



IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

A True Copy
Certified order issued May 08, 2018

Jyle W. Cayce
Clerk, U.S. Court of Appeals, Fifth Circuit

No. 17-10826

GREGORY DEAN BANISTER,

Petitioner-Appellant

v.

LORIE DAVIS, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL
JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION,

Respondent-Appellee

Appeal from the United States District Court
for the Northern District of Texas

O R D E R:

Gregory Dean Banister, Texas prisoner # 1265563, was convicted by a jury of aggravated assault with a deadly weapon and sentenced to 30 years of imprisonment. He filed a 28 U.S.C. § 2254 application asserting numerous claims, which the district court denied on the merits. Banister now moves for issuance of a certificate of appealability (COA) with respect to 12 issues rejected by the district court: (1) ineffective assistance of counsel (IAC) based on appellate counsel's failure to challenge the legal and factual sufficiency of the evidence; (2) IAC based on trial counsel's failure to move for a directed verdict; (3) IAC based on trial counsel's failure to move to strike expert testimony; (4) IAC based on appellate counsel's failure to challenge an unsupported statement by the prosecutor in closing argument; (5) IAC based

No. 17-10826

on appellate counsel's failure to raise the denial of a lesser-included offense instruction on the offense of deadly conduct; (6) IAC based on trial counsel's failure to properly request a lesser-included offense instruction on the offense of reckless driving; (7) IAC based on trial counsel's failure to object to the trial court's limiting instruction; (8) IAC based on appellate counsel's failure to challenge the limiting instruction; (9) constructive or actual denial of appellate counsel based on the failure to include the jury charge in the appellate record; (10) admission of an incriminating statement in violation of the Fifth and Sixth Amendments; (11) denial of due process and a fair trial based on a juror's affidavit regarding the basis for her verdict; and (12) cumulative error.

To obtain a COA, a prisoner must make "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). "A petitioner satisfies this standard by 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). If a district court has rejected the claims on their merits, the movant "must demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000). This court must decide whether to grant a COA "without full consideration of the factual or legal bases adduced in support of the claims" and without deciding the merits of the appeal. *Buck v. Davis*, 137 S. Ct. 759, 773 (2017) (internal quotation marks and citation omitted).

The court has an independent duty to examine whether it has jurisdiction over an appeal. *Crone v. Cockrell*, 324 F.3d 833, 836 (5th Cir. 2003). Banister is seeking a COA that would allow him to appeal the district court's denial of his § 2254 petition. Filing a timely notice of appeal within

No. 17-10826

thirty days of entry of judgment is a jurisdictional prerequisite. 28 U.S.C. § 2107(a); *Hamer v. Neighborhood Hous. Servs.*, 138 S. Ct. 13, 16–17 (2017) (“[A]n appeal filing deadline prescribed by statute will be regarded as ‘jurisdictional,’ meaning that late filing of the appeal notice necessitates dismissal of the appeal.”). Judgment on Banister’s petition was entered by the district court on May 15, 2017. Banister filed his notice of appeal on July 20, 2017—66 days later. The notice of appeal was not filed within thirty days, so we lack jurisdiction unless there was a reason the time to file was extended.

Banister timely filed a Rule 59(e) motion, which could extend the time for filing a notice of appeal until the entry of an order disposing of the motion. Fed. R. App. P. 4(a)(4)(A)(iv). However, a Rule 59(e) motion that “add[s] a new ground for relief” or “attacks the federal court’s previous resolution of the claim on the merits” is construed as a successive habeas petition “since alleging that the court erred in denying habeas relief on the merits is effectively indistinguishable from alleging that the movant is, under the substantive provisions of the statutes, entitled to habeas relief.” *Williams v. Thaler*, 602 F.3d 291, 302 (5th Cir. 2010) (quoting *Gonzalez v. Crosby*, 545 U.S. 524, 531–32 (2005)). A successive habeas petition filed in the district court is not among the motions that extends the time to file a notice of appeal. Fed. R. App. P. 4(a)(4)(A).

Here, Banister does not seek a COA on the denial of his Rule 59(e) motion but instead seeks to appeal the district court’s reasoning in denying his initial § 2254 petition. Moreover, Banister’s Rule 59(e) motion merely attacked the merits of the district court’s reasoning in denying the § 2254 petition and is properly characterized as successive petition. Because the Rule 59(e) motion was a successive petition, it did not toll the period for timely filing a notice of appeal. Fed. R. App. P. 4(a)(4)(A); *Uranga v. Davis*, 879 F.3d 646, 648 (5th Cir.

No. 17-10826

2018) (“[A] purported Rule 59(e) motion that is, in fact, a second or successive § 2254 application is subject to the restrictions of the Antiterrorism and Effective Death Penalty Act (“AEDPA”) and would not toll the time for filing a notice of appeal.”); *Williams*, 602 F.3d at 303–04 (“[W]e do not believe that a habeas petitioner should have the opportunity to circumvent AEDPA’s jurisdictional bar on second or successive applications based on little more than the petitioner’s ability to [timely file a Rule 59(e) motion].”). As such, even if Banister’s petition for a COA were construed as seeking a COA on the district court’s denial of his Rule 59(e) motion, we would lack jurisdiction because the Rule 59(e) motion is a successive habeas petition that did not extend the notice of appeal filing period.

We DENY Banister’s petition for a COA because we lack jurisdiction over the appeal.

/s/Jennifer Walker Elrod
JENNIFER WALKER ELROD
UNITED STATES CIRCUIT JUDGE