FILED
United States Court of Appeals
Tenth Circuit

July 30, 2021

Christopher M. Wolpert
Clerk of Court

UNITED STATES COURT OF APPEALS

TENTH CIRCUIT

AZLEN ADIEU FARQUOIT MARCHET,

Petitioner - Appellant,

v.

ROBERT POWELL,*

Respondent - Appellee.

No. 19-4077
(D.C. No. 2:19-cv-00115-JNP)
(D. Utah)

ORDER DENYING CERTIFICATE OF APPEALABILITY**

Before **HOLMES**, **BACHARACH**, and **MORITZ**, Circuit Judges.

Proceeding pro se,[1] state prisoner Azlen Adieu Farquoit Marchet appeals from the district court's denial of his petition for a writ of habeas corpus filed

* Pursuant to Fed. R. App. P. 43(c)(2), Robert Powell is substituted as Respondent-Appellee for Larry Benzon, former warden of the Utah State Prison.

** This Order is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. It may be cited, however, for its persuasive value consistent with Fed. R. App. P. 32.1 and 10th Cir. R. 32.1.

1 Because Mr. Marchet is proceeding *pro se*, we construe his filings liberally, *Erickson v. Pardus*, 551 U.S. 89, 94 (2007) (per curiam); *accord Garza v. Davis*, 596 F.3d 1198, 1201 n.2 (10th Cir. 2010), but "we will not 'assume the role of advocate,'" *United States v. Parker*, 720 F.3d 781, 784 n.1 (10th Cir. 2013) (quoting *Yang v. Archuleta*, 525 F.3d 925, 927 n.1 (10th Cir. 2008)).

pursuant to 28 U.S.C. § 2254. Mr. Marchet seeks a certificate of appealability ("COA") and moves for leave to proceed *in forma pauperis* ("IFP") on appeal.

Exercising jurisdiction under 28 U.S.C. § 1291, we **deny** Mr. Marchet's COA application and **dismiss** this matter. We also **deny** his IFP motion.

I

Following a jury trial, Mr. Marchet was convicted for the 2003 rape of S.W., a woman he knew through her place of employment. A state district court sentenced him to a prison term of five years to life, to be served consecutively with any other prison terms that he was then serving. Mr. Marchet filed a motion for a new trial alleging: (1) ineffective assistance of counsel and (2) that the jury had used testimony of two witnesses for the improper purpose of evaluating his character. The state district court denied Mr. Marchet's motion for a new trial. He then appealed his conviction to the Utah Court of Appeals, where he raised the same arguments. The Utah Court of Appeals affirmed the state district court's rulings. Thereafter, both the Utah Supreme Court and the U.S. Supreme Court denied certiorari and declined to hear Mr. Marchet's appeal.

On February 20, 2019, Mr. Marchet filed a one-page § 2254 habeas petition in the United States District Court for the District of Utah. That petition underlies this appeal. In it, Mr. Marchet clearly stated that the petition was an "abridged petition" that would ultimately be "amended"—but, supposedly because

of the "time sensitive nature of a federal filing," he only alleged cursorily four "generic grounds" for relief: "[(1)] [i]n[e]ffective [a]ssistance of counsel[,] [(2)] prosecutor misconduct[,] [(3)] false forensic testimony[,] and [(4)] [R]ule 404(b) violations." R. at 4 (§ 2254 Pet., filed Feb. 20, 2019). Mr. Marchet acknowledged that he had "filed a similar [p]etition 4 months ago." *Id.* During the approximately two-month period that followed, however, Mr. Marchet did not file an amended petition in this action. And, there was no amended petition on file when the district court decided to dismiss Mr. Marchet's bare-bones petition.

Specifically, on April 16, 2019, the district court dismissed Mr. Marchet's § 2254 petition as duplicative. It found that, in addition to the petition before it, Mr. Marchet had previously filed with the Utah federal district court two other habeas petitions—specifically, in "case numbers 2:18-CV-577-TS and 2:18-CV-578-TC"—that were still pending before two other district judges. R. at 7 (Dismissal Order, filed April 16, 2019). Because both of the other cases had outstanding orders for Mr. Marchet to cure deficiencies, the court determined that Mr. Marchet could include any additional information from the instant case in either pending petition. Accordingly, the petition underlying this appeal was dismissed as duplicative.

Yet, Mr. Marchet pressed forward, submitting six additional filings with the district court. These motions sought various kinds of relief including the

following: reinstatement of his case, on the ground that he had filed an amended petition; appointment of counsel; and some form of setting aside of the judgment, pursuant to Federal Rule of Civil Procedure 60(b), under the view that the court mistakenly interpreted the initial § 2254 petition as duplicative of other similar petitions on file, because in actuality those petitions related to other state cases and different issues. Notably, Mr. Marchet never attached his purported amended petition to any of these post-dismissal filings.

In one order, the district court denied all of Mr. Marchet's post-dismissal motions. It noted that an amended petition was never filed, and had Mr. Marchet "ever filed an amended petition or given any hint of how this petition involves a different issue or conviction than any of his other petitions in other cases in this Court, this Court would have been clear that the petition here is not duplicative of other of Petitioner's cases and recognize there was a mistake." R. at 30–31 (Mem. Decision & Order Den. Post-J. Mots., filed January 14, 2020). Yet, because "almost a year ha[d] passed since [Mr. Marchet] first filed his petition here and [Mr. Marchet] ha[d] still never tried to file an amended petition nor suggest[ed] what may be different about this case than any of his others," the court felt justified in concluding that it had made no mistake—that is to say, Mr. Marchet's petition was properly deemed duplicative. *Id*. at 31. Mr. Marchet's motions were thus denied.

Mr. Marchet timely filed a notice of appeal, seeking the issuance of a COA to challenge the court's dismissal of his habeas action. Mr. Marchet has attached to his appellate brief a petition that is purportedly his amended § 2254 petition.

II

A

Mr. Marchet must obtain a COA to appeal from the district court's denial of his habeas petition. *See* 28 U.S.C. § 2253(c)(1)(A); *Clark v. Oklahoma*, 468 F.3d 711, 713 (10th Cir. 2006) ("A COA is a jurisdictional pre-requisite to our review." (citing *Miller-El v. Cockrell*, 537 U.S. 322, 323 (2003))). We will issue a COA only if Mr. Marchet makes a "substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). In its seminal decision, *Slack v. McDaniel*, the Supreme Court shed light on the showing required to satisfy this statutory standard:

> Where a district court has rejected the constitutional claims on the merits, the showing required to satisfy § 2253(c) is straightforward: The petitioner must demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong.

529 U.S. 473, 484 (2000).

As *Slack* made clear, however, a prisoner's showing is "somewhat more complicated where, as here, the district court dismisses the petition based on procedural grounds." *Id.* In that circumstance, "[the petitioner] must demonstrate

both that 'jurists of reason would find it debatable whether the petition 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." *Clark*, 468 F.3d at 713 (emphases added) (quoting *Slack*, 529 U.S. at 484); *accord Winn v. Cook*, 945 F.3d 1253, 1257 (10th Cir. 2019).

"Rather than addressing these two threshold requirements in order, we may 'resolve the issue whose answer is more apparent from the record and arguments.'" *Frost v. Pryor*, 749 F.3d 1212, 1230–31 (10th Cir. 2014) (quoting *Slack*, 529 U.S. at 485). And we conclude that the proper resolution of the district court's procedural disposition here is readily apparent. After we reach the procedural issue, we need go no further because that resolution dooms Mr. Marchet's request for a COA. *See, e.g.*, *Woodward v. Cline*, 693 F.3d 1289, 1292 (10th Cir. 2012) ("Where a plain procedural bar is present and the district court is correct to invoke it to dispose of the case, a reasonable jurist could not conclude either that the district court erred in dismissing the petition or that the petitioner should be allowed to proceed further." (quoting *Slack*, 529 U.S. at 484)).

In particular, we conclude that reasonable jurists would not debate the district court's determination that Mr. Marchet's petition was duplicative and subject to dismissal on that basis. Mr. Marchet had filed two other habeas petitions with the court that were pending when the court dismissed his instant

petition, and Mr. Marchet never clarified—through the filing of the promised amended petition or otherwise—how the instant petition was different from the others. Indeed, Mr. Marchet himself characterized the instant petition as similar to the one he had filed with the court four months prior.

Moreover, notwithstanding Mr. Marchet's contrary post-dismissal assertions to the district court, the record clearly shows that Mr. Marchet never filed an amended petition with the court before it dismissed the petition. Indeed, if Mr. Marchet believed that the court was confused regarding this, he could have easily dispelled the confusion by attaching a file-stamped copy of his amended petition to any one of his six post-dismissal filings. But he did not do so. Accordingly, the only petition before the court when it dismissed this action was Mr. Marchet's bare-bones, one-page submission of February 20, 2019—a document that shed no light on any ostensible differences between it and Mr. Marchet's two other habeas petitions pending in the same court.

Thus, for all of the reasons discussed, we conclude that reasonable jurists would not debate the district court's determination that the instant petition was duplicative of the other petitions that Mr. Marchet already had filed and, consequently, that it should be dismissed.[2]

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[2] Indeed, documents in the district court's files after Mr. Marchet filed the instant notice of appeal would only reinforce the soundness of this conclusion—in particular, revealing in explicit terms the overlap between the petitions. Recall that in the district court's dismissal order, it identified Mr.

Finally, we acknowledge that Mr. Marchet presents on appeal—as an attachment to his brief—what he represents to be his (promised) amended § 2254 petition. However, in light of our careful review of the district court record, it is clear to us that this document was never presented to the district court. Therefore, it could not possibly have entered into the court's decisional calculus, and reasonable jurists would not consider it now. *See, e.g.*, *Needham v. Utah*, 763

Marchet's two other pending petitions—that is, "in case numbers 2:18-CV-577-TS and 2:18-CV-578-TC." R. at 7. In a subsequent order, filed on September 29, 2020, in responding to Mr. Marchet's post-judgment protestations, the district court clarified that the instant petition and the two other petitions pending in the Utah federal court at the time of the dismissal order all sought to challenge a criminal judgment in the *same* state court case, No. 051903260. *See* Dist. Ct. Mem. Decision & Order Den. Post-J. Mots., Case No. 2:19-cv-00115-JNP, ECF No. 29, at 2–3 (D. Utah Sept. 29, 2020) ("September 29 Order"). Indeed, one of those two district court cases was still pending when the court entered its September 29 Order. *See* September 29 Order at 2 (noting that the state district court case number in the § 2254 petition before it—case number 051903260—was the "very same state criminal case [] being challenged . . . and still pending decision" in another Utah federal district court case); *id.* at 3 ("The state district court case number on the petition filed in [Utah district court] Case No. 2:19-CV-394 TS also reads '051903260.'"). The court's September 29 Order was entered post-judgment—after Mr. Marchet filed the instant appeal—and we accordingly lack jurisdiction to review any issues related to it. Nevertheless, we do take judicial notice of the September 29 Order because it provides detailed insight into the confusing circumstances regarding Mr. Marchet's filing of multiple habeas actions. *See, e.g.*, *United States v. Ahidley*, 486 F.3d 1184, 1192, n.5 (10th Cir. 2007) ("[W]e may exercise our discretion to take judicial notice of publicly-filed records in our court and certain other courts concerning matters that bear directly upon the disposition of the case at hand."). Our resolution of Mr. Marchet's request for COA, however, does not depend on the information in this order. Reasonable jurists would not debate that, based on the information before it, the district court made the correct decision in dismissing Mr. Marchet's action as duplicative.

F. App'x 753, 756 (10th Cir. 2019) (unpublished) ("Because [the petitioner] improperly relies on materials outside of the record to challenge the district court's decision, he has failed to show that reasonable jurists could debate the district court's resolution of his Rule 60(b) claim."); *United States v. Gerhartz*, 303 F. App'x 601, 604 (10th Cir. 2008) (unpublished) ("The difficulty is that, when considering whether to issue a COA, we are instructed to review only whether the district court's decision was arguably incorrect. And we fail to see how the district court could have been wrong not to consider arguments or evidence not presented to it." (citation omitted)); *see also Boone v. Carlsbad Bancorporation, Inc.*, 972 F.2d 1545, 1549 n.1 (10th Cir. 1992) (declining to consider plaintiffs' "first amended complaint" that was "[a]ppended to their opening brief" to provide "a supplemental statement of facts . . . . because it was not before the district court when the various rulings at issue were made").

In sum, reasonable jurists would not debate the district court's determination that Mr. Marchet's one-page § 2254 petition was duplicative of his two prior § 2254 petitions and that, consequently, his § 2254 petition should be dismissed. Accordingly, insofar as Mr. Marchet seeks a COA to challenge this dismissal, we deny it.

B

We also deny Mr. Marchet's IFP motion. To proceed IFP, among other things, Mr. Marchet must be able to show "the existence of a reasoned, nonfrivolous argument on the law and facts in support of the issues raised on appeal." *Watkins v. Leyba*, 543 F.3d 624, 627 (10th Cir. 2008) (quoting *McIntosh v. U.S. Parole Comm'n*, 115 F.3d 809, 812 (10th Cir. 1997)). It is patent to us that Mr. Marchet has not made this showing. Accordingly, we deny his IFP motion. *See, e.g.*, *Jimenez v. Utah*, 665 F. App'x 657, 660 (10th Cir. 2016) (unpublished) (denying IFP request when the petitioner failed to include any "meaningful legal analysis" about the district court's order).

III

For the foregoing reasons, we rule as follows: to the extent that Mr. Marchet seeks to challenge on appeal the district court's dismissal of his § 2254 action, we **DENY** a COA and **DISMISS** this matter; additionally, we **DENY** Mr. Marchet's motion to proceed IFP.

ENTERED FOR THE COURT

Jerome A. Holmes
Circuit Judge