

**FILED**  
**United States Court of Appeals**  
**Tenth Circuit**

**UNITED STATES COURT OF APPEALS**  
**FOR THE TENTH CIRCUIT**

**July 12, 2023**

**Christopher M. Wolpert**  
**Clerk of Court**

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GLENDALL DEWAYNE LEE,

Petitioner - Appellant,

v.

RICK WHITTEN, Warden,

Respondent - Appellee.

No. 23-5020  
(D.C. No. 4:19-CV-00546-GKF-JFJ)  
(N.D. Okla.)

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**ORDER DENYING CERTIFICATE OF APPEALABILITY\***

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

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Glendell Dewayne Lee, an Oklahoma state prisoner, is serving a life sentence for two counts of shooting with intent to kill, armed robbery, and possession of a firearm as a felon. After failing to obtain post-conviction relief for alleged constitutional violations in Oklahoma courts, Mr. Lee filed a pro se petition for a writ of habeas corpus under 28 U.S.C. § 2254 in the Northern District of Oklahoma. The district court found all Mr. Lee’s constitutional claims procedurally barred or without merit and denied a certificate of appealability (“COA”). In his request for a COA from this court, Mr. Lee abandons the claims asserted in his habeas petition and raises a new argument based on

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\* This order is not binding precedent except under the doctrines of law of the case, res judicata, and collateral estoppel.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.

the trial court's failure to grant Mr. Lee's counsel a continuance. This argument is waived, procedurally barred, and inadequately briefed. Therefore, we deny Mr. Lee's request for a COA and dismiss this matter.

## **I. BACKGROUND**

### ***A. Factual History***

Evidence at trial established that, in March 2015, Mr. Lee approached the driver's side door of a car in which Ivan Hernandez Lozano and Ruben Orizabal sat waiting for a friend. Mr. Lee leaned against the driver's side door, asked for a cigarette and a ride to a convenience store, and inquired if they wanted to buy marijuana or a gun. When the men answered in the negative, Mr. Lee pointed the gun at Mr. Lozano and demanded the gold chains he was wearing. As Mr. Lozano began to remove the chains, Mr. Lee pulled them from Mr. Lozano's neck and shot both Mr. Lozano and Mr. Orizabal before running away. Both victims survived, and Mr. Lozano testified against Mr. Lee at trial.

Mr. Orizabal was unavailable to testify but the court permitted the state to read his preliminary hearing testimony into the record, including his identification of Mr. Lee.

### ***B. Procedural History***

A public defender represented Mr. Lee at his preliminary hearing in December 2015. A private attorney then entered an appearance for Mr. Lee and the public defender withdrew in January 2016. The private attorney represented Mr. Lee at the arraignment and agreed to a trial date of August 29, 2016, but otherwise appears to have done nothing on Mr. Lee's behalf during the six months of his representation. Six weeks before trial, in July 2016, Mr. Lee's counsel lost his license to practice and withdrew. The public

defender's office again took on Mr. Lee's representation and re-assigned the public defender who had represented Mr. Lee at his preliminary hearing. However, the public defender's supervisor told her not to speak with Mr. Lee until the supervisor resolved Mr. Lee's request for a new preliminary hearing based on ineffective assistance of counsel, which Mr. Lee dropped around three weeks before trial. Mr. Lee's public defender finally received permission to speak with Mr. Lee on August 3, 2016. On August 15, Mr. Lee's public defender advised the court she would be requesting a continuance and formally moved for a continuance on August 17. At a hearing on August 18, counsel argued for the continuance to allow more preparation time, but the court indicated it was not inclined to grant the continuance and advised counsel to continue to prepare for trial as planned while it took the motion under advisement. The court denied the motion for a continuance three days before trial.

After a five-day trial, the jury found Mr. Lee guilty of two counts of shooting with intent to kill, one count of robbery with a firearm, and one count of possession of a firearm as a felon. The jury recommended, and the court imposed, four consecutive sentences: 100-year sentences for each conviction of shooting with intent to kill, and life sentences for the robbery and firearm convictions.

On direct appeal, Mr. Lee wrote to appellate counsel requesting that he raise arguments based on the trial court's failure to grant a continuance and its effect on trial counsel's ability to prepare. Appellate counsel did not do so. Instead, appellate counsel argued (1) plain error based on an incomplete jury instruction, (2) prosecutorial misconduct, (3) ineffective assistance of counsel, and (4) cumulative error. The

Oklahoma Court of Criminal Appeals (“OCCA”) affirmed the convictions but remanded for resentencing based on the jury instruction it agreed had been erroneous. Mr. Lee was resentenced to four terms of life imprisonment to run concurrently.

Mr. Lee filed three pro se applications for post-conviction relief in Oklahoma court. In his first application, Mr. Lee raised ten grounds for relief, including ineffective assistance of trial counsel for failure to (1) investigate, (2) impeach a witness, (3) raise a defense, (4) appropriately challenge the sentence, (5) correct improper jury instructions, (6) move to suppress evidence, (7) advise him of a potential affirmative defense, (8) call an alibi witness, and (9) present proper jury instructions; and ineffective assistance of appellate counsel for failing to (10) argue incorrect sentencing instructions. The Oklahoma district court dismissed his application, and the OCCA affirmed on the basis that the errors Mr. Lee complained of were either barred by res judicata as decided on direct appeal, or they had been waived or procedurally barred because Mr. Lee failed to raise them on direct appeal.

While Mr. Lee’s first application was pending, he filed a second application for post-conviction relief challenging (1) the trial judge’s refusal to grant a continuance of trial to allow counsel to further prepare, (2) the racial makeup of the jury, (3) exclusion of evidence about the victim’s immigration status and that he was given something of value in exchange for cooperation with the prosecution, (4) exclusion of evidence the victims had illegal drugs in their possession, (5) failure to exclude testimony of a witness who admitted to not understanding the questions, (6) denial of his right to confront a witness whose testimony at preliminary hearing was read to the jury, (7) denial of his motion to

suppress in-court identifications as unreliable, (8) trial counsel's failure to investigate another possible perpetrator, and (9) trial counsel's failure to advise him about a plea offer. The Oklahoma district court dismissed the second application on the basis that Mr. Lee was barred by Okla. Stat. tit. 22, § 1086 from presenting new claims in a second application for post-conviction relief. Mr. Lee appealed but then withdrew his appeal.

Before he filed his third application for post-conviction relief, Mr. Lee filed a petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254 in the Northern District of Oklahoma arguing (1) erroneous jury instructions, (2) prosecutorial misconduct, (3) ineffective assistance of trial counsel for approximately the same reasons raised in his post-conviction applications, and (4) cumulative error.

In his third application for post-conviction relief in Oklahoma court, Mr. Lee argued that Oklahoma lacked jurisdiction to convict him because he was an Indian who allegedly committed crimes on the Muscogee (Creek) Reservation.<sup>1</sup> The Oklahoma district court denied his application on various grounds including procedural default, and the OCCA affirmed on the basis that Mr. Lee had failed to brief his appeal.

While his first federal habeas petition was pending, Mr. Lee filed a second federal habeas petition arguing that Oklahoma lacked jurisdiction to convict him under *McGirt v. Oklahoma*, 140 S. Ct. 2452 (2020). The district court construed the

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<sup>1</sup> See *McGirt v. Oklahoma*, 140 S. Ct. 2452 (2020) (holding Congress never disestablished the Muscogee (Creek) Reservation and Oklahoma lacked jurisdiction over major crimes committed by Indians within its boundaries).

petition as a motion for leave to amend his original petition to add the *McGirt* claim. The court denied Mr. Lee permission to amend, reasoning that the amendment would be futile because it was procedurally defaulted. The court denied all Mr. Lee's grounds for relief in his original habeas petition. The court explained that Mr. Lee had received relief for the instructional error complained of when his sentence was adjusted on remand from the OCCA on direct appeal, and his other claims for relief were various combinations of moot, procedurally barred, and not meritorious. The court denied a COA.

Mr. Lee now seeks a COA from this court based on alleged constitutional violations arising from the trial court's failure to grant a continuance.

## II. DISCUSSION

A federal court may grant habeas relief if a state court decision was “contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States,” or “was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.” 28 U.S.C. § 2254(d)(1), (2). This is a highly deferential standard designed to allow federal courts to interfere with state-court decisions only in cases of “extreme malfunctions in the state criminal justice systems” on issues of federal law. *Harrington v. Richter*, 562 U.S. 86, 102 (2011) (quoting *Jackson v. Virginia*, 443 U.S. 307, 332 n.5 (1979) (Stevens, J., concurring in judgment)). “Federal habeas relief is not available to correct state law errors.” *Leatherwood v. Allbaugh*, 861 F.3d 1034, 1043 (10th Cir. 2017) (citing *Estelle v. McGuire*, 502 U.S. 62, 67–68 (1991)).

Before this court may examine the merits of a § 2254 petition, the petitioner must obtain a COA from either the district court or this court. 28 U.S.C. § 2253(c)(1)(A). “A [COA] may issue . . . only if the applicant has made a substantial showing of the denial of a constitutional right.” 28 U.S.C. § 2253(c)(2). To show the denial of a constitutional right, the “applicant should ‘include reference to a specific federal constitutional guarantee, as well as a statement of the facts that entitle [him] to relief.’” *Leatherwood*, 861 F.3d at 1043 (quoting *Gray v. Netherland*, 518 U.S. 152, 162–63 (1996)). We will grant a COA only if the petitioner shows 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.’” *Miller-El v. Cockrell*, 537 U.S. 322, 336 (2003) (quoting *Slack v. McDaniel*, 529 U.S. 473, 484 (2000)). Where the state court decision rested on an independent and adequate state procedural ground, such as failure to make a trial objection, the claim is procedurally barred from habeas review, unless the state court proceeded to review for plain error and denied relief because the claim lacked merit under federal law. *Cargle v. Mullin*, 317 F.3d 1196, 1206 (10th Cir. 2003).

The district court declined to issue a COA, so we must consider Mr. Lee’s application for a COA at the outset. Fed. R. App. P. 22(b)(2). Because Mr. Lee is

proceeding pro se, we construe his filings liberally<sup>2</sup> as seeking a COA on three related issues: (1) ineffective assistance of trial counsel because counsel was inadequately prepared, (2) denial of due process from the trial court’s refusal to grant a continuance to allow counsel further time to prepare, and (3) ineffective assistance of appellate counsel for failing to make this argument on appeal.

Mr. Lee faces several barriers to obtaining a COA from this court. First, these issues are not preserved for appellate review because Mr. Lee did not raise them in his habeas petition in the district court. We generally do not consider arguments not first raised in a habeas petition. *Stouffer v. Trammell*, 738 F.3d 1205, 1221 n.13 (10th Cir. 2013); *see also Childers v. Crow*, 1 F.4th 792, 798 (10th Cir. 2021) (explaining that, although we apply a liberal construction to pro se habeas filings, we refrain from “rewrit[ing] a petition to include claims that were never presented” (quotation marks omitted)); *Harmon v. Sharp*, 936 F.3d 1044, 1085 (10th Cir. 2019) (Holmes, J., concurring) (observing that “in 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”).

Mr. Lee’s claims are also procedurally barred by an independent and adequate state procedural rule. Federal habeas review is generally unavailable for claims procedurally defaulted in state courts or that state courts clearly would not entertain

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<sup>2</sup> *See Childers v. Crow*, 1 F.4th 792, 798 (10th Cir. 2021) (applying a liberal construction to pro se habeas filings); *Whitney v. New Mexico*, 113 F.3d 1170, 1173–74 (10th Cir. 1997) (applying a “less stringent standard” to pleadings by pro se litigants).



due to a state procedural rule that is firmly established and regularly followed. *Fontenot v. Crow*, 4 F.4th 982, 1028–29 (10th Cir. 2021), *cert. denied*, 142 S. Ct. 2777 (2022). In denying Mr. Lee’s second application for post-conviction relief, which included a version of Mr. Lee’s argument regarding denial of a continuance, the Oklahoma district court determined the claim was barred by Okla. Stat. tit. 22, § 1086, which requires that all grounds for post-conviction relief be raised in the first petition.<sup>3</sup> *See id.* at 1024 (explaining Okla. Stat. tit. 22, § 1086 is an independent and adequate state procedural rule barring habeas review). Thus, Mr. Lee’s claims related to denial of a continuance are procedurally barred.

Even if we could set aside these procedural barriers, we would not grant a COA because Mr. Lee has not made a substantial showing of a constitutional violation. Mr. Lee’s request for a COA is premised on his claim that counsel was ineffective because she was inadequately prepared for trial. To show ineffective assistance of counsel, a petitioner must show both that counsel’s performance “fell below an objective standard of reasonableness” and that “the deficient performance prejudiced the defense.” *Strickland v. Washington*, 466 U.S. 668, 687–88 (1984). Mr. Lee’s COA request and brief contain only general allegations of inadequate preparation and prejudice; they do not explain why a different verdict or sentence might have resulted had counsel had more time to prepare. Such general statements do not allow us to

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<sup>3</sup> Mr. Lee withdrew his request for an appeal from the OCCA of the denial of his second post-conviction application, so the district court decision is the only state court decision on the matter.

meaningfully evaluate Mr. Lee’s claim, *see Whitney v. New Mexico*, 113 F.3d 1170, 1173–74 (10th Cir. 1997) (declining to supply factual allegations or arguments on pro se appellant’s behalf), nor can they show the prejudice required for a Sixth Amendment violation, *see United States v. Cronin*, 466 U.S. 648, 659 n.26 (1984) (explaining that, apart from circumstances in which a defendant has been actually or constructively denied counsel altogether, “there is generally no basis for finding a Sixth Amendment violation unless the accused can show how specific errors of counsel undermined the reliability of the finding of guilt”).

As for his due process claim, Mr. Lee makes only conclusory statements that the trial court’s denial of a continuance resulted in a denial of due process. “When denial of a continuance is asserted as the basis for a habeas petition, the petitioner must show that not only was the denial of the continuance an abuse of discretion, but also that the denial was so arbitrary and fundamentally unfair that it violates constitutional principles of due process.” *Lucero v. Kerby*, 133 F.3d 1299, 1309 (10th Cir. 1998) (internal quotation marks omitted). Mr. Lee does not explain how the trial was fundamentally unfair, nor does our own review of the record reveal fundamental unfairness.<sup>4</sup>

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<sup>4</sup> The record shows counsel making only general arguments about the late substitution of counsel and delays in procuring a transcript of the preliminary hearing, without specifying preparation that would be foregone or other fundamental unfairness that might result from going to trial as planned.

Mr. Lee provides even less support for his claim of ineffective assistance of appellate counsel for failing to argue the denial of a continuance.<sup>5</sup> Ineffective assistance of appellate counsel exists where appellate counsel unreasonably fails to discover and raise a nonfrivolous issue and there is a reasonable probability that, but for counsel's unreasonable failure, the appellant would have prevailed. *Milton v. Miller*, 744 F.3d 660, 669 (10th Cir. 2014) (citing *Smith v. Robbins*, 528 U.S. 259, 285 (2000); *Strickland*, 466 U.S. at 687). Mr. Lee has not meaningfully argued either prong of the test.

### III. CONCLUSION

Mr. Lee has failed to make a substantial showing of denial of a constitutional right. Therefore, we DENY his request for a COA and DISMISS this matter.

Entered for the Court

Carolyn B. McHugh  
Circuit Judge

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<sup>5</sup> Additionally, Mr. Lee failed to exhaust this argument in state court. "A threshold question that must be addressed in every habeas case is that of exhaustion." *Harris v. Champion*, 15 F.3d 1538, 1554 (10th Cir. 1994). "A state prisoner generally must exhaust available state-court remedies before a federal court can consider" a request for habeas relief. *Bland v. Sirmons*, 459 F.3d 999, 1011 (10th Cir. 2006); see 28 U.S.C. § 2254(b)(1). To exhaust a claim, a petitioner must present it to the state courts in a manner sufficient to notify the courts of the federal constitutional claim and pursue it through one complete round of state appellate review. See *Fontenot v. Crow*, 4 F.4th 982, 1019 (10th Cir. 2021), cert. denied, 142 S. Ct. 2777 (2022). Mr. Lee did not raise any claim based on appellate counsel's failure to object to denial of a continuance in his three applications for post-conviction relief in state court.