

UNPUBLISHED**UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT**

No. 21-7159

CLARK D. THOMAS,

Petitioner - Appellant,

v.

MCKENDLEY NEWTON, Warden of Allendale Correctional Institution; ALAN M. WILSON, Attorney General of South Carolina,

Respondents - Appellees.

Appeal from the United States District Court for the District of South Carolina, at Charleston. Margaret B. Seymour, Senior District Judge. (2:19-cv-03179-MBS)

Submitted: March 16, 2023

Decided: June 16, 2023

Before WYNN and RICHARDSON, Circuit Judges, and KEENAN, Senior Circuit Judge.

Dismissed by unpublished per curiam opinion.

Clark D. Thomas, Appellant Pro Se.

Unpublished opinions are not binding precedent in this circuit.

PER CURIAM:

Clark D. Thomas seeks to appeal the district court's orders dismissing his 28 U.S.C. § 2254 petition and denying reconsideration of its order dismissing his § 2254 petition. In civil cases, parties have 30 days after the entry of the district court's final order to note an appeal, Fed. R. App. P. 4(a)(1)(A), unless the district court extends the appeal period under Fed. R. App. P. 4(a)(5) or reopens the appeal period under Fed. R. App. P. 4(a)(6). “[T]he timely filing of a notice of appeal in a civil case is a jurisdictional requirement,” *Bowles v. Russell*, 551 U.S. 205, 214 (2007), and “an appeal from denial of [Fed. R. Civ. P.] 60(b) relief does not bring up the underlying judgment for review,” *Aikens v. Ingram*, 652 F.3d 496, 501 (4th Cir. 2011) (en banc) (internal quotation marks omitted). The district court's order dismissing Thomas' § 2254 petition was entered on March 24, 2021. The notice of appeal was filed no earlier than July 3, 2021. Thomas' appeal from the dismissal of his petition is untimely, he did not obtain an extension or reopening of the appeal period, and his motion for reconsideration did not extend the appeal period because it was not filed within the period for seeking relief under Fed. R. Civ. P. 52 or Fed. R. Civ. P. 59(e). *See Parker v. Bd. of Pub. Utils.*, 77 F.3d 1289, 1291 (10th Cir. 1996) (holding that Fed. R. Civ. P. 59(e) time period is triggered by entry of judgment, not service of notice). Accordingly, we dismiss this portion of the appeal for lack of jurisdiction.

Thomas also seeks to appeal the district court's order denying on the merits his motion to reconsider the court's prior order denying relief on his § 2254 petition. Because Thomas' motion was not filed within 28 days after the entry of the district court's order dismissing the action, the motion is properly construed as filed pursuant to Fed. R. Civ. P.

60(b). *See* Fed. R. Civ. P. 52(b), 59(e) (providing 28-day filing period); *MLC Auto., LLC v. Town of S. Pines*, 532 F.3d 269, 277-78 (4th Cir. 2008) (explaining that postjudgment motions should be construed based on time period within which they are filed). The order is not appealable unless a circuit justice or judge issues a certificate of appealability. 28 U.S.C. § 2253(c)(1)(A); *see generally United States v. McRae*, 793 F.3d 392, 400 & n.7 (4th Cir. 2015). A certificate of appealability will not issue absent “a substantial showing of the denial of a constitutional right.” 28 U.S.C. § 2253(c)(2). When the district court denies relief on the merits, a prisoner satisfies this standard by demonstrating that reasonable jurists could find the district court’s assessment of the constitutional claims debatable or wrong. *See Buck v. Davis*, 580 U.S. 100, 115-17 (2017). When the district court denies relief on procedural grounds, the prisoner must demonstrate both that the dispositive procedural ruling is debatable and that the petition states a debatable claim of the denial of a constitutional right. *Gonzalez v. Thaler*, 565 U.S. 134, 140-41 (2012) (citing *Slack v. McDaniel*, 529 U.S. 473, 484 (2000)).

Limiting our review of the record to the issues raised in Thomas’ informal brief, we conclude that Thomas has not made the requisite showing. *See* 4th Cir. R. 34(b); *see also Jackson v. Lightsey*, 775 F.3d 170, 177 (4th Cir. 2014) (“The informal brief is an important document; under Fourth Circuit rules, our review is limited to issues preserved in that brief.”). Accordingly, we deny a certificate of appealability and dismiss the appeal. We deny Thomas’ request to appoint counsel. We dispense with oral argument because

the facts and legal contentions are adequately presented in the materials before this court and argument would not aid the decisional process.

DISMISSED

FILED: June 16, 2023

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 21-7159
(2:19-cv-03179-MBS)

CLARK D. THOMAS

Petitioner - Appellant

v.

MCKENDLEY NEWTON, Warden of Allendale Correctional Institution; ALAN M. WILSON, Attorney General of South Carolina

Respondents - Appellees

JUDGMENT

In accordance with the decision of this court, a certificate of appealability is denied and the appeal is dismissed.

This judgment shall take effect upon issuance of this court's mandate in accordance with Fed. R. App. P. 41.

/s/ PATRICIA S. CONNOR, CLERK

FILED: June 16, 2023

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUITNo. 21-7159, Clark Thomas v. McKendley Newton
2:19-cv-03179-MBS

NOTICE OF JUDGMENT

Judgment was entered on this date in accordance with Fed. R. App. P. 36. Please be advised of the following time periods:

PETITION FOR WRIT OF CERTIORARI: The time to file a petition for writ of certiorari runs from the date of entry of the judgment sought to be reviewed, and not from the date of issuance of the mandate. If a petition for rehearing is timely filed in the court of appeals, the time to file the petition for writ of certiorari for all parties runs from the date of the denial of the petition for rehearing or, if the petition for rehearing is granted, the subsequent entry of judgment. See Rule 13 of the Rules of the Supreme Court of the United States; www.supremecourt.gov.

VOUCHERS FOR PAYMENT OF APPOINTED OR ASSIGNED

COUNSEL: Vouchers must be submitted within 60 days of entry of judgment or denial of rehearing, whichever is later. If counsel files a petition for certiorari, the 60-day period runs from filing the certiorari petition. (Loc. R. 46(d)). If payment is being made from CJA funds, counsel should submit the CJA 20 or CJA 30 Voucher through the CJA eVoucher system. In cases not covered by the Criminal Justice Act, counsel should submit the Assigned Counsel Voucher to the clerk's office for payment from the Attorney Admission Fund. An Assigned Counsel Voucher will be sent to counsel shortly after entry of judgment. Forms and instructions are also available on the court's web site, www.ca4.uscourts.gov, or from the clerk's office.

BILL OF COSTS: A party to whom costs are allowable, who desires taxation of costs, shall file a Bill of Costs within 14 calendar days of entry of judgment. (FRAP 39, Loc. R. 39(b)).

PETITION FOR REHEARING AND PETITION FOR REHEARING EN BANC:

A petition for rehearing must be filed within 14 calendar days after entry of judgment, except that in civil cases in which the United States or its officer or agency is a party, the petition must be filed within 45 days after entry of judgment. A petition for rehearing en banc must be filed within the same time limits and in the same document as the petition for rehearing and must be clearly identified in the title. The only grounds for an extension of time to file a petition for rehearing are the death or serious illness of counsel or a family member (or of a party or family member in pro se cases) or an extraordinary circumstance wholly beyond the control of counsel or a party proceeding without counsel.

Each case number to which the petition applies must be listed on the petition and included in the docket entry to identify the cases to which the petition applies. A timely filed petition for rehearing or petition for rehearing en banc stays the mandate and tolls the running of time for filing a petition for writ of certiorari. In consolidated criminal appeals, the filing of a petition for rehearing does not stay the mandate as to co-defendants not joining in the petition for rehearing. In consolidated civil appeals arising from the same civil action, the court's mandate will issue at the same time in all appeals.

A petition for rehearing must contain an introduction stating that, in counsel's judgment, one or more of the following situations exist: (1) a material factual or legal matter was overlooked; (2) a change in the law occurred after submission of the case and was overlooked; (3) the opinion conflicts with a decision of the U.S. Supreme Court, this court, or another court of appeals, and the conflict was not addressed; or (4) the case involves one or more questions of exceptional importance. A petition for rehearing, with or without a petition for rehearing en banc, may not exceed 3900 words if prepared by computer and may not exceed 15 pages if handwritten or prepared on a typewriter. Copies are not required unless requested by the court. (FRAP 35 & 40, Loc. R. 40(c)).

MANDATE: In original proceedings before this court, there is no mandate. Unless the court shortens or extends the time, in all other cases, the mandate issues 7 days after the expiration of the time for filing a petition for rehearing. A timely petition for rehearing, petition for rehearing en banc, or motion to stay the mandate will stay issuance of the mandate. If the petition or motion is denied, the mandate will issue 7 days later. A motion to stay the mandate will ordinarily be denied, unless the motion presents a substantial question or otherwise sets forth good or probable cause for a stay. (FRAP 41, Loc. R. 41).

IN THE UNITED STATES DISTRICT COURT
FOR DISTRICT OF SOUTH CAROLINA

Clark D. Thomas, #187845,)	
)	C/A No. 2:19-3179-MBS
Petitioner,)	
)	
vs.)	
)	
McKendley Newton, Jr., Warden of)	ORDER AND OPINION
Allendale Correctional Institution, and)	
Alan M. Wilson, Attorney General of)	
South Carolina,)	
)	
Respondents.)	
)	

Petitioner Clark D. Thomas is an inmate in custody of the South Carolina Department of Corrections. He currently is housed at Allendale Correctional Institution in Fairfax, South Carolina. Petitioner was arrested after restraining his spouse (the “victim”) in a motel room overnight, during which time he repeatedly beat her, bound her with duct tape, shackled her to a chair, and tased her multiple times. He was convicted of criminal domestic violence of a high and aggravated nature and kidnaping, and sentenced to incarceration for 10 years on the charge of criminal domestic violence and 20 years on the charge of kidnaping, to be served concurrently. Petitioner pursued both his direct appeal and post-conviction relief remedies at the state court level. On November 8, 2019, Petitioner filed a petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254, asserting the following grounds for relief:

GROUND ONE: Petitioner’s 6th and 14th Amendment rights to the effective assistance of counsel and due process were violated in trial counsel refusing a lesser included charge of criminal domestic violence (CDV).

GROUND TWO: Petitioner’s 6th & 14th Amendment rights to the effective assistance of counsel and due process were violated in trial counsel making negative comments about Petitioner throughout his opening and closing statements.

GROUND THREE: Petitioner's 6th & 14th Amendment rights to the effective assistance of counsel and due process were violated in trial counsel failing to impeach the alleged victim with her medical records.

GROUND FOUR: Petitioner's 6th and 14th Amendment rights to the effective assistance of counsel and due process were violated in trial counsel failing to argue that the kidnapping should not have subjected Petitioner to the sex offender registry.

GROUND FIVE: Petitioner's 6th and 14th Amendment rights to the effective assistance of trial counsel and due process were violated in trial counsel making sure that he was able to leave for vacation by abbreviating Petitioner's trial.

GROUND SIX: Petitioner's 6th and 14th Amendment rights to the effective assistance of counsel and due process were violated in trial counsel failing to bring up contradictions in the alleged victim's testimony and previous statements.

GROUND SEVEN: Petitioner's 14th Amendment right to due process was violated in Respondents failing to disclose the alleged victim's medical records.

GROUND EIGHT: Petitioner's 6th and 14th Amendment rights to the effective assistance of counsel and due process were violated in trial counsel failing to call witnesses demonstrating that the alleged victim previously made statements that she liked being tased.

GROUND NINE: Petitioner's 6th and 14th Amendment rights to the effective assistance of counsel and due process were violated in trial counsel in failing to present evidence that Petitioner was entitled to a sentence pursuant to S.C. Code Ann. § 16-25-90 for having suffered CDV at the hands of the alleged victim.

GROUND TEN: Petitioner's 6th and 14th Amendment rights to the effective assistance of counsel and due process were violated in trial counsel failing to communicate and prepare Petitioner for trial.

GROUND ELEVEN: Petitioner's 14th Amendment right to due process was violated in Respondents failing to provide police reports concerning the alleged victim.

GROUND TWELVE: Petitioner's 14th Amendment right to due process was violated by Respondents failing to disclose information concerning a plea offer with the alleged victim.

GROUND THIRTEEN: Petitioner's 6th and 14th Amendment rights to the effective assistance of counsel and due process were violated in trial counsel failing to

impeach the alleged victim with evidence of her plea offer with Respondents.

GROUND FOURTEEN: Petitioner's 6th and 14th Amendment rights to the effective assistance of counsel and due process were violated in trial counsel failing to object to the kidnapping instruction that was given to the jury.

GROUND FIFTEEN: Petitioner's 6th and 14th Amendment rights to the effective assistance of counsel and due process were violated in trial counsel failing to object to States Exhibits 1-2 and 41-45.

GROUND SIXTEEN: Petitioner's 6th and 14th Amendment rights to the effective assistance of counsel and due process were violated in trial counsel failing to object to Respondents vouching for the credibility of the prosecuting witness during closing arguments.

GROUND SEVENTEEN: Petitioner's 6th and 14th Amendment rights to the effective assistance of counsel and due process were violated in trial counsel failing to seek the dismissal of the charges against Petitioner grounded on the violation of Petitioner's right to a speedy trial.

GROUND EIGHTEEN: Petitioner's 6th and 14th Amendment rights to the effective assistance of counsel and due process were violated in trial counsel failing to properly cross-examine the detective in this case with his contradicting affidavit.

GROUND NINETEEN: Petitioner's 6th and 14th Amendment rights to the effective assistance of counsel and due process were violated in trial counsel failing to object to the circumstances of aggravation charged to the jury in the instruction of CDVHAN.

See generally ECF No. 1, 13-91.

In accordance with 28 U.S.C. § 636(b) and Local Rule 73.02, D.S.C., the § 2254 petition was referred to Magistrate Judge Mary Gordon Baker for a Report and Recommendation. The parties filed cross-motions for summary judgment. On July 24, 2020, the Magistrate Judge issued a Report and Recommendation in which she concluded that Petitioner's § 2254 petition was untimely under 28 U.S.C. § 2244(d). Taking into account times when the § 2244(d) limitations period was tolled, Petitioner was required to file his § 2254 petition no later than July 25, 2018.

Petitioner's § 2254 petition was filed 471 days after the limitations period ended. The Magistrate Judge also noted that Petitioner had filed a successive post-conviction relief (PCR) application that still was pending in state court. The Magistrate Judge determined that Petitioner's successive PCR application was not timely under S.C. Code Ann. § 17-27-45(A). Because the successive PCR application was not timely under state law, it was not "properly filed" for purposes of § 2244(d)(2) and did not act to toll the limitations period. The Magistrate Judge recommended that the court deny Petitioner's motion for summary judgment and grant Respondents' cross-motion for summary judgment on the grounds that Petitioner's § 2254 petition is time-barred.

Petitioner filed objections to the Report and Recommendation on January 4, 2021. Petitioner argued that the first claim set forth in the successive PCR application was filed pursuant to S.C. Code Ann. § 17-27-45(C) on the grounds of after-discovered evidence of the victim's medical records. Petitioner further argued that his second claim in the successive PCR application was based on PCR counsel's allegedly conspiring with Respondents to undermine the first PCR application, and thus the claim could not have been raised in his first PCR application. The court found that the victim's medical records could have been subpoenaed prior to trial, so that his claim was not cognizable as newly discovered evidence. The first claim for relief thus was not timely raised. The court concluded that Petitioner's second ground for relief also was barred as untimely. The court further found that the Petitioner could not satisfy his burdens of showing equitable tolling or actual innocence. On March 24, 2021, the court denied Petitioner's motion for summary judgment, granted Respondents' cross-motion for summary judgment, and denied and dismissed Petitioner's § 2254 petition, with prejudice. Judgment was entered March 24, 2021.

This matter now is before the court on Petitioner's motion to alter or amend a judgment to

include specific findings of fact and conclusions of law, which motion was filed on April 27, 2021. Respondents filed a response in opposition on May 11, 2021, to which Petitioner filed a reply on May 24, 2021.

DISCUSSION

Petitioner brings this motion pursuant to Fed. R. Civ. P. 52(a)(1) and 59(e). Rule 52(a)(1) provides: “(a) Findings and Conclusions. (1) In General. In an action tried on the facts without a jury or with an advisory jury, the court must find the facts specially and state its conclusions of law separately. The findings and conclusions may be stated on the record after the close of the evidence or may appear in an opinion or a memorandum of decision filed by the court. Judgment must be entered under Rule 58.” Under Rule 52(b), a motion must be filed no later than 28 days after the entry of judgment. Rule 59(e) provides: (e) Motion to Alter or Amend a Judgment. A motion to alter or amend a judgment must be filed no later than 28 days after the entry of the judgment.” Pursuant to Fed. R. Civ. P. 6(b)(2), a court cannot extend the time to act under Rules 52(b) and 59(e).

Respondents assert that Petitioner’s motion to alter or amend a judgment to include specific findings of fact and conclusions of law was not timely filed. The court agrees. Petitioner’s motion was due no later than 28 days after March 24, 2021, or April 21, 2021. Petitioner’s motion, cover letter, and certificate of service are dated April 23, 2021. Petitioner also submitted an affidavit that was notarized on April 24, 2021, and the envelope forwarding Petitioner’s filing to the Clerk of Court is date stamped April 24, 2021.

In his reply, Petitioner contends that he should receive the benefit of the court’s standard language that time should be extended by an additional three days if served by mail. According to

Petitioner, when given the benefit of three days if served by mail, his time expired on April 24, 2021. However, the full statement of the court's standard language regarding deadlines reads: "Add an additional 3 days only if served by mail or otherwise allowed under Fed. R. Civ. P. 6 or Fed. R. Crim. P. 45." Rule 6 does not allow extensions of time for Rule 52(b) or 59(e) motions. The court concludes that Petitioner's motion was filed out of time.

Even if the court were to consider Petitioner's motion for reconsideration, he cannot prevail. Petitioner first contends that the court erred in declining to rule on the Magistrate Judge's finding that Petitioner could have subpoenaed the victim's medical records to use as evidence during trial. Petitioner raised the issue of the victim's medical records in support of his argument he is entitled to equitable tolling. In his objections to the Report and Recommendation, Petitioner contended that the solicitor introduced pictures and medical records at trial that he had acquired at least eighteen months prior to trial, but had suppressed. Petitioner asserted that the Magistrate Judge held him and trial counsel accountable for relying on the presumption that the assistant solicitor was a scrupulous government official, and taking the assistant solicitor at his word that all relevant materials had been provided to Petitioner and trial counsel prior to trial. Petitioner claimed that the Magistrate Judge "spurned facts favorable to Petitioner in favor of ruinous fallacies to justify her erroneous recommendation to dismiss the case" and that he had, instead, established that trial counsel and PCR counsel had acted adversely to Petitioner's interests such that the medical records could not, in the exercise of due diligence, been discovered prior to trial.

Next, Petitioner asserts that the court failed to make specific findings of fact or conclusions of law regarding the assistant solicitor who prosecuted Petitioner's case at the state level. According to Petitioner, the court overlooked the solicitor's purported suppression of a chain of custody report

that showed the victim's clothing was provided to the state eight months after Petitioner's arrest on February 20, 2007. Petitioner contends that the assistant solicitor deliberately misled the jury into believing the victim's testimony that the arresting officer discovered her clothing at the crime scene on June 7, 2006. In his objections to the Report and Recommendation, Petitioner asserted that the Magistrate Judge's failure to address the purportedly suppressed chain of custody report demonstrated her interpretation of the background of this case to be factually flawed and biased.

Finally, Petitioner asserts that the court failed to make specific findings of fact or conclusions of law on Petitioner being required to register as a sex offender despite his acquittal on the false allegation of having sexually assaulted the victim. Petitioner argues that compelling him to register as a sex offender constitutes a double-jeopardy violation inasmuch as the jury found Petitioner not guilty of rape.¹

In any event, Petitioner's factual recitations do not explain why he did not timely file his § 2254 petition. Petitioner's mere disagreement with the court's ruling does not support a Rule 59(e) motion. Hutchinson v. Staton, 994 F.2d 1076, 1081 (4th Cir. 1993).

CONCLUSION

For the reasons stated, Petitioner's motion to alter or amend a judgment to include specific findings of fact and conclusions of law (ECF No. 123) is **denied**.

¹ Petitioner raised no objection regarding registering as a sex offender in his objections to the Report and Recommendation. In the absence of a timely filed objection, a district court need not conduct a de novo review, but instead must "only satisfy itself that there is no clear error on the face of the record in order to accept the recommendation." Diamond v. Colonial Life & Acc. Ins. Co., 416 F.3d 310, 315 (4th Cir. 2005).

CERTIFICATE OF APPEALABILITY

A certificate of appealability will not issue absent “a substantial showing of the denial of a constitutional right.” 28 U.S.C. § 2253(c)(2). A prisoner satisfies this standard by demonstrating that reasonable jurists would find that any assessment of the constitutional claims by the district court is debatable or wrong and that any dispositive procedural ruling by the district court is likewise debatable. Miller-El v. Cockrell, 537 U.S. 322, 336-38 (2003); Rose v. Lee, 252 F.3d 676, 683-84 (4th Cir. 2001). The court concludes that Petitioner has not made the requisite showing.

IT IS SO ORDERED.

/s/ Margaret B. Seymour
Senior United States District Judge

Charleston, South Carolina

July 14, 2021