

United States Court of Appeals
for the Fifth Circuit

United States Court of Appeals
Fifth Circuit

FILED

February 24, 2023

Lyle W. Cayce
Clerk

DEMARKUS ANTONIO BROWN,

Petitioner—Appellant,

versus

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

Respondent—Appellee.

Application for Certificate of Appealability
the United States District Court
for the Eastern District of Texas
USDC No. 9:16-CV-143

UNPUBLISHED ORDER

Before HAYNES, ENGELHARDT, and OLDHAM, *Circuit Judges.*

PER CURIAM:

Demarkus Antonio Brown, former Texas prisoner # 1649376, seeks a certificate of appealability (COA) to appeal the dismissal of his 28 U.S.C. § 2254 application challenging his juvenile conviction for delinquent conduct (aggravated robbery).

No. 22-40840

“This court must examine the basis of its jurisdiction, on its own motion, if necessary.” *Mosley v. Cozby*, 813 F.2d 659, 660 (5th Cir. 1987). A timely notice of appeal in a civil case is a jurisdictional prerequisite. *Bowles v. Russell*, 551 U.S. 205, 213-14 (2007).

Within 28 days of the entry of the judgment dismissing his § 2254 application, Brown filed a constructive motion for reconsideration under Federal Rule of Civil Procedure 59(e). We construe the district court’s order entered on September 14, 2022, as a denial of his Rule 59(e) motion. Accordingly, Brown had 30 days from the entry of that order in which to file his notice of appeal. *See FED. R. APP. P. 4(a)(1)(A), (a)(4)(A)(v)*. At the earliest, Brown’s notice of appeal was filed on or about November 21, 2022, which was in the form of a motion for a COA. Accordingly, he missed the deadline to file a notice of appeal by approximately 38 days, and he did not timely seek an extension of the time for filing a notice of appeal or move in a timely manner to reopen the time to file an appeal. *See FED. R. APP. P. 4(a)(5), (6)*.

Because Brown’s notice of appeal was filed more than 30 days after the district court entered its order denying his Rule 59(e) motion, it was untimely, and therefore his appeal is DISMISSED for lack of jurisdiction. Brown’s motion for a COA is DENIED as moot. His motion for leave to proceed in forma pauperis on appeal and motion to appoint counsel are also DENIED.

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

DEMARKUS ANTONIO BROWN,
Plaintiff,

v.

DIRECTOR, TDCJ-CID,
Defendant.

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CIVIL ACTION NO. 9:216-CV-00143
JUDGE MICHAEL J. TRUNCALE

ORDER

The Court previously entered an order dismissing this petition for writ of habeas corpus as barred by the applicable statute of limitations. A final judgment was also entered.

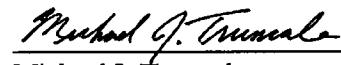
In dismissing the petition as barred by limitations, the Court relied on a Report and Recommendation of United States Magistrate Judge that was adopted by the Court. At the time the final judgment was entered, no objections to the Report and Recommendation had been filed. Petitioner was subsequently given additional time to file objections. After petitioner filed his objections, the Court entered an order overruling his objections. Petitioner has now filed a motion requesting a certificate of appealability.

An appeal from a judgment denying federal habeas relief may not proceed unless a judge issues a certificate of appealability. *See* 28 U.S.C. § 2253. The standard for a certificate of appealability requires the petitioner to make a substantial showing of the denial of a federal constitutional right. *See Slack v. McDaniel*, 529 U.S. 473, 483 U.S. 473, 483-84 (2000); *Elizalde v. Dretke*, 362 F.3d 323, 328 (5th Cir. 2004). To make a substantial showing, the petitioner need not demonstrate that he would prevail on the merits. Rather, the petitioner must demonstrate that the issues he raises are subject to debate among jurists of reason, that a court could resolve the issues raised in a different manner, or that the questions presented are worthy of encouragement to proceed further. *See Slack*, 529 U.S. at 483-84. Any doubt whether to grant a certificate of appealability should be resolved in favor of the petitioner, and the severity of the penalty imposed may be

considered in making this determination. *See Miller v. Johnson*, 200 F.3d 274, 280-81 (5th Cir. 2000).

This petition was dismissed because it was filed after the period of limitations expired and because petitioner failed to demonstrate he was actually innocent. The Court does not find that either of these bases are subject to debate amongst jurists of reason. The factual and legal issues raised by petitioner have been consistently resolved adversely to his position and the questions presented are not worthy of encouragement to proceed further. As a result, a certificate of appealability shall not issue in this matter. The motion requesting a certificate of appealability [Dkt. 49] is therefore **DENIED**.

SIGNED this 1st day of December, 2022.



Michael J. Truncale
United States District Judge

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from this filing is
available in the
Clerk's Office.**