IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

APPENDIX-A

No. 19-50121

DAN GRANDBERRY,

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 Western District of Texas

ORDER:

Dan Grandberry, Texas prisoner # 1685729, was convicted by a jury of two counts of aggravated sexual assault of a child, for which he received sentences of 60 years in prison, and two counts of indecency with a child, which resulted in two-year sentences. He now seeks a certificate of appealability (COA) to appeal the district court's denial of his Federal Rule of Civil Procedure 60(b)(4) motion, which challenged the rejection of his 28 U.S.C. § 2254 application as untimely and, alternatively, on the merits. Grandberry contends that the district court lacked subject matter jurisdiction to consider the timeliness of his federal application because when he raised the limitations issue in his postconviction proceedings, the state courts failed to address the

issue, meaning that the State has forfeited or waived the question of timeliness.

To obtain a COA, Grandberry must make "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2); *see Miller-El v. Cockrell*, 537 U.S. 322, 336 (2003). He therefore must demonstrate that jurists of reason "could conclude the issues presented are adequate to deserve encouragement to proceed further." *Miller-El*, 537 U.S. at 327. Because he is challenging the denial of a Rule 60(b) motion, Grandberry must show that reasonable jurists could debate whether the district court's ruling was an abuse of discretion. *See Hernandez v. Thaler*, 630 F.3d 420, 428 (5th Cir. 2011). He has not made the requisite showing. Accordingly, Grandberry's motion for a COA is DENIED.

JAMES C. HO
UNITED STATES CIRCUIT JUDGE

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

APPENDIX - B

DAN GRANDBERRY,	§	
TDCJ No. 01685729,	§	
	§	
Petitioner,	§	
	§	
v.	§	**CIVIL NO. SA-14-CA-852-DAE**
	§	
LORIE DAVIS,[1] Director,	§	
Texas Department of Criminal Justice,	§	
Correctional Institutions Division,	§	
	§	
Respondent.	§	

ORDER

Before the Court is *pro se* Petitioner's Motion to Vacate Judgment (ECF No. 27) pursuant to Fed. R. Civ. P. 60. On March 30, 2015, this Court dismissed Petitioner's 28 U.S.C. § 2254 petition for habeas corpus relief (ECF No. 1) as untimely and alternatively without merit (ECF No. 14). Petitioner now seeks reconsideration of only the Court's decision to dismiss his petition as barred by the one-year statute of limitations embodied in § 2244(d). Specifically, Petitioner argues the Court's judgment is void under Rule 60(b)(4) because the Court lacked subject-matter jurisdiction over the timeliness issue because the issue was waived by the state court during Petitioner's state habeas corpus proceedings. After careful consideration, Petitioner's motion is denied.

A district court has jurisdiction to consider a Rule 60(b) motion in habeas proceedings so long as the motion "attacks, not the substance of the federal court's resolution of the claim on the

[1] The previous named Respondent in this action was William Stephens. On May 1, 2016, Lorie Davis became the 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.

merits, but some defect in the integrity of the federal habeas proceedings." *Gonzalez v. Crosby*, 545 U.S. 524, 532 (2005). A motion that seeks to add a new ground for relief or attack the previous resolution of a claim on the merits is, in fact, a successive petition subject to the standards of 28 U.S.C. § 2244(b). *Id.* at 531-32. However, a motion which merely challenges the district court's ruling which precluded a ruling on the merits—for instance, a denial based on the statute-of-limitations bar—falls within the jurisdiction of the district court to consider. *Id.* at 532 n.4; *Adams v. Thaler*, 679 F.3d 312, 319 (5th Cir. 2012). As such, this Court has jurisdiction to consider Petitioner's motion, as it challenges only the Court's application of the statute of limitations set forth in § 2244(d).

Under Rule 60(b)(4), a judgment may be set aside if the district court lacked subject matter or personal jurisdiction, or if it acted inconsistent with due process. *Jackson v. Thaler*, 348 F. App'x 29, 32 (5th Cir. 2009) (quoting *Callon Petroleum Co. v. Frontier Ins. Co.*, 351 F.3d 204, 208 (5th Cir. 2003)). Petitioner fails to make this showing, and has provided no relevant authority supporting his contention that the Court lacked subject-matter jurisdiction over the limitations issue. Moreover, even assuming the Court's exercise of subject-matter jurisdiction was erroneous in this case, it would be considered res judicata and not subject to collateral attack through Rule 60(b)(4) because Petitioner was previously given the opportunity to challenge jurisdiction and failed to do so. *See Brown v. Illinois Cent. R. Co.*, 480 F. App'x 753, 754-55 (5th Cir. 2010) (citing *Ins. Corp. of Ireland, Ltd. v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 702 n. 9 (1982)); *Picco v. Global Marine Drilling Co.*, 900 F.2d 846, 850 (5th Cir. 1990) (where party had notice of order in question and opportunity to challenge jurisdiction on appeal, but did not do so, party was "barred from challenging . . . jurisdiction in a Rule 60(b)(4) proceeding").

It is therefore **ORDERED** that Petitioner's Motion to Vacate Judgment (ECF No. 27) is **DENIED.**

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).

It is so **ORDERED.**

SIGNED this the 9 day of January, 2019.

DAVID A. EZRA
SENIOR U.S. DISTRICT JUDGE