UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Deborah S. Hunt
Clerk

100 EAST FIFTH STREET, ROOM 540
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Filed: November 01, 2022

Mr. Anthony Brown
1761 Preston Street
Memphis, TN 38106

Re: Case No. 22-5504, *Anthony Brown v. TN, et al*
Originating Case No. : 2:21-cv-02416

Dear Mr. Brown,

The Court issued the enclosed Order today in this case. Judgment to follow.

Sincerely yours,

s/Julie Connor
Case Manager
Direct Dial No. 513-564-7033

cc: Mr. Thomas M. Gould
Mr. Michael Matthew Stahl

Enclosure

No mandate to issue

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No. 22-5504

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

ANTHONY BROWN,

Petitioner-Appellant,

v.

STATE OF TENNESSEE,

Respondent-Appellee,

and

TENNESSEE BOARD OF PAROLE; HERBERT HARRISON SLATERY III, Tennessee Attorney General & Reporter,

Respondents.

ORDER

Before: MOORE, Circuit Judge.

Anthony Brown, a formerly incarcerated individual proceeding pro se,[1] appeals the district court's judgment denying as untimely his petition for a writ of habeas corpus, which the district court construed as being filed pursuant to 28 U.S.C. § 2254,[2] and the district court's order denying his Federal Rule of Civil Procedure 59(e) motion to alter or amend the judgment. The timely notice of appeal has been construed as a request for a certificate of appealability (COA). *See* Fed. R. App. P. 22(b). Brown also moves for leave to proceed in forma pauperis.

[1] Brown's status as a parolee satisfies the "in custody" requirement for habeas corpus relief under 28 U.S.C. § 2254(a). *See Jones v. Cunningham*, 371 U.S. 236, 242-43 (1963).

[2] Brown purported to file his habeas corpus petition under 28 U.S.C. § 2241. But because Brown is "in custody" pursuant to a state court judgment, the district court properly construed his habeas corpus petition as a § 2254 petition. *See Rittenberry v. Morgan*, 468 F.3d 331, 336-37 (6th Cir. 2006).

Appendix-A

In 2010, a jury found Brown guilty of possession of 0.5 grams or more of cocaine with the intent to deliver, simple possession of cocaine, and simple possession of marijuana. He was sentenced to 20 years in prison. On March 30, 2012, the Tennessee Court of Criminal Appeals (TCCA) affirmed his conviction, and the Tennessee Supreme Court denied leave to appeal on August 16, 2012. *State v. Brown*, No. W2010-01764-CCA-R3-CD, 2012 WL 1154284, at *1 (Tenn. Crim. App. Mar. 30, 2012), *perm. appeal denied*, (Tenn. Aug. 16, 2012).

On September 24, 2012, Brown filed a petition for post-conviction relief, which he subsequently amended through counsel. The trial court denied the petition, and the TCCA affirmed on August 25, 2014. *Brown v. State*, No. W2013-01611-CCA-R3-PC, 2014 WL 4199309, at *1, *7 (Tenn. Crim. App. Aug. 25, 2014). Brown did not seek discretionary leave to appeal from the Tennessee Supreme Court. During these post-conviction proceedings, in 2013, Brown filed a habeas corpus petition under § 2254 in federal court. The district court dismissed the petition without prejudice for lack of exhaustion.

Brown filed the present petition, at the earliest, on June 16, 2021. Tennessee filed a motion to dismiss, arguing that Brown's petition was barred by the one-year statute of limitations set forth in 28 U.S.C. § 2244(d). The district court agreed, granted the motion, denied Brown's petition, and declined to issue a COA. Thereafter, the district court denied Brown's Rule 59(e) motion to alter or amend the judgment and declined to issue a COA.

A COA may be granted "only if the applicant has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2); *see Miller-El v. Cockrell*, 537 U.S. 322, 327, 336 (2003). When the district court's denial is based on a procedural ruling, the movant must demonstrate that "jurists of reason would find it debatable whether the [motion] 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." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000).

The Antiterrorism and Effective Death Penalty Act imposes a one-year statute of limitations for filing habeas corpus petitions. *See* 28 U.S.C. § 2244(d)(1). Except in circumstances that are not present here, the limitations period runs from "the date on which the judgment became

final by conclusion of direct review or the expiration of the time for seeking such review." *See* 28 U.S.C. § 2244(d)(1)(A). The statute of limitations is tolled when "a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending." 28 U.S.C. § 2244(d)(2).

Here, the statute of limitations would have started on November 15, 2012, the day after the last day on which Brown was permitted to file a petition for a writ of certiorari in the United States Supreme Court after the Tennessee Supreme Court denied leave to appeal. But, the limitations period was tolled (or, rather, was prevented from starting) when Brown filed his petition for post-conviction relief in the trial court on September 24, 2012. Thus, the statute of limitations did not begin running until 60 days after the TCCA's August 25, 2014, decision affirming the trial court's denial of Brown's petition, *see* Tenn. R. App. P. 11(b), and expired one year later. Brown's § 2254 petition was thus filed more than five years after the statute of limitations expired. He does not dispute this. Thus, reasonable jurists could not debate the district court's conclusion that Brown's habeas petition was time-barred.

When a petitioner fails to file a timely § 2254 petition, a court may allow equitable tolling of the limitations period upon a showing that (1) the petitioner diligently pursued their rights and (2) the petitioner was prevented from timely filing the petition by an "extraordinary circumstance." *Holland v. Florida*, 560 U.S. 631, 649 (2010) (quoting *Pace v. DiGuglielmo*, 544 U.S. 408, 418 (2005)). Alternatively, the untimeliness of a petition may be excused when a petitioner "show[s] that it is more likely than not that no reasonable juror would have convicted him in the light of . . . new evidence." *McQuiggin v. Perkins*, 569 U.S. 383, 399 (2013) (quoting *Schlup v. Delo*, 513 U.S. 298, 327 (1995)).

In his petition and his response to Tennessee's motion to dismiss, Brown did not argue that he is entitled to equitable tolling or that the untimeliness of his petition is excused by his actual innocence. Instead, he argued for the first time in his Rule 59(e) motion that "an extraordinary circumstance stood in his way that prevented" him from timely filing his habeas corpus petition—

namely, that the trial court "intentionally sealed all of the court records"; he also claimed that he is actually innocent.

To justify the alteration or amendment of a judgment under Rule 59(e), the movant must demonstrate: "(1) a clear error of law; (2) newly discovered evidence; (3) an intervening change in controlling law; or (4) a need to prevent manifest injustice." *Betts v. Costco Wholesale Corp.*, 558 F.3d 461, 474 (6th Cir. 2009) (quoting *Henderson v. Walled Lake Consol. Sch.*, 469 F.3d 479, 496 (6th Cir. 2006)).

The district court rejected the arguments raised in Brown's Rule 59(e) motion, finding that his "belated attempt to assert a basis for the application of equitable tolling" did not warrant relief under Rule 59(e) because he could have raised the arguments before it denied his petition, such as in his response to Tennessee's motion to dismiss. Because "Rule 59(e) motions cannot be used to present new arguments that could have been raised prior to judgment," *Howard v. United States*, 533 F.3d 472, 475 (6th Cir. 2008), no reasonable jurist could debate the district court's denial of Brown's Rule 59(e) motion and rejection of the equitable tolling arguments that he attempted to raise therein. *Id.*; *see also Gulley v. County of Oakland*, 496 F. App'x 603, 612 (6th Cir. 2012) ("A Rule 59(e) motion is not properly used as a vehicle to . . . advance positions that could have been argued earlier, but were not."). In any event, Brown has not raised a debatable issue with respect to his equitable tolling arguments. Although Brown asserted in a cursory manner that he was prevented from filing a timely habeas corpus petition because the trial court sealed the court records, he did not explain why the purportedly sealed records were necessary to the filing of his petition, what steps he took to unseal them, or when he accessed them. Nor has Brown provided "new reliable evidence . . . that was not presented at trial" of his actual innocence. *Schlup*, 513 U.S. at 324.

The court therefore **DENIES** the application for a COA and **DENIES** as moot the motion for leave to proceed in forma pauperis.

ENTERED BY ORDER OF THE COURT

Deborah S. Hunt, Clerk

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 22-5504

ANTHONY BROWN,

Petitioner-Appellant,

v.

STATE OF TENNESSEE,

Respondent-Appellee,

and

TENNESSEE BOARD OF PAROLE; HERBERT HARRISON SLATERY III, Tennessee Attorney General & Reporter,

Respondents.

Before: MOORE, Circuit Judge.

JUDGMENT

THIS MATTER came before the court upon the application by Anthony Brown for a certificate of appealability.

UPON FULL REVIEW of the record and any submissions by the parties,

IT IS ORDERED that the application for a certificate of appealability is DENIED.

ENTERED BY ORDER OF THE COURT

Deborah S. Hunt, Clerk

CASENO: 2:21cv02416
DOCUMENT: 12

Anthony Brown
1761 Preston Street
Memphis, TN 38106

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Appendix-B

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

ANTHONY BROWN,

Petitioner,

v. Case No. 2:21-cv-2416-MSN-tmp

STATE OF TENNESSEE, et al.,

Respondents.

ORDER DENYING MOTION TO TRANSFER SUCCESSIVE HABEAS PETITION
ORDER GRANTING MOTION TO DISMISS UNTIMELY PETITION
ORDER DENYING PETITION PURSUANT TO 28 U.S.C. § 2254
ORDER DENYING CERTIFICATE OF APPEALABILITY
ORDER CERTIFYING APPEAL NOT TAKEN IN GOOD FAITH
AND
ORDER DENYING LEAVE TO PROCEED *IN FORMA PAUPERIS* ON APPEAL

On June 16, 2021, Petitioner Anthony Brown[1] filed a *pro se* "Emergency Petition for the Constitutional Writ of Habeas Corpus Relief Demand to Be Immediately Released From State Custody and Memorandum of Law" (*see* ECF No. 1), which the Court construes as a petition under 28 U.S.C. § 2254. (*See* ECF No. 14 at PageID 29.) On July 12, 2021, Respondent filed Respondent's Motion to Transfer Successive Habeas Petition and a supporting memorandum. (*See* ECF No. 7.) On August 5, 2021, Respondent filed the state court record (*see* ECF No. 8) and a Motion to Dismiss Untimely Petition for Writ of Habeas Corpus with a supporting memorandum. (ECF No. 9.) On September 2, 2021, Petitioner filed a response to the motion to dismiss. (ECF No. 11.) For the reasons stated below, Respondent's Motion to Transfer Successive Habeas

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[1] Brown asserts that he is on parole from a 2008 conviction for possession of crack cocaine, for which he was sentenced to 20 years imprisonment. (*See* ECF No. 1 at PageID 2, 13–14, 16.)

Petition is **DENIED**, and the Motion to Dismiss Untimely Petition for Writ of Habeas Corpus is **GRANTED**. The § 2254 Petition is **DENIED** and **DISMISSED** as time barred.

BACKGROUND

A Shelby County jury convicted Brown of possession of 0.5 grams or more of cocaine with intent to deliver, a Class B felony, simple possession of cocaine, a Class A misdemeanor, and simple possession of marijuana, a Class A misdemeanor. The conviction for simple possession of cocaine was merged with the Class B felony, and Brown received an effective 20-year sentence as a Range II offender. *See State v. Brown*, No. W2010-01764-CCA-R3-CD, 2012 WL 1154284, at *1 (Tenn. Crim. App. Mar. 30, 2012) (ECF No. 8-11). The Tennessee Court of Criminal Appeals ("TCCA") affirmed the judgment of the trial court. *Id.* The Tennessee Supreme Court denied permission to appeal on August 16, 2012. (ECF No. 8-16.)

Brown filed a *pro se* petition for post-conviction relief. (*See* ECF No. 8-17 at PageID 878–916.) He filed an Amended and Supplemental Petition for Post-Conviction Relief through counsel. (*Id.* at PageID 918–25.) The trial court denied post-conviction relief on June 27, 2013. (*Id.* at PageID 926–42.) On appeal, the TCCA affirmed the trial court's judgment on August 25, 2014. (ECF No. 8-22.) *See Brown v. State*, No. W2013-01611-CCA-R3-PC, 2014 WL 4199309, at *1, *7 (Tenn. Crim. App. Aug. 25, 2014).

In 2013, while the state post-conviction proceedings were pending, Brown filed a petition under § 2254. *See Brown .v. Johnson*, No. 2:13-cv-02180-SHM-dkv (W.D. Tenn. Mar. 18, 2013).[2] Brown filed a Motion for Stay and Abeyance to stay the petition to allow for exhaustion of certain issues for which he sought post-conviction relief. (*See* No.13-2180, ECF No. 4.) On July 3, 2013,

[2] The case was transferred from the United States District Court for the Middle District of Tennessee.

the Court denied the Motion for Stay and Abeyance and dismissed the § 2254 petition without prejudice due to lack of exhaustion. (ECF No. 8 at PageID 108–09.)

MOTION TO TRANSFER SUCCESSIVE HABEAS PETITION

Respondent argues that the instant § 2254 Petition should be transferred to the United States Court of Appeals for the Sixth Circuit as it is successive to the previous habeas petition filed in *Brown v. Johnson*, No. 2:13-cv-02180-SHM-dkv (W.D. Tenn. July 3, 2013). (ECF No. 7 at PageID 35; *see* ECF No. 7-1 at PageID 37.) Respondent notes that the Court denied relief because of Petitioner's failure to exhaust his state court remedies and contends that the denial of relief warrants a transfer under 28 U.S.C. § 2244(b). (*Id.* at PageID 39–40.) Petitioner asserts that the instant habeas petition is not successive because the initial petition, filed in 2013, was filed by Terry Clifford, without Petitioner's permission. (ECF No. 11 at PageID 1143–44, 1160.)

State prisoners ordinarily may file only one § 2254 petition. There are severe restrictions on a district court's ability to consider "second or successive" petitions. 28 U.S.C. §§ 2244(b)(1)-(2). However, "[t]he Supreme Court has made clear that not every numerically second petition is 'second or successive' for purposes of" § 2244(b)(3). *See In re Bowling*, No. 06-5937, 2007 WL 4943732, at *2 (6th Cir. Sept. 12, 2007) (citing *In re Bowen*, 436 F.3d 699, 704 (6th Cir. 2006)). The Supreme Court has confirmed that a petition filed after a mixed petition has been dismissed and before the district court adjudicated any claims is to be treated as "any other first petition" and is not a second or successive petition. *Slack v. McDaniel*, 529 U.S. 473, 487 (2000); *see Storey v. Vasbinder*, 657 F.3d 372, 378 (6th Cir. 2011) ("a petition filed after a remedial appeal, ordered in response to an earlier petition, is not second or successive within the meaning of § 2244(b)—even if it includes claims that could have been included, but were not, in the first petition").

In the instant case, the initial petition was dismissed without prejudice for failure to exhaust

without the district court adjudicating any claims. Thus, the instant § 2254 Petition filed in 2021 is not second or successive for purposes of § 2244(b)(3), and the Motion to Transfer Successive Habeas Petition is **DENIED**.

MOTION TO DISMISS UNTIMELY HABEAS PETITION

Respondent argues that the instant § 2254 Petition was filed more than six years late and that the Petition is not entitled to equitable tolling. (Civ. No. 21-2416, ECF No. 10 at PageID 1140–41.) Petitioner does not address the timeliness of his petition. (*See* ECF No. 11.)

Twenty-eight U.S.C. § 2244(d) provides:

> (1) A 1-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court. The limitation period shall begin to run from the latest of—
>
> (A) the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review;
>
> (B) the date on which the impediment to filing an application created by State action in violation of the Constitution or laws of the United States is removed, if the applicant was prevented from filing by such State action;
>
> (C) the date on which the constitutional right asserted was initially recognized by the Supreme Court, if the right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or
>
> (D) the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.
>
> (2) The time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted toward any period of limitation under this subsection.

State convictions ordinarily become "final" within the meaning of § 2244(d)(1)(A) when the time expires for filing a petition for a writ of certiorari from a decision of the highest state court

on direct appeal. *Pinchon v. Myers*, 615 F.3d 631, 640 (6th Cir. 2010) (citing *Lawrence v. Fla.*, 549 U.S. 327, 333 (2007)); *Sherwood v. Prelesnik*, 579 F.3d 581, 585 (6th Cir. 2009). The Tennessee Court of Criminal Appeals issued its decision on direct appeal on March 30, 2012, and the Tennessee Supreme Court denied permission to appeal on August 16, 2012. Therefore, Petitioner's convictions became final on the last date for filing a petition for a writ of certiorari with the United States Supreme Court, on November 14, 2012. *See* Sup. Ct. R. 13.1 (a petition for a writ of certiorari must be filed within 90 days after entry of judgment). The running of the limitations period commenced the following day on November 15, 2012.

The limitations period was tolled, pursuant to 28 U.S.C. § 2244(d)(2), when Petitioner filed his post-conviction petition on or about August 28, 2012. (*See* ECF No. 8-17 at PageID 889.) The Tennessee Court of Criminal Appeals affirmed the dismissal of the post-conviction petition on August 25, 2014. Petitioner had sixty days to file an application for permission to appeal.[3] The running of the limitations period recommenced at that time and expired 365 days later, on October 27, 2015.[2]

The instant petition was signed more than five years later, on June 16, 2021, and even if it

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[3] The term "pending" for statutory tolling purposes includes "the time in which the petitioner could have pursued a further appeal from the denial of post-conviction relief in the state courts." *See Holbrook v. Curtin*, 833 F.3d 612, 615 (6th Cir. 2016); *see Carey v. Saffold*, 536 U.S. 214, 220 (2002) (tolling extended "until the application has achieved final resolution through the State's post-conviction procedures").

[2] Respondent incorrectly calculates the deadline as October 24, 2014. (*See* ECF No. 10 at PageID 1139.) Because the last day of the limitations period fell on Saturday, October 24, 2015, Petitioner had until the end of the next business day to file a timely § 2254 petition. *See* Fed. R. Civ. P. 6(a)(1)(C).

Section 2244(d)(1) provides that the limitations period begins to run from the latest of the four specified circumstances. In this case, however, there is no reason to conclude that the limitations period for the issues raised by Petitioner commenced at any time later than the date on which his conviction became final.

is deemed to have been filed on that date, *see Houston v. Lack*, 487 U.S. 266, 270–71, 276 (1988); *Brand v. Motley*, 526 F.3d 921, 925 (6th Cir. 2008); *Towns v. United States*, 190 F.3d 468, 469 (6th Cir. 1999) (§ 2255 motion), it is time barred.

"[T]he doctrine of equitable tolling allows federal courts to toll a statute of limitations when a litigant's failure to meet a legally mandated deadline unavoidably arose from circumstances beyond that litigant's control." *Keenan v. Bagley*, 400 F.3d 417, 421 (6th Cir. 2005) (internal quotation marks omitted), *abrogated on other grounds as recognized in Johnson v. United States*, 457 F. App'x 462, 470 (6th Cir. 2012). The § 2254 limitations period is subject to equitable tolling. *Holland v. Fla.*, 560 U.S. 631, 645–49 (2010). "[T]he doctrine of equitable tolling is used sparingly by the federal courts." *Robertson v. Simpson*, 624 F.3d 781, 784 (6th Cir. 2010); *see also Vroman v. Brigano*, 346 F.3d 598, 604 (6th Cir. 2003); *Jurado v. Burt*, 337 F.3d 638, 642 (6th Cir. 2003). "The party seeking equitable tolling bears the burden of proving he is entitled to it." *Robertson*, 624 F.3d at 784. A habeas petitioner is entitled to equitable tolling "only if he shows '(1) that he has been pursuing his rights diligently, and (2) that some extraordinary circumstance stood in his way' and prevented timely filing." *Holland*, 560 U.S. at 649 (quoting *Pace v. DiGuglielmo*, 544 U.S. 408, 418 (2005)).

Petitioner makes no argument for equitable tolling. (*See* ECF No. 11.) He has failed to meet his burden of demonstrating an entitlement to equitable tolling.

CONCLUSION

The Motion to Transfer Successive Habeas Petition is **DENIED**. The § 2254 Petition is time-barred, and Petitioner is not entitled to equitable tolling. The Motion to Dismiss Untimely Habeas Corpus Petition is **GRANTED**, and the § 2254 Petition is **DISMISSED** with prejudice. Judgment shall be entered for Respondent.

APPELLATE ISSUES

There is no absolute entitlement to appeal a district court's denial of a § 2254 petition. *Miller-El v. Cockrell*, 537 U.S. 322, 335 (2003); *Bradley v. Birkett*, 156 F. App'x 771, 772 (6th Cir. 2005). The Court must issue or deny a certificate of appealability ("COA") when it enters a final order adverse to a § 2254 petitioner. Rule 11, Rules Governing Section 2254 Cases in the United States District Courts. A petitioner may not take an appeal unless a circuit or district judge issues a COA. 28 U.S.C. § 2253(c)(1); Fed. R. App. P. 22(b)(1).

A COA may issue only if the petitioner has made a substantial showing of the denial of a constitutional right, and the COA must indicate the specific issue or issues that satisfy the required showing. 28 U.S.C. §§ 2253(c)(2) & 3. A "substantial showing" is made when the petitioner demonstrates that "reasonable jurists could debate whether (or, for that matter, agree that) the petition should have been resolved in a different manner or that the issues presented were 'adequate to deserve encouragement to proceed further.'" *Miller-El*, 537 U.S. at 336 (citing *Slack*, 529 U.S. at 484); *Henley v. Bell*, 308 F. App'x 989, 990 (6th Cir. 2009) (per curiam) (same).

A COA does not require a showing that the appeal will succeed. *Miller-El*, 537 U.S. at 337; *Caldwell v. Lewis*, 414 F. App'x 809, 814–15 (6th Cir. 2011) (same). Courts should not issue a COA as a matter of course. *Bradley*, 156 F. App'x at 773 (quoting *Miller-El*, 537 U.S. at 337). In this case, there can be no question that the claims in this petition are barred by the statute of limitations. Because any appeal by Petitioner on the issues raised in this petition does not deserve attention, the Court **DENIES** a COA.

For the reasons the Court denies a COA, the Court determines that any appeal would not be taken in good faith. It is therefore **CERTIFIED**, pursuant to Fed. R. App. P. 24(a), that any appeal in this matter would not be taken in good faith, and leave to appeal *in forma pauperis* is

DENIED.[4]

IT IS SO ORDERED, this 27th day of October 2021.

s/ Mark S. Norris
MARK S. NORRIS
UNITED STATES DISTRICT JUDGE

[4] If Petitioner files a notice of appeal, he must pay the full $505 appellate filing fee or file a motion to proceed *in forma pauperis* and supporting affidavit in the Sixth Circuit Court of Appeals within thirty (30) days of the date of entry of this Order. *See* Fed. R. App. P. 24(a)(5).

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Western District of Tennessee

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Docket Text:
ORDER DENYING [7] MOTION TO TRANSFER SUCCESSIVE HABEAS PETITION, ORDER GRANTING [8] MOTION TO DISMISS UNTIMELY ORDER DENYING CERTIFICATE OF APPEALABILITY, ORDER CERTIFYING APPEAL NOT TAKEN IN GOOD FAITH, AND ORDER DENYING LEAVE TO PROCEED IN FORMA PAUPERIS ON APPEAL. Signed by Judge Mark S. Norris on 10/27/2021. (Norris, Mark)

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