

APPENDIX

A

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 17-20421



In re: LEXTER K. KOSSIE,

Movant

A True Copy

Certified order issued Aug 15, 2017

Styl W. Coyle
Clerk, U.S. Court of Appeals, Fifth Circuit

Motion for an order authorizing
the United States District Court for the
Southern District of Texas, Houston to consider
a successive 28 U.S.C. § 2254 application

Before HIGGINBOTHAM, JONES, and COSTA, Circuit Judges.

PER CURIAM:

Lexter K. Kossie, Texas prisoner # 700661, moves for authorization to file a successive 28 U.S.C. § 2254 application. In his motion, Kossie contends that the district court erred in construing his Federal Rule of Civil Procedure 15(a) motion as an unauthorized successive. Alternatively, he contends that his motion should have been construed as a proper Federal Rule of Civil Procedure 60(b) motion because he has demonstrated “extraordinary circumstances” warranting the reopening of his habeas proceedings.

Because Kossie’s § 2254 application had been denied by final judgment almost nine years before he filed his Rule 15(a) motion to amend, the district court did not have jurisdiction to consider the motion. *See Rosenzweig v. Azurix Corp.*, 332 F.3d 854, 864 (5th Cir. 2003); *United States v. Early*, 27 F.3d 140, 141-42 (5th Cir. 1994). In his motion, Kossie sought to raise a new claim of ineffective assistance of counsel. Thus, the district court was correct in

construing it as an unauthorized successive § 2254 application. *See Gonzalez v. Crosby*, 545 U.S. 524, 532 (2005); 28 U.S.C. § 2244(b)(3)(A). This court may authorize the filing of a successive § 2254 application only if the applicant makes a prima facie showing that his claim was not presented in a prior application and (1) his claim relies on a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or (2) his claim relies on a new factual predicate. § 2244(b)(2), (b)(3)(C).

Kossie's ineffective assistance of counsel claim is based on alleged errors that occurred at the time of trial and could have been raised in his previous § 2254 application. *See* § 2244(b)(2)(B). To the extent that Kossie contends that he should be allowed to file a successive § 2254 application in light of *Trevino v. Thaler*, 133 S. Ct. 1911 (2013), and *Martinez v. Ryan*, 132 S. Ct. 1309 (2012), his argument is unavailing. We have held that "*Martinez* does not provide a basis for authorization under § 2244(b)(2)(A), as the Court's decision was an 'equitable ruling' that did not establish 'a new rule of constitutional law.'" *Adams v. Thaler*, 679 F.3d 312, 323 n.6 (5th Cir. 2012) (quoting *Martinez*, 132 S. Ct. at 1319); *see also In re Sepulvado*, 707 F.3d 550, 554 (5th Cir. 2013) (recognizing that *Martinez* set forth an equitable ruling rather than a new rule of constitutional law). Because *Trevino* was merely an application of *Martinez's* equitable rule, it likewise did not establish a new rule of constitutional law. *See Trevino*, 133 S. Ct. at 1915-21.

Accordingly, IT IS ORDERED that Kossie's motion for authorization to file a successive § 2254 application is DENIED. We have previously warned Kossie that he would face sanctions, including monetary sanctions and denial of access to the judicial system, if he continued to file frivolous or repetitive challenges to his aggravated robbery conviction. *See In re Kossie*, No. 08-20172

(5th Cir. Apr. 29, 2008); *In re Kossie*, No. 15-90023 (5th Cir. Oct. 19, 2015); *In re Kossie*, No. 15-90115 (5th Cir. March 16, 2016). We have also sanctioned Kossie \$100 for failing to heed our warnings. See *In re Kossie*, No. 14-20361 (5th Cir. July 23, 2014). Because Kossie continues to ignore our warnings, IT IS FURTHER ORDERED that a SANCTION IS IMPOSED. Kossie is ORDERED to pay a monetary sanction in the amount of \$300, payable to the clerk of this court. Kossie is BARRED from filing in this court or in any court subject to this court's jurisdiction any pleadings that challenge the aforementioned conviction and sentence until the sanction is paid in full, unless he first obtains leave of the court in which he seeks to file such challenge. Kossie is further CAUTIONED that any future frivolous or repetitive filings in this court or any court subject to this court's jurisdiction will subject him to additional sanctions.

APPENDIX

B

GENERAL ORDERS OF THE COURT

Testimony began at 3:15 p.m. court recessed for a 15 minute break. At 3:40 p.m. court resumed testimony outside the presence of the jury. At 3:47 p.m. the jury returned to open court and testimony continued at 4:55 p.m. Matter set for court recessed for the day.

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The Defendant: Kossie Appellate

In Person With Counsel: Sheria Miller

For the State: Tom Bennett

Court Reporter: Cynthia Lee

Judge Presiding: Jimmie Jones

At 9:45 a.m. court resumed testimony; at 10:25 a.m. defense rested and court recessed for 15 minutes. At 11:10 a.m. the court resumed testimony with both the state and defense presenting final argument. At 11:47 a.m. both sides rested and closed. Jury began deliberations at this time at 1:05 p.m. jury return with a verdict. Def found guilty of aggravated robbery. At 1:47 p.m. defense ~~rested~~ ~~begin opening argument for the punishment phase.~~ Defendant waives life.

ten days time waived; Defendant sentenced to not less than _____ years not more than 41e

C3308 D PAGE 2 11/29/81 Ref given under notice of appeal Appeal denied in the Texas Department of Corrections.

Page 1

APPENDIX

C

THE STATE OF TEXAS §

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AFFIDAVIT OF JOANN KOSSIE

COUNTY OF HARRIS §

BEFORE ME: the undersigned authority, on this day personally appeared JOANN KOSSIE, a person known to me to be over the age of eighteen (18) and fully competent in all respects to make this Affidavit. After being duly sworn, upon her oath, JOANN KOSSIE, deposed and said:

"My name is JOANN KOSSIE, I am the wife of LEXTER KENNON KOSSIE, the defendant in the above-referenced Cause No. and I am also personally acquainted with the facts of Dexter's conviction whereas he was convicted and sentenced to life in prison for an aggravated robbery which occurred on November 13, 1993, in a Burger King restaurant located in Humble, Texas.

"Since Dexter's release from prison in 1986, he has been in and out of several drug treatment facilities for abuse of alcohol and crack cocaine. Whenever he was on crack and alcohol he was like a man insane. Sometimes he would spend his entire pay check on crack. Then he would stay up days and nights pawning, begging, borrowing, stealing and selling everything he could get his hands on to buy more crack.

"In my opinion, once Dexter was under the influence of crack the craving for more crack made him lose all self-control and had he not been under the influence of crack he would not have committed the offense in which in was convicted for in Cause No.679887. I personally have witnessed Dexter be a law abiding citizen when he was not on crack and at no time did he do the insane things that he does while under the influence of crack cocaine.

"Had I been consulted by defense attorney prior to Dexter's sentencing trial, I would have been able to provide trial testimony in regards to Dexter's extensive crack cocaine and alcohol addiction in which the jury could have possibly considered in mitigating punishment. I would have also been able to provide trial testimony in regards to our marriage and the three (3) children we had at that time of ages 10 month, 3 and 13 years old, how great a husband and father he was to me and our children when he was not on crack, and I am willing to do so in the future if needed.

"I declare under penalty of perjury under the laws of the State of Texas that the foregoing is true and correct."
Further Affiant saith not.

SIGNED ON THIS 5th day of March, 2015.

x Joann Kossie
JOANN KOSSIE (Affiant)

SUBSCRIBED AND SWORN TO BEFORE ME BY
JOANN KOSSIE on this 5th day of March, 2015.

x Stacy Lancey
Notary Public in and for
Harris County, Texas



THE STATE OF TEXAS §

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AFFIDAVIT OF LUCINDA KOSSIE

COUNTY OF HARRIS §

BEFORE ME, the undersigned authority, on this day personally appeared **LUCINDA KOSSIE**, a person known to me to be over the age of (18) eighteen and fully competent in all respect to make this Affidavit. After being duly sworn, upon her oath, **LUCINDA KOSSIE**, deposed and said:

"My name is **LUCINDA KOSSIE**, I am the mother of **LEXTER KENNON KOSSIE**, the defendant in the above-referenced Cause No. I am also personally acquainted with the facts of Lexter's conviction whereas he was convicted and sentenced to life in prison for an aggravated robbery which occurred on November 13, 1993, in a Burger King restaurant located in Humble, Texas.

"Prior to Lexter robbing the Burger King he had admitted himself into several drug abuse facilities, namely: St. Joseph Hospital, Herman Hospital, and West Oak Hospital, for his chronic abuse of alcohol and crack cocaine. After an endless battle with his addiction his parole officer had him admitted at the Texas House a treatment facility for parolees. Lexter was still unable to overcome his dependency on alcohol and crack cocaine. I did not personally see Lexter pawning, stealing or selling things to get crack but as a mother I knew he was and that one day he would get into serious trouble because of his dependency on crack.

"In my opinion once Lexter was under the influence of crack he lost all self-control and had he not been under the influence of crack on November 13, 1993, he would not have committed that robbery offense. Crack had away of making Lexter's behavior irrational and to the point where I questioned his sanity.

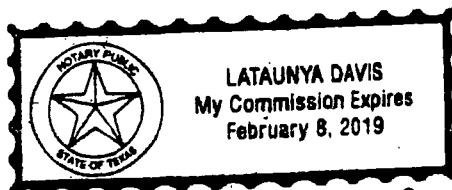
"Had I been consulted by the defense attorney prior to Lexter's sentencing trial, I would have been able to provide trial testimony in regards to Lexter's extensive drug and alcohol abuse which the jury would have considered for mitigating his punishment. I am still, willing to do so in the future if needed.

"I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge."

Further Affiant saith not. *March*
-- SIGNED ON the 6th day of 3, 2015.

X *Lucinda Kossie*
LUCINDA KOSSIE (Affiant)

SUBSCRIBED AND SWORN TO BEFORE ME BY
LUCINDA KOSSIE on this 6th day of March, 2015.



X *Lataunya Davis*
Notary Public in and for
Harris County, Texas

2C

APPENDIX



I. AFFIDAVIT OF HARRY J. BONNELL, M.D.

I, Harry J. Bonnell, M.D., having been asked by Lexter Kossie, TDCJ#700661, declare as follows:

1. I am a medical doctor, currently employed as a Forensic Pathologist licensed to practice Medicine in the State of California. A true and correct copy of my curriculum vitae is attached as Exhibit A.

2. I attended Georgetown University Medical School in Washington, D.C., and graduated from that program in 1979. I have taught at the University of Washington, Madigan Army Medical Center, King County Corrections Center, Uniformed Services University of Health Sciences, University of Cincinnati College of Medicine, and the School of Medicine of the University of California, San Diego.

3. From 1991-2001, I was the Chief Deputy Medical Examiner for the Office of the Medical Examiner in San Diego, California. I have also been Chief Deputy Coroner and Director of Forensic Pathology of Hamilton County, Ohio, Staff Pathologist in the Forensic Sciences Department at the Armed Forces Institute of Pathology, and Assistant Medical Examiner of King County, Washington.

4. I have personally performed over 7000 autopsies and provided sworn testimony more than 585 times in the Superior Courts of twenty states, six Federal Court jurisdictions and eight military courts..

5. In preparing this affidavit, I extensively reviewed the literature on cocaine as well as my personal observations. Cocaine is a central nervous stimulant that may cause restlessness, euphoria, dizziness, dyskinesia, tremor, dysphoria and insomnia. Chronic usage may lead to personality changes, irritability, hyperactivity and psychosis. This can result in the craving for cocaine to take control of rational thinking and make the person more capable of committing crimes and other illegal behaviors.

6. Had I been consulted by defense prior to trial, I would have been available to consult and provide trial testimony as required, and am willing to do so in the future if needed. I am not being reimbursed in any manner for rendering this opinion.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed this th 29 day of December 2014 in San Diego, California.

HARRY J. BONNELL, M.D.
HARRY J. BONNELL, M.D.

Jurat
State of California
County of San Diego
Subscribed and sworn to (or affirmed)
before me on this 29 day of December
2014 by Harry J. Bonnell
proved to me on the basis of satisfactory evidence
to be the person(s) who appeared before me.
Julio Simoes
Signature (Notary seal)

