

**FILED**  
**United States Court of Appeals**  
**Tenth Circuit**

**UNITED STATES COURT OF APPEALS**

**August 25, 2021**

**FOR THE TENTH CIRCUIT**

**Christopher M. Wolpert**  
**Clerk of Court**

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WILLIAM BUCK RODGERS,

Petitioner - Appellant,

v.

SCOTT CROW, Director,

Respondent - Appellee.

No. 21-5032  
(D.C. No. 4:17-CV-00060-CVE-FHM)  
(N.D. Okla.)

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**ORDER DENYING CERTIFICATE OF APPEALABILITY\***

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Before **MATHESON, MORITZ, and EID**, Circuit Judges.

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William Buck Rodgers, an Oklahoma prisoner proceeding pro se, seeks a certificate of appealability (COA) from the district court’s order denying a motion reconsider in a 28 U.S.C. § 2254 proceeding. We deny a COA and dismiss this appeal.

**I. BACKGROUND & PROCEDURAL HISTORY**

In September 2012, Rodgers shot and killed his across-the-street neighbor during an argument. The state of Oklahoma charged him with first-degree murder. Rodgers argued self-defense but the jury nonetheless convicted. Rodgers received a

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\* This order is not binding precedent except under the doctrines of law of the case, res judicata, and collateral estoppel.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.

sentence of life imprisonment. After exhausting state appellate and postconviction procedures without relief, he filed, through counsel, a 28 U.S.C. § 2254 petition in the United States District Court for the Northern District of Oklahoma. The bulk of his petition argued alleged errors surrounding the self-defense issue.

The district court denied Rodgers’s § 2254 petition and entered judgment on April 1, 2020. More than eight months later (December 28, 2020), Rodgers filed a pro se “Motion For Reconsideration Out Of Time.” R. vol. I at 685. Rodgers reported that he did not learn of the April 1 judgment until he received a letter from his attorney on July 1, 2020, informing him of the judgment and withdrawing as counsel—and that letter was itself dated June 24, 2020, well after entry of judgment. He therefore asked the court to excuse his untimeliness. Then, on the merits, he generally re-argued the self-defense question and asserted new alleged defects in his state criminal proceedings.

The district court found that Rodgers’s motion could not be construed as a Federal Rule of Civil Procedure 59(e) motion because it was filed more than twenty-eight days after judgment. The court instead found that the motion was best understood as a Rule 60(b) motion. So construed, the district court held that it lacked jurisdiction because the motion was, in substance, an unauthorized second or successive § 2254 petition.

In the same order, the district court also considered whether it could construe Rodgers’s motion as a Federal Rule of Appellate Procedure 4(a)(6) motion to reopen the time to file an appeal. But that rule requires the moving party to file a motion

within fourteen days after receiving notice of the judgment or within 180 days of the judgment, whichever comes first. *See* Fed. R. App. P. 4(a)(6)(B). Rodgers filed his motion on December 28, 2020, which is beyond the time permitted under either possibility. Thus, the district court found that it could not reopen the time to appeal.

Rodgers timely filed a notice of appeal from the district court’s order denying his motion to reconsider.

## II. ANALYSIS

This appeal may not proceed unless we grant a COA, *see* 28 U.S.C. § 2253(c)(1)(B), and we may not grant a COA unless Rodgers “ma[kes] a substantial showing of the denial of a constitutional right,” *id.* § 2253(c)(2). This means he “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). And he must make an extra showing in this circumstance because the district court denied his motion to reconsider on procedural grounds, namely, lack of jurisdiction and lack of authority to reopen the time to appeal. So he must also show that “jurists of reason would find it debatable whether the district court was correct in its procedural ruling.” *Id.*

Rodgers offers no argument in this regard. He instead re-argues his underlying claims for relief on the merits. In any event, jurists of reason could not disagree that the district court lacked jurisdiction over the motion to reconsider. We have reviewed that motion and agree that it was, in substance, a second or successive § 2254 petition. *See Spitznas v. Boone*, 464 F.3d 1213, 1215 (10th Cir. 2006) (“[A

Rule] 60(b) motion is a second or successive petition if it in substance or effect asserts or reasserts a federal basis for relief from the petitioner’s underlying conviction.”). “Before a second or successive application . . . is filed in the district court, the applicant shall move in the appropriate court of appeals for an order authorizing the district court to consider the application.” 28 U.S.C. § 2244(b)(3)(A). Because Rodgers never obtained an order of authorization, the district court properly denied the motion for lack of jurisdiction.

Jurists of reason also could not disagree with the district court’s conclusion that it could not reopen Rodgers’s time to appeal. The Federal Rules of Appellate Procedure do not permit reopening where a party waited as long as Rodgers to request that relief. The district court properly declined to take this course.

Rodgers’s opening brief concludes with the following: “[R]ecently under the *McGirt* ruling [*i.e.*, *McGirt v. Oklahoma*, 140 S. Ct. 2452 (2020)], I just discovered that I am a Native American, and am exhausting State remedies as required by law. I ask that you stay this appeal until the State makes its[] ruling.” Aplt. Combined Opening Br. at 27. We deny this request. Assuming Rodgers has or will have a claim for federal habeas relief under *McGirt* (and we express no opinion about that), he must move this court for authorization to file another § 2254 petition in the district court. *See* 28 U.S.C. § 2244(b)(3)(A). A motion for authorization is a separate proceeding, so there is no usefulness in staying this proceeding to await the ripening of some other claim.

### III. CONCLUSION

We deny Rodgers's application for a COA and dismiss this appeal.

Entered for the Court

A handwritten signature in black ink, appearing to read 'C. M. Wolpert', with a long horizontal flourish extending to the right.

CHRISTOPHER M. WOLPERT, Clerk