

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

FILED
United States Court of
Appeals
Tenth Circuit

April 26, 2021

Christopher M. Wolpert
Clerk of Court

TONY PRECILIAND OVERTON,

Petitioner - Appellant,

v.

SCOTT CROW, Interim Director,

Respondent - Appellee.

No. 20-6180
(D.C. No. 5:19-CV-00598-F)
(W.D. Okla.)

ORDER

Before **BACHARACH**, Circuit Judge, **LUCERO**, Senior Circuit Judge, and **MORITZ**, Circuit Judge.

This appeal arises from convictions in an Oklahoma state court for first-degree murder, first-degree burglary, and robbery with a dangerous weapon. Petitioner Mr. Tony Precilian Overton sought habeas relief, and the magistrate judge recommended denial of relief. Mr. Overton didn't object, and the district judge adopted the recommendation to deny habeas relief. Mr. Overton wants to appeal.

I. Mr. Overton seeks leave to reopen the time to appeal.

But he waited too long. Over three months after expiration of the deadline to appeal, Mr. Overton moved to reopen the time for appeal. He

acknowledged notice of the magistrate judge's report and recommendation.

But he stated that

- he had not known that he could appeal the district court's ruling,
- he could no longer get help from another inmate law clerk, who had transferred to another facility, and
- he had only limited access to legal resources.

In the alternative to reopening the time for appeal, Mr. Overton asked for an opportunity to object to the magistrate judge's report and recommendation.

II. The district court denies Mr. Overton's motion to reopen.

The district court denied the request to reopen the time for appeal, reasoning that Mr. Overton had not disputed notice of the order that he wanted to appeal.

The district court also denied Mr. Overton's alternative request to allow objections to the magistrate judge's report and recommendation, reasoning that such objections amounted to a second or successive habeas petition. *See In re Cline*, 531 F.3d 1249, 1251 (10th Cir. 2008).

III. We deny Mr. Overton's applications for a certificate of appealability and leave to object to the report and recommendation.

Mr. Overton can appeal the district court's denial of his request to reopen only if he obtains a certificate of appealability. 28 U.S.C.

§ 2253(c)(1)(A). To obtain the certificate, Mr. Overton must show that

jurists of reason could reasonably debate (1) the correctness of the denial of the motion to reopen the time for appeal and (2) the merits of the constitutional claims. *See Dulworth v. Jones*, 496 F.3d 1133, 1137–38 (10th Cir. 2007).

In his appellate brief, Mr. Overton

- denies earlier knowledge that he could appeal the denial of his habeas petition and
- argues that the Covid-19 pandemic had deprived him of assistance with legal research that would have informed him of his appeal rights.

Mr. Overton has not justified a certificate of appealability. If a party receives notice of an order or judgment within 21 days of entry, Federal Rule of Appellate Procedure 4(a)(6) prevents an extension of the time to appeal. *See Ogden v. San Juan County*, 32 F.3d 452, 455 (10th Cir. 1994). Mr. Overton has acknowledged receipt of the required notice. So the district court could not extend the time to file a notice of appeal.

Mr. Overton contends that he did not understand his appeal rights and lacked access to legal assistance. But he needed to comply with the same procedural requirements that apply to all litigants. *Kay v. Bemis*, 500 F.3d 1214, 1218 (10th Cir. 2007). For all litigants, there is “no latitude on the clear and restrictive language of Rule 4(a)(6).” *Clark v. Lavallie*, 204 F.3d 1038, 1041 (10th Cir. 2000).

We also reject Mr. Overton’s alternative request to object to the magistrate judge’s report and recommendation. That request involves merits-based challenges to his state–court convictions. The district court has already addressed those challenges, so Mr. Overton cannot raise them again now. See 28 U.S.C. § 2244(b)(1); *In re Rains*, 659 F.3d 1274, 1275 (10th Cir. 2011).

* * *

We decline to issue a certificate of appealability on Mr. Overton’s challenge to the district court’s denial of his motion to reopen the time to appeal, and we dismiss that matter. We construe Mr. Overton’s request to submit objections to the magistrate’s report and recommendation as an application for leave to file a second or successive habeas petition, and we deny that application.

Though we dismiss the matter and deny the request for leave to object to the report and recommendation, we note that Mr. Overton cannot afford to prepay the filing fee. So we grant his motion for leave to proceed in forma pauperis.

Entered for the Court

Robert E. Bacharach
Circuit Judge