* constitutional harm. *See Prendergast v. Clements*, 699 F.3d 1182, 1184–85 (10th Cir. 2012) (finding a failure to exhaust because there was “nothing in Prendergast’s briefing . . . to alert the state court about a federal constitutional claim”). That fact alone, combined with Mr. Montgomery’s failure to make any exhaustion argument in his appeal, supports the district court’s determination. *See Miranda*, 967 F.2d at 398; *see also Bronson v. Swensen*, 500 F.3d 1099, 1104 (10th Cir. 2007) (“[T]he omission of an issue in an opening brief generally forfeits appellate consideration of that issue.”).

And even if Mr. Montgomery *had* exhausted his claims, we would still find them unreviewable on account of his procedural default. With respect to his 2021 mandamus action, Mr. Montgomery filed an appeal. But that appeal was dismissed because it challenged only the magistrate judge’s recommendation, which was not a final and appealable order. Mr. Montgomery sought no further review; as a result, he failed to carry his claims through one complete round of Colorado’s appellate review process. *See Woodford*, 548 U.S. at 92. With respect to his 2024 state habeas petition, Mr. Montgomery appealed to the Colorado Supreme Court. However, the court merely affirmed a prior dismissal “because all of the asserted grounds for relief were or could

have been raised in the first case.” ROA at 236 (quoting *Turman v. Buckallew*, 784 P.2d 774, 780 (Colo. 1989) (quotation marks omitted)).

A notable corollary to the exhaustion requirement is that we “may not review federal claims that were procedurally defaulted in state court—that is, claims that the state court denied based on an adequate and independent state procedural rule.” *Fontenot v. Crow*, 4 F.4th 982, 1028 (10th Cir. 2021) (quoting *Davila v. Davis*, 582 U.S. 521, 527 (2017) (quotation marks omitted)). Here, Mr. Montgomery’s state habeas petition was independently and adequately resolved by a firmly established and regularly followed state procedural rule.³ *See Ellis v. Raemisch*, 872 F.3d 1064, 1093 n.7 (10th Cir. 2017) (assuming that Colorado Rule of Criminal Procedure 35(c)(3)(VII), which bars any claim that could have been raised in a prior appeal or postconviction proceeding, “satisf[ies] the independence and adequacy criteria” where the petitioner did not attack the rule’s independence or adequacy); *see also Gonzales v. Hartley*, 396 F. App’x 506, 508 (10th Cir. 2010) (affirming the district court’s determination that it could not review a habeas petition that did not complete a round of appellate review under Colorado’s established process).⁴ Accordingly, even if Mr. Montgomery had fairly presented his constitutional claims and satisfied the exhaustion requirement with respect to his state habeas petition,

³ And while petitioners may sometimes overcome a procedural default, *see, e.g., Davila v. Davis*, 582 U.S. 521, 536 (2017), Mr. Montgomery has offered no such argument.

⁴ We cite unpublished cases for their persuasive value only and do not treat them as binding authority. *See United States v. Ellis*, 23 F.4th 1228, 1238 n.6 (10th Cir. 2022).

his procedural default would still bar consideration of the claims raised in his § 2241 petition.

2. Timeliness of Claims

Like all federal habeas petitions, § 2241 petitions are subject to strict timing requirements. *See Titsworth v. Mullin*, 415 F. App'x 50, 55 (10th Cir. 2007) (citing *Dulworth v. Evans*, 442 F.3d 1265, 1268 (10th Cir. 2006)) (“The one-year limitations period of the Antiterrorism and Effective Death Penalty Act . . . , 28 U.S.C. § 2244(d)(1), applies to the filing of a § 2241 petition.”). Mr. Montgomery was required to raise both of the present claims, which are premised on alleged errors in the execution of his sentence, within one year of “the date on which the factual predicate of the . . . claims presented could have been discovered through the exercise of due diligence.” 28 U.S.C. § 2244(d)(1)(D).

Mr. Montgomery brought identical claims in his 2021 state mandamus action. Thus, it stands to reason that he was aware of the factual predicates underlying his claims by May 18, 2021—the date he initiated that action. Because the state court denied his requested relief on April 5, 2022, and because he had forty-nine days to appeal that denial, *see* Colo. R. App. P. 4(b)(1), the one-year limitations period began to run on May 25, 2022. *See* 28 U.S.C. § 2244(d)(2); *see also Gibson v. Klinger*, 232 F.3d 799, 804 (10th Cir. 2000) (“[W]e hold today that, regardless of whether a petitioner actually appeals a denial of a post-conviction application, the limitations period is tolled during the period in which the petitioner *could have* sought an appeal under state law.”).

Accordingly, Mr. Montgomery’s § 2241 petition—which was filed long after May 25, 2023—is untimely.⁵

And while the “statutory limitations period may be tolled for equitable reasons,” *Holland v. Florida*, 560 U.S. 631, 645 (2010), any petitioner making such an argument “bears a strong burden to show specific facts to support his claim of extraordinary circumstances and due diligence,” *Yang v. Archuleta*, 525 F.3d 925, 928 (10th Cir. 2008) (quoting *Brown v. Barrow*, 512 F.3d 1304, 1307 (11th Cir. 2008) (quotation marks omitted)). Mr. Montgomery claims that “he did not discover the ‘crime of violence’ issue until September 2025.” Appellant’s Br. at 14–15. However, that assertion is blatantly contradicted by the 2021 mandamus action that raised an identical claim.

IV. CONCLUSION

Reasonable jurists could not debate the district court’s denial of Mr. Montgomery’s § 2241 petition. We therefore DENY his request for a COA and DISMISS this matter.

Entered for the Court

Carolyn B. McHugh
Circuit Judge

⁵ Although Mr. Montgomery previously argued that his 2024 state habeas petition would toll the limitations period, that petition was also filed after the limitations period had run.