

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT



No. 19-40273

DANIEL EDWARD MURRAY,

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

ORDER:

Daniel Edward Murray, Texas prisoner # 1468676, moves for a certificate of appealability (COA) to appeal the district court's dismissal in part and denial in part of his 28 U.S.C. § 2254 petition challenging his convictions for aggravated sexual assault of a child, indecency with a child by contact, and possession of child pornography. He argues that (1) the district court erred in dismissing his claims challenging his indecency with a child conviction as time barred; (2) his guilty plea was unknowing and involuntary because the trial court improperly pronounced the oral sentence; and (3) his trial counsel was ineffective because (a) he recommended that Murray enroll in a treatment program without doing an investigation into the facility and programs; (b) he revealed Murray's treatment to prosecutors without Murray's knowledge or

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

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permission and without any agreement as to the use of the information; (c) he did not arrange for Murray to be interviewed and/or treated by a forensic psychologist in a timely manner; (d) he did not properly prepare for trial as he failed to litigate the admissibility or exclusion of Murray's treatment records; (e) he did not investigate the computer drives on which the pornography was allegedly found; (f) he did not object to the trial court's failure to effectuate the plea agreement; and (g) he did not prepare for trial by investigating potential witnesses to be used to mitigate punishment despite the witnesses' availability and desire to assist the defense.

To obtain a COA, a petitioner must make "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2); *Miller-El v. Cockrell*, 537 U.S. 322, 336 (2003). If the district court denies relief on the merits, the petitioner must establish that reasonable jurists would find the district court's assessment of the claims debatable or wrong. *Slack v. McDaniel*, 529 U.S. 473, 484 (2000). If relief is denied on procedural grounds, a COA should issue if the petitioner demonstrates, at least, that jurists of reason would find it debatable whether the application "states a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling." *Id.* Murray has not made the required showing concerning his claims.

For the first time in his COA motion, Murray contends that (1) the district court erred by dismissing his § 2254 application as time barred because he is actually innocent; (2) the statute of limitations should be waived because he is raising constitutional questions of law; (3) the filing of his petition was substantially delayed because the death of an inmate on Murray's unit caused a sudden lockdown and denial of law library access; (4) his constitutional right to contract and his due process rights under the Fifth and Fourteenth

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Amendments were denied when the judgment was reformed and a new sentence was pronounced; (5) the trial court's error in sentencing him, which required reversal and separated the time tables for his convictions, constitutes an extraordinary circumstance warranting equitable tolling; (6) his trial counsel violated HIPPA¹ by obtaining his medical records from a treatment facility without a court order and giving the report to the State without Murray's permission; and (7) his counsel's total lack of preparation constituted a constructive denial of counsel under *United States v. Cronic*, 466 U.S. 648, 659 (1984). He also raises the following new arguments in support of his claim that his guilty plea was unknowing and involuntary: (1) under the plea agreement, he was to receive a single 30-year sentence, indicating that the lesser charge would be dismissed; however, this did not happen; (2) "[a] viable assumption would be that the plea agreement calling for a thirty-year sentence was in fact for two fifteen-year sentences running concurrently"; and that it was clear from the plea agreement that he would not receive "the maximum of any sentence." This court does not have jurisdiction to consider claims raised for the first time in a COA motion. *See Black v. Davis*, 902 F.3d 541, 545 (5th Cir. 2018), *cert. denied*, 140 S. Ct. 859 (2020).

Accordingly, Murray's COA motion is DENIED. His motion for leave to proceed in forma pauperis on appeal is also DENIED.

/s/ James L. Dennis
JAMES L. DENNIS
UNITED STATES CIRCUIT JUDGE

¹ Health Insurance Portability and Accountability Act.

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

DANIEL EDWARD MURRAY, #1468676 §
 §
VS. § CIVIL ACTION NOS. 4:16cv41, 4:16cv42
 §
DIRECTOR, TDCJ-CID §

POSTJUDGMENT ORDER

A review of the docket in this case reveals that Petitioner filed a notice of appeal (Dkt. #29), but did not file a motion for certificate of appealability. A petitioner must obtain a certificate of appealability before appealing a district court's decision, 28 U.S.C. § 2253(c)(1). However, a certificate of appealability may issue only if the petitioner has made a substantial showing of the denial of a constitutional right, 28 U.S.C. § 2253(c)(2). The court construes Petitioner's notice of appeal as a motion for certificate of appealability.

The Supreme Court of the United States explained what is required for a "substantial showing of the denial of a constitutional right" in *Slack v. McDaniel*, 529 U.S. 473, 484 (2000). In cases where a district court rejects a petitioner's constitutional claims on the merits, the petitioner "must demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong." *Id.* "When the district court denies a habeas petition on procedural grounds without reaching the movant's underlying constitutional claim, a [certificate of appealability] should issue when the prisoner shows, at least, that jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling." *Id.* The Supreme Court

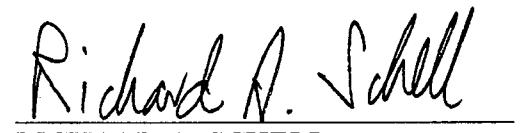
has held that a certificate of appealability is a “jurisdictional prerequisite” and a court of appeals lacks jurisdiction to rule on the merits until a certificate of appealability has been issued. *Miller-El v. Cockrell*, 537 U.S. 322, 336 (2003).

Petitioner’s § 2254 motion was denied because his claims were barred by the statute of limitations or were without merit. Petitioner has not made a substantial showing of the denial of a constitutional right and, thus, is not entitled to a certificate of appealability.

Petitioner also filed a motion to proceed *in forma pauperis* on appeal (Dkt. #32). Because Petitioner has not shown that he is entitled to a certificate of appealability, he also has not shown that he is entitled to proceed *in forma pauperis* on appeal. *United States v. Delario*, 120 F.3d 580, 582-83 (5th Cir. 1997) (failure to show entitlement to a certificate of appealability warrants denial of a petitioner’s motion to proceed *in forma pauperis* on appeal). Furthermore, a review of Petitioner’s inmate financial statement shows that deposits in the last six months totaled \$850.00. Thus, Petitioner is, for that reason also, not entitled to *in forma pauperis* status.

It is accordingly **ORDERED** that the construed motion for certificate of appealability and the motion to proceed *in forma pauperis* on appeal (Dkt. #32) are **DENIED**. All motions by either party not previously ruled upon are **DENIED**.

SIGNED this the 18th day of June, 2019.



RICHARD A. SCHELL
UNITED STATES DISTRICT JUDGE