

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 19-50250



A True Copy
Certified order issued Dec 10, 2019

Jyle W. Cayer
Clerk, U.S. Court of Appeals, Fifth Circuit

Petitioner-Appellant

MARCEL NWAGWU,

v.

LORIE DAVIS, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL
JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION,

Respondent-Appellee

Appeal from the United States District Court
for the Western District of Texas

ORDER:

Marcel Nwagwu, Texas prisoner # 1593238, moves for a certificate of appealability (COA) to appeal the district court's dismissal of his Federal Rule of Civil Procedure 60(b)(6) motion. He also moves for leave to proceed in forma pauperis (IFP) on appeal and for appointment of counsel. Nwagwu's Rule 60 motion sought relief from the 2013 dismissal of his 28 U.S.C. § 2254 application as time barred.

First, Nwagwu contends that the district court erred in concluding that his Rule 60(b)(6) motion was a second or successive § 2254 application. Because Nwagwu's motion challenged the dismissal of his initial § 2254 application as untimely, his Rule 60 motion was not successive. *See Gonzalez v. Crosby*, 545 U.S. 524, 532 n.4 (2005).

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Arguing that the Rule 60(b)(6) motion was based on extraordinary circumstances, Nwagwu asserts that he was deceived and abandoned by his state habeas counsel, which ultimately prevented him from timely filing his § 2254 application. To obtain a COA, Nwagwu must make “a substantial showing of the denial of a constitutional right,” 28 U.S.C. § 2253(c)(2), which includes a showing that reasonable jurists could debate the district court’s resolution “or that the issues presented were adequate to deserve encouragement to proceed further,” *Slack v. McDaniel*, 529 U.S. 473, 484 (2000) (internal quotation marks and citation omitted). Because he seeks a COA to appeal the denial of his Rule 60(b) motion, he must show that a reasonable jurist could conclude that the district court’s denial of his Rule 60(b) motion was an abuse of discretion. *See Hernandez v. Thaler*, 630 F.3d 420, 428 (5th Cir. 2011). Nwagwu has not made such a showing.

Accordingly, Nwagwu’s motion for a COA is DENIED. His motions for leave to proceed IFP and for appointment of counsel also are DENIED. Nwagwu is WARNED that frivolous, repetitive, or otherwise abusive filings challenging his conviction and sentence will invite the imposition of sanctions, including dismissal, monetary sanctions, and restrictions on his ability to file pleadings in this court and any court subject to this court’s jurisdiction.



GREGG J. COSTA
UNITED STATES CIRCUIT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

FILED

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CLERK, U.S. DISTRICT COURT
WESTERN DISTRICT OF TEXAS
BY *AD*
OFFICE CLERK

Case No. A-13-CV-283-SS

MARCEL NWAGWU,
PETITIONER,

V.

LORIE DAVIS,¹
RESPONDENT.ORDER

On August 9, 2013, the Magistrate Judge issued a Report and Recommendation, recommending Petitioner's habeas corpus application be dismissed as time-barred. Petitioner filed objections on or about September 3, 2013. On October 10, 2013, the Court accepted the report and recommendation, overruled the objections, and dismissed Petitioner's application for habeas corpus relief. Petitioner timely executed his notice of appeal on October 16, 2013. The Fifth Circuit Court of Appeals denied Petitioner a certificate of appealability on May 29, 2014, and on November 24, 2015 denied Petitioner authorization to file a successive § 2254 application.

Petitioner subsequently filed a motion pursuant to Rule 60(b)(4) of the Federal Rules of Civil Procedure. On December 29, 2015, the Court denied in part and dismissed in part Petitioner's motion.

Thereafter, the Fifth Circuit denied Petitioner authorization to file a successive § 2254 petition on two other occasions. In its order, issued on April 18, 2018, the Fifth Circuit warned Petitioner the filing of frivolous, repetitive, or otherwise abusive pleadings will invite the imposition

¹The previous named respondent in this action was William Stephens. On May 1, 2016, Lorie Davis succeeded Stephens as Director of the Texas Department of Criminal Justice, Correctional Institutions Division. Under Rule 25(d) of the Federal Rules of Civil Procedure, Davis is automatically substituted as a party.

of sanctions, which may include dismissal, monetary sanctions, and restrictions on his ability to file pleadings in that court and any court subject to the Fifth Circuit's jurisdiction.

Unheeded by the Fifth Circuit's warning, Petitioner returns to this Court with a Motion for Relief Pursuant to Rule 60(b)(6) of the Federal Rules of Civil Procedure. Petitioner accuses his state habeas counsel of taking too long to file his state application for habeas corpus relief and not informing him about the limitations period for federal applications. Essentially, Petitioner is requesting the Court to review the merits of his federal application for habeas corpus relief.

As explained time and time again, the Court is without jurisdiction over this matter. Because § 2244(b)(3)(A) "acts as a jurisdictional bar to the district court's asserting jurisdiction over any successive habeas petition until [the Fifth Circuit] has granted the petitioner permission to file one," the district court is without jurisdiction to consider the action. *United States v. Key*, 205 F.3d 773, 774 (5th Cir. 2000).

It is therefore ORDERED that the Motion for Relief Pursuant to Rule 60(b)(6) [Dkt. #23], filed by Petitioner on February 22, 2019, is DISMISSED WITHOUT PREJUDICE for want of jurisdiction.

It is further ORDERED that a certificate of appealability is DENIED, as reasonable jurists could not debate the denial or dismissal of the petitioner's motion on substantive or procedural grounds, nor find that the issues presented are adequate to deserve encouragement to proceed. *Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003).

SIGNED this the 27 day of February 2019.

B. Sparks
SAM SPARKS
SENIOR UNITED STATES DISTRICT JUDGE