

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 19-10172



A True Copy
Certified order issued Apr 22, 2019

John W. Cayce
Clerk, U.S. Court of Appeals, Fifth Circuit

BRADY ALAN DANIEL,

Petitioner - Appellant

v.

LORIE DAVIS, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL
JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION,

Respondent - Appellee

Appeal from the United States District Court
for the Northern District of Texas

Before OWEN, HO, and DUNCAN, Circuit Judges.

PER CURIAM:

We remanded this case to the district court because it was unclear from the record whether the petitioner, a pro se prisoner, placed his notice of appeal in the prison mail system on or before January 28, 2019, the last day for filing the notice. The district court ordered the parties to file whatever evidence they had to demonstrate when the notice of appeal was placed in the mail. The Texas Department of Criminal Justice provided authenticated mail logs. The pro se appellant filed a motion in which he requested to be excused from the late filing but failed to state when he actually deposited the appeal in the prison mail system. After reviewing the evidence, the district court found that

APPENDIX C

the notice of appeal was placed in the mail on January 30, 2019. The court's findings are not clearly erroneous. When set by statute, the time limitation for filing a notice of appeal in a civil case is jurisdictional. *Hamer v. Neighborhood Hous. Servs. of Chi.*, 138 S. Ct. 13, 17 (2017); *Bowles v. Russell*, 551 U.S. 205, 214 (2007). The lack of a timely notice mandates dismissal of the appeal. *Robbins v. Maggio*, 750 F.2d 405, 408 (5th Cir. 1985). Accordingly, the appeal is DISMISSED for want of jurisdiction. All pending motions are denied as moot.

Appendix C

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 19-10172

BRADY ALAN DANIEL,

Petitioner - Appellant

v.

LORIE DAVIS, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL
JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION,

Respondent - Appellee

Appeal from the United States District Court
for the Northern District of Texas

Before OWEN, HO, and DUNCAN, Circuit Judges.

PER CURIAM:

This panel previously dismissed the appeal for lack of jurisdiction and denied appellant's motion for a certificate of appealability. The panel has considered Appellant's motion for reconsideration. IT IS ORDERED that the motion is DENIED.

Appendix A

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
SAN ANGELO DIVISION

BRADY ALAN DANIEL,

Appellant,

v.

LORIE DAVIS, Director,
Texas Department of Criminal Justice,
Correctional Institutions Division,

Appellee.

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CIVIL ACTION NO. 6:16-CV-00061-C

USCA No. 19-10172

ORDER

The United States Court of Appeals for the Fifth Circuit remanded this case for a determination of the date Appellant delivered his notice of appeal to prison officials.

In response to this Court's Order dated March 1, 2019, the Texas Department of Criminal Justice ("TDCJ") has provided the Court with an authenticated copy of the outgoing mail logs from the TDCJ Hodge Unit for between January 14, 2019, through February 1, 2019. Appellee notes that the applicable mail logs contain only one entry pertaining to mail sent by Appellant to either this Court or the Fifth Circuit. The Court has reviewed the mail logs and finds that on January 30, 2019, the Hodge Unit mail room received one item of correspondence from Appellant addressed to the Clerk of the United States District Court in San Angelo, Texas.

The Court notes that on March 8, 2019, Appellant filed a "Motion Requesting Acceptance of Appeal," essentially stating that his "near late (untimely) entry of objection to order¹ was caused by need of time and decision to further the appeal process. . . so, time was needed to make the decision to go further in the appeals process, or not [all sic]." Appellant

¹ This refers to Doc. 29, the document that this Court liberally construed as a notice of appeal by Order entered February 8, 2019.

contends that he needed more time to decide whether he would pursue an appeal because he is not a trained professional and has been denied appointment of counsel in this habeas proceeding. Appellant also asserts that he should be excused from the applicable time limit to file his notice of appeal because the December 27, 2018 order denying his petition did not provide him with the deadline to file his appeal. Appellant further states "my appeal was placed in the prison mailing system to be picked up by officials on the deadline of a 30 day time limit that was unexpressed in the denial of Dec.27 2018 [all sic]." Yet that statement does not provide additional clarification of the actual date that he deposited the objection/notice of appeal in the unit mail system, and in any event, the document is not sworn, or an unsworn declaration made under penalty of perjury under 28 U.S.C. § 1746.

As previously noted, it appears that the document construed by this Court as a notice of appeal was logged as received by the unit's mail room on January 30, 2019 – two days after the last day for filing. *See* Fed. R. App. P. 4(c)(1). If Appellant's Motion Requesting Acceptance of Appeal may be very liberally construed as a motion for extension of time to file his notice of appeal, the motion is DENIED. Federal Rule of Appellate Procedure 4(a)(5)(A)(ii) permits a district court to extend the time to file a notice of appeal if the party shows excusable neglect or good cause. Petitioner's explanation for his late filing does not constitute excusable neglect or good cause.

This case is returned to the Fifth Circuit for further proceedings.

SO ORDERED.

Dated March 22, 2019.



SAM R. CUMMINGS
Senior United States District Judge

**IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT**

No. 19-10172

BRADY ALAN DANIEL,

Petitioner - Appellant

v.

LORIE DAVIS, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL
JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION,

Respondent - Appellee

Appeal from the United States District Court
for the Northern District of Texas

Before DAVIS, HIGGINSON, and ENGELHARDT, Circuit Judges.

PER CURIAM:

Pursuant to 28 U.S.C. § 2107(a) and Federal Rule of Appellate Procedure 4(a)(1)(A), the notice of appeal in a civil case must be filed within thirty days of entry of judgment. In this habeas corpus case filed by a state prisoner, the final judgment was entered and certificate of appealability was denied on December 27, 2018. Therefore, the final day for filing a timely notice of appeal was Monday, January 28, 2019, because the thirtieth day was a Sunday. See Fed. R. App. P. 26(a)(1)(C). The petitioner's pro se notice of appeal is dated January 14, 2019, and it is stamped as filed on February 1, 2019. A prisoner's pro se notice of appeal is timely filed if deposited in the institution's internal

No. 19-10172

mail system on or before the last day for filing. *See* FED. R. APP. P. 4(c)(1). As it cannot be determined from the record in this case whether the petitioner delivered the notice of appeal to prison officials for mailing on or before January 28, 2019, the case must be remanded to the district court to make this determination. *See Thompson v. Montgomery*, 853 F.2d 287, 288 (5th Cir. 1988) (per curiam). Upon making this determination, the district court shall return the case to this court for further proceedings, or dismissal, as may be appropriate.

United States Court of Appeals

FIFTH CIRCUIT
OFFICE OF THE CLERK

LYLE W. CAYCE
CLERK

TEL. 504-310-7700
600 S. MAESTRI PLACE
NEW ORLEANS, LA 70130

February 27, 2019

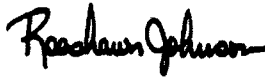
MEMORANDUM TO COUNSEL OR PARTIES LISTED BELOW:

No. 19-10172 Brady Daniel v. Lorie Davis, Director
USDC No. 6:16-CV-61

Enclosed is an order entered in this case.

Sincerely,

LYLE W. CAYCE, Clerk



By:
Roeshawn A. Johnson, Deputy Clerk
504-310-7998

Mr. Craig William Cospers
Mr. Brady Alan Daniel
Ms. Karen S. Mitchell

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
SAN ANGELO DIVISION

BRADY ALAN DANIEL

Petitioner,

v.

LORIE DAVIS, Director
Texas Department of Criminal Justice,
Correctional Institutions Division,

Respondent.

CIVIL ACTION NO.
6:16-CV-061-C

JUDGMENT

For the reasons stated in the Court's Order of even date,

IT IS ORDERED, ADJUDGED, AND DECREED that the above-styled and -numbered
cause is dismissed with prejudice.

Dated December 27, 2018.



SAM R. CUMMINGS
Senior United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
SAN ANGELO DIVISION

BRADY ALAN DANIEL

Petitioner,

v.

LORIE DAVIS, Director
Texas Department of Criminal Justice,
Correctional Institutions Division,

Respondent.

CIVIL ACTION NO.
6:16-CV-061-C

ORDER

On January 14, 2019, Petitioner filed an "Objection to Order" which was construed as a motion to reconsider this Court's Order dismissing his petition entered on December 27, 2018. The Court finds that Petitioner's objections should be overruled and such motion should be DENIED. Moreover, Petitioner's request for "a time extension if [he has] past [sic] a limit [he is] unaware of" should be DENIED.

The Court very liberally construes the objections as a Notice of Appeal¹. However, Petitioner did not pay the filing fee of \$505.00, nor did he file an application to proceed *in forma pauperis* and a certificate of his inmate trust account.

It is, therefore, ORDERED that if Petitioner wishes to proceed with this appeal, he shall pay the \$505.00 filing fee or file an application to proceed *in forma pauperis* and a certificate of his inmate trust account within thirty (30) days from the date of this Order.

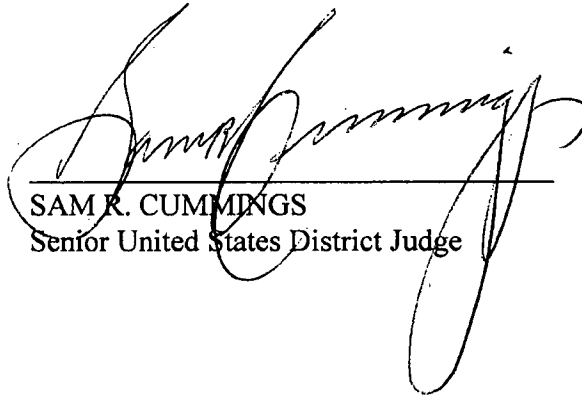
¹Petitioner's request for a certificate of appealability was denied by Order dated December 27, 2018.

Failure to comply with this Order may result in the dismissal of this appeal without further notice.

The Clerk shall mail to Petitioner an Application to Proceed *In Forma Pauperis*.

SO ORDERED.

Dated February 8, 2019.



SAM R. CUMMINGS
Senior United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
SAN ANGELO DIVISION

BRADY ALAN DANIEL,

Appellant,

v.

LORIE DAVIS, Director,
Texas Department of Criminal Justice,
Correctional Institutions Division,

Appellee.

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CIVIL ACTION NO. 6:16-CV-00061-C

USCA No. 19-10172

ORDER

The Court has considered Appellant's "Motion to Re-Open for Reconsideration Timely Filed 'Notice of Appeal to the Fifth Circuit' [all sic]" filed May 30, 2019, and finds that, to the extent this Court has authority to consider such motion, it should be DENIED in all things. The United States Court of Appeals for the Fifth Circuit previously dismissed Appeal No. 19-10172 for want of jurisdiction on April 22, 2019, and denied Appellant's subsequent motion for reconsideration on May 10, 2019.

SO ORDERED.

Dated May 31, 2019.



SAM R. CUMMINGS
Senior United States District Judge

Appendix-B

APPENDIX E

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
SAN ANGELO DIVISION

BRADY ALAN DANIEL,

Petitioner,

v.

LORIE DAVIS, Director,
Texas Department of Criminal Justice,
Correctional Institutions Division,

Respondent.

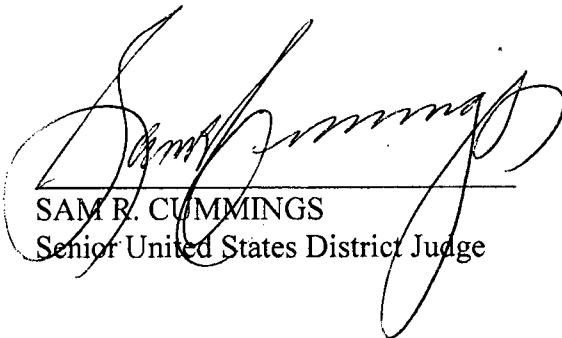
CIVIL ACTION NO.
6:16-CV-061-C

ORDER

The Court has considered Petitioner's Application to Proceed *in Forma Pauperis* along
with his certificate of inmate trust account filed on February 25, 2019, and finds that he should be
granted permission to proceed *in forma pauperis*¹ on appeal.

SO ORDERED.

Dated February 26, 2019.



SAM R. CUMMINGS
Senior United States District Judge

APPENDIX F

¹Petitioner's request for a certificate of appealability was denied by Order dated December 27, 2018.

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