FILED
United States Court of Appeals
Tenth Circuit

June 27, 2023

Christopher M. Wolpert
Clerk of Court

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

GABRIEL SOLIS,

Petitioner - Appellant,

v.

WILLIAM RANKINS, Warden,

Respondent - Appellee.

No. 23-6016
(D.C. No. 5:22-CV-01037-D)
(W.D. Okla.)

ORDER DENYING CERTIFICATE OF APPEALABILITY[*]

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

Gabriel Solis, an Oklahoma prisoner proceeding pro se,[1] seeks a certificate of appealability (COA) to challenge the district court's order dismissing his 28 U.S.C. § 2254 habeas petition as untimely. Because Solis makes no argument suggesting that reasonable jurists could debate the district court's ruling, we deny his COA request and dismiss this matter.

Solis pleaded guilty to one count of child abuse or, in the alternative, enabling child abuse, and the state court sentenced him to 45 years in prison. In July 2016, the

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[*] This order is not binding precedent except under the doctrines of law of the case, res judicata, and collateral estoppel. But it may be cited for its persuasive value. *See* Fed. R. App. P. 32.1(a); 10th Cir. R. 32.1(A).

[1] Although we liberally construe Solis's pro se filings, we do not act as his advocate or create arguments on his behalf. *See Yang v. Archuleta*, 525 F.3d 925, 927 n.1 (10th Cir. 2008).

OCCA denied Solis's petition for certiorari, thereby affirming his conviction and sentence. Over five years later, Solis sought postconviction relief in state court; the lower court denied relief, and the OCCA affirmed.

In December 2022, Solis filed the underlying federal habeas petition, asserting that his 45-year sentence violates the Eighth Amendment because it exceeds the applicable statutory maximum sentence.[2] A magistrate judge recommended dismissing the petition as untimely. The magistrate judge determined that Solis's one-year deadline for filing a federal habeas petition began to run in October 2016, at the expiration of the time to seek United States Supreme Court review of the OCCA's July 2016 decision. *See* 28 U.S.C. § 2244(d)(1)(A) (providing that one-year deadline begins to run on "the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review"); Sup. Ct. R. 13.1 (providing 90-day window for seeking certiorari review at the Supreme Court). The magistrate judge also found no grounds supporting statutory tolling, equitable tolling, or the actual-innocence exception.

Reviewing de novo, the district court overruled Solis's objections and adopted the recommendation in full. In particular, it rejected Solis's argument that his one-year deadline began to run not in October 2016 but instead in December 2022, on the date that

[2] In support of this claim, Solis invoked Okla. Stat. tit. 21, § 843.1, which addresses "abuse" committed by a "caretaker" and carries a ten-year statutory maximum. This statute is listed as Solis's statute of conviction on the state-court docket sheet and in his October 2015 judgment. But other state-court documents—including the OCCA's 2016 decision—refer to Solis's statute of conviction as Okla. Stat. tit. 21, § 843.5, which addresses "child abuse" and carries a statutory maximum of life in prison. This discrepancy does not impact our analysis here.

he says he finished serving the alleged 10-year statutory maximum sentence and accordingly became aware of his claim for unlawful confinement. *See* § 2244(d)(1)(D) (providing that one-year deadline can run from "the date on which the factual predicate of the claim . . . could have been discovered through the exercise of due diligence"). The district court reasoned that, contrary to Solis's position, the factual basis for his unlawful-confinement claim originated "when the allegedly unauthorized sentence was imposed." R. 231. It therefore dismissed Solis's petition as untimely and declined to issue a COA.

Solis now requests a COA from this court, seeking to challenge the dismissal of his habeas petition. *See* 28 U.S.C. § 2253(c)(1)(A). We will grant a COA if Solis can "show[], at least, 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." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000) (emphasis added). If we conclude that reasonable jurists would not debate the district court's procedural ruling, we need not address the constitutional question. *Id.* at 485.

Solis's combined opening brief and COA application does not challenge the district court's procedural ruling that his petition is untimely. He has accordingly waived any argument that reasonable jurists could debate that ruling. *See United States v. Springfield*, 337 F.3d 1175, 1178 (10th Cir. 2003) (finding waiver where petitioner "failed to address . . . claim in either his application for a COA or his brief on appeal"); *Patterson v. Jones*, 419 F. App'x 857, 859 (10th Cir. 2011) (finding waiver where petitioner "fail[ed] to discuss the district court's resolution of any of his habeas claims,

much less explain how reasonable jurists could debate the correctness of the court's decision).[3] We therefore deny his COA request and dismiss this appeal.

Entered for the Court

Nancy L. Moritz
Circuit Judge

[3] We find this unpublished case persuasive. *See* Fed. R. App. P. 32.1(a); 10th Cir. R. 32.1(A).