APPENDIX--1

Opinion From Texas' Seventh District Court of Appeals

Timms v. State 2010 Tex.App. Lexis 3407(unpublished)

NO. 07-09-0038-CR

IN THE COURT OF APPEALS

FOR THE SEVENTH DISTRICT OF TEXAS

AT AMARILLO

PANEL D

APRIL 23, 2010

PAUL D. TIMMS,

Appellant

v.

THE STATE OF TEXAS,

Appellee

FROM THE 364TH DISTRICT COURT OF LUBBOCK COUNTY;

NO. 2007-417,789; HON. BRAD UNDERWOOD, PRESIDING

Memorandum Opinion

Before QUINN, C.J., and CAMPBELL and PIRTLE, JJ.

Paul D. Timms was convicted of aggravated robbery under the law of parties and sentenced to life imprisonment. He challenges the conviction by contending, through six issues, that 1) the evidence was legally and factually insufficient to show that a theft was committed, 2) the evidence was legally and factually insufficient to show that the theft committed was a felony, and 3) he was denied the right to compulsory process

when the trial court refused to compel a co-conspirator to testify. We affirm the judgment.

Background

Appellant and his wife Tammy used and sold methamphetamine. One of their sources for the drug was Tommy Yugovich. Apparently, Yugovich supplied narcotics to others as well, and it was through one of these third party transactions that he received a counterfeit $20 bill. The bill eventually came into the possession of appellant who attempted to negotiate it. This resulted in his arrest. Believing that Yugovich helped create the predicament, appellant sought to have Yugovich pay half of the attorney's fees he would incur in defending himself. Yugovich refused. That refusal, however, did not assuage appellant's desire to foist some of the economic burden onto Yugovich.

While in jail, appellant engaged in phone conversations with various people, including his wife Tammy and Donnie Green. From these conversations arose a plan through which funds or drugs would be extracted from Yugovich. Those participating in the effort would be Green, Tammy, and Jerry Don Castle (Castle), and it unfolded on March 25, 2007.

Yugovich arranged to meet Tammy at Castle's home to sell her drugs. Before doing so, he stopped to buy the narcotics that he intended to sell. Then, he proceeded to the house with his girlfriend, Michelle Pierce (Michelle). When the two arrived, Castle phoned Tammy, who appeared shortly thereafter. Upon entering the house, Tammy sat next to Yugovich while Castle invited Michelle into an adjoining room to play pool. After Castle and Michelle exited, Tammy excused herself and went to the

bathroom. Yugovich was alone weighing or dividing the drugs he intended to sell when Green broke through a door with a metal t-post in hand. The t-post was used to strike Yugovich twice in the head. As he was being assaulted, Yugovich cried out. In response, Michelle returned to the room wherein Yugovich was located. Seeing what was happening, she attempted to hit Green with a pool cue. Yet, that did not stop him for he brought the t-post down upon her head. As Yugovich and Michelle were now on the floor, Green began "asking where is it, where is the shit?" Michelle replied, "you have it already" after noticing that he held the bag containing the drugs. Green then saw money on the floor, stooped, picked the sum up, and left. Once Green had gone, Tammy exited the bathroom and also left. Apparently, she did so in a hurry since she forgot to take her pocketbook.

Whether Green actually arrived at Castle's house with Tammy is unknown, as is whether she left with him. Nonetheless, the two were seen together earlier that evening. So too did they phone each other within minutes after the assault and engage in a joint telephone conversation with appellant the next day. During this latter conversation, they referred to the "home invasion" (*i.e.* the label ascribed by the media to the incident), and appellant could be heard telling Tammy that she ". . . had no reason, nothing to do with that now. All right." Then, appellant uttered "[a]ll right. So that's taken care of" to which Tammy says, "[a]s far as I know." Green too can be heard reassuring appellant about it being "taken care of." When Green eventually mentioned that "[t]hey got a pretty good description of that guy on the news," appellant cautioned that "they just need to chill out now."

The beating resulted in Yugovich suffering a skull fracture and permanent brain damage. Michelle's injuries were severe but less so. She needed only fourteen stitches to close the wound on her head.

Appellant was tried by a jury. It returned a verdict of guilty upon the charge of aggravated robbery. The trial court accepted the verdict and sentenced him to life.

Issues 2 & 4 - Evidence of Responsibility

We initially address appellant's issues two and four. Therein, he challenges the legal and factual sufficiency of the evidence to support his conviction as a party and to show that the value of the property taken by Green equaled or exceeded the value needed for the theft to be a felony. We overrule the issues.

The applicable standards of review are found in *Jackson v. Virginia,* 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979) and *Watson v. State,* 204 S.W.3d 404 (Tex. Crim. App. 2006). We refer the parties to those cases and their progeny.

There are several ways in which one may be held criminally responsible for an offense of another. Two such ways are either 1) by soliciting, encouraging, directing, aiding, or attempting to aid the other person to commit the offense while acting with intent to promote or assist the commission of the offense or 2) by a co-conspirator committing a separate felony offense in furtherance of the unlawful purpose of the conspiracy which separate offense should have been anticipated as a result of the carrying out of the conspiracy. TEX. PENAL CODE ANN. §7.02(a)(2) & (b) (Vernon 2003). Each mode was included in the jury charge here. And to prove those elements, the State not only tendered the evidence we mentioned under "Background" but also

various recordings of telephone conversations. The latter were between appellant, Tammy, and Green and involved 1) appellant saying "that's all he needed to hear" in response to Tammy disclosing that Yugovich would not help pay for appellant's attorney, 2) appellant telling Tammy that he wanted to speak with Green, 3) appellant informing Tammy that he "was going [to] send [Green] in" after Tammy stole the dope from Yugovich, 4) Tammy saying "[a]ll right . . . send him over there," 5) Green uttering that the "deal with old boy, that it's a done deal," 6) appellant asking Green "[w]hat are you going to come up with" and Green answered, "[e]very bit of it . . . . I'm taking all of it," 7) appellant telling Green to let the "old boy" believe "that Tammy has got the cash money" to "tell him she's got $800 or whatever, plus whatever she owes him . . .," 8) Green replying "'[a]ll right . . . . we can do it that way then," 9) appellant directing Green to "let me talk to Tammy again so I can make her understand that," 10) appellant commenting that he did not want the episode to occur at his house, and 11) appellant recommending "that it . . . be done at [Castle's] house" instead since Castle had "been wanting to do the same thing to Tommy as what [appellant] wants to have done." This totality of evidence enabled one to rationally conclude beyond reasonable doubt that appellant was a party because he planned the entire event, drugs were to be taken from Yugovich as part of the plan, and the planned events actually transpired. That the participants used indefinite phrases such as "old boy" or that appellant was never heard expressly directing anyone to hit or rob Yugovich matters little. Guilt can be founded upon circumstantial evidence and rational deductions from such evidence. *Gardner v. State*, No. AP-75,582, 2009 Tex. Crim. App. LEXIS 1441 at *12 (Tex. Crim. App. October

21, 2009). More importantly, a jury's verdict is not rendered factually deficient or manifestly unjust simply because it may be founded upon circumstantial evidence and deductions therefrom.

Nor does it matter that the State purportedly neglected to prove the value of the property taken. Indeed, authority dictates that it need not prove a completed theft when attempting to prove robbery. *Demouchette v. State*, 731 S.W.2d 75, 78 (Tex. Crim. App. 1986); *accord Wooden v. State*, 101 S.W.3d 542, 546 (Tex. App.–Fort Worth 2003, pet. ref'd) (stating that robbery can be established without proof that property was actually stolen). All that is necessary is to show a theft was attempted. *Wooden v. State,* 101 S.W.3d at 546. This, in turn, means that it did not matter whether the drugs taken by Green had a value equal to or exceeding that needed for the theft to be deemed a felony. In other words, if there was no need to establish that anything was taken, then there was no need to show that the items not taken had a particular value.

So, none of the contentions underlying the two issues we address have merit. Consequently, we again say that the verdict enjoys the support of both legally and factually sufficient evidence.

Issues 1 & 3 – Evidence of Theft

In his first and third issues, appellant attacks the legal and factual sufficiency of the evidence to show that a theft occurred. We overrule the issues.

According to appellant, the prosecution failed to establish that the property taken by Green belonged to either Michelle or Yugovich or that the money Green

retrieved from the floor exceeded the value of the drugs. Yet, as indicated above, there was no need to prove that an actual, completed theft occurred. Thus, who owned the drugs that were taken (which the evidence rather clearly showed were Yugovich's) and whether their value exceeded the sum of money Tammy brought is immaterial.

Issue Five – Compel Testimony

Next, appellant argues that the trial court erred in refusing to compel Green to testify, and in so refusing, it also denied him his right to compulsory process. We overrule the issue.

No one questions the fact that Green committed acts for which he could be criminally prosecuted. Furthermore, the record establishes that he invoked his Fifth Amendment right insulating him from self-incrimination per the advice of his legal counsel. Since that particular right trumps a defendant's Sixth Amendment right to compulsory process, *Bridge v. State*, 726 S.W.2d 558, 567 (Tex. Crim. App. 1986); *Boler v. State*, 177 S.W.3d 366, 370-71 (Tex. App.–Houston [1st Dist.] 2005, pet. ref'd), and a trial court need not make any inquiry into the validity of one's reliance upon the Fifth Amendment when invoked per the advice of counsel, *Boler v. State*, 177 S.W.3d at 371, the trial court at bar did not err as suggested by appellant.

Issue Six – Improper Charge

Via his last issue, appellant contends that the verdict was legally and factually insufficient because the charge allowed the jury to convict on an "invalid" basis. This

contention implicates the methods by which one can be held liable for the crimes of another. The supposed invalidity at issue concerned the second method discussed in issues two and four above, *i.e.* liability for the acts of a co-conspirator. According to appellant, the trial court was prohibited from submitting that method since the evidence failed to show that the value of property stolen equaled or exceeded that needed for the crime to be a felony. We overrule the issue.

As previously discussed, one can prove robbery without establishing that a completed theft occurred. *Demouchette v. State, supra*. So, the State was not obligated to prove the value of the object stolen. This, in turn, meant that the jury could legitimately find that Green committed robbery even if no one illustrated how much the drugs were worth. So, we have no choice but to reject this means of attacking the legal and factual sufficiency of the evidence.

Having overruled each issue, we affirm the judgment.

Brian Quinn
Chief Justice

Do not publish.

APPENDIX--2

District Court's Order Denying 2254 Petition

(U.S.D.C. No. 5:13-CV-148)

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
LUBBOCK DIVISION

PAUL D. TIMMS, Petitioner, V. LORIE DAVIS,[1] Director Texas Department of Criminal Justice, Correctional Institutions Division, Respondent.	)	CIVIL ACTION NO. 5:13-CV-148-C ECF

ORDER

Petitioner Paul D. Timms filed a Petition for a Writ of Habeas Corpus by a Person in State Custody and memorandum in support on July 8, 2013. Respondent responded to the petition by filing an Answer with Brief in Support and relevant records. Petitioner filed a response.

Petitioner is in custody pursuant to a judgment and sentence out of the 364th District Court of Lubbock County, Texas. In cause number 2007-417,789, styled *The State of Texas v. Paul D. Timms,* Petitioner was found guilty of aggravated robbery on October 16, 2008. Petitioner was sentenced by the judge to life imprisonment on December 23, 2008.

Petitioner filed an appeal on January 15, 2009. In an unpublished opinion issued on April 23, 2010 (No. 07-09-00038-CR), the Seventh Court of Appeals affirmed his conviction and sentence. Petitioner filed a petition for discretionary review (PDR) that was refused by the Court of Criminal Appeals of Texas on September 15, 2010 (PDR No. 831-10). Petitioner filed a

[1]Lorie Davis has been named Director of the Texas Department of Criminal Justice, Correctional Institutions Division, and the caption is being changed pursuant to Fed. R. Civ. P. 25(d).

petition for writ of certiorari in the Supreme Court of the United States that was denied on February 22, 2011.

Petitioner filed his first state petition for writ of habeas corpus in the trial court on January 31, 2012, and it was denied without written order on July 3, 2013. Petitioner raised the following grounds for review: his rights to a unanimous jury verdict were violated by an erroneous jury charge; the State submitted two legally invalid theories in violation of due process; the State suborned false/misleading statements from its witness; he received ineffective assistance of trial and appellate counsel; and the State's use of the conspiracy statute and his sentence offends the Eighth Amendment and violates the Fourteenth Amendment.[2]

The Court understands Petitioner to raise the following grounds for review in his federal petition:

(1) His Sixth Amendment right to compulsory process was violated when the trial court allowed a co-defendant, Donnie Green, who had already pleaded guilty and been sentenced to invoke his Fifth Amendment right.

(2) The State suborned false/misleading statements from its witnesses in violation of Petitioner's right to due process.

(3) He received ineffective assistance of counsel at trial when counsel failed to

  (a) introduce exculpatory evidence in the form of a phone recording between Donnie Green and his mother;

  (b) object to and request increased specificity in the jury charge;

  (c) object to the State's submission of four legally invalid theories of law;

  (d) object to the State's knowing use of false/perjured testimony; and

[2] The Court notes that Petitioner filed a second state petition as well as some amended petitions that are described in detail in Respondent's Answer. His second state petition was also denied on July 3, 2013.

(e) request a charge on a lesser included offense based on the State's theories relating to the non-aggravating crimes concerning Tammy Timms as an accomplice.

(4) The evidence is legally insufficient to convict Petitioner of aggravated robbery under the law of parties statutes.

(5) He received ineffective assistance of counsel on appeal because appellate counsel failed to

(a) exhaust Petitioner's claim that the evidence was legally insufficient in his Petition for Discretionary Review, per Petitioner's request; and

(b) argue on appeal that the evidence was legally insufficient to prove that Petitioner was criminally responsible for the aggravating element of the crime.

The Court has reviewed Petitioner's pleadings, Respondent's answer, and the state court records submitted by Respondent.

Based upon the facts and law clearly set forth in Respondent's answer, the Court finds that whether or not any of Petitioner's grounds for review are procedurally barred, his claims are without merit and his objections to Respondent's Response should be overruled. Petitioner has failed to demonstrate that the state court's decision to deny relief conflicts with clearly established federal law as determined by the Supreme Court or is "based on an unreasonable determination of the facts in light of the evidence." 28 U.S.C. § 2254(d). Therefore, Petitioner's petition for a writ of habeas corpus should be DENIED and this case DISMISSED WITH PREJUDICE. Any pending motions are denied.

Pursuant to Rule 22 of the Federal Rules of Appellate Procedure and 28 U.S.C. § 2253(c), this Court finds that a certificate of appealability should be denied. Petitioner has failed to show that reasonable jurists would find (1) this Court's "assessment of the constitutional claims

debatable or wrong," or (2) "it debatable whether the petition states a valid claim of the denial of a constitutional right" and "debatable whether [this Court] was correct in its procedural ruling." *Slack v. McDaniel,* 529 U.S. 473, 484 (2000).

SO ORDERED.

Judgment shall be entered accordingly.

Dated July 27, 2016.

SAM R. CUMMINGS
Senior United States District Judge

APPENDIX--3

District Court's Order Denying Fed. R. Civ. P. 60(b) Motion

(U.S.D.C. No. 5:13-CV-148)

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
LUBBOCK DIVISION

PAUL D. TIMMS,	§	
	§	
Petitioner,	§	
	§	
v.	§	CIVIL ACTION NO. 5:13-CV-00148-C
	§	
DIRECTOR, TDCJ-CID,	§	
	§	
Respondent.	§	

ORDER

Petitioner filed a 45-page Motion for Relief from Judgment Pursuant to Federal Rule of Civil Procedure 60(b)(6), with 200 pages of attachments. (Doc. 28). He also filed a motion for leave to file his Rule 60(b) motion in excess of the page limit. (Doc. 31). As explained below, the motion for leave to file is GRANTED, but Petitioner's motion for relief from final judgment is DENIED.

I. BACKGROUND

Petitioner challenges the July 27, 2016 Order and Judgment of this Court, which denied and dismissed his petition for writ of habeas corpus on the merits. The Court adopted the facts and reasoning set forth in the Respondent's answer. Petitioner now objects that "the [C]ourt itself provided no reasoned opinion regarding [his] § 2254 petition." (Doc. 28 at 1). Petitioner argues that the Respondent applied the wrong standard to his claims, and that the Court erred in adopting the incorrect standard. Specifically, he claims that the Court improperly relied on *Harrington v. Richter*, 562 U.S. 86 (2011) to apply the deferential standard of AEDPA in the absence of a reasoned opinion from the Texas Court of Criminal Appeals. Instead, he argues that the Court should have followed the "look through" doctrine first established in *Ylst v. Nunnemaker*, 501 U.S. 797 (1991) and more recently affirmed in *Wilson v. Sellers*, 138 S. Ct. 1188 (2018).

He asserts that the last court to offer a reasoned opinion on his case was the intermediate state court of appeals—Texas's Seventh Court of Appeals sitting in Amarillo. But in denying his compulsory process claim,[1] the Amarillo court applied a state created rule of law that conflicted with Supreme Court precedent.

II. LEGAL STANDARD

In Petitioner's Motion Requesting Relief from Final Judgment, he argues that his case is extraordinary, and that the Court's earlier denial of habeas relief was a fundamental miscarriage of justice. Petitioner expressly relies on Rule 60(b) of the Federal Rules of Civil Procedure as the basis for the relief he seeks. Rule 60(b) is a "catchall provision" that gives a court broad discretion to grant relief "from a final judgment, order, or proceeding" for "any other reason that justifies relief." *Ex Parte Edwards*, 865 F.3d 197, 203 (5th Cir. 2017). "To succeed on a Rule 60(b) motion, the movant must show (1) that the motion [was] made within a reasonable time; and (2) extraordinary circumstances exist that justify the reopening of a final judgment." *Id.* (citing *Gonzalez v. Crosby*, 545 U.S. 524, 535 (2005).

Federal Rule of Civil Procedure 60(b)(6) provides that "[o]n motion and upon such terms as are just, the court may relieve a party or a party's legal representative from a final judgment, order, or proceeding for . . . any . . . reason justifying relief from the operation of the judgment." Fed. R. Civ. P. 60(b)(6). While this rule "is commonly referred to as a 'grand reservoir of equitable power to do justice,'" *Rocha v. Thaler*, 619 F.3d 387, 400 (5th Cir. 2010) (quotation omitted), the rule "contains its own limitations, such as the requirement that the motion 'be made within a reasonable time'" and the requirement that a movant "show 'extraordinary circumstances' justifying the reopening of a final judgment," *Gonzalez v. Crosby*, 545 U.S. 524,

[1] Petitioner claims that the trial court erred in allowing his codefendant to invoke his Fifth Amendment right against self-incrimination at Petitioner's trial because his codefendant had already been convicted by that point.

535 (2005) (quoting *Ackermann v. United States*, 340 U.S. 193, 199 (1950)). The Supreme Court has noted that "[s]uch circumstances will rarely occur in the habeas context." *Id.*

"A Rule 60(b) motion is considered 'successive' if it raises a new claim or attacks the merits of the district court's disposition of the case." *Tamayo v. Stephens*, 740 F.3d 986, 990 (5th Cir. 2014) (citing *Adams v. Thaler*, 679 F.3d 312, 319 (5th Cir. 2012)). A district court may not consider a "second or successive petition" without authorization from the appropriate court of appeals. *Id.* (citing 28 U.S.C. § 2243(b)(2)).

III. DISCUSSION

Here, Petitioner attacks the merits of the Court's disposition of the case, re-urges his claims, and rehashes the arguments he made in his original petition and his subsequent filings in this case. As a result, his Rule 60(b) motion is successive, and the Court lacks the authority to consider it. The fact that Petitioner renews his claims with a focus on newer Supreme Court precedent does not alter the analysis. *See Gonzalez v. Crosby*, 545 U.S. at 531–532 (2005) (Finding that a district court's consideration of a Rule 60(b) motion based on a purported change in substantive law governing a claim would "impermissibly circumvent the requirement that a successive habeas petition be precertified by the court of appeals.")

Alternatively, and to the extent that Petitioner's motion is cognizable under Rule 60(b), he has failed to present any extraordinary circumstances to justify relief. As mentioned above, Petitioner re-offers his arguments with renewed support from the Supreme Court's 2018 decision in *Wilson v. Sellers*. There, the Supreme Court held that when a federal habeas court is reviewing the summary decision of a state high court, it should look through the unexplained decision to the last related state-court decision that does provide reasoning, and then presume that the unexplained high-court decision adopted the same reasoning. *Wilson v. Sellers*, 138 S.

Ct. 1188 (2018). But the *Wilson* court also held that a state may rebut the presumption by showing that the unexplained affirmance most likely relied on different grounds.

Petitioner here argues that if the Court "looked through" to the Amarillo court's opinion in his direct appeal, it would have to reverse his conviction because the Amarillo court's reasoning was flawed. However, Respondent acknowledged that the Amarillo court's opinion relied on bad law. Respondent argued instead that the Texas Court of Criminal Appeals (TCCA) most likely relied on different grounds to deny Petitioner relief. In support of that argument, Respondent offered lengthy excerpts from the record to show that the TCCA "undoubtedly relied on the record and [controlling law]" finding that Petitioner's compulsory process claim was without merit. In other words, Respondent rebutted the presumption that the TCCA relied on the same grounds as the Amarillo court by offering evidence of alternative proper grounds that were clear from the record and were the likely basis for the decision. Thus, the review in this case was entirely consistent with the Supreme Court's later *Wilson* decision.

Finally, the Court notes that Petitioner has also failed to demonstrate that he sought relief within "a reasonable time." His federal habeas petition was denied by Order and Judgment dated July 27, 2016, and his certificate of appealability was denied by the Fifth Circuit Court of Appeals on June 20, 2017. Additionally, the Supreme Court denied his petition for a writ of certiorari on January 8, 2018. Petitioner filed his Rule 60(b) motion on June 8, 2020, almost four years after the Court's disposition of this case and over two years after the Supreme Court's decision in *Wilson v. Sellers.*

IV. CONCLUSION

Petitioner's Rule 60(b) motion is, in essence, a successive petition, so this Court lacks authority to consider it because Petitioner has not obtained authorization from the Fifth Circuit. Alternatively, and to the extent that Petitioner's motion could be properly considered under Rule

60(b), the Court finds that it must be denied because Petitioner did not bring his claims within a reasonable time and he failed to demonstrate extraordinary circumstances that would justify relief.

Furthermore, for these reasons and the reasons set forth in the original Order of dismissal dated July 27, 2016, pursuant to Rule 22 of the Federal Rules of Appellate Procedure and 28 U.S.C. § 2253(c), any request for a certificate of appealability should be denied because Petitioner has failed to show that reasonable jurists would (1) find this Court's "assessment of the constitutional claims debatable or wrong," or (2) find "it debatable whether the petition states a valid claim of the denial of a constitutional right" and "debatable whether [this Court] was correct in its procedural ruling." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000). *See Hernandez v. Thaler*, 630 F.3d at 428 ("A habeas petitioner . . . must obtain a COA before he can appeal the denial of a Rule 60(b) motion.").

SO ORDERED.

Dated November 9, 2020.

SAM R. CUMMINGS
Senior United States District Judge

APPENDIX--4

Fifth Circuits Denial of COA on District Court's Denial of Fed. R. Civ. P. 60(b)(6) Relief

(Fifth Cir. No. 20-11188)

Received 8-2-2021

United States Court of Appeals for the Fifth Circuit

No. 20-11188

United States Court of Appeals
Fifth Circuit
FILED
July 23, 2021
Lyle W. Cayce
Clerk

PAUL D. TIMMS,

Petitioner—Appellant,

versus

BOBBY LUMPKIN, *Director, Texas Department of Criminal Justice, Correctional Institutions Division*,

Respondent—Appellee.

Application for Certificate of Appealability from
the United States District Court
for the Northern District of Texas
No. 5:13-CV-148

ORDER:

Convicted of aggravated robbery in 2008, Paul Timms was denied habeas corpus relief and a certificate of appealability ("COA") by the district court. He seeks a COA from this court. He raises various issues, including that he was subjected to an incorrect standard of review, that he was denied compulsory process, that he was denied relief under Federal Rule of Civil Procedure 60(b)(6), that he received ineffective assistance of counsel, that the state suborned false testimony, and that the evidence was insufficient to convict.

To obtain a COA, an applicant must make a substantial showing of the denial of a constitutional right. *See* 28 U.S.C. § 2253(c)(2). This entails "demonstrating that jurists of reason could disagree with the district court's resolution of his constitutional claims or that jurists could conclude the issues presented are adequate to deserve encouragement to proceed further." *Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003).

Timms fails to make the required showing. Accordingly, his motion for a COA is DENIED.

/s/ Jerry E. Smith
JERRY E. SMITH
United States Circuit Judge

APPENDIX--5

Fifth Circuits Denial of Pro-Se Request for

Extension of Time

(Fifth Cir. No. 20-11188)

United States Court of Appeals for the Fifth Circuit

No. 20-11188

PAUL D. TIMMS,

Petitioner—Appellant,

versus

BOBBY LUMPKIN, *Director, Texas Department of Criminal Justice, Correctional Institutions Division*,

Respondent—Appellee.

Appeal from the United States District Court
for the Northern District of Texas
No. 5:13-CV-148

ORDER:

IT IS ORDERED that appellant's motion for an extension to file a petition for rehearing/rehearing en banc is DENIED.

/s/ Jerry E. Smith
JERRY E. SMITH
United States Circuit Judge