

Appendix A

Order of the United States Court of Appeals for the Fifth Circuit, *Yebra v. Davis*, No. 18-11262 (5th Cir. Aug. 2, 2019)

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

No. 18-11262



A True Copy
Certified order issued Aug 02, 2019

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

JAVIER YEBRA,

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

O R D E R:

Javier Yebra, Texas prisoner # 1642491, was convicted of aggravated assault with a deadly weapon and was sentenced to 50 years of imprisonment. The district court denied his 28 U.S.C. § 2254 petition challenging that conviction and also denied his motion to supplement his § 2254 petition with an expert affidavit that was not presented in the state habeas proceedings. We denied a certificate of appealability (COA). Yebra later filed a motion pursuant to FED. R. CIV. P. 60(b)(6), seeking reversal of the denial of his motion to supplement, which the district court denied. He now moves this court for a COA to appeal that denial.

To obtain a COA, Yebra must make “a substantial showing of the denial of a constitutional right.” 28 U.S.C. § 2253(c)(2); *Slack v. McDaniel*, 529 U.S.

No. 18-11262

473, 483-84 (2000). “[R]elief under Rule 60(b)(6) is available only in extraordinary circumstances.” *Buck v. Davis*, 137 S. Ct. 759, 778 (2017) (internal quotation marks and citation omitted). This court reviews the denial of a motion for relief under Rule 60(b)(6) for an abuse of discretion. *Id.* at 777. To obtain a COA to appeal the denial of his Rule 60(b) motion, Yebra must show that reasonable jurists could debate whether the district court abused its discretion in declining to reopen the judgment. *See id.*

Yebra has failed to make the required showing. *See id.*; *Slack*, 529 U.S. at 483-84; *see also Cullen v. Pinholster*, 563 U.S. 170, 181 (2011). Accordingly, the motion for a COA is DENIED.

A handwritten signature in black ink, appearing to read "SK Duncan", with a long horizontal flourish extending to the right.

STUART KYLE DUNCAN
UNITED STATES CIRCUIT JUDGE

Appendix B

Memorandum and Order of the United States District Court for the Northern District of Texas (Amarillo Division), *Yebra v. Davis*, No. 2-12-CV-173-D (N.D. Tex. Aug 27, 2018)

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
AMARILLO DIVISION

JAVIER YEBRA,

Petitioner,

v.

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

Respondent.

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Civil Action No. 2:12-CV-173-D

ORDER

Petitioner Javier Yebra's ("Yebra's") July 16, 2018 motion for relief from prior judgment is denied.

Yebra moves for relief under Fed. R. Civ. P. 60(b)(5) and (6), indicating that he is seeking relief from the magistrate judge's March 4, 2016 order denying his motion requesting leave of court to file a supplemental pleading to his habeas petition.¹ Yebra also indicates that he is seeking relief from the March 23, 2016 judgment entered in this case.²

¹By his February 11, 2016 motion, Yebra sought to supplement his federal habeas application with an affidavit of Dr. Shaku S. Teas ("Dr. Teas"). On February 23, 2016 the magistrate judge entered his report and recommendation that Yebra's federal habeas application be denied. On March 4, 2016 the magistrate judge denied Yebra's motion to supplement, concluding that when the state court adjudicated Yebra's claims on the merits during state habeas proceedings, Dr. Teas's affidavit was not before the state court, and, therefore, under *Cullen v. Pinholster*, 563 U.S. 173 (2011), this court could not consider the affidavit in reviewing Yebra's federal habeas application. Yebra's objections to the magistrate judge's order were overruled April 1, 2016.

²Post-judgment, Yebra requested that the case be abated so that he could present Dr. Teas's affidavit to the state courts. His motion was denied. Yebra later appealed the judgment to the United States Court of Appeals for the Fifth Circuit, contending that he was entitled to a certificate of appealability ("COA") "with respect to his claims that counsel rendered ineffective assistance and that the state trial court erred by failing to sua sponte appoint a forensic pathologist to aid in his defense." Yebra also asserted that this court "erred by denying his two motions to supplement or


In his motion, Yebra contends that he filed a second state habeas petition in 2018 asserting that his trial counsel was ineffective for failing “to investigate and request expert assistance,” and presented the state courts with the affidavit of Dr. Shaku S. Teas (“Dr. Teas”). On June 20, 2018 the Texas Court of Criminal Appeals denied Yebra’s request for habeas relief without written order: a determination on the merits of Yebra’s claims. *See In re Yebra*, No. 78,088-02.

Yebra now requests that the court withdraw its prior rulings, allow him to supplement his federal habeas petition with Dr. Teas’s affidavit, and order briefing on the merits of his “two claims concerning the affidavit.” In effect, Yebra is moving the court, under Rule 60(b), to set aside the final judgment in this case, to reopen this proceeding, and to reconsider (this time with Dr. Teas’s affidavit) the claims previously raised in his initial federal habeas application.

Yebra has not demonstrated that he is entitled to relief under Rule 60(b). Accordingly, his motion for relief from judgment is denied.

SO ORDERED.

August 27, 2018.


SIDNEY A. FITZWATER
UNITED STATES DISTRICT JUDGE

amend his 2254 petition.” On June 30, 2017 the Fifth Circuit denied a COA.