

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 19-40461

SCOTT LESLIE CARMELL,

Petitioner - Appellant

v.

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

Respondent - Appellee

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

Before JONES, HIGGINSON, and OLDHAM, Circuit Judges.

PER CURIAM:

A member of this panel previously denied appellant's motions for a certificate of appealability and to proceed in forma pauperis. The panel has considered appellant's motion for reconsideration of the denial of the motion for a certificate of appealability. IT IS ORDERED that the motion is DENIED.

Appendix C

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT



A True Copy
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No. 19-40461

SCOTT LESLIE CARMELL,

Petitioner-Appellant

v.

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

Respondent-Appellee

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

O R D E R:

Scott Leslie Carmell, Texas prisoner # 777548, was convicted of 15 counts of sexual offenses, including eight counts of indecency with a child, five counts of sexual assault, and two counts of aggravated sexual assault. He was denied relief under 28 U.S.C. § 2254. Carmell filed in the district court a motion for relief from judgment pursuant to Federal Rule of Civil Procedure 60(b)(4), asserting that the judgment denying his § 2254 application was void. The district court denied the motion as an unauthorized successive § 2254 application. Carmell now moves for a certificate of appealability (COA) to appeal the denial of his Rule 60(b)(4) motion. He also moves for leave to proceed in forma pauperis (IFP) on appeal.

Carmell argues that the district court erred in its determination that his Rule 60(b)(4) motion was a successive § 2254 application. He asserts that the

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state trial court lacked jurisdiction, and he reasons that, if the original criminal judgment was void, any judgment based on the original criminal judgment is also void.

A COA is required for Carmell to appeal the denial of his Rule 60 motion. *See* 28 U.S.C. § 2253(c)(1); *Ochoa Canales v. Quarterman*, 507 F.3d 884, 888 (5th Cir. 2007). A COA may issue only if the movant “has made a substantial showing of the denial of a constitutional right.” § 2253(c)(2); *see Slack v. McDaniel*, 529 U.S. 473, 483-84 (2000). This standard requires a movant to establish that reasonable jurists would find the decision to deny relief debatable or wrong, or that the issues he presents deserve encouragement to proceed further. *Slack*, 529 U.S. at 484. Because he seeks a COA to appeal the denial of his Rule 60(b) motion, Carmell must show that reasonable jurists could debate whether 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).

Carmell has not made the showing required to obtain a COA. *See Slack*, 529 U.S. at 484. Accordingly, his COA application is DENIED. Carmell’s IFP motion is DENIED.



ANDREW S. OLDHAM
UNITED STATES CIRCUIT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
SHERMAN DIVISION

SCOTT LESLIE CARMELL, #777548 §
VS. § CIVIL ACTION NO. 4:13cv681
DIRECTOR, TDCJ-CID §

ORDER DENYING RELIEF FROM JUDGMENT

Before the Court is Petitioner Scott Leslie Carmell's motion to vacate the judgment pursuant to Fed. R. Civ. P. 60(b)(4) (Dkt. #68). He argues that the judgment is void for lack of full jurisdiction. In support of his motion, he focuses on the judgment of the state trial court, as opposed to the judgment issued by this Court. He argues that the state trial court did not have jurisdiction. He goes on to discuss alleged flaws in the state court indictment, the elements of the offense for which he was convicted, and the duty of a court to determine if it has jurisdiction.

Background

On January 14, 1997, in the 367th District Court of Denton County, Texas, following pleas of not guilty, Carmell was convicted of eight counts of indecency with a child, five counts of sexual assault, and two counts of aggravated sexual assault. The jury assessed punishment at twenty years of imprisonment on all counts except for the aggravated sexual assault charges, for which he received life sentences.

Carmell's various convictions were initially upheld on appeal. *Carmell v. State*, 963 S.W.2d 833 (Tex. App. - Ft. Worth 1998, pet. ref'd). The Supreme Court reversed three of the counts on *ex post facto* grounds and remanded the case to the appellate court for further proceedings. *Carmell v. Texas*, 529 U.S. 513 (2000). On remand, the Second Court of Appeals affirmed the convictions once again. *Carmell v. State*, 26 S.W.3d 726 (Tex. App. - Ft. Worth 2000, pet. ref'd). The Supreme Court denied his petition for a writ of certiorari. *Carmell v. State*, 534 U.S. 957 (2001).

Carmell then filed fifteen applications for a writ of habeas corpus in state court, which were denied without written order by the Texas Court of Criminal Appeals. *Ex parte Carmell*, Nos. WR-31,863-02-16 (Tex. Crim. App. Nov. 13, 2002). Carmell proceeded to file a petition for a writ of habeas corpus in this Court, which was denied. *Carmell v. Director, TDCJ-CID*, No. 4:02cv421, 2006 WL 543990 (E.D. Tex. March 6, 2006). The Fifth Circuit affirmed, in part, and reversed and remanded solely on the issue of ineffective assistance of appellate counsel. *Carmell v. Quarterman*, 292 F. App'x 317 (5th Cir. 2008). The decision included the following instructions:

But, with respect to Carmell's ineffective assistance of appellate counsel claim on remand, we REVERSE the district court's judgment denying habeas relief and REMAND the case to the district court for entry of judgment granting habeas relief on Counts 7 through 10, unless the state affords Carmell an out-of-time appeal in the Texas Courts of Appeals, with the assistance of counsel, within such reasonable time as the district court may fix.

Id. at 329. Relief was granted because Carmell's appellate counsel on remand failed to file a brief on his behalf. *Id.* The Supreme Court denied Carmell's petition for a writ of certiorari. *Carmell v. Quarterman*, 557 U.S. 922 (2009). In light of the Fifth Circuit's instructions, this Court issued an order granting Carmell habeas corpus relief unless the State afforded him an out-of-time appeal with the assistance of counsel. *Carmell v. Director, TDCJ-CID*, No. 4:02cv421 (E.D. Tex. Nov. 19, 2008). The State, in turn, afforded Carmell the opportunity to file an out-of-time appeal with the assistance of counsel. In the out-of-time appeal, the Second Court of Appeals once again affirmed Carmell's convictions, entertaining three additional issues, two of which had not been previously litigated. *Carmell v. State*, 331 S.W.3d 450 (Tex. App. - Ft. Worth 2010, pet. ref'd). The Supreme Court denied his petition for a writ of certiorari. *Carmell v. Texas*, 132 S. Ct. 409 (2011).

Carmell then filed a new application for a writ of habeas corpus in state court. The Texas Court of Criminal Appeals denied Carmell's "supplemental claims alleging ineffective assistance of appellate counsel after remand from the Supreme Court." *Ex parte Carmell*, No. WR-31,863-17, 2013 WL 5424967, at *1 (Tex. Crim. App. 2013). His remaining grounds were dismissed as a subsequent application pursuant to Tex. Code Crim. Proc. art. 11.07 § 4. *Id.*

Carmell filed the present petition on November 4, 2013. It was dismissed with prejudice on December 15, 2015. The Fifth Circuit affirmed the decision. *Carmell v. Davis*, 707 F. App'x 295 (5th

Cir. 2017). The Supreme Court denied his petition for a writ of certiorari. *Carmell v. Davis*, ___ U.S. ___, 139 S. Ct. 254 (2018). The present Rule 60(b)(4) motion was filed on January 10, 2019.

Discussion and Analysis

Rule 60 allows a district court to provide relief from a judgment if “the judgment is void.” Fed. R. Civ. P. 60(b)(4). A judgment may be set aside pursuant to Rule 60(b)(4) if the district court lacked subject matter or personal jurisdiction, or if it acted inconsistent with due process of law. *Callon Petroleum Co. v. Frontier Ins. Co.*, 351 F.3d 204, 208 (5th Cir. 2003) (citations omitted). Due process usually requires only proper notice and service of process and a court of competent jurisdiction, and even serious procedural irregularities during the course of the civil case will not subject the judgment to collateral attack. *New York Life Ins. Co. v. Brown*, 84 F.3d 137, 143 (5th Cir. 1996). Carmell has not shown that this Court lacked jurisdiction over his habeas case or that it acted contrary to due process of law. He is not entitled to relief under Rule 60(b)(4).

In arguing that he is entitled to relief, Carmell focuses on the lack of personal jurisdiction as discussed in *Jackson v. FIE Corp.*, 302 F.3d 515 (5th Cir. 2002). In that case, the Fifth Circuit reversed a district court’s decision granting a default judgment against the defendant in a products liability action due to the lack of personal jurisdiction over the defendant. *Id.* at 531. The facts in *Jackson* are not remotely related to the facts in this case. This Court did not grant a judgment in favor of the petitioner without obtaining jurisdiction over the respondent. Carmell is not entitled to relief based on *Jackson*.

The Fifth Circuit discussed the proper analysis to employ in considering a Rule 60(b)(4) motion in the context of a habeas case in *Jackson v. Thaler*, 348 F. App’x 29 (5th Cir. 2009). That case involved a capital murder conviction out of Harris County, Texas. The Fifth Circuit observed that there was no question that the Southern District of Texas was authorized by statute to consider a petition for a writ of habeas corpus by a state inmate convicted in Harris County. *Id.* at 33. This Court likewise has statutory authority to consider a conviction by an inmate convicted in Denton County. What made Jackson’s case unique was his claim that the petition was filed by an attorney without his approval. *Id.* Jackson, however, never made the claim until after the district court denied his petition,

the Fifth Circuit affirmed the decision, and the Supreme Court denied certiorari. *Id.* The Fifth Circuit found that “Jackson’s failure to contest the district court’s jurisdiction over his habeas petition when he had the opportunity to do so bars him from collaterally attacking that jurisdiction after the fact.” *Id.* In the present case, Carmell likewise waited too long to bring a claim alleging that this Court lacked jurisdiction. Moreover, unlike the situation in *Jackson*, Carmell filed the petition *pro se*. He personally invoked the jurisdiction of this Court to consider the petition, and jurisdiction was proper. His claim that this Court lacked jurisdiction is devoid of merit.

In addition to the foregoing, the crux of Carmell’s Rule 60(b)(4) motion is a claim that the state trial court lacked jurisdiction in the state criminal proceedings, as opposed to this Court lacking jurisdiction to consider his petition. He is confusing two separate concepts. Courts have routinely found that Rule 60(b)(4) does not apply in cases where a habeas petitioner argued that a state district court lacked jurisdiction, as opposed to a federal district court hearing a petition lacked jurisdiction. *See, e.g., Winkfield v. Stephens*, No. 3:13-CV-3651-L, 2015 WL 3456625, at *2 (N.D. Tex. May 8, 2015); *Adams v. Stephens*, No. 3:14-CV-1276-D, 2014 WL 3778161, at *4 (N.D. Tex. July 31, 2014); *Smithback v. Texas*, No. 3:07-CV-0288-M, 2007 WL 1518971, at *8 (N.D. Tex. May 24, 2007).

In conclusion, Rule 60(b)(4) provides relief from a *federal* judgment that is void, not a state court judgment that is purportedly void. Carmell has not shown that this Court lacked subject matter or personal jurisdiction, or it acted inconsistent with due process of law. Rule 60(b)(4) is inapplicable, and the present motion is devoid of merit.

Finally, Carmell’s claim that the state trial court lacked jurisdiction was previously considered by the Court. He made the argument in his first two grounds for relief. The claim was rejected by this Court, the Fifth Circuit affirmed the decision, and the Supreme Court denied certiorari. A Rule 60(b) motion is considered a successive collateral attack if it challenges an earlier denial of relief on the merits or raises new claims. *Gonzalez v. Crosby*, 545 U.S. 524, 532 (2005). The present motion constitutes a successive collateral attack. When a petition is second or successive, a petitioner must seek an order from the Fifth Circuit Court of Appeals that authorizes this Court to consider the petition. 28 U.S.C. § 2244(b)(3)(A). Carmell has not shown that the Fifth Circuit granted him permission to

file a second or successive petition; thus, the present motion is an unauthorized second or successive petition. It is accordingly

ORDERED that Carmell's motion to vacate the judgment pursuant to Rule 60(b)(4) (Dkt. #68) is **DENIED**. All motions not previously ruled on are **DENIED**. It is finally

ORDERED that the Clerk of Court shall return unfiled any new motions for relief from the judgment submitted by Carmell unless he shows that the Fifth Circuit has granted him permission to file a second or successive petition.

SIGNED this 11th day of April, 2019.


AMOS L. MAZZANT
UNITED STATES DISTRICT JUDGE