

UNPUBLISHED

**UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT**

No. 18-6645

ROBERT EDWARD BUTLER,

Petitioner - Appellant,

v.

HAROLD W. CLARKE,

Respondent - Appellee.

Appeal from the United States District Court for the Eastern District of Virginia, at Richmond. John A. Gibney, Jr., District Judge. (3:18-cv-00102-JAG-RCY)

Submitted: October 23, 2018

Decided: October 26, 2018

Before NIEMEYER, KING, and WYNN, Circuit Judges.

Dismissed by unpublished per curiam opinion.

Robert Edward Butler, Appellant Pro Se.

Unpublished opinions are not binding precedent in this circuit.

PER CURIAM:

Robert Edward Butler seeks to appeal the district court's order denying his Fed. R. Civ. P. 60(b) motion for reconsideration of the district court's order denying relief on his 28 U.S.C. § 2254 (2012) petition. The order is not appealable unless a circuit justice or judge issues a certificate of appealability. 28 U.S.C. § 2253(c)(1)(A) (2012); *Reid v. Angelone*, 369 F.3d 363, 369 (4th Cir. 2004). A certificate of appealability will not issue absent "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2) (2012). When the district court denies relief on the merits, a prisoner satisfies this standard by demonstrating that reasonable jurists would find that the district court's assessment of the constitutional claims is debatable or wrong. *Slack v. McDaniel*, 529 U.S. 473, 484 (2000); see *Miller-El v. Cockrell*, 537 U.S. 322, 336-38 (2003). When the district court denies relief on procedural grounds, the prisoner must demonstrate both that the dispositive procedural ruling is debatable, and that the petition states a debatable claim of the denial of a constitutional right. *Slack*, 529 U.S. at 484-85.

We have independently reviewed the record and conclude that Butler has not made the requisite showing. Accordingly, we deny a certificate of appealability, deny leave to proceed in forma pauperis, and dismiss the appeal. We dispense with oral argument because the facts and legal contentions are adequately presented in the materials before this court and argument would not aid the decisional process.

DISMISSED

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Richmond Division

ROBERT EDWARD BUTLER,

Petitioner,

v.

Civil Action No. 3:18CV102

HAROLD W. CLARKE,

Respondent.

MEMORANDUM OPINION

Robert Edward Butler, a Virginia prisoner proceeding *pro se*, filed a petition pursuant to 28 U.S.C. § 2254 (“§ 2254 Petition”). *See Butler v. Young*, No. 3:02CV56, 2002 WL 32925758, at *1 (E.D. Va. July 16, 2002). By Memorandum Opinion and Order entered on July 16, 2002, the Court denied Butler’s § 2254 Petition because it was barred by the applicable one-year statute of limitations. *Id.* at 2.

On February 14, 2018, the Court received from Butler “A Motion under Rule 60(b)” seeking relief under Federal Rule of Civil Procedure 60(b)(6) (“Rule 60(b) Motion,” ECF No. 1).¹ In his Rule 60(b) Motion, Butler requests that the Court vacate the dismissal of his § 2254 Petition due to extraordinary circumstances. (*See id.* at 1, 4.)²

¹ Federal Rule of Civil Procedure 60(b) provides, in pertinent part:

(b) **Grounds for Relief from a Final Judgment, Order, or Proceeding.** On motion and just terms, the court may relieve a party or its legal representative from a final judgment, order, or proceeding for the following reasons:

....
(6) any other reason that justifies relief.

Fed. R. Civ. P. 60(b)(6).

² The Court employs the pagination assigned by the CM/ECF docketing system to Butler’s Rule 60(b) Motion.

A party seeking relief under Federal Rule of Civil Procedure 60(b) must make a threshold showing of “timeliness, a meritorious defense, a lack of unfair prejudice to the opposing party, and exceptional circumstances.” *Dowell v. State Farm Fire & Cas. Auto. Ins. Co.*, 993 F.2d 46, 48 (4th Cir. 1993) (quoting *Werner v. Carbo*, 731 F.2d 204, 207 (4th Cir. 1984)). After a party satisfies this threshold showing, “he [or she] then must satisfy one of the six specific sections of Rule 60(b).” *Id.* (citing *Werner*, 731 F.2d at 207).

Under Federal Rule of Civil Procedure 60(c)(1), Butler was required to file his motion within a reasonable time after the entry of the July 16, 2002 Memorandum Opinion and Order. Fed. R. Civ. P. 60(c)(1) (“A motion under Rule 60(b) must be made within a reasonable time—and for reasons (1), (2), and (3) no more than a year after the entry of the judgment or order or the date of the proceeding.”). Butler’s Rule 60(b) Motion, filed over fifteen years after the entry of the challenged judgment, was not filed in a reasonable time. *See McLawhorn v. John W. Daniel & Co., Inc.*, 924 F.2d 535, 538 (4th Cir. 1991) (“We have held on several occasions that a Rule 60(b) motion is not timely brought when it is made three to four months after the original judgment and no valid reason is given for the delay.” (citing *Cent. Operating Co. v. Utility Workers of Am.*, 491 F.2d 245 (4th Cir. 1974); *Consol. Masonry & Fireproofing, Inc. v. Wagman Constr. Corp.*, 383 F.2d 249 (4th Cir. 1967))). Moreover, “[a] motion under [Rule] 60(b)(6) may not be granted absent ‘extraordinary circumstances.’” *MLC Auto., LLC v. Town of Southern Pines*, 532 F.3d 269, 277 n.5 (4th Cir. 2008) (quoting *Reid v. Angelone*, 369 F.3d 363, 370 (4th Cir. 2004)).

Instead of arguing why his Rule 60(b) Motion should be considered timely, Butler essentially argues that he is entitled to an evidentiary hearing to determine whether this Court properly denied his § 2254 Petition as untimely. (See Rule 60(b) Mot. 2, 5–7.) Thus, Butler fails to offer any persuasive argument as to why this Court should find that his Rule 60(b)(6) was

filed within a reasonable time. *Cf. Fortune v. Clarke*, 712 F. App'x 296, 297 (4th Cir. 2018) (explaining that determination of timeliness of a Rule 60(b) motion is discretionary, not jurisdictional). Butler also fails to demonstrate any such extraordinary circumstances that would warrant vacating the prior dismissal of his § 2254 Petition.³ Accordingly, Butler's Rule 60(b) Motion (ECF No. 1) will be DENIED. A certificate of appealability will be DENIED.

An appropriate Order shall issue.

Date: 5/4/18
Richmond, Virginia

IS/ JAG
John A. Gibney, Jr.
United States District Judge

³ From what the Court can discern, Butler appears to argue in his Rule 60(b) Motion that extraordinary circumstances exist because his § 2254 Petition should not have been subject to the statute of limitations governing federal habeas petitions, or in the alternative, that his lack of habeas counsel excuses the procedural default of his claims under *Martinez v. Ryan*, 566 U.S. 1 (2012). (See Rule 60(b) Mot. 1, 5–7.) Butler also makes reference to the Supreme Court's decision in *Buck v. Davis*, 137 S. Ct. 759 (2017). (*Id.* at 2, 6.) As explained in the denial of Butler's § 2254 Petition, Butler had until April 24, 1997 to file his federal petition for a writ of habeas corpus, but he failed to file any petition for a writ of habeas corpus, state or federal, by that date. *Butler*, 2002 WL 32925758, at *2. Contrary to Butler's apparent belief, the Court did not address whether he had procedurally defaulted his federal habeas claims in the Memorandum Opinion denying his § 2254 Petition. See *id.* Further, the United States Court of Appeals for the Fourth Circuit has held that the Supreme Court's decision in *Martinez v. Ryan* is not an extraordinary circumstance that warrants Rule 60(b) relief. *Moses v. Joyner*, 815 F.3d 163, 168–69 (4th Cir. 2016), cert. denied sub nom. *Moses v. Thomas*, 137 S. Ct. 1202 (2017). Finally, in *Buck v. Davis*, the Supreme Court held, among other things, that extraordinary circumstances existed where a death row inmate demonstrated that his counsel inappropriately provided testimony about the inmate's race at sentencing. *Buck*, 137 S. Ct. at 778. Butler fails to explain, and the Court fails to discern, how *Buck* is relevant in the instant case. Accordingly, Butler fails to demonstrate extraordinary circumstances that warrant vacating the Court's denial of his § 2254 Petition.

**Additional material
from this filing is
available in the
Clerk's Office.**