United States Court of Appeals for the Fifth Circuit

No. 22-10315

United States Court of Appeals
Fifth Circuit
FILED
October 3, 2022
Lyle W. Cayce
Clerk

TIWIAN LAQUINN SKIEF,

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
USDC No. 3:18-CV-226

Before CLEMENT, SOUTHWICK, and HIGGINSON, *Circuit Judges*.

PER CURIAM:

Tiwian Laquinn Skief, Texas prisoner # 1769917, moves this court for a certificate of appealability (COA) to appeal the denial of his Federal Rule of Civil Procedure 60(b) motion, arguing that the district court abused its discretion in denying that motion. Additionally, he seeks leave from this court to proceed in forma pauperis (IFP) on appeal.

In his Rule 60(b) motion, Skief requested that the district court reissue the judgment in his 28 U.S.C. § 2254 proceedings so that he could file a new notice of appeal after his original appeal was dismissed by this court for want

APPENDIX A

of prosecution. Because Skief's motion is an attempt to reinstate appellate jurisdiction through the Rule 60(b) proceedings, a COA is not necessary. *See Ochoa Canales v. Quarterman*, 507 F.3d 884, 888 (5th Cir. 2007); *Dunn v. Cockrell*, 302 F.3d 491, 492 & n.1 (5th Cir. 2002).

Turning to the merits of Skief's appeal, this court reviews the denial of a Rule 60(b) motion for abuse of discretion. *See Bailey v. Cain*, 609 F.2d 769, 767 (5th Cir. 2010). As the district court correctly concluded, a Rule 60(b) motion may not be used to circumvent the time limits for appeal, which are jurisdictional and for which there are no equitable exceptions. *See Bowles v. Russell*, 551 U.S. 205, 214 (2007); *see also Perez v. Stephens*, 745 F.3d 174, 178(5th Cir. 2014); 28 U.S.C. § 2107(a). And Skief's motion did not satisfy any of the grounds for an out-of-time appeal, as it was not filed within the period to seek an extension of time to appeal, nor was it based on lack of notice of entry of judgment. *See* § 2107(a); FED. R. APP. P. 4(a)(5), (6). The judgment of the district court is affirmed and the motion to proceed IFP correspondingly denied.

AFFIRMED; COA DENIED AS UNNECESSARY; MOTION TO PROCEED IFP DENIED.

APPENDIX A

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

TIWIAN LAQUINN SKIEF, TDCJ No. 1769917, Petitioner, V. DIRECTOR, TDCJ-CID, Respondent.	§ § § § § § § § § §	No. 3:18-cv-226-M-BN

FINDINGS, CONCLUSIONS, AND RECOMMENDATION OF THE UNITED STATES MAGISTRATE JUDGE

Petitioner Tiwian Laquinn Skief, a Texas prisoner, "was convicted of murder and sentenced to fifty years in prison." *Skief v. State*, No. 05-12-00223-CR, 2013 WL 2244336, at *1 (Tex. App. – Dallas May 21, 2013, pet. ref'd), *aff'g State v. Skief*, No F10-35936-L (Crim. Dist. Ct. No. 5, Dall. Cnty., Tex. Feb. 10, 2012). After his criminal judgment was affirmed on direct appeal, the Texas Court of Criminal Appeals (the CCA) refused Skieff's petition for discretionary review, *see Skief v. State*, PD-0655-15 (Tex. Crim. App. Nov. 4, 2015), and the United States Supreme Court denied his petition for a writ of certiorari, *see Skief v. Texas*, 137 S. Ct. 62 (2016).

The CCA then denied Skieff's state habeas application without written order on the trial court's findings without a hearing. *See Ex parte Skief*, WR-82,496-02 (Tex. Crim. App. Dec. 20, 2017). On December 29, 2020, this Court entered judgment denying his *pro se* 28 U.S.C. § 2254 habeas petition. *See Skief v. Dir., TDCJ-CID*, No. 3:18-cv-226-M-BN, 2020 WL 7753726 (N.D. Tex. Oct. 14, 2020), *rec. accepted*, 2020 WL 7711376 (N.D. Tex. Dec. 29, 2020). And the United States Court of Appeals for

the Fifth Circuit dismissed Skief's related appeal for want of prosecution on July 7, 2021. *See Skief v. Lumpkin*, No. 21-10517 (5th Cir. July 7, 2021) [Dkt. No. 35].

Citing the Fifth Circuit's denying his request to reinstate his appeal on November 4, 2021, Skief returned to this Court in January 2022 to move the Court, under Federal Rule of Civil Procedure 60(b), to reenter the December 2020 judgment "to re-set [his] time to appeal." Dkt. No. 39.

This case remains referred to the undersigned United States magistrate judge for pretrial management under 28 U.S.C. § 636(b) and a standing order of reference from Chief Judge Barbara M. G. Lynn. And the undersigned enters these findings of fact, conclusions of law, and recommendation that the Court should deny Skief's motion.

While Rule 60(b) provides for relief from a final judgment or order, "a Rule 60(b) motion for relief from a final judgment denying habeas relief counts as a second or successive habeas application ... so long as the motion 'attacks the federal court's previous resolution of a claim on the merits.'" *Banister v. Davis*, 140 S. Ct. 1698, 1709 (2020) (cleaned up; quoting *Gonzalez v. Crosby*, 545 U.S. 524, 532 (2005)). Even so, "there are two circumstances in which a district court may properly consider a Rule 60(b) motion in a § 2254 proceeding: (1) the motion attacks a 'defect in the integrity of the federal habeas proceeding,' or (2) the motion attacks a procedural ruling which precluded a merits determination" by, for example, arguing that a district court's ruling as to exhaustion, procedural default, or limitations was in error. *Gilkers v. Vannoy*, 904 F.3d 336, 344 (5th Cir. 2018) (quoting *Gonzalez*, 545 U.S. at 532); *see*

also Jackson v. Lumpkin, ___ F.4th ____, No. 20-20516, 2022 WL 354439 (5th Cir. Feb. 7, 2022).

But Skief seeks to use Rule 60(b) solely as a basis to reinstate an appeal. Unfortunately for him, "[R]ule 60(b) cannot be used to circumvent the limited relief available under Federal Rule of Appellate Procedure 4(a)(5), which advances the principle of protecting the finality of judgments." *Perez v. Stephens*, 745 F.3d 174, 178 (5th Cir. 2014) (quoting *Dunn v. Cockrell*, 302 F.3d 491, 492-93 (5th Cir. 2002)).

"The language used in *Dunn* makes it particularly clear that where the sole purpose of a Civil Rule 60(b) motion is 'to achieve an extension of the time in which to file a notice of appeal, it must fail.'" *Id.* (quoting *Dunn*, 302 F.3d at 493; citing *United States v. O'Neil*, 709 F.2d 361, 373 (5th Cir. 1983) ("[W]here ... the [Civil] Rule 60(b) motion ... asks only that the order be vacated and reentered.... the [Civil] Rule 60(b) motion is avowedly being used only to extend the time for appeal. It hence squarely collides with [Appellate] Rule 4(a)(5)."); footnote omitted).

Moreover, after *Dunn*, the United States Supreme Court held "that the 'timely filing of a notice of appeal in a civil case is a jurisdictional requirement.'" *Id.* at 178-79 (quoting *Bowels v. Russell*, 551 U.S. 205, 214 (2007)).

> The Court explained that courts lacked power to carve out equitable exceptions to Appellate Rule 4(a) because the deadlines to appeal are jurisdictional statutory requirements under 28 U.S.C. § 2107. *Bowles* unequivocally states that "the timely filing of a notice of appeal in a civil case is a jurisdictional requirement. Because this Court has no authority to create equitable exceptions to jurisdictional requirements, use of the 'unique circumstances' doctrine is illegitimate."
>
> [Thus t]he strong language in *Bowles*, while not referring specifically to Civil Rule 60(b), does not permit appellate courts to create exceptions to circumvent the appellate deadlines as set forth in

> Appellate Rule 4(a) and § 2107. This is particularly true because Appellate Rule 4 "carries § 2107 into practice."

Id. at 179 (citations omitted).

In sum, in addition to being foreclosed by controlling authority in this circuit, to allow Rule 60(b) "to circumvent the exceptions codified in 28 U.S.C. § 2107 runs afoul of *Bowles*'s clear language that courts cannot create exceptions to jurisdictional requirements that are statutorily based." *Id.* (citing *Bowles*, 551 U.S. at 212-14); *see also Jordan v. Davis*, 698 F. App'x 203, 204 (5th Cir. 2017) (per curiam) ("[A] Rule 60 motion may not be used to circumvent the time limits for appealing, especially where the motion was made after the time for seeking an extension of time for appeal has expired." (citing *Dunn*, 302 F.3d at 492-93; *Perez*, 745 F.3d at 177-79)).

The Court should therefore deny Skief's Rule 60(b) motion.

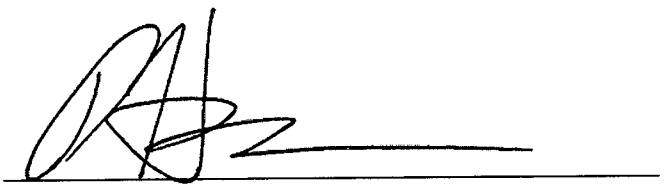
Recommendation

The Court should deny Petitioner Tiwian Laquinn Skief's motion under Federal Rule of Civil Procedure 60(b) [Dkt. No. 39] but should, solely for statistical purposes, reopen and then close this case based on any order accepting or adopting these findings, conclusions, and recommendation.

A copy of these findings, conclusions, and recommendation shall be served on all parties in the manner provided by law. Any party who objects to any part of these findings, conclusions, and recommendation must file specific written objections within 14 days after being served with a copy. *See* 28 U.S.C. § 636(b)(1); FED. R. CIV. P. 72(b). In order to be specific, an objection must identify the specific finding or recommendation to which objection is made, state the basis for the objection, and

specify the place in the magistrate judge's findings, conclusions, and recommendation where the disputed determination is found. An objection that merely incorporates by reference or refers to the briefing before the magistrate judge is not specific. Failure to file specific written objections will bar the aggrieved party from appealing the factual findings and legal conclusions of the magistrate judge that are accepted or adopted by the district court, except upon grounds of plain error. *See Douglass v. United Servs. Auto. Ass'n*, 79 F.3d 1415, 1417 (5th Cir. 1996).

DATED: February 9, 2022



DAVID L. HORAN
UNITED STATES MAGISTRATE JUDGE

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

TIWIAN LAQUINN SKIEF, TDCJ No. 1769917, Petitioner, V. DIRECTOR, TDCJ-CID, Respondent.	§ § § § § § § § § §	No. 3:18-cv-226-M

ORDER

The Court DENIES Petitioner Tiwian Laquinn Skief's March 28, 2022 motion for leave to appeal *in forma pauperis* (IFP) [Dkt. No. 47] as to the Court's denial of his Rule 60(b) motion and CERTIFIES, under 28 U.S.C. § 1915(a)(3), and as fully explained in the magistrate judge's findings, conclusions, and recommendation [Dkt. No. 41], that Petitioner's appeal is not taken in good faith. But Petitioner may challenge this finding under *Baugh v. Taylor*, 117 F.3d 197 (5th Cir. 1997), by filing a motion to proceed IFP on appeal with the Clerk of the Court, U.S. Court of Appeals for the Fifth Circuit, within 30 days of this order.

SO ORDERED this 29th day of March, 2022.

Barbara M.G. Lynn

BARBARA M. G. LYNN
CHIEF JUDGE

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

TIWIAN LAQUINN SKIEF, TDCJ No. 1769917, Petitioner, V. DIRECTOR, TDCJ-CID, Respondent.	§ § § § § § § § § §	No. 3:18-cv-226-M

ORDER ACCEPTING FINDINGS, CONCLUSIONS, AND RECOMMENDATION OF THE UNITED STATES MAGISTRATE JUDGE, DENYING NEW MOTIONS UNDER RULES 52 AND 59, AND DENYING A CERTIFICATE OF APPEALABILITY

The United States Magistrate Judge made Findings, Conclusions, and a Recommendation in this case that the Court should deny Petitioner Tiwian Laquinn Skief's motions under Federal Rules of Civil Procedure 52(b) and 59(e). *See* Dkt. No. 25. An objection was filed by Petitioner [Dkt. No. 28]. The District Court reviewed *de novo* those portions of the proposed Findings, Conclusions, and Recommendation to which objection was made, and reviewed the remaining proposed Findings, Conclusions, and Recommendation for plain error. Finding no error, the Court ACCEPTS the Findings, Conclusions, and Recommendation of the United States Magistrate Judge.

The Court therefore DENIES Petitioner's motions [Dkt. Nos. 23 & 24], construed as requesting relief under Rule 59(e).

And, although the Court previously denied a certificate of appealability (COA) as to the denial of Petitioner's *pro se* 28 U.S.C. § 2254 application for a writ of habeas corpus, insofar as a COA "is required to appeal the denial of a Rule 59(e) motion in a habeas case," *Mitchell v. Davis*, 669 F. App'x 284, 284 (5th Cir. 2016) (per curiam) (citing *Ochoa Canales v. Quarterman*, 507 F.3d 884, 887-88 (5th Cir. 2007)), considering the record in this case and pursuant to Federal Rule of Appellate Procedure 22(b), Rule 11(a) of the Rules Governing §§ 2254 and 2255 proceedings, and 28 U.S.C. § 2253(c), the Court DENIES a certificate of appealability as to its denial of Petitioner's motions [Dkt. Nos. 23 & 24].

The Court adopts and incorporates by reference the Magistrate Judge's Findings, Conclusions, and Recommendations filed in this case [Dkt. Nos. 16 & 25] in support of its finding that Petitioner has failed to show that reasonable jurists would find "it debatable whether the petition states a valid claim of the denial of a constitutional right" or "debatable whether [this Court] was correct in its procedural ruling." *Slack v. McDaniel,* 529 U.S. 473, 484 (2000).

Defendant has filed new motions under Rules 52 and 59 and those are denied for the same reasons the original motions are being denied.

But, if Petitioner elects to file a notice of appeal, he must either pay the $505 appellate filing fee or move for leave to appeal *in forma pauperis*.

SO ORDERED this 12th day of April, 2021.

Barbara M. G. Lynn

BARBARA M. G. LYNN
CHIEF JUDGE