In the

United States Court of Appeals

For the Eleventh Circuit

No. 20-10993

TONY BARKSDALE,

Petitioner-Appellant,

versus

ATTORNEY GENERAL, STATE OF ALABAMA,
COMMISSIONER, ALABAMA DEPARTMENT OF CORRECTIONS,
WARDEN, HOLMAN CORRECTIONAL FACILITY,

Respondents-Appellees.

Appeal from the United States District Court
for the Middle District of Alabama
D.C. Docket No. 3:08-cv-00327-WKW-CSC

ON MOTION FOR RECONSIDERATION OF THE DENIAL OF APPLICATION FOR A CERTIFICATE OF APPEALABILITY

Before LAGOA, and ED CARNES, Circuit Judges.

ORDER:

Before us is Petitioner-Appellant Tony Barksdale's amended motion to reconsider the denial in full of a certificate of appealability (COA), which was entered by order of a single judge of this Court on June 29, 2020, in Barksdale's appeal from the district court's denial of his 28 U.S.C. § 2254 petition.[1] The motion to reconsider is granted in part.

The claims that are involved in this appeal, the district court's rulings, the applicable law and record facts, Barksdale's contentions, and other matters involving the issues arising from those claims are discussed in the previously entered, single-judge order denying a COA. We will not reiterate them here. We will,

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[1] The initial order denying the application for a COA was entered by a single judge, as permitted by Federal Rule of Appellate Procedure 22(b)(2) and 11th Circuit Rule 22-1(c). As also permitted by Rule 22-1(c), petitioner filed a motion for reconsideration of that denial, which went to the panel. Thereafter, one of the three judges who was on the panel retired from judicial service. Petitioner later filed an amended motion for reconsideration of the denial of a COA, which also went to the panel. That is the motion before us now, and it is being ruled on by quorum, as permitted by 28 U.S.C. § 46(d) ("A majority of the number of judges authorized to constitute a court or panel thereof, as provided in paragraph (c), shall constitute a quorum.").

however, revise or correct that earlier order's statement of the COA standard, and we will apply the correct standard here. As a result, and we will also modify the result to grant a COA on the claim of ineffective assistance of counsel at the sentence stage.

A COA may issue "only if the applicant has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). That inquiry "is not coextensive with a merits analysis," and in deciding whether a COA should issue a court of appeals may not rule on the merits of the case. *Buck v. Davis*, 137 S. Ct. 759, 773–74 (2017). "At the COA stage, the only question is whether the applicant has shown 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.'" *Id.* at 773 (quoting *Miller–El v. Cockrell,* 537 U.S. 322, 327 (2003)).

This threshold question should be decided without "full consideration of the factual or legal bases adduced in support of the claims." *Miller–El*, 537 U.S. at 336. Deciding the merits of a claim in ruling on an application for a COA "place[s] too heavy a burden on the prisoner at the COA stage," *Buck*, 137 S. Ct. at 774 (emphasis omitted), and § 2253(c) forbids doing it, *Miller–El*, 537 U.S. at 336. It's too heavy a burden at the threshold because "a claim can be debatable even though every jurist of reason might agree, after the COA has been granted and the case has received full consideration, that petitioner will not prevail." *Buck*, 137 S. Ct. at 774 (quoting *Miller–El,* 537 U.S. at 338).

Where a district court has denied a constitutional claim not only for lack of merit but also on procedural bar grounds, a petitioner must also show 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 same strictures that apply to the application of the COA standard to merits denials also apply to denials of claims based on procedural bar holdings. Courts of appeal are not to collapse the issue of whether the district court's procedural ruling is debatable with the issue of whether it is correct. If jurists of reason could disagree with a district court's procedural ruling, as well as its substantive ruling, a COA should be granted on the claim.

Accordingly, we vacate the parts of the June 29, 2020 order that concluded the claims for which Barksdale seeks a COA lack merit or that the procedural bar holdings of the district court were correct. Applying the proper COA standard, we conclude instead that Barksdale has not shown that jurists of reason could disagree with or find debatable or deserving of encouragement to proceed further any of the claims and issues for which he is seeking a COA, except for one. Jurists of reason could disagree with or find debatable or deserving of encouragement to proceed further his ineffective assistance of counsel regarding sentencing claim. Only that claim. We will grant a COA for it alone.

Petitioner's motion for reconsideration is granted to the extent that we have reconsidered whether a COA should be granted under the correct standard as to each of the claims for which he

seeks one. Having done that, we deny a COA for all of those claims except the ineffective assistance of counsel regarding the sentence claim. For that claim alone, a COA is granted. As to all of the other claims, a COA is denied.[2]

This Court's review of the district court's judgment will be restricted to the sentence stage ineffective assistance of counsel claim, and in any brief petitioner files hereafter he may not argue any other claim or issue. He may not, for example, argue his claim of ineffective assistance of counsel at the guilt stage. *Newland v.*

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[2] The claims relating to the trial and sentence proceeding for which petitioner sought a COA are that: he received ineffective assistance of counsel at the guilt stage; he received ineffective assistance of counsel at the penalty stage; the trial judge unconstitutionally determined that aggravating circumstances outweighed mitigating ones and that a death sentence was warranted "without regard to the jury's findings of fact"; a "proper jury instruction on age as a mitigating circumstance" was unconstitutionally denied; and a capital sentence was imposed without a unanimous jury recommendation. Petitioner's Application for a Certificate of Appealability at 9–10.

The petitioner also asked for a COA on a claim that related solely to the state court collateral proceeding. As his COA application phrased it:

> In the State habeas proceedings, the adoption of the prosecution's proposed findings of fact and conclusions of law in their entirety, coupled with other evidence that the judge did not reach independent determinations but simply accepted whatever the Attorney General put in front of him, also demonstrated that Petitioner was denied his right to a constitutionally proper collateral review.

Id. at 10.

Hall, 527 F.3d 1162, 1166 n.4 (11th Cir. 2008) (A COA granted on the issue of sentencing stage ineffective assistance does not cover any guilt stage ineffective assistance claim or issue); *see also Spencer v. Sec'y, Dep't of Corr.*, 609 F.3d 1170, 1180 (11th Cir. 2010) ("It is abundantly clear that 'our review is restricted to the issues specified in the certificate of appealability.'"); *Hodges v. Att'y Gen., State of Fla.*, 506 F.3d 1337, 1340–41 (11th Cir. 2007) (explaining that "there would be little point in Congress requiring specification of the issues for which a COA was granted if appellate review was not to be limited to the issues specified.") (quoting *Murray v. United States*, 145 F.3d 1249, 1250 (11th Cir. 1998)); *Rivers v. United States*, 777 F.3d 1306, 1308 n.1 (11th Cir. 2015) (Claims outside the scope of the COA "are not at issue" in the appeal.); *Murray*, 145 F.3d at 1250–51 (Consistent with prior decisions, "and with the obvious import of § 2253(c)(3), we hold that in an appeal brought by an unsuccessful habeas petitioner, appellate review is limited to the issues specified in the COA.").

We have formally stricken parts of a petitioner's brief that addresses claims or issues not covered by the COA. *See Hodges*, 506 F.3d at 1340–41 (striking the part of a petitioner's brief addressing an issue for which no COA was granted because the petitioner had "flout[ed] the clear COA order limiting the issues that could be briefed on the merits"); *Castillo v. United States*, 816 F.3d 1300, 1306 (11th Cir. 2016) (striking the portions of the petitioner's briefs that addressed an issue beyond the scope of the COA).

Claims and issues other than the one specified in the COA will not be addressed or decided by this Court. *Presnell v. Warden*, 975 F.3d 1199, 1227 n.54 (11th Cir. 2020) (refusing to consider on appeal an ineffective assistance of counsel issue different from the one for which a COA had been granted); *Jones v. Sec'y, Fla. Dep't of Corr.*, 906 F.3d 1339, 1341 n.1 (11th Cir. 2018) (refusing to consider the petitioner's issue of equitable tolling since the COA was granted only on the issue of statutory tolling, because "our review is cabined by the COA, so that argument is not properly before us"); *Griffith v. United States*, 871 F.3d 1321, 1329 n.8 (11th Cir. 2017) (refusing to consider "several other contentions" that are "beyond the scope of the COA"); *Denson v. United States*, 804 F.3d 1339, 1341 n.1 (11th Cir. 2015) ("Because this issue is outside the scope of the COA, we do not address it."); *Jordan v. Sec'y, Dep't of Corr.*, 485 F.3d 1351, 1356 (11th Cir. 2007) ("[W]e will not decide any issues involving the actual innocence claim because the law of this circuit prohibits consideration of any issue that was not specified in the COA order."); *Diaz v. Sec'y for Dep't of Corr.*, 362 F.3d 698, 702 (11th Cir. 2004) ("Because the COA in this case was limited to the question of whether equitable tolling enlarged the time period for filing, and not whether an actual innocence claim could equitably toll the statute of limitations, we do not address this issue.").

In conclusion, a certificate of appealability is GRANTED on the sentence stage ineffective assistance of counsel claim and is DENIED on all of the other claims and issues.

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

ELBERT PARR TUTTLE COURT OF APPEALS BUILDING
56 Forsyth Street, N.W.
Atlanta, Georgia 30303

David J. Smith
Clerk of Court

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September 07, 2022

Steven Marc Schneebaum
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Appeal Number: 20-10993-P
Case Style: Tony Barksdale v. Attorney General, State of Ala, et al
District Court Docket No: 3:08-cv-00327-WKW-CSC

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The enclosed order has been ENTERED.

Appellant's brief is **due 40 days** from the date of the enclosed order.

Sincerely,

DAVID J. SMITH, Clerk of Court

Reply to: David L. Thomas
Phone #: (404) 335-6171

MOT-2 Notice of Court Action